



**Chebii v Kimosop (Civil Appeal 59 of 2020)
[2022] KEHC 12142 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 59 OF 2020**

**OA SEWE, J
JUNE 22, 2022**

BETWEEN

DAVID KIPROP CHEBII APPELLANT

AND

TIMOTHY KIMOSOP RESPONDENT

(Being an Appeal from the Judgment and Decree of SRM's Court at Iten (Hon. Caroline R. T Ateya SRM), delivered on the 9th March, 2020 in Iten SPMC No. 11 of 2019)

JUDGMENT

1. The respondent was the plaintiff in Iten SPMCC No 11 of 2019: Timothy Kimosop v Winfred Jepkemboi Kipyekomen & David Kiprop Chebii, in which he sued the two defendants therein for general and special damages in respect of injuries sustained by him in a road traffic accident that took place on April 11, 2019. The respondent had alleged that he was riding Motor Cycle Registration No KMDC 956P along Iten-Eldoret Road when, at Finland Area, the said motor cycle was hit by Motor Vehicle Registraion No KCL 181H belonging to the 2nd defendant; and which was then being driven by the 1st defendant.
2. The respondent blamed the the defendants for the accident and supplied particulars of negligence at paragraph 6 of the Plaint. The record of the lower court shows that the 1st defendant, though served, opted not to enter appearance. Accordingly, interlocutory judgment was entered against her on September 30, 2019 in favour of the respondent at 100% liability. The parties thereafter entered into a consent on liability as against the 2nd defendant who is the appellant herein in the ratio of 80:20 before the matter proceeded for assessment of quantum of damages payable. Upon hearing the evidence of the respondent, the learned magistrate assessed the damages payable as follows:

General Damages Kshs 800,000

Special Damages Kshs 159,714



Future medical expenses Kshs 150,000

(Less 20%) Kshs 160,000

Kshs 949,714

3. Being aggrieved by that outcome, the appellant filed this appeal on August 5, 2020 impugning the judgment of the lower court on the following grounds:
 - (a) That the learned magistrate misdirected herself by applying the wrong principles resulting in an award of Kshs 800,000/= to the respondent as general damages for sustaining a fracture of the left femur and soft tissue injuries; which amount is manifestly excessive in the circumstances;
 - (b) That the learned magistrate erred in law and in fact by failing to consider the authorities cited in the appellant's written submissions with regard to the quantum of damages;
 - (c) That the learned magistrate erred in law and in fact by taking into account irrelevant factors and or failing to take into account relevant factors, thereby arriving at an erroneous judgment;
 - (d) That the learned magistrate misapprehended the evidence on record resulting in a grossly excessive award of damages;
 - (e) That the learned magistrate erred in law and in fact by failing to properly and exhaustively evaluate the evidence on record, resulting in wrong inferences and conclusions;
 - (f) That the judgment of the learned magistrate, in the circumstances, is unfair and unjust.
4. In the premises, the appellant prayed that his appeal be allowed and that the judgment and decree of the subordinate court be set aside and substituted with a proper finding by this Court. He also prayed that the costs of the appeal be awarded to him.
5. The appeal was canvassed by way of written submissions, pursuant to the directions of the Court dated May 11, 2021. Thus, Mr Mwangi, learned counsel for the appellant, proposed the following issues for determination in his written submissions dated May 26, 2021 in line with the Grounds of Appeal:
 - (a) Whether the learned magistrate misapprehended the evidence with regard to the nature of the injuries and ended up applying the wrong principles in awarding damages;
 - (b) Whether the learned magistrate erred in law and fact by failing to consider the submissions of the appellant; and thereby took into account irrelevant factors on quantum; and,
 - (c) Whether the judgment of the learned magistrate is unjust in the circumstances.
6. Mr Mwangi submitted that the learned magistrate erred by wrongly admitting into evidence the Medical Report prepared by Dr Sokobe. That report was produced by the respondent as the Plaintiff's Exhibit 10A along with the P3 Form, the Plaintiff's Exhibit 9; which had also been prepared by Dr Sokobe. According to Mr Mwangi, the two documents were admitted in evidence in contravention of the provisions of Section 35 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. He relied on *Koran Isaac v Mariam Hamed* [2014] eKLR in urging the Court to find that, in the absence of consent, the documents ought to have been produced by their author. Counsel also made reference to Civil Appeal No 243 of 1998: *Mohamed Musa & Another v Peter M Mailanyi & Another*, and *Valji Jetba Kerai & Another v Julius Ombasa Manono & Another* [2019] eKLR in this regard.
7. Additionally, Mr Mwangi faulted the learned magistrate for having awarded Kshs 150,000/= for future medical expenses. In his submission, that amount was not specifically pleaded by the respondent in



his Plaintiff. He likewise submitted that it was not proved, in so far as it was premised on the impugned Medical Report by Dr Sokobe. Counsel relied on *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR and *Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v NIA (minor suing through her next friend I A I S & 3 Others)* [2018] eKLR for the proposition that future medical expenses are in the nature of special damages and therefore must not only be specifically pleaded but also strictly proved.

