



**Okello v Kombwayo (Civil Appeal E041 of 2021)  
[2023] KEHC 17710 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17710 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E041 OF 2021  
JRA WANANDA, J  
MAY 26, 2023**

**BETWEEN**

**TRUPHENA AWINO OKELLO ..... APPELLANT**

**AND**

**SILAS O. AGAY KOMBWAYO ..... RESPONDENT**

**JUDGMENT**

1. This Appeal is against quantum of damages awarded as compensation for injuries suffered by a 35 years old adult female that arose as a result of a road accident.
2. By the Complaint dated and filed on 16/06/2020, the Appellant sued the Respondent seeking general and special damages, future medical expenses, costs of the suit and interest. The accident was stated to have occurred on 27/09/2019, along Mumias-Busia Road at Koyonzo area. The Appellant claimed that she was a pedestrian and that the Respondent negligently drove his motor vehicle registration number KCP 720E Toyota Axio causing it to lose control and hit the Respondent. As a result, the Appellant herein sustained severe injuries.
3. The Respondent filed his Statement of Defence on 23/02/2021. He denied the occurrence of the accident or any negligence on his part. In the alternative, he alleged contributory negligence on the part of the Appellant.
4. Subsequently, the parties recorded a consent whereof liability was apportioned in the ratio of 80:20 favour of the Appellant. The matter then proceeded to formal proof on quantum.
5. At the end of the formal proof, on 03/08/2021 the Learned Magistrate entered Judgment in favour of the Appellant and awarded her damages as follows:
  - i General damages Kshs 1,000,000
  - ii Special damages Kshs 6,000



Sub-total Kshs 1,006,000

Less 20% Kshs 201,200

Total Kshs 804,800

6. The Appellant was also awarded interest and costs of the suit.

### **Grounds of Appeal**

7. The Appellant was aggrieved by the decision of the trial Magistrate and filed this Appeal on 25/08/2021. He preferred the following 5 grounds: -

- i. That the learned trial Magistrate erred in law and fact in awarding quantum that is inordinately low and which is inconsistent with the injuries pleaded and proved to have been sustained by the Plaintiff/Appellant.
- ii. That the learned trial Magistrate erred in law and fact in failing to award future medical expenses of Kshs 300,000/= when the medical report was produced by consent and the Defendant/Respondent did not challenge the said sum.
- iii. That the learned trial Magistrate erred in law and fact by completely misapprehending the purpose of the said Kshs 300,000/=
- iv. That the learned trial Magistrate erred in law and fact in awarding special damages that were inconsistent with the receipts that were produced by the Plaintiff/Appellant and which receipts were produced by consent.
- v. That the learned trial Magistrate erred in law and fact in ignoring the Plaintiff/Appellant's closing submissions on quantum.

8. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellant filed his Submissions on 19/10/2022 through her Advocates, Messrs G.K. Okara & Co. and the Respondent filed on 30/11/2022 through Messrs Masinde & Co.

### **Appellant's Submissions**

9. Counsel for the Appellant submitted that the injuries suffered were severe and that the general damages of Kshs 1,000,000/- awarded by the trial Court was inordinately low. He cited the case of James Thiongo Githiri vs Nduati Njuguna Ngugi [20120 eKLR, Nakuru HCCC No. 344 of 2010 in which a sum of Kshs 4,000,000/- was awarded as general damages. He submitted that the injuries suffered therein were comparable to the injuries suffered herein by the Appellant. He proposed that the award for general damages be enhanced to Kshs 2,000,000/-.

