



REPUBLIC OF KENYA



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**Achacha v Litunya (Civil Appeal E044 of 2021)
[2022] KEHC 3332 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E044 OF 2021**

SN RIECHI, J

JUNE 30, 2022

BETWEEN

CLARKSON OCHIENG ACHACHA APPELLANT

AND

JOSHUA WAFULA LITUNYA RESPONDENT

*(An appeal from the Judgement and Decree of Hon. C.A S Mutai
S. P.M in Bungoma CMCC No. 33/2019 delivered on 25/6/2021)*

JUDGMENT

- 1 By an undated amended plaint, the respondent (plaintiff in the trial court) sought general and special damages and costs against the appellant for injuries sustained when the appellant's motor vehicle rammed onto the motor cycle he was riding.
- 2 As a result of the said accident, the respondent sustained; head injury with loss of consciousness for 3 weeks, blunt injury to the left eye, fracture of the right humerus, fracture of the right femur, fracture of the left femur and multiple cut wounds on both lower limbs.
- 3 The respondent attributed the occurrence of the accident to the appellant's driver and or agent's negligence to wit; driving at a high speed, driving without due care and attention to other road users, driving carelessly and in a dangerous manner, changing lanes haphazardly, failing to take measures to avoid the accident, failing to heed to road traffic rules, failing to take cognizance of the nature of the road and or driving a defective vehicle.
- 4 The appellant in his amended defence denied the occurrence of the accident in the manner pleaded, ownership of motor vehicle registration number KBV 946J and attributed negligence leading to the accident to the respondent. The appellant also disputed the injuries sustained and therefore sought a dismissal of the suit.



- 5 In the trial at the subordinate court, the respondent testified as PW-1 and adopted his statement stating that on 18/11/2018 while riding and carrying a pillion passenger towards Malaba on the Bungoma-Malaba road when at Mayanja shopping centre, the appellant's motor vehicle swerved into his lane violently knocking him and other pedestrians walking by the roadside. As a result of the collision, he sustained injuries and admitted at Bungoma County Referral Hospital for 2 months. He later reported at Bungoma police station where a P3 form was issued. The respondent then closed his case.
- 6 The appellant did not call any witness for the defence and closed the defence case.
- 7 The trial court upon considering the evidence apportioned liability at the ration of 80:20, awarded Kshs 1,800,000/= in damages for pain and suffering, Kshs 200,000/= in future medical expenses and Kshs 12,550/= in special damages subject to the 20% contribution. The appellant was aggrieved thus the instant appeal which is premised on the following grounds; -
1. That the learned trial magistrate erred in law and fact by awarding the respondent a sum of Kshs 2, 012, 550/= a sum which was excessive in the circumstances and not justified.
 2. That the learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 1,800,000/= for general damages an amount which is so excessive in the circumstances as to amount to an erroneous estimate of the loss suffered.
 3. The learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 12,550/= in special damages that were not proved to the required standards.
 4. The learned trial magistrate erred in law and fact in awarding the respondent the sum of Kshs 200,000/= for future medical expenses that were not proved to the required standards.
 5. The learned trial magistrate erred in law and fact in over-relying on the respondent's evidence which was not corroborated.
 6. The learned trial magistrate erred in law and fact in disregarding the relevant evidence on record hence arriving at a wrong conclusion.
 7. The learned trial magistrate erred in in law and fact in failing to consider the appellant's submissions and the legal authorities relied upon in support of his defence.
 8. The learned trial magistrate erred in law and in fact by over relying on the respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.
 9. The learned trial magistrate's decision albeit discretionary was plainly wrong.
- The appeal was disposed of by way of written submissions.
- 8 The appellant argued the appeal by raising the following issues; -
1. Whether the learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 1, 800,000/= as general damages.
 2. Whether the learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 12, 550/= as special damages.
 3. Whether the learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 200,000/= as future medical expenses.