8. On the ground that the learned magistrate failed to consider the submissions filed on behalf of the appellant; including the authorities cited in support of those submissions, Mr Mwangi submitted that there was no indication in the lower court's judgment that the appellant's written submissions as well as the authorities cited on his behalf were taken into consideration. He posited that, had the learned magistrate properly considered the authorities, she would probably have reached a different decision on quantum. Counsel pointed out that the learned magistrate relied on the case of *Janet Opiyo & Another v Stephen Tuwei* [2012] eKLR in which an amount of Kshs 600,000/= was awarded; yet the plaintiff in that case had sustained far more severe injuries.
9. Mr Mwangi also cited *Mohamed Gulab Hussein & Benson Kariuki v Felistus Lenah Muema* [2016] eKLR; *Millicent Atieno Ochuonyo v Katola Richard* [2015] eKLR and *Alfred Chivatsi Chai & Another v Mercy Zawadi Nyambu* [2019] eKLR for the proposition that damages must not only be within the limits set by comparable decided cases but also within the limits the Kenyan economy can afford. Thus, in addition to the authorities cited before the lower court, Mr Mwangi made reference to *Ibrahim Kalema Lewa v Esteele Company Limited* [2016] eKLR in which an award of Kshs 300,000/= was upheld on appeal for fracture of the lower femur.
10. On behalf of the respondent, Mr Keter filed his written submissions on June 24, 2021. He conceded that the respondent sustained severe injuries and that the fractured femur bone was fixed with implants which have remained in situ to date. Counsel pointed out that the respondent had relied on two comparable decisions, namely:
 - (a) *Godfrey Wamalwa Wamba & Another v Kyalo Wambua* [2018] eKLR; and,
 - (b) Nairobi HCCA No. 686 of 2013: *Peter Karoka aka Ngige v Mbaluka Molanzo aka Erick & Others*
11. He explained that in both cases, awards were made in the sums of Kshs 800,000/= and Kshs 900,000/=, respectively, for comparable injuries. He further urged the Court to take into consideration Garissa HCCA No 27 of 2018: *Rukia Abdi Manya & Another v Officer Commanding Police Station, Habaswein & 2 Others* for the principle that an appellate court ought not to disturb the finding of a trial magistrate on quantum simply because it would have given a different award had it tried the matter. Counsel also relied on the case of *Gitobu Imanyara & 2 Others v the Attorney General* [2016] eKLR and *Kemfro Africa Ltd T/A Meru Express Service & Another v Olive Lubia* [1982-1988] 1 KAR 727 as to the applicable principles in the assessment of damages. He therefore urged the Court to dismiss the appeal as the award was within the range of current awards for comparable injuries.
12. This being a first appeal, it is the duty of the Court to consider and re-evaluate the evidence adduced before the lower court with a view of making its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. (see *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123). And, as was observed by Sir Kenneth O'Connor in *Peters vs Sunday Post Limited* [1958] EA 424:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing



the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

13. As the appeal is basically on quantum, the issues for determination, as can be derived from the grounds of appeal are these:

- (a) Whether the trial court applied the wrong principles in determining the issue of quantum of damages in the matter, and
- (b) Whether the trial court erred when it awarded damages under the head of future medical expenses.

14. It is now trite that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In *H West & Son Ltd vs Shephard* [1964] AC 326, for instance, it was held that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

15. Similarly, in *Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company advocates* [2013] eKLR, the Court of Appeal held that:

"...We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled..."

16. The same position was reiterated by the Court of Appeal in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs Kiarie Shoe Stores Limited)* [2015] eKLR, thus:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages." (Also see *Butt vs Khan* [1981] KLR 349)



17. Thus, the approach taken by Hon Wambilyanga, J in HCCC No 752 of 1993: *Mutinda Matheka vs Gulam Yusuf*, which I find useful, was thus:

“The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation.”

