Adana v Ogora (Civil Appeal E006 of 2021) [2025] KEHC 4446 (KLR) (7 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4446 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E006 OF 2021

DKN MAGARE, J

APRIL 7, 2025

BETWEEN

MBIPUI JULIUS ADANA ..... APPELLANT

AND

AVENUS OGORA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S.K. Onjoro (SRM), given on 9.10.2020 in Kisii CMCC No. 695 of 2018. The Appellant was the Defendant in the lower court. The court heard the matter and delivered judgment as follows:
    a. Liability 70:30% for the Plaintiff
    b. General damages Ksh. 1,600,000/=
    c. Special damages Ksh. 25,180/=
    d. Costs of the suit
2. The Appellant was aggrieved and filed a precise Memorandum of Appeal on quantum and set forth the following grounds of appeal:
    a. That the learned trial magistrate erred in law and, in fact, in awarding Ksh. 1,600,000/- on 100% basis in general damages which was inordinately high.
    b. That the learned trial magistrate erred in law and, in fact, in awarding Ksh. 25,180/= on 100% basis for special damages, which was not proved.
    c. That the learned trial magistrate erred in law and, in fact, by failing to consider the appellant's evidence on record, thereby arriving at an excessive award.

Pleadings

3. Being an appeal on quantum, it is unnecessary to go to the pleadings related to liability. I do not see why the grounds of appeal refer to 100% liability when the court clearly reduced the total award by 30% being the liability given away in favour of the Appellant owing to the parties' consent on liability.

4. The Respondent filed suit by way of the Plaint dated 9.11.2018 claiming damages arising from an accident on 16.8.2018 when the Respondent was riding his motorcycle registration No. KMDZ 453G within Kisii Township when he was knocked down by the Appellant's motor vehicle registration number KBJ 754U. The Respondent pleaded that he suffered the following injuries:

    i. Tenderness on the chest wall

    ii. Dislocation of the left shoulder joint

    iii. Fracture of the left ulna and radius

    iv. Dislocation of the left knee

    v. Pelvis fracture

    vi. Fracture of the left tibia and fibula

Evidence

5. The Respondent testified as PW2. He relied on his witness statement and a bundle of documents, both dated 9.11.2018, produced in evidence. It was his case on cross-examination that the accident motor vehicle was joining from a feeder road when it hit him.

6. Liability was by consent recorded at 70:30 in favour of the Respondent. The medical report was produced with consent without calling the maker, and the Appellant closed his case without calling witnesses. It was recorded in court that the Appellant would file a second medical report together with submissions, but I have not seen any filed in court.

Submissions

7. Parties filed submissions in support of their respective positions in the matter. The Appellant filed submissions dated 23.5.2022. It was submitted that a sum of Ksh 100,000/= will suffice as general damages. They relied on Omar Motors Garage John Ochieng Otiende [2018] eKLR, based on which it was submitted that the Respondent suffered minor injuries, not fractures.

8. The Appellant cited a plethora of authorities based on the submissions that the injuries suffered by the Respondent were soft tissue injuries and not fractures. On special damages, it was submitted that only Ksh. 18,680/= was proved and should be awarded.

9. The Respondent submitted on the other hand that the award by the lower court was not inordinately high as to be interfered with. The special damages, according to the Respondent were pleaded and proved and so correctly awarded.

Analysis

10. 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.

11. The jurisdiction for this court to review the evidence in the lower court should this be done but with caution. In the case of Peters vs Sunday Post Limited [1958] EA 424, the 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. The duty of this court in the appeal is thus to reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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 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..."

13. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Servcie 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.

14. For the appellate court 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. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, 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..."

15. The award must have accord to the local circumstances. In the case of Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, Keller JA stated the following regarding the award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, wherethe conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter &

Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.

The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.

Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.

But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

16. The issue in the court below was whether the Respondent suffered those injuries. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

17. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

18. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

19. Damages are proved to be at large, they must be commensurate with similar injuries. The injuries suffered were as follows:

    i. Tenderness on the chest wall

    ii. Dislocation of the left shoulder joint

    iii. Fracture of the left ulna and radius

    iv. Dislocation of the left knee

    v. Pelvis fracture

    vi. Fracture of the left tibia and fibula

20. The Appellant did not present any medical evidence. The evidence of the Respondent was as such uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* stated that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
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> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

21. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

22. The medical report is not binding, and the court is entitled to reject it if it does not align with the rest of the evidence. Due regard must, however, be given to a medical report where there is no conflicting medical evidence. The Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

23. Courts must give proper respect to the opinions of experts. Such opinions are not, as it were, binding on the courts and the courts must accept them as stated in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, where it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
>
> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

24. This court will independently reevaluate the expert report. The medical report, in this case, was in consonance with the treatment notes and the Respondent's evidence. Dr. Ombati Timothy Mokua concluded that the Respondent sustained great harm with fractures of the left tibia and fibula, fracture of left ulna and radius, pelvis fracture, left knee dislocation, crack of the iliac bone, left shoulder joint dislocation, and several other injuries which were in the process of healing. He gave a prognosis that the dislocations may complicate with post-traumatic arthritis later.

25. The court takes judicial notice that that the iliac is largest and most superior bone of the hip, forming part of the pelvic girdle and connecting with the ischium and pubis to create the hip bone. The pelvis fracture thus extended not only on the pelvis but with a crack in the iliac. These injuries were thus serious.

26. Therefore, it is my finding that the injuries pleaded herein were proved. The medical report of Dr. Ombati Timothy Mokua dated 2.11.2018 clearly stated that the Respondent suffered left tibia fibula fractures, left ulna radius fractures, pelvis fracture, left knee dislocation and left shoulder dislocation and was not controverted. I do not accede to the submissions by the Appellant that the Respondent only suffered soft tissue injuries which is without basis. I find no basis to interfere with this finding.

27. The Appellant also contended that the assessment of damages was excessive and not commensurate with the injuries. The lower court awarded damages as follows:

    General damages – Ksh. 1,600,000

    Special damages – Ksh. 25,180/=

28. As regards general damages, the lower court awarded Kshs. 1,600,000/-. No specific authority was referred to. The damages must be commensurate to the injuries for consistency in the judicial award. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

29. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

30. I proceed to establish related injuries. In the case of James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another (2015) eKLR, the Plaintiff therein suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg. Ougo J assessed damages at Ksh 1,500,000/=.

31. In China Road & Bridge Corporation vs. Job Mburu Ndung'u [2021] eKLR (Mwita, J), the court had awarded Kshs. 2,000,000.00, where the injuries sustained were fractures of the left radius, the left ulna, the right tibia and the right fibula.

32. In my reevaluation based on the above authorities, the fractures suffered by the Respondent were multiple and the court was called upon to assess damages based on the general hallmark of the injuries all of which may not have appeared in related judicial decisions. The award could as such be based on an estimate bearing in mind the injuries that included fracture of the pelvis, tibia and fibula and ulna and radius. The authorities cited by the Appellant did not present all facets of the injuries suffered by the Respondent and appear to have been founded on the wrong assumption that the Respondent did not suffer any fractures. Based on the foregoing authorities, I find the award by the lower court of Kshs. 1,600,000/- not inordinately high.

33. On special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

34. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were

pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...

35. The Appellant submitted that only Ksh.18,680/- was proved. The Respondent pleaded Ksh. 171,700/- and I note the court awarded Ksh. 25,180/- under this head. The Respondent produced receipts as follows:

    a. 18,000/= Cash receipt

    b. Medical report receipt Ksh. 6,500/=

    c. Other receipts 1,240/=

    Total Ksh. 25,180/=

36. Appellant has not appealed the finding on special damages but I have to find whether the court awarded more than what was proved as urged by the Appellant. In my revaluation, I find no basis for the award of Kshs. 6,500/= for medical report. The same was not proved to have been incurred. Therefore, the special damages are Ksh. 18,680/= as submitted by the Appellant. The special damages will not be subject to contribution. The lower court did so in error. The error is reversible and I correct it.

Determination

37. The upshot of the foregoing is that I make the following orders: -

    a. The appeal against the award of general damages lacks merit and is dismissed.

    b. The award of special damages is set aside and substituted with Ksh. 18,680/=. This amount shall not be subject to contribution.

    c. The Respondent shall have costs assessed at Ksh. 85,000/=.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS DAY OF 7TH DAY OF APRIL, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by: -

No appearance for the Appellant

Oduor for the Respondent

Court Assistant – Michael