10. On future medical expenses, he submitted that the Appellant pleaded a sum of Kshs 300,000/-, the trial Magistrate erred in declining to award the same, the amount was expressly stated in the Appellant's doctor's (Dr. Sokobe) medical Report, the Report was produced by consent and was not therefore challenged, the Report stated that as a result of the injuries, the Appellant's right leg is now deformed with pus discharging sinuses (indicating chronic osteomyelitis) and that her permanent disability was assessed at 20%. He further submitted that as a result of the injuries, metal implants were inserted into the Appellant's right leg, the plates have since been removed, contrary to the holding made by the trial Magistrate. nowhere did the Report state that the Kshs 300,000/- was required for removal of the plates, neither in the pleadings nor in the evidence was such fact alleged, the holding arose only in the Judgment, the medical Report was prepared after removal of the plates and that the doctor expressly



stated that the Appellant will require future medical attention and estimated the cost thereof at Kshs 300,000/-.

11. Regarding special damages, Counsel faulted the trial Magistrate for awarding only Kshs 6,000/- whereas the Appellant produced two receipts, for Kshs.6,000/- and for Kshs 20/-, respectively. According to Counsel therefore, Kshs 6,200/- should have been awarded.

### **Respondent's Submissions**

12. On the claim for future medical expenses, Counsel submitted that the same was in the nature of special damages and that although it was pleaded, it was not strictly proved. He relied on the decision in Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] and also Tracom Limited & Another v Hassan Mohammed Adan [2009] eKLR. Counsel argued that although the Appellant pleaded that she will incur future medical expenses and relied on the medical report by Dr. Sokobe, she did not call the said doctor to explain the nature of the treatment and the anticipated costs. He further submitted that it was the Appellant's evidence that she already underwent treatment and that the metal plate had already been removed, this was confirmed by the medical documents from St. Marys Hospital, in as much as the Appellant had indicated that she had not fully recovered, she produced no evidence to show that she was still on medication or that she was still visiting any medical facility. He submitted that the trial magistrate was thus justified in rejecting the claim for Kshs 300,000/- as the same was not sufficiently proved.
13. On general damages, Counsel submitted that it is a well-established principle that an appellate Court will only interfere with quantum of damages where the trial Court either took into account an irrelevant factor or left out a relevant factor or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence. On this point, Counsel relied on the cases of Kemfro Africa Limited t/a Meru Express Services, Gathongo Kanini v A.M. Lubia and Olive Lubia, Osman Mohammed & Another v Saluro Bundit Mohammed, Civil Appeal No. 30 of 1997 and Millicent Atieno Ochuonyo v Katola Richard [2015]. Counsel argued that the trial Magistrate relied on previous awards given in comparable cases and that those awards justified the figure of Kshs 1,000,000/- as awarded.
14. Regarding special damages, he argued that although the Appellant pleaded a sum of Kshs 18,200/- as special damages, he only produced two receipts, for Kshs 6,000/- and for Kshs 20/- totalling the sum of Kshs 6,020/-.

### **Analysis & Determination**

15. This being the first appellate Court, I am required to re-evaluate the evidence adduced before the trial court and arrive at an independent determination. This position was held in the case of Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) E.A 123 where the Court stated as follows:  

“ ... An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions .....”
16. In my view, the issues that arise for determination in this appeal are the following;
  - i. Whether the amount of Kshs 1,000,000/- awarded by the trial Court as general damages was inordinately too low



- ii. Whether the trial Court erred in declining to award the amount of Kshs 300,000/- pleaded as future medical expenses.
- iii. Whether the amount of Kshs 6000/- awarded as Special damages was less than the amount that was proved.

17. I now proceed to analyse and answer the issues.

**i. Whether the amount of Kshs 1,000,000/- awarded by the trial Court as general damages was inordinately too low**

18. Regarding the extent of this appellate Court's powers on interference with an award of damages, the Court of Appeal in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, held as follows:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’

19. It is therefore clear that the instances when this appellate Court is permitted to interfere with awards of general damages by the trial Court are limited.

