



REPUBLIC OF KENYA



**Hussein v Janji (Civil Appeal E121 of 2023)
[2023] KEHC 27379 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E121 OF 2023
DKN MAGARE, J
DECEMBER 20, 2023**

BETWEEN

NOOR OMAR HUSSEIN APPELLANT

AND

DAVID DUME JANJI RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Hon. D.O. Mbeja, PM given on 19/5/2023 in Mombasa CMCC 1742 of 2018. The Appellant filed two grounds of Appeal.
2. The Appeal raises three sub- issues on quantum.
 - a. Special damages 309,430.
 - b. 150,000/= future medical expenses.
 - c. General damages

Pleadings

3. The plaintiff pleaded the following injuries: -
 - a. Communitated and displaced fractures of the proximal left femur
 - b. Segmented and displaced fractures of the proximal right femur
 - c. Fracture/dislocation of the left elbow
 - d. Fracture of the right distal radius (colles)
 - e. Fracture/dislocation of the distal inter-phalangeal joint of the right middle finger.



- f. Deep massive 15 cm long cut wound obliquely across the left knee
- g. Deep 8 cm long cut wound on the right knee joint.
- h. A 4x2 cm laceration on the left thigh.
- i. Several lacerations on the right thigh.
- j. A 2 x cm laceration on the left forehead

Special damages

4. The appellant served process and before the date for hearing made amendments to read.
 - a. Paid for medical Reports 13,000/=
 - b. Paid for P3 form 1,500
 - c. Medical costs to be provided.
 - d. Transport (to be provided
 - e. Total 14,500
5. Medical expenses were amended on 28/5/2019 to read 253,000.
6. The future medical costs were amended to read 150,000/=.
7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
8. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
9. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
10. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.



11. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

12. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

Analysis

13. The matter proceeded ex parte after the request of 8/10/2018. The request for judgment was made on 12/10/2018. The amendment was made on 28/5/2019. The amendments were not paid for.

14. The Appellant was not subsequently served of the Amendments or amended Plaint. without such service, the amendment bill by the wayside. Order 8 Rule 6 of the civil procedure provides as follows: -

“Failure to amend after order [Order 8, rule 6.]

Where the court has made an order giving any party leave to amendment, unless that party amends within the period specified if no period is specified within 14 days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.

15. Leave to amend was granted ex parte on 28/5/2019. By 12/6/2019 the amendment given to the plaintiff ceased to have effect. Consequently, on Kshs. 14,500/= remained claimed as hitherto claimed. The subsequent amendment is of no legal effect.

16. To make matter worse, there ex parte proceedings and all consequential orders were granted. The amendment was part of the proceedings set aside. They were proceedings on 28/5/2019.

17. The amendments were not paid for any requisite statutes fees. Without court filing fees there is no amendment to increase special damages to Kshs. 253,000, future medical expenses costs of Ksh. 150,000/=and a total of Ksh. 415,500.

18. In David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows regarding special damages: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:

“...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”



19. The award of 309,430 is hereby set aside. Witness statement was produced in evidence together with documents. The examining doctor indicated that a sum of 150,000 was required to remove implants.
20. There were surgical medical procedures. Future medical costs were pleaded, though not particularised. There is no requirement of strict proof. In this case I am satisfied that whether or not then were special pleadings on future medical costs, the same were proved.
21. I therefore find that Kshs. 150,000/= was proper. I dismiss the Appeal in respect thereof the specials that were pleaded in the plaint made 1450/= concerning;
 - a. Medical Reports 13,000
 - b. 3 form – 1,500
 - c. Total 14,500
22. The P3 was filled but no evidence of payment. A sum of Kshs. 10,500 was received by advocates for medical report. In this matter, there was only one report. The Respondent was unable to differentiate the current medial reports and the other reports not in issue. The court did not also broad on the subject. In view of the foregoing we cannot know the value of each report. The Respondent simply threw the report on to the court and sought validation special damages are thus set aside and in lieu thereof, an order is sued dismissing a claim for special damages.

General damages

23. The court is a 4- page judgment awarded Kshs. 3,000,000/=. The court does not indicate the authorities relied on. The fractures suffer are serious. However not a serious as to attract as award of 3,000,000/=.
24. The duty of the court regarding general damages is settled. In *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR*, Justice D.S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”
25. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.
26. The foregoing was settled in the cases of *Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR* where the Court of Appealed held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”
27. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.



28. The Court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

29. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

30. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

31. So my duty as the appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
- c. The award is simply not justified from evidence.

32. In the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR, justice Meoli stated as follows: -

12. The sentiments of the English Court in *Lim Poh Choo v Health Authority* (1978)1 ALL ER 332 were echoed by Potter JA in *Tayab v Kinany* (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345 as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”

33. Coming to the injuries, in the case of *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR, the Respondent suffered segmental fracture of the right femur mid shaft; segmental fracture of the right tibia shaft (open); fracture of the right fibula; and, fracture of the left 3rd metatarsal bone with recovery was expected in one and a half years and further surgery estimated at Kshs 50,000 to remove



the metal plates leading the doctor to assess disability at 30%. The Court upheld the award of Kshs. 1,500,000 for general damages.

34. Further it is noted that in the case of *Guardial Singh Ghataurhae v Parminder Singh Manku & 3 others* [2018] eKLR, the claimant suffered comminuted intra articular fracture of the right tibial plateau and metaphysis, Fracture right patella, Comminuted fracture of right distal radius, Osteoarthritis of right knee, Fracture of four ribs on right side and Severe lacerations, bruising and scarring. The court affirmed an award of Kshs. 2,500,000 as general damages. These were more serious injuries than the ones suffered by the Respondent in this matter.
35. In the case of *George William Awuor v Beryl Awuor Ochieng* [2020] eKLR, the Court, Justice, Meoli substituted an award of general damages of Ksh 2,000,000 on 15/12/2020 with a sum of Kshs 1,200,000, for injuries indicated in the medical report by Dr. Odondi that was admitted by consent of both the appellant and the respondent revealed that the respondent suffered fractures of the right femur and left tibia fibula. The doctor noted that the tibia fibula fractures were compound while the femur fracture was simple. It was also noted that the respondent's right thigh had surgical scars and some bruising which had since healed but that the nail was still in situ and she would have to undergo surgery to remove the nail.
36. The amount awarded herein was out of range with the comparable injuries. The injuries are inordinately excessive.
37. In the case of circumstances, I get aside the award of Kshs. 3,000,000/= and order that the same be substituted with an order reducing the award to Kshs. 1,400,000/=.

Determination

38. I make the following orders: -
 - a. The Appeal is partly allowed.
 - b. The award of Kshs. 3,000,000/= is set aside and substituted with a sum of Kshs. 1,400,000/=.
 - c. The special damages of Kshs. 309,430 is set aside and in lieu thereof the claim for special damages is dismissed *in toto*.
 - d. The claim for 300,000 and 150,000 for loss of earning capacity and future medical costs were proved.
 - e. The appellant to have costs of Kshs. 90,000/=
 - f. The Respondent to have cost in the court below.
 - g. The file is closed.
 - h. 30 days stay.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF DECEMBER, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Nga'nga for the Respondent



No appearance for the Appellant

Court Assistant - Brian