18. Additionally, in *Stanley Maore vs Geoffrey Mwenda* [2004] eKLR, the Court of Appeal suggested thus:

“...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

19. With the foregoing in mind, I have looked at the evidence of the respondent as to the exact nature of his injuries. He testified before the lower court on July 4, 2019 to the effect that he was riding a motor cycle from Iten to his home on April 11, 2019 in the company of Timothy Kemboi Korir when they had an accident. He sustained injuries for which he was treated at Iten Referral Hospital before being referred to Moi teaching and Referral Hospital, where he was admitted. He stated that he sustained a fracture of his thigh bone as well as injuries on his hand and face.

20. The respondent produced, as the Plaintiff's Exhibit 1 to 12 documents pertaining to his treatment, including the Discharge Summary issued at Moi Teaching and Referral Hospital as well as the treatment notes, x-ray film, prescription forms, radiology request together with invoices and receipts for payments made. The respondent also produced a Medical Report dated April 12, 2019 and a P3 Form issued on April 11, 2019 that were prepared/filled by Dr Sokobe to prove that he suffered the following injuries:

- (a) Lacerations on the left forehead
- (b) Bruises on the left 3rd ring finger
- (c) Cut wound on the left 4th finger
- (d) Fracture of the left femur

21. Counsel for the appellant took issue with the fact that the two Medical Reports were produced by the respondent as opposed to their maker, Dr Sokobe. While his argument is sound, it is noteworthy that no such objection was taken before the lower court; and therefore the learned magistrate had no reason make a determination thereon in her judgment.

22. The foregoing notwithstanding, it is settled that the court has discretionary powers to allow a party to raise a new point on appeal, depending on the nature of the point to be raised and the circumstances of



the case. In *Securicor (Kenya) Ltd v EA Drapers Ltd & another* [1987] eKLR, for instance, the Court of Appeal took the view that: -

“...Certainly the cases show that the discretion must be exercised sparingly. The evidence must all be on the record and the new point must not raise disputes of fact. The new point must not be at variance to the facts or case decided in the court below...”

23. In this case, it is manifest from the record that the respondent did not call Dr Sokobe to produce the two Medical Reports; and therefore that the two documents were instead produced by the respondent; yet Section 35 of the *Evidence Act* states that:

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

- (i) had personal knowledge of the matters dealt with by the statement; or
- (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

24. As far as can be ascertained from the record, no justification was made as to why Dr Sokobe was unable to attend court to personally produce the two Medical Reports. Consequently, there was no proof that the circumstances contemplated in the proviso to that Section 35 (1) of the *Evidence Act* existed so as to exempt Dr Sokobe from testifying in court. Thus, in *Thuranira Karauri vs Agnes Nebeche* [1997] eKLR, it was held thus by the Court of Appeal:

“...the medical report prepared by Dr Maina Ruga was produced by the plaintiff herself in breach of the clear provisions of section 35 of the *Evidence Act* (Cap 8 Laws of Kenya). It was not produced by consent. Dr Ruga should have been called to produce it. The Judge clearly erred in admitting it...”

25. It is therefore clear, that in the absence of consent by the parties to admit a document in evidence, the existence of any of the circumstances in the proviso to Section 35 must be demonstrated for a medical report to be tendered other than by its maker. For this reason, I would agree with counsel for the appellant that the learned magistrate fell into error when she allowed the respondent to produce the subject medical reports prepared by Dr Joseph Sokobe.

26. The foregoing notwithstanding, there was no controversy before the lower court as to the injuries suffered by the respondent; including a fracture of his left femur, for which he was admitted at Moi Teaching & Referral Hospital for treatment. The injuries are confirmed by the Discharge Document



marked the Plaintiff's Exhibit 2 and the treatment notes marked the Plaintiff's Exhibit 3. There was therefore credible proof before the lower court that the respondent did in fact sustain the injuries complained of; and therefore the learned magistrate's finding in that regard cannot be faulted. In *Koran Isaac v Mariam Hamed (supra)* in which the medical report was similarly allowed in error, Hon Tuiyott, J (as he then was) posed the question, "Did that necessarily mean that the Plaintiff had failed to prove her injuries?" Here is the approach taken by the learned judge which I entirely agree with:

"...I do not think so, because the Plaintiff had produced the medical chit issued to her at Busia District Hospital. She had proved that she had sustained a cut wound to her forehead. What she may not have proved was the prognosis of the injuries that had been captured by the medical report. In the absence of the medical report she could not have proved the probable future course and outcome of the injuries suffered: Nevertheless, on the basis of the medical chit she able to prove that she had suffered a cut wound to her forehead..."

27. Indeed, the record of the lower court confirms that counsel for the appellant did file written submissions dated January 10, 2010 in which he conceded that the respondent suffered lacerations of the left forehead, bruises on the 3rd left finger, cut wound on the left 4th finger and a fracture of the left femur. I therefore find sufficient evidence to support the respondent's injuries.
28. Counsel for the respondent had urged for an award of Kshs 900,000/= as general damages, citing *Geoffrey Wamalwa Wamba & Another v Kyalo Wambua (supra)* in which the plaintiff had been awarded Kshs 700,000/= for fractured tibia and fibula; and *Peter Karoka aka Ngige v Mbaluka Malonza (supra)* in which the lower court's award of Kshs 900,000/= for a fracture of the left femur was reduced by the High Court to Kshs 800,000/= on November 2, 2018.
29. On the other hand, counsel for the appellant had made reference to the following authorities in support of his proposed award of Kshs 500,000/=:
 - (a) *Paul Kitbinji Kirimi & Another v Gatwiri Muriithi* [2018] eKLR in which the plaintiff had sustained a cut on the upper lip, red right eye, fracture of the right mandible and a fracture of the distal third of the right femur and was awarded Kshs 700,000/=, which was, on appeal reduced to Kshs 450,000/=.
 - (b) *Caleb Onyango Uyogo v P A (a minor suing through W R K as next friend)* [2014] eKLR, in which the plaintiff sustained soft tissue injuries with a swollen face, a fracture of the middle part of the right femur and soft tissue injuries of the pelvis. On appeal the trial court's award of Kshs 300,000/= was upheld.
 - (c) *Thomas Ombima v Samson Anindo Mwenje* [2018] eKLR in which the plaintiff sustained a comminuted fracture of the middle third of the left femur, back injury, dislocation of the left ankle, chest injuries, soft tissue injuries to the elbow joint and soft tissue injuries to the left knee and was awarded Kshs 950,000/= by the trial court. On appeal that amount was reduced to Kshs 400,000/=.
30. Taking into account all the relevant factors, including the respective ages of the authorities relied on by the parties, and the effect of inflation, I would not consider an award of Kshs 800,000/= to be excessive, on the basis of the authorities cited by counsel for the respondent, especially the case of *Peter Karoka aka Ngige v Mbaluka Malonza (supra)*.
31. On whether the trial court erred in awarding damages under the head of future medical expenses, I note that counsel impugned the award of Kshs 150,000/= on two fronts; firstly, on the ground that it was not pleaded; and secondly, that it was not proved as the medical evidence in support thereof,



specifically the Medical Report of Dr Sokobe, was improperly admitted by the lower court. However, a perusal of the Plaint filed before the lower court does show that indeed the respondent had included his claim for future medical expenses in the sum of Kshs 150,000/= at paragraphs 10 and 11 thereof. In this regard, the Court of Appeal restated the beaten path in *Tracom Limited & Another vs Hasssan Mohamed Adan* [2009] eKLR thus:

“...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 vs 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...”

32. As to whether that aspect of the respondent’s claim was proved it is noteworthy that the respondent relied entirely on the impugned medical report prepared by Dr Sokobe, who was never called to testify. As the court has already found that the medical report ought not to have been admitted without calling its maker, it would follow that the lower court had no evidential basis for awarding the claim on future medical expenses. The said award on future medical expense is set aside for lack of medical evidence. The sum awarded for special damages of Kshs 159,714.00/= was not only pleaded and proved but was also not challenged on appeal. It is therefore left undisturbed.

33. In the result, the appeal succeeds partially in respect of the claim for future medical expenses which is hereby disallowed. The final sums due to the respondent are therefore as hereunder:

General damages Kshs 800,000.00

Less 20% (Kshs 160,000.00)

Subtotal Kshs 640,000.00

Special damages Kshs 159,714.00

Total Kshs 799,714.00

34. Accordingly, the judgment of the lower court is hereby set aside and substituted with the judgment of this Court in favour of the respondent in the sum of Kshs 799,714/= together with interest from the date of the award by the lower court, as well as costs of the lower court suit. As the appeal is partially successful, the respondent is hereby awarded only half of the costs of the appeal.

35. It is so ordered.



DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 22ND DAY OF JUNE 2022.

.....

OLGA SEWE

JUDGE