20. On the mode of assessing damages, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”. Further, in *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR, Nyakundi J stated as follows:

“It was noted in a comparative jurisdiction in the case of *Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & Another* Claim No. 2005 HCV 294 guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”



21. Similarly, in *Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR* the Court of Appeal observed as follows:
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
22. It must however be always remembered that injuries suffered by one person will never be fully comparable to injuries suffered by another person.
23. The accident occurred on 27/09/2019. From the medical report of Dr. S.J. Sokobe dated 27/05/2020, the Appellant suffered a head injury with loss of consciousness, bruises on the right cheek, fractures of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> right ribs, multiple wounds on the left arm, multiple lacerations and cut wounds on the left arm and fracture of the right tibia/fibula. The Appellant was treated at the St. Marys Hospital and stated that she was admitted at the said hospital for about 1 month. She also stated that a metal plate was inserted into her right leg. The Discharge Summary from the same hospital reveals that she was again admitted at the same hospital for 3 days between 24/03/2020 and 27/03/2020 during which the metal plate was successfully removed.
24. According to the medical report of Dr. Sokobe, on the date when he examined the Appellant on 27/05/2020, the Appellant’s right leg had become deformed and had developed pus discharging sinuses. According to the doctor, this indicated contraction of what he described as chronic osteomyelitis. The Appellant had also developed multiple ugly scars on her right cheek, left arm and left leg. The doctor assessed the Appellant’s permanent disability at 20% and also stated that the Appellant required further treatment at an estimated cost of about Kshs 300,000/-.
25. The Appellant has faulted the trial Magistrate for awarding Kshs1,000,000/- as general damages for pain and suffering which described as inordinately too low. She prays that the amount be enhanced to Kshs 2,000,000/=. I have looked at previous comparable awards and noted that in *James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & another [2015] eKLR*, the injuries sustained by the Plaintiff therein were fractures of the left radius, left ulna, right tibia and right fibula. Treatment was by immobilization of the left upper limb and right lower limb, plating of the tibia bone fracture of the right leg and immobilization with an external fixator. There was a recommendation for removal of dead bit bones from the right tibia as infection had set in. The Plaintiff’s permanent incapacity was then assessed at 10% and it was stated that his temporary incapacity would be for about 3 years and 3 months. The Court awarded general damages of Kshs.1,500,000/-
26. In *P W v Peter Muriithi Ngari [2017] eKLR*, the Plaintiff (a minor) sustained a fracture of the left femur which was operated on and fixed with a metallic plate, fractures of the left fibula and tibia malleoli which were operated on and fixed with K-wires and plates and blunt injuries to the pelvis causing fracture of the pelvis. He developed urine incontinence and his permanent disability was assessed at 20%. It was stated that he would require future operations to remove the metals. The Court held that the award of Kshs 600,000/- was far below comparable awards for comparable injuries and substituted the same with an award of Kshs 1,600,000/-
27. In this instant case, the trial Magistrate relied on the case of *George William Awuor v Beryl Awour Ochieng [2020] eKLR* in which R. Aburili J, on appeal, awarded a sum of Kshs 1,200,000/- and *Pauline Gesare Onami v Samuel Changure & Another [2017] eKLR* where on appeal, H.A. Omondi J (as she then was) upheld an award for a sum of Kshs 600,000/-.



28. I have keenly looked at the authorities relied upon by the trial Magistrate and I note that the injuries sustained therein were not as severe as those that were sustained by the Appellant herein. Further, there was no allegation of permanent disability in the said cases as was in this case.
29. In this instant case, the Appellant's testimony on the injuries she suffered, the treatment she underwent and the state of her recovery or lack thereof was not challenged. The medical documents referred to above were also produced by consent and the contents thereof were also not controverted. In view of the severity of the injuries suffered by the Appellant and considering the effects of inflation, I hereby set aside the award of Kshs.1,000,000/- awarded to the Appellant as general damages and substitute it with an award of Kshs 1,500,000/-.

**Whether the trial Court erred in declining to award the amount of Kshs 300,000/- pleaded as future medical expenses.**

30. At paragraph 11(c) of the Complaint, the Appellant pleaded for future medical expenses at a sum of Kshs 300,000/-. He has faulted the trial Magistrate for failing to award the same. The Court of Appeal in *Tracom Limited & v Hassan Mohamed Adan* [2009] eKLR, held as follows: -

“...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, this Court, stated: - “And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded.” We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

31. Similarly, in *Geoffrey Kamuki & Another –vs- RKN* (Minor suing through her late father and next friend ZKN [2020] eKLR, the Court stated as follows:

“...To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. Is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was



pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it...”

32. It is therefore clear from the foregoing that once the Plaintiff pleads that future medical expenses will be incurred, he may not necessarily need to specifically state the exact amount of such future expenses since that will depend on several other factors. This is because it is not always clear at that time of filing the case what these future costs may be. It is therefore only necessary to plead the approximate amount. Of course, evidence has to be then led at the trial to prove such future expenses anticipated.
33. The Appellant produced a medical report which stated that she needed Kshs 300,000/- for future medical expenses. The trial Magistrate declined to award the same on the basis that the Appellant required the amount for surgery for removal of the metal plate inserted into her leg. According to the trial Magistrate, the metal plate had already been removed at the time of trial and that the Appellant had failed to indicate whether she had paid Kshs 300,000/= for the removal. In my view, the trial Magistrate erred when she held that the amount was required solely for purposes of removal of the metal plates. From the proceedings, neither the Appellant nor the doctor stated that the Appellant needed the Kshs 300,000/- specifically as the cost of removal of the metal plates. On the contrary, it is stated in the medical report that the Appellant “sustained severe soft & bony tissue injuries from which she has not recovered” and that “she needs further treatment at an estimated cost of Kshs 300,000 ...”. Further, the Appellant stated that “I do not have money to go to hospital that is why I have not gone to hospital”.
34. Clearly therefore, the Appellant’s case before the trial Court was that she needed the amount to pursue general future treatment. No rival medical report was produced to controvert this testimony. I therefore find that the Appellant proved that she needed the amount for general future medical expenses and that the same was supported by medical evidence. Consequently, I hereby award the Appellant Kshs 300,000/- as future medical expenses.

**iii. Whether the amount of Kshs 6,000/- awarded as Special damages was less than the amount that was proved.**

35. As aforesaid, special damages must be both specifically pleaded and proved before they can be awarded by the Court. At Ground No. 4 of the Memorandum of Appeal, the Appellant stated that the trial Magistrate erred in awarding special damages that were inconsistent with the receipts that were produced. In his Submissions, the Appellant’s Counsel faults the trial Magistrate for awarding only Kshs 6,000/- whereas the Appellant produced two receipts, for Kshs.6,000/- and Kshs 20/-, respectively. According to Counsel therefore, what should have been awarded was Kshs 6,020/-.
36. It is therefore curious that the amount that is in contention is only Kshs 20/-. Be that as it may, it is true that although the Appellant pleaded a sum of Kshs 18,200/- as special damages, he only produced two receipts, for Kshs 6,000/- and Kshs 20/-. He is therefore entitled to Kshs 6,020/- as special damages. It is so awarded.

**Final Orders**

- i. In the end this appeal succeeds. The entry of Judgment in favour of the Appellant is retained save that the breakdown of quantum awarded is set aside and substituted in favour of the Appellant as follows;
  - a General damages Kshs 1,500,000
  - c Special damages Kshs 6,020
  - d Future medical expenses Kshs 300,000



Sub-total Kshs 1,806,020

Less 20% as agreed by the parties Kshs 361,204

Total Kshs 1,444,816

- ii. The Appellant is awarded costs of this Appeal. The lower Court's order awarding interest and costs to the Appellant is also retained.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 26<sup>TH</sup> DAY OF MAY 2023**

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**WANANDA J. R. ANURO**

**JUDGE**

