



REPUBLIC OF KENYA



KENYA LAW
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**Pesa v Riambila (Civil Appeal E058 of 2023)
[2025] KEHC 243 (KLR) (21 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E058 OF 2023**

AC BETT, J

JANUARY 21, 2025

BETWEEN

BANISTA KALERWA PESA APPELLANT

AND

RASHID OMORO RIAMBILA ALIAS OMORA RESPONDENT

*(Being an appeal from the judgement and decree of Hon. T. Obutu (SPM)
in Mumias CMCC No. 103 of 2021 delivered on 30th March 2023)*

JUDGMENT

1. The Respondent filed a suit against the Appellant vide a plaint dated 29th September 2021 seeking damages for injuries sustained as a result of a road traffic accident on 19th November 2019 along the Mumias-Bungoma road.
2. According to the Respondent, on the material day, he was riding his motor cycle registration number KMEG 729 L TVS star along the Mumias-Bungoma road when upon reaching Angola area, the Appellant's motor vehicle registration no. KBY 861 X Mitsubishi FH which he claimed was negligently and carelessly being driven by the Appellant, their agent, and /or driver lost control and hit his motor cycle registration no. KMEG 729 L. As a result of the collision the Respondent sustained serious injuries for which he held the Appellant liable. The Appellant denied liability and the matter proceeded to hearing.
3. In his judgement, the trial magistrate found that the Respondent was riding on the left side and that the Appellant was trying to overtake a lorry and, in the process, hit the Respondent. He found the Appellant 100% liable for the accident and on quantum, he relied on the medical reports prepared by the 3 doctors who assessed the Respondent. The trial magistrate awarded the Respondent Kshs. 2,000,000/= as general damages and Kshs. 400,000/= for future medication. He further awarded Kshs. 67,000/= for the special damages that was proven bringing the total amount to Kshs. 2,467,000/=



4. The Appellant being dissatisfied with the said judgment and decree filed this appeal based on the following grounds:-
 - a) That the learned trial magistrate erred in law and in fact by failing to consider the submissions by the appellant.
 - b) That the learned trial magistrate erred in law and in fact by failing to take into account the evidence on record hence arriving at a wrong decision.
 - c) That the learned trial magistrate erred in law and in fact by adopting the wrong principles in assessment of damages.
 - d) That the trial magistrate erred in law and in fact by awarding the respondent Kshs. 2,000,000/= in general damages which was excessive thereby arriving at a wrong decision.
 - e) That the learned trial magistrate erred in awarding future medical expenses of Kshs. 400,000/= when the same was not pleaded.
5. The Appellant prays that the appeal be allowed and that the lower court's judgment be set aside and the court to reassess the damages downwards.
6. The appeal was canvassed by way of written submissions.

Appellant's Submission

7. In his submissions, the Appellant questioned the basis that the trial court used in awarding Kshs. 2,000,000/= for damages and contended that the trial court failed to consider his submissions. He relied on the case of PW vs. Peter Muriithi Ngari (2017) eKLR High court Civil Appeal No 54 of 2013 on the court's jurisdiction to review evidence from the lower court.
8. The Appellant submitted that there was no proof of continuous medication and avers that the Kshs. 2,000,000/= was excessive and should be reduced to Kshs. 1,000,000/=.
9. On the award of Kshs. 400,000/= for future medical expenses, the Appellant asserted that the same was awarded upon recommendation by Dr. Sokobe even though it was never pleaded in the plaint. He quoted the case of Tracom Ltd & Anor vs. Hassan Mohammed Adan (2009) eKLR where the court held that future medical expenses ought to be pleaded, proven and averred and that since the same was not done, the trial court had no basis in awarding the same.
10. In conclusion, the Appellant claims that the damages awarded were in excess since the court failed to consider both the evidence before it and the Appellant's submissions.

Respondent's Submission

11. The Respondent submitted that the decision by the trial magistrate was reasonable and urged this court to uphold the trial court's award on quantum since the injuries sustained by the Respondent were confirmed by three doctors. He asserted that Dr. Andai who examined him on 14th March 2020 found that there was physical disability which was confirmed by Dr. Sokobe who examined him on 4th August 2022 and assessed his disability at 20%. He argued that although Dr. Janipher Kaluthu did not mention the permanent disability, she testified that he had a medical rotation of his right leg, stiffness at the ankle and hip joint.
12. The Respondent relied on his authorities from the lower court's submissions being Samson Simbe vs. Callen Obonyo Nyangau Kisumu HCA E 037 of 2021 where the court awarded Kshs. 2,000,000/=



for 2 fractures and dislocation; James Katua Peter vs. Simon Mutua Musaya Machakos HCC No 135 of 2021 where lady Justice Sitati (Rtd) awarded Kshs. 2,000,000/= for multiple fractures and dislocation; Gitonga vs. Kalunye (2022) KEHC 3070 the court awarded Kshs. 1,000,000/= and Joseph Macharia vs. Hassan Mohammed Adan (2009) EKLR where the respondent had fracture of left hip and left humerus, and the court awarded Kshs. 2,000,000/=.

13. The Respondent asserted that from the doctor's examination, he needed future medication, and the court should not turn a blind eye to the said need.
14. The Respondent finally prays that the appellate court uphold the decision by the trial court and find that the appeal lacks merit.

Evidence in brie

15. PW1, Rashid Omoro Riambila testified that on 19/11/2019 along the Mumias Bungoma road at Shibale, he was riding his motorcycle registration number KMEG 729 L when he was hit by the motor vehicle KBT 861 X whereby he sustained the injuries detailed in the medical reports. He adopted his witness statement as evidence and produced documents including receipts in proof of his claim.
16. There is no dispute that the accident occurred as stated by the Respondent. The Appellant has not appealed against the trial court's finding on liability.
17. The Respondent was treated at St. Mary's hospital Mumias where he was admitted from 19th November 2019 to 19th February 2020. There, treatment included surgical toilet, internal fixation of the femoral fracture, application of exofix to the right leg, antibiotics, analgesics and dressing.
18. PW2 was Dr. Charles Andayi. He testified that he examined the plaintiff on 11th March 2020. He examined the plaintiff and found that he had pain around his front part of the waist, scar in the right leg and right thigh which had not yet healed.
19. Dr. Andayi concluded that the patient had suffered serious bone injuries and moderate soft tissue injuries although he had healed with deformity on the right leg and that he needed further treatment to remove the implants. He produced his medical report and a medical report by Dr. Sokobe as exhibits.
20. The witness was later recalled and admitted that he had prepared the medical report and stated that the Respondent could heal in one and a half years and but needed Kshs. 70,000/= to remove the implants which although indicated by Dr. Sokobe at Kshs. 400,000/= would be cheaper at a government institution.
21. The defence relied on Dr. Janipher Kahili's medical report dated 9th June 2022 which was admitted by consent.

Analysis and Determination

15. This being a first appeal, the court is under duty to re- evaluate and review the evidence afresh with the aim of arriving at its own independent conclusion while bearing in mind the fact that unlike the trial court, it did not have the benefit of seeing and hearing the witness as they testified. See the case of *Selle v Associated Motor Boat Company Ltd & Others* [1968]1EA 123 where the court had this to say:-

“ An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make



due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

15. From the submissions, the issues that arise for determination are:- whether the award on quantum is excessive; and whether the trial court erred in awarding KShs. 400,000/= for future medical examination.

16. The principles upon which an appellate court will disturb an award of damages are well settled. An appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages. In *Butt -vs- Khan Civil Appeal No. 40 of 1997 [1978] eKLR*, the court stated 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 arrive at a figure which was either inordinately high or low.”

15. In the case of *Boniface Waiti & Another -vs- Michael Kariuki Kamau [2007] eKLR*, Lady Justice Nambuye (as she then was) stated the following principles should guide the court in awarding general damages: -

- a) An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.
- b) The award should be commensurate to the injuries suffered.
- c) Awards in decided cases are mere guides and each case should be treated on its facts and merit.
- d) Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.
- e) Awards should not be inordinately too high or too low.

26. In the present case, the Respondent suffered the following injuries: - Open book fracture of the pelvis; Closed fracture of the right femur; Open segmental fracture of the right tibia; open fracture of the right fibula.

27. The medical reports by Dr. Sokobe and Dr. Andayi who examined the Respondent agree that the Respondent suffered the injuries set out in his statement. Although permanent disability was assessed at 20%, the Doctor who did the said assessment did not testify and the medical report was consequently not subjected to cross-examination. Moreover, the medical report was inconsistent with the medical reports done by Dr. Andayi and Dr. Kahuthu. It is trite law that a document that is produced without its maker being called to testify holds little probative value. In view of the fact that Dr. Andayi's report is in consonance with Dr. Kahuthu's report, and having in mind that Dr. Andayi testified in court and was subjected to cross-examination, I will opt to agree with the two doctors but however add a rider that both doctors have alluded to some form of disability with Dr. Kahuthu finding that the Respondent had medial rotation of his right leg, plus stiffness at the ankle and hip joint. Considering the evidence, there is no doubt that the Respondent suffered some form of permanent disability. The doubt is in respect to the extent or percentage of that disability.



