



REPUBLIC OF KENYA



**Jeran General Contractors Limited v Amuomoi (Civil Appeal E130 of 2021)
[2023] KEHC 26123 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E130 OF 2021
RE ABURILI, J
NOVEMBER 29, 2023**

BETWEEN

JERAN GENERAL CONTRACTORS LIMITED APPELLANT

AND

EDWIN ONYANGO AMUOMOI RESPONDENT

*(An appeal arising out of the Judgement & Order of the Honourable
N.S. Telewa in the Chief Magistrate's Court at Kisumu delivered
on the 28th October 2021 in Kisumu CMCC No. 371 of 2020)*

JUDGMENT

Introduction

1. The appellant was sued by the appellant for general damages, special damages of Kshs. 6,158, costs of future medical treatment, loss of future earnings as well as costs and interest of the suit following injuries he sustained in a road traffic accident along the Kisumu – Busia road on the 10th August 2020.
2. In her judgement, the trial magistrate held that the suit was undefended as the appellant on numerous occasions failed to set forth his defence. The trial magistrate found in favour of the respondent on liability at 100% against the appellant and proceeded to award general damages of Kshs. 1,300,000, Special damages of Kshs. 6,158 and Loss of future earnings of Kshs. 150,000.
3. Aggrieved by the said decision, the appellant filed his memorandum of appeal dated 2nd November 2021 and filed on the 5th November 2021 raising the following grounds of appeal only challenging quantum of damages:
 - a. That the learned trial magistrate erred in law and in fact in awarding general damages of Kshs. 1,300,000 which award was excessive and not commensurate to the nature of injuries sustained by the plaintiff.



- b. That the learned trial magistrate erred in law and in fact in awarding cost of future expenses of Kshs. 150,000 which award was not specifically pleaded and proved.
 - c. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case she was deciding.
 - d. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.
4. The parties filed submissions to canvass the appeal.

The Appellants' Submissions

5. The appellant submitted that besides the discharge summary, no other initial treatment notes were produced that would have guided the Court on the extra injuries pleaded by the respondent such as fracture and as such there was no basis as to the amount awarded as general damages.
6. The appellant further submitted that there was a clear discrepancy in the injuries sustained as per the initial treatment notes and discharge summary and the P3 form and as such it was important for the trial magistrate to make a determination as to what documents and/or medical evidence she relied on in making the award for damages.
7. The appellant submitted that the injuries sustained by the respondent was a mid-shaft fracture to the tibia fibula which had fully healed with no incapacitation and there was no proof of continuous medication.
8. It was submitted that the amount of Kshs. 1,300,000 in general damages was excessive in the circumstances and that in view of the injuries proved, an award of Kshs. 450,000 would have been sufficient. Reliance was placed on the case of *Daniel Otieno Owino & Another v Elizabeth Atieno Owuor* [2020] eKLR.
9. On the award for future earnings of Kshs. 150,000, the appellant submitted that the same was never specifically pleaded as required by the law and that the report by Dr. Okombo that provided for the award of future medical expenses was never produced as an exhibit and thus the trial magistrate erred in relying on the same.

The Respondent's Submissions.

10. The respondent submitted that the the P3 form (PEXh 2) confirmed the fracture of the tibia and fibula bones and a mid-shaft displacement of the tibia from the x ray and further that the said document also confirmed some of the soft tissue injuries sustained. It was further submitted that the X ray report from Ritri Medical Imaging Clinic (PEXh 8) similarly confirmed the fractures of the tibia and fibula mid third shafts and an anterolateral displacement of the tibia fracture.
11. It was the respondent's submission that the discharge summary from JOORTH (PEXh 12) confirmed the swelling of the right mid leg, the fractures of the right midshaft tibia and fibula through the initial and final diagnosis and further that the medical report from Dr. Okombo (PEXh 10) confirmed both the above stated injuries and concluded that the accident impacted on the productivity and the health of the Respondent.
12. The respondent thus submitted that that from the analysis above, the Respondent suffered serious fracture of the right midshaft tibia and fibula with anterolateral displacement of the Tibia and that the



Respondent also suffered numerous soft tissue injuries given that the accident occurred on a Tarmac Road.

13. It was the respondent's submission that the trial court did not err in the award granted. Reliance was placed on the cases of *George William Awuor v Beryl Awuor Ochieng* [2020] eKLR where the plaintiff therein suffered inter alia fractures of the right femur and left tibia fibula coupled with several soft tissue injuries. The Court awarded a figure of 1,200,000/- on appeal, *Zachary Kariithi v Jashon Otieno Ocbola* [2016] eKLR where the Plaintiff suffered inter alia Compound fractures of the right tibia/fibula and several soft tissue injuries. The Plaintiff was awarded Kshs. 1,500,000/- and the case of *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] eKLR the plaintiff suffered the fracture of the left tibia and fibula in addition to soft tissue injuries where the Court awarded Kshs 1,300,000 for pain and suffering.
14. The respondent submitted that he pleaded for loss of future earnings to the required standard of the law at paragraph 7 of the Plaint and proved the same via his testimony wherein he adduced evidence to the effect that he was a bodaboda rider who earned Kshs. 2,500 per day but that as a result of the injuries he could not carry out and thus lost his job.
15. The respondent relied on the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR where the Court of Appeal held inter alia that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings was equally the production of documents as this would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways and that if documentary evidence is available, that is well and good.
16. The respondent thus submitted that the appeal lacked merit and should be dismissed.

Analysis and Determination

17. I have considered the grounds of appeal, the evidence tendered before the trial court, the pleadings and submissions for and against this appeal. The main issues for determination are:
 - 1) Whether the plaintiff/Respondent proved that she sustained any injuries in the undisputed accident.
 - 2) Whether the Respondent is entitled to any damages and if so, how much.
 - 3) What orders should this court make?
 - 4) Who should bear costs of the appeal?
18. On whether the Respondent proved that she sustained any injuries in the undisputed accident of 10/8/2020, in his plaint dated 25th August 2020, the Plaintiff pleaded that following the accident, he sustained injuries involving:
 - a) X-ray shows mid third Tibia Fibula Fractures, anterolateral displacement of the Tibia Fracture and Fibula Fracture in a satisfactory position.
 - b) Tenderness on the chest
 - c) Tenderness on the left shoulder
 - d) Tenderness on the right shoulder
 - e) Tenderness on the right hand



- f) Tenderness on the right leg
 - g) Swelling of the right mid leg
 - h) Chest pains
 - i) Multiple bruises on the right hand
 - j) Double fracture on the left leg
 - k) Deformed right leg
 - l) Fracture of the tibia and fibula mid third shafts
 - m) Anterolateral displacement of the tibia fracture
19. The above pleaded injuries were a replica of the injuries enumerated in the medical Report produced by Dr. Okombo (BSc. M.D. M.P.H (Physician) dated 12.8.2020. The Doctor listed the injuries sustained by the plaintiff as:
- a. Injury to the chest
 - b. Injury to the left shoulder
 - c. Injury to the right shoulder with a swelling
 - d. Injury to the right hand with bruises
 - e. Injury to the right leg with fractures
20. PW2 Philip Kiplimo a Clinical Officer, Kisumu County Hospital testified and produced a P3 form for the Respondent that he filled on the 11.8.2020. It was his testimony that the respondent suffered soft tissue injuries and fracture of the right leg.
21. PW4 Hellen Amollo the Senior Health Records Information Management Officer at JOOTRH produced the respondent's discharge summary PExh 12 dated 10.8.2020 that showed that the respondent had fracture of the right mid shaft tibia fibula as was evidenced in the results of the X-ray carried out on him and contained in the X-ray request form produced as PEXH 9.
22. Besides the medical documents above stated, the Respondent testified on oath that she sustained injuries involving fracture of the right leg and other soft tissue injuries on both shoulders the legs and hands.
23. The appellant asserts that besides the discharge summary, no other initial treatment notes were produced that would have guided the Court on the extra injuries pleaded by the respondent such as fracture and as such there was no basis as to the amount awarded as general damages and further that there was a clear discrepancy in the injuries sustained as per the initial treatment notes and discharge summary and the P3 form.
24. However, having considered the evidence of the plaintiff and exhibit 12 Hospital discharge summary, exhibit 9 the X-ray request form and exhibit 2 P3 form, I am satisfied that following the accident on 10/8/2020, that the major injuries that he was being treated for was the fracture of the Right leg, tibia and fibula as well as soft tissue injuries to his shoulders, hands and legs.
25. The burden of proof lies on he who alleges and in the case, on the Respondent that he sustained injuries in the road accident. However, the standard of proof is on the balance of probabilities and not beyond reasonable doubt. From the oral evidence adduced by the Plaintiff, I am inclined to believe that besides



- the fracture of the right leg tibia and fibula, he sustained soft tissue injuries to the legs, shoulders and hands.
26. In this case, the appellant was at liberty to refer the appellant for a second medical opinion if at all it did not believe that the assessment of his injuries were accurate.
27. The oral evidence adduced by the Respondent coupled with the evidence and production of the medical Report and Hospital Discharge summary clearly indicate that the fracture of the right leg tibia fibula was the major injury sustained by the Respondent, but there is no indication that that was the only injury sustained by him. The plaintiff's own oral evidence and medical evidence relied on give me no reasons to doubt that evidence that indeed the Respondent sustained the injuries pleaded and testified on.
28. For the above reasons, I find and hold that the Respondent proved on a balance of probabilities that he sustained the injuries pleaded and testified on by the Respondent, PW2 and PW4.
29. On the second issue of whether the Respondent is entitled to any damages and if so, how much, having found that the Respondent proved that he was injured in the areas stated above, I am persuaded that the Respondent was and is still entitled to damages. The only question is how much.
30. The trial court found in favour of the respondent on liability at 100% against the appellant and proceeded to award general damages of Kshs. 1,300,000, Special damages of Kshs. 6,158 and Loss of future earnings of Kshs. 150,000.
31. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that:
- ‘An appellate court will not disturb an award for general 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..’
32. In *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 the Court of Appeal held:
- ‘We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Mariga V Musila* [1984] KLR 257).’
33. The same principle was restated in *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, where the Court of Appeal held:
- “...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.’

