



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 153 OF 2012**

**BETWEEN**

**ZACHARY KARIITHI.....APPELLANT**

**AND**

**JASHON OTIENO OCHOLA.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. Ezra Awino, SRM dated 23<sup>rd</sup> November 2012 at the Chief Magistrates Court at Kisumu in Civil Case No. 361 of 2011)***

**JUDGMENT**

1. This is an appeal against the trial court's assessment and award of damages. The respondent was injured in a road traffic accident which occurred on 2<sup>nd</sup> July 2011 along the Awasi- Ahero road involving two motor vehicles; KBA 513Y driven by the respondent and KAZ 939G driven by the appellant or his driver. The issue of liability was settled by consent with the appellant shouldering 60% of the liability. The respondent prayed for general and special damages amounting to Kshs. 750,000/-. According to the plaint, the respondent sustained the following injuries;

- Chest pains
- Injuries to the waist
- Compound fractures of the right tibia/fibula
- Compound fracture of the left femur bone mid shaft
- Fracture of the right femur bone
- Fracture of the 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> ribs of the right side
- Injuries to the forehead
- Injuries to the hip joint
- Injuries to the big left toe

2. After hearing the matter, the trial magistrate made the following award;

<i>General Damages</i>	–	<i>Kshs.</i>	<i>2,000,000.00</i>
<i>Special Damages</i>	-	<i>Kshs.</i>	<i>750,000.00</i>
<i>Future Medical Expenses-</i>		<i>Kshs.</i>	<i>500,000.00</i>

Kshs. 3,250,000.00

Less 40% Contribution – Kshs. 1,300,000.00

TOTAL Kshs. 1,950,000.00

3. Both parties filed extensive written submission and referred to case law in support of their opposing contentions. According to Mr Karanja, counsel for the appellant, the issues for determination raised in the memorandum of appeal dated 20<sup>th</sup> December 2012 are three-fold. The first is the award of general damages is inordinately high considering the nature of the injuries and the authorities cited by the parties. He submitted that the trial magistrate failed to consider and analyse the authorities cited hence the award was excessive. In his view, an award of Kshs. 1,300,000.00 would have been reasonable. Second, counsel urged that the claim for special damages was neither pleaded nor proved to the requisite standard. He contended that the respondent produced invoices which were insufficient to prove that monies were incurred. Finally, counsel urged the court to disallow the claim for future medical expenses as this was neither pleaded nor proved. In counsel's view, the fact that the doctor made a recommendation was insufficient unless the amount was pleaded.

4. Counsel for the respondent, Mr Singahachi, supported the decision of the trial magistrate and was convinced that the award was reasonable in the circumstances and reflective of the nature and extent of the injuries sustained by the respondent. Counsel pointed to the fact that the amount of special damages was pleaded and proved. He stated that although the claim was not particularised in the body of the plaint, the fact that it was claimed in the prayers was sufficient compliance with the law. Lastly, counsel submitted that future medical expenses were proved by the doctor's clear assessment of the injuries and were thus properly awarded.

5. It is established that the trial court has discretion in awarding damages and the appellate court should not ordinarily intervene merely because it would have awarded a higher or lesser sum. As the Court of Appeal stated in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***;

*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 ....*

6. The nature and extent of the injuries sustained by the respondent is not in dispute. The injuries pleaded by the respondent were confirmed by the Discharge Summary from Aga Khan Hospital where he was admitted for 4 weeks. At the time he testified, the respondent stated he had not yet healed. Both his legs had been operated on and had screws in place which needed to be removed. Dr L. W. Okombo prepared a medical report dated 18<sup>th</sup> August 2011. From the X-rays he observed fractures of the left femur bone mid shaft, right femur bone, right tibia and fibula and fractures of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> right side ribs. Dr Okombo concluded that the respondent had not fully recovered and required physiotherapy and reconstructive surgery. He estimated that such surgery would cost a minimum of Kshs. 550,000/-. He also noted the respondent was not able to stand or walk on his feet. Dr Olima examined the respondent on 5<sup>th</sup> April 2012. He reviewed the respondent's documents from Aga Khan Hospital and observed that the respondent had surgical scars on both thighs and on the medical aspect of the right upper 1/3 of the right tibia, varus deformity of the right knee joint and was walking with unstable gait. He concluded that the respondent suffered multiple severe fractures which were internally fixed.

7. I will now deal with the issue of general damages for pain and suffering and loss of amenities. Before the trial court, counsel for the respondent suggested that a sum of Kshs. 4,000,000/- was appropriate based on ***Wanjiku Karimu v Simon Tum and Another MSA HCC No. 368 of 2010 [2010]eKLR*** where the plaintiff sustained multiple fractures including displaced and angulated fractures of the right distal radius, avulsion of the right ulna styloid process, displaced comminuted fracture of the upper mid shaft of the right femur, displaced fracture of the right pubic and ischial ramii and also left ischial ramii and arcuate eminence fractures of the right index, middle, ring and little fingers, dislocation of the right ulna

end, friction burns on the buttocks, right wrist, forearm, right back, right temporal back and scalp and on the left iliac crest in addition to lacerations on the legs, and hands. She was awarded Kshs. 1,800,000/- in 2012. Counsel also cited the case of **James Thiong'o v Nduati Njuguna Ngugi NKR HCCC No. 344 of 2010 [2012]eKLR** in which the plaintiff was awarded Kshs. 1,800,000/- in 2012 for the following injuries; fracture of the right tibia and fibula which were mal-united resulting in a prominent deformity in the right leg.