4. Whether the learned trial magistrate erred in law and fact in over relying on the respondent's evidence which was not corroborated and disregarding relevant evidence on record.
 5. Whether the learned trial magistrate erred in law and fact in over relying on the respondent's submissions and authorities thus arriving at a wrong conclusion.
- 9 On the first issue, counsel contends that the injuries pleaded is not supported by the report of Dr. Sokobe and the treatment notes from Bungoma County Referral Hospital. That no X-ray films or CT scans, or radiology report were produced in support of the fact that the respondent sustained severe soft tissue and bony injuries and permanent disability assessed at 10% three months after the accident. Counsel therefore submits that the assessment of permanent disability is wrong.
- 10 Counsel submits that the sum awarded under this limb was excessively high and amounts to an erroneous estimate of the injuries sustained. The authorities in *Hassan Noor Mahmoud Vs Tae Youn Ann* (2001)eKLR and *Peninah Wangari Murachia Vs Cosmos Ltd & another* (2009)eKLR_____ have been cited in support of the proposition that Kshs 300,000/= is sufficient compensation under this limb.
- 11 On special damages, counsel submits that under this limb, Kshs 6,000/= was awarded for medical report and Kshs 550/= for copy of records produced in the name of Naomi Nasambu and the respondent ought not have been awarded under the head. That the trial magistrate erred by awarding sums not pleaded as held in *Francis Muchee Nthiga Vs David N. Waweru* (2013)eKLR.
- 12 Under the award of future medical expenses, counsel contends that this sum was erroneously awarded since the respondent failed to call the treating doctor. The discharge summary from Bungoma County Referral Hospital did not indicate the respondent would need to undergo future medical treatment for the removal of the metal implant. In support of this contention, counsel cites *Zacharia Waweru Thumbi Vs Samuel Njoroge Thuku* (2006)eKLR.
- 16 On the third issue, it is submitted that the trial magistrate erroneously exercised his discretion by failing to frame issues to be determined. That the trial magistrate jumped into the arena by failing to state the reasons for his decision and how he arrived at the figures so arrived at. Counsel relies on the authorities in *Independent Electoral & Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* (2014)eKLR, *Saj Ceramic Ltd Vs Robinson Mongare* (2015)eKLR_____ and the provisions of Order 21 Rule 4 of the Civil Procedure Rules.
- 17 The respondent submits on the issue whether the trial magistrate reached the right conclusion on the award of damages that the trial magistrate correctly awarded the sum of Kshs 1,800,000/= in that permanent disability was assessed at 10%. That this taken together with the evidence of Dr. Sokobe, the injuries sustained by the respondent were very severe thus the award. Counsel relies on the authorities in *Hussein Ali Sharrif alias Hussein Ali Vs ALL (minor suing through FTL) (2018)eKLR and Florence Hare Mkaha Vs Pwani Tawakal Mini Coach & another* (2014)eKLR.
- 18 On the award under special damages and future medical expenses, it is submitted that two receipts were produced in proof of special damages while on future medical expenses, it is submitted that the respondent is confined to a wheel chair and the award of Kshs 200,000/= ought to be affirmed.
- 19 On whether the trial magistrate applied the correct principles in reaching his decision, counsel submits on the strength of the authority in *Millicent Atieno Vs Katola Richard* (2015)eKLR that comparable injuries should be compensated with comparable awards. It is therefore submitted that the trial magistrate applied the correct principles in arriving at his conclusion.



- 20 This being a first appeal, the guiding principles are as stated in [*Oluoch Eric Gogo -Vs- Universal Corporation Limited*](#) [2015] eKLR, where the court held;

“As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....

- 21 The appeal herein revolves around the issue of quantum of damages to be awarded. Liability was settled by consent at a 80:20 ratio. There are numerous decisions of the court on the principles applicable. In [*Catholic Diocese of Kisumu Vs Tete*](#) (2004) eKLR_____ it was held;

It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles,

- 22 On quantum, there are several authorities of this court regarding the assessment thereof. In [*A.A.M. Vs Justus Gisairo Ndarera & Another*](#) (2010) e KLR_____ the court held;

“Money cannot renew a physical frame that has been battered and shattered and all the courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair---”

- 23 On general damages for pain and suffering, the trial magistrate awarded Kshs 1,800,000/=. It was pleaded that the respondent sustained head injury with loss of consciousness for 3 weeks, blunt injury to the left eye, fracture of the right humerus, fracture of the right femur, fracture of the left femur and multiple cut wounds on both lower limbs. This can be discerned from the discharge summary (Pexh-1), the P-3 form (Pexh-2) and the medical report prepared by Dr. Sokobe (Pexh-4). Permanent disability was assessed at 40%.

- 24 The appellant’s contention on the discrepancy in permanent disability has been noted. The medical report referred to by the appellant which assessed disability at 10% was not produced in evidence. The correct report forming the record is the one dated 9/10/2019 which assessed permanent disability at 40%.

- 25 The nature and the extent of injuries were not controverted by the appellant in cross-examination or by way of a counter medical report. The issue therefore remaining to be determined is whether the sum awarded by the trial court is commensurate with the injuries so sustained as was observed in [*Simon Taveta v Mercy Mutitu Njeru*](#) (2014) eKLR_____ where the Court of Appeal held;-

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.

- 26 In the trial court, the respondent had proposed Kshs 3,000,000/= as adequate compensation. The appellant on his part had proposed Kshs 120,000/=.



- 27 It is trite law that comparable injuries ought to be compensated with comparable awards. In *Subati Flowers Limited v Walter Wanyonyi Wekesa* (2019) eKLR, Mwangi J. upheld an award of Kshs 1,600,000/= where permanent disability had been assessed at 40%.
- 28 In *Benuel Bosire vs Lydia Kemunto Mokora* (2019) eKLR, the court reduced an award of Kshs. 2,000,000/= to Kshs. 700,000/= where the respondent had a single compound fracture for which disability had been assessed at 40%.
- 29 Similarly, in *SBI International Holdings (AG) Kenya vs William Ambunga Ongeri* (2018) eKLR, the respondent sustained 40% permanent disability. The court upheld the trial court's award of General Damages at Ksh. 800,000/=.
- 30 In *Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Limited* (2020) eKLR the trial court awarded Kshs 1,200,000/= where permanent disability was assessed at 40%.
- 31 In the circumstances of the matter before me, it is apparent the respondent sustained serious injuries and in light of the authorities cited above I am inclined to find that the award of 1,800,000/= awarded in general damages is on the higher side and ought to be disturbed. I therefore substitute the figure with the sum of Kshs 1,200,000/=.
- 32 Regarding special damages, it is now settled that special damages need not only be specifically pleaded but also proved. This was observed in *Maritim and Another v Anjere* (1990-1994) EA 312, 316, where the Court of Appeal held:

In this regard, we can only refer to this court's decision in *Sande v Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992* (UR) where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.

- 33 In the amended plaint, the respondent pleaded Kshs 212,550/= made up as follows; Kshs 12,000/= for medical report, Kshs 550/= for motor vehicle search and Kshs 200,000/= in future medical expenses. In evidence, the respondent produced receipt for medical report in the sum of Kshs 6,000/=, receipt for Kshs 550/= for motor vehicle search and the medical report indicated that the respondent would require Kshs 200,000/= in future medical expenses.
- 34 I find the award of Kshs 12,550/= was erroneous and ought to be set aside since only receipts summing up to Kshs 6,550/= only was produced and is hereby awarded.
- 35 The appellant challenged the award of Kshs 200,000/= in form of future medical expenses. On the issue, it was held in *Geoffrey Kamuki & another v RKN (Minor suing through her late father and next friend ZKN)* [2020] eKLR.

To my mind, the import of the Court of Appeal's holding was that what the plaintiff was required to do was to plead the fact of future medical expenses to lay the basis for tendering the evidence upon which the court would base its decision. 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

36 In this case, the medical report produced as Pexh-4 confirmed that the respondent would need to undergo further treatment at a cost of Kshs 200,000/=. This sum was not controverted by way of another medical report.

37 As such, I find the trial magistrate correctly awarded this sum.

In the final analysis I award as follows;

Pain and suffering Kshs 1,200,000/=

Future medical expenses Kshs 200,000/=

Special damages Kshs 6, 550/=

Total Kshs 1,406,550/=

Less 20% contribution. Kshs 281, 310/=

Sum total Kshs 1, 125,240/=

38 The appeal herein partially succeeds and each party shall bear his own costs of the appeal and the respondent awarded costs in the subordinate court together with interest on the sum of Kshs 1, 125, 240/= from the date of judgement in the trial court until payment in full.

DATED AT BUNGOMA THIS 30TH DAY OF JUNE, 2022

S.N. RIECHI

JUDGE