In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p. 730 Kneller J.A. said: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango V. Manyoka* [1961] EA 705, 709, 713; *Lukenya Ranching and Farming Co-Operatives Society Ltd V. Kavoloto* [1970] EA 414, 418, 419. This Court follows the same principles.”

And in *Gicheru V Morton and Another* (2005) 2 KLR 333 this Court stated:

‘In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal 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 small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.’

See also *Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012*.

The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal.”

34. In the instant case, the trial magistrate awarded general damages of Kshs. 1,300,000, Special damages of Kshs. 6,158 and Loss of future earnings of Kshs. 150,000, which amount the appellant regards as inordinately high. The respondent agrees with the trial magistrate on the award.

35. The Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that –

“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.”

36. 65. In *Charles Oriwo Odeyo v. Appollo Justus Andabwa & Another* [2017] eKLR the court stated:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler v Butler* (1984) KLR 225.

The assessment of damages in personal injury case by court is guided by the following principles: -



- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high (See *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR.”

37. The respondent herein sustained the following injuries:

- a. Fracture of the right leg tibia fibula
- b. Soft tissue injuries of both shoulders
- c. Soft tissue injuries of the hands
- d. Soft tissue injuries of the legs

38. I have considered the awards in the following cases:

- a. In *Ndwiga & another v Mukimba* (Civil Appeal E006 of 2022) [2022] KEHC 11793 (KLR), where Njuguna J. reduced an award of Kshs 1,200,000/= to Kshs 500,000/= where the Respondent had sustained tenderness and swelling of the left leg and fracture of tibia and fibula left leg.
- b. In *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* [2020] eKLR where the respondent had suffered a fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg and the High Court set aside the award of Kshs 600,000/= and replaced it with Kshs 400,000/=.
- c. In the case of *Zachariah Mwangi Njeru v Joseph Wachira Kanoga*, Nyeri HCCA No 9 of 2012 the plaintiff sustained comminuted fracture of the tibia and fibula. The court set aside an award of Kshs 800,000/= and substituted it with an award of Kshs 400,000/=.
- d. In *Tirus Mburu Chege & Another v JKN & Another* (2018) eKLR where the Respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness the court reduced the award for general damages from Kshs 800,000/= to Kshs 500,000/=.

39. I have considered that the Appellant suffered some soft tissue injuries and fractures of the right tibia and fibula bones. The trial court awarded the respondent general damages of Kshs. 1,300,000. In my view, this was excessive. This court has reason to interfere with the award. I consider a sum of Kshs 500,000 to be adequate compensation for the injuries suffered by the respondent.

40. The appellant further impugned the trial court for awarding future medical expenses of Kshs. 150,000, as the same was never specifically pleaded as required by the law as the report by Dr. Okombo that provided for the award of future medical expenses was never produced as an exhibit and thus the trial magistrate erred in relying on the same. Here, the appellant confused the damages for future medical



expenses and that of future earnings. There was no award for future medical expenses and there is no cross appeal on this aspect. the trial court awarded Kshs 150,000 as loss of future earnings as pleaded in paragraph 7 of the plaint. It was however pleaded that the award for future earnings was never specifically pleaded and proved hence it should be set aside.

41. In *Cecilia W. Mwangi and Another v Ruth W. Mwangi* NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”

42. Similarly, in the case of *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically.”

43. The Court of Appeal in *S J v Francesco Di Nello & another* [2015] eKLR stated as follows:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.

This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd’s Law Reports 40 wherein Lord Denning M. R. said as follows:

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings.”

44. From the principles set out in the above cases from the Court of appeal and binding on this court, ties, loss of future earnings must be pleaded and proved as they are in the nature of special damages. On the other hand, loss of future earning capacity need not be pleaded as it is in the nature of general damages.
45. Having said that, from the trial court record, the respondent pleaded for loss of future earnings which were never specified. Parties are bound by their pleading. I find that though pleaded, there was no specific figure given in the pleadings for loss of future earnings hence it was an error by the trial court in awarding damages for loss of future earnings.
46. I set aside the award for loss of future earnings.
47. The upshot of the above is that the trial magistrate award is hereby set aside and substituted with the following awards:



General damages – Kshs. 500,000

Special damages - Kshs. 6,158

Total Kshs. 506,158

48. The respondent shall also have costs of the lower court and interest on general damages at court rates from date of judgment in the lower court until payment in full. Special damages will earn at court rates from the date of filing suit until payment in full.
49. As the damages have been substantially reduced, I order that each party bear their own costs of this appeal. This judgment and decree to be returned to the lower court forthwith together with the trial court file.
50. This file is closed.
51. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