28. The trial court awarded Kshs. 2,000,000/= for the general damages. However, according to the Appellant, the award was too high in the circumstances. He proposed Kshs.1,000,000/= as adequate compensation while the Respondent urged the court to maintain the award.
29. In deciding on an appropriate award as general damages, the court must ensure that comparable injuries attract comparable awards. The Court of Appeal in the case of Mbaka Nguru & Another v James George Nyakwar [1989] eKLR stated thus:-
- “The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”
- This principle was reiterated in Stanley Maore v Geoffrey Mwenda [2004] eKLR where the Court of Appeal held that:- “Having so said, 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.”
30. I have gone through the authorities cited by both parties in support of their case. In the case cited by the Appellant, the claimant had suffered less severe injuries than those suffered by the Respondent herein. Similarly, all the claimants in the cases relied on by the Respondent sustained far more severe injuries. In fact, each one of the claimants were confirmed to have suffered a significant percentage of disability arising from the injuries. The said precedents cannot therefore be said to be relevant in assisting the court to make a fair determination on the quantum of damages.
31. The exercise of awarding general damages is not an exact science, and no two cases are the ever the same. Additionally, no award of damages can restore an injured body, particularly a body that has suffered multiple fractures. However, courts must be careful to observe the laid down principles in its awards.
32. I have carefully considered the grounds of appeal, and it is my view that the authorities cited hereafter are more relevant and appropriate in this case.
33. In Mwaura Muiruri –vs- Suera Flowers Limited & Another [2014] eKLR wherein the plaintiff sustained multiple lacerations on the face; soft tissue injuries to the chest; comminuted fractures of the right humerus upper and lower thirds of the tibia; compound fractures of the right upper and lower one third tibia and fibula; and soft tissue injuries. Disability was assessed at 70% computed as follows; 50% for the loss of the right arm and 20% on the left leg. The court awarded him Kshs.1,450,000/= for pain and suffering. The said injuries were more serious than the injuries sustained by the Respondent herein but more comparable in nature. It is important to note that the aforesaid award was made ten years ago.
34. In the case of George William Awuor v Beryl Awuor Ochieng [2020] eKLR, the court, on appeal reduced an award of Kshs. 2,000,000/= to Kshs. 1,200,000/= where the respondent had suffered simple fractures of the right femur; and a compound fracture to the left tibia and fibula. She also had a residual surgical scar on the right thigh with a nail being in situ.
35. Another comparable case albeit with more severe injuries is the case of Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR where the appellate court awarded Kshs. 1,500,000/= in general damages to the respondent who had 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 expected recovery in one and a half years and where the doctor assessed disability at 30%.The doctor's report was that many people with the kind of injury suffered by the respondent would end up inevitably with amputation and the leg had been saved by use of external fixator and bone transplant procedure.

36. In the case of Cold Car Hire Tours Limited v Elizabeth Wambui Matheri [2015] eKLR, the respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement, the trial court award of Kshs. 1,400,000/= as general damages was upheld by the high court on appeal.
37. Having said that, in my view, the trial court did not take into account all the relevant factors in arriving at the award of damages. The court considered cases where the injuries were much more severe than in the present case therefore going against one of the cardinal principles to be observed in the award of general damages. Consequently, the damages awarded are inordinately high as to amount to an erroneous estimate of the damages. The award of Kshs. 2,000,000/= for the injuries sustained by the Respondent is not commensurate with the injuries suffered and calls for this court's interference.
38. Considering the injuries suffered by the Respondent, the comparable recent awards in respect to similar injuries; and bearing in mind the inflationary trends and the state of the Kenyan economy; and having considered the authorities tendered by the parties and the other authorities cited herein, I find that an award of Kshs. 1,600,000/= is an adequate and appropriate compensation.
39. The other issue for determination by this court is on award for future medical expenses.
40. It has been held by the court that in order for a claim of future medical expenses to be awarded, it must be specifically pleaded and strictly proved.
41. The Court of Appeal in the case of Tracom Limited & Another –vs-Hassan Mohamed Adan [2009] eKLR stated: -

“...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...”



42. I note from the plaint, that the claim for future medical expenses was not pleaded. Such expenses are in the nature of special damages, and it is trite that for special damages to be awarded, special damage must not only be specifically pleaded, but it must also equally be specifically proved.
43. The law on future medical expenses is straightforward and clear, future medical expenses must be pleaded in order for a party to lead evidence in proof thereof. Where the same are not pleaded, they are not available.
44. Accordingly, the award of Kshs. 400,000/= for future medication is set aside.
45. In conclusion the appeal against quantum partially succeeds while the appeal against the award for future medical expenses wholly succeeds.
46. The upshot is that the judgement of the lower court is set aside. Instead, judgement is entered in favour of the Respondent as against the Appellant as follows: -
1. Liability 100%
 2. General damages Kshs. 1,600,000/=
 3. Special damages Kshs. 67,000/=
- Total Award Kshs. 1,667,000/=
47. The Respondent shall have the costs of the suit in the lower court plus interest on the re-assessed award. Each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF JANUARY 2025.

A. C. BETT

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

Court Assistant: Polycap