8. The appellant submitted that a sum of Kshs. 1,300,000/- was reasonable. Counsel for the appellant cited several cases. In **Jesca Kaari Mutwiri Mwangi v Fara Said Hassan and Another MRU HCCC No. 170 of 2001 [2009]eKLR** the plaintiff suffered fracture of the right and left femur, deep cut wounds on the face, fracture of the mandible, left femoral neck and soft tissue injuries on the right foot heel and was awarded Kshs. 1,500,000/- in 2009. The plaintiff in **Mary Pamela Oyioma v Yess Holdings Limited NKR HCCC No. 186 of 2008 [2011]eKLR** was awarded Kshs. 900,000/- as general damages in 2011 for a comminuted fracture of the right femur, compound fracture of the of the left tibia, soft tissue injuries of the right shoulder and multiple cuts wounds all over the body. In **Boniface Njiru v Tohel Agencies and Another NRB HCC No. 555 of 2007 [2011]eKLR**, the plaintiff sustained a blunt head injury with loss of consciousness for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries and was awarded Kshs. 1,000,000/- in 2011.

9. 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 of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR** thus:

*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.*

10. In **Jabane v Olenja [1986] KLR 661**, the Court of Appeal elucidated the principles that guide the court in assessing general damages as follows;

*The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.*

1. *Each case depends on its own facts;*
2. *awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);*
3. *comparable injuries should attract comparable awards.*
4. *inflation should be taken into account; and*
5. *unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.*

11. I have re-evaluated the injuries sustained and the cases cited by the parties in light of the above principles. The respondent sustained severe multiple fractures which resulted in him being hospitalised for a month. The serious residual effect was that he was unable to walk long distances. Recalling that no two cases are alike, I find that the decisions cited by the respondent are on the higher side given the more serious injuries sustained by the claimants. The decisions cited by the respondent bear a close relationship with the present case. Since the cases cited were relatively recent, the issue of factoring inflation was minimal hence I find that the award of Kshs. 2,000,000/- inordinately high. An award of Kshs. 1,500,000.00 would be more reflective of the nature of the injuries sustained by the respondent.

12. I now turn to the issue of future medical expenses. The governing principle was explained by the Court of Appeal in **Kenya Bus Services Ltd v Gituma [2004] EA 91** as follows;

*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 damages and is a fact that must be pleaded, if evidence thereon 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 the infringement of a person's legal rights should be pleaded.*

13. A cursory glance at the plaint shows that the claim for future medical expenses was not pleaded. Although the medical report by Dr Okombo alluded to the possibility of future medical expenses being incurred and estimated the cost, such evidence was insufficient to mount a case in the absence of a specific plea in the plaint. In **Mbaka Nguru & Another v James George Rakwaro NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR**, the Court of Appeal put it this way;

*We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head .....*

14. Since the respondent did not plead the claim for future medical expenses, the award of Kshs. 500,000/- is set aside.

15. The final issue is that of special damages. It is firmly established that special damages can only be awarded if pleaded and proved. The Court of Appeal in **Coast Bus Service Ltd v Murunga Danyi CA Civil Appeal No. 192 of 1992 (UR)** stated as follows;

*We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as done in this case, that the particulars of special damages were to be supplied at the time of trial .....* It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars.

16. While the claim for special damages was pleaded as prayer, the nature of the claim was not set out in the body of the plaint. The claim was thus not pleaded with the required particularity. It is not clear what the amount was for or what it represented apart from the fact it was just a sum claimed under the rubric of special damages. In my view the pleading lacked the sufficient particularity required of a claim of this nature.

17. I further agree with counsel for the appellant that the claim was not proved. Special damages represent a pecuniary loss or expense hence if nothing has been paid it cannot be said that the claimant suffered loss or damage and that it is why an invoice cannot constitute evidence of loss. At the hearing the respondent testified that he spent a total of Kshs. 750,000/- and that he had paid Kshs. 10,000/-. He produced an invoice issued by Aga Khan Hospital for Kshs. 716,963/-. He did not prove that the money demanded in the invoice had been paid. In the absence of proof that the invoice had been settled, the claim for special damages must fail (see **Total Kenya Limited v Janevams Ltd CA Civil Appeal No. 178 of 2005[2015]eKLR**). I disallow the claim for special damages.

18. In conclusion and for the reasons I have set out above, I allow the appeal and substitute the judgment made in the subordinate court with the following award in favour of the respondent;

<b>General Damages</b>	<b>Kshs. 1,500,000.00</b>
<b>Less 40%</b>	<b>Kshs. 600,000.00</b>
<b>Total</b>	<b>Kshs. 900,000.00</b>

19. The sum shall accrue interest from the date of judgment in the subordinate court. The appellant shall have the costs of this appeal.

**DATED and DELIVERED at KISUMU this 12<sup>th</sup> day of October 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr M. Karanja, Advocate instructed by the appellant.

Mr Singahachi instructed by Kuke and Company Advocates for the respondent.