



REPUBLIC OF KENYA



**Amadi v Ogwasi (Civil Appeal E094 of 2021)
[2024] KEHC 145 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E094 OF 2021
M THANDE, J
JANUARY 12, 2024**

BETWEEN

PHINEAS OMONDI AMADI APPELLANT

AND

CHARLES OWINO ODEYO OGWASI RESPONDENT

(An Appeal from the Judgment of Hon. Maureen Nabibya Principle Magistrate delivered on 6.5.21 in Mombasa CMCC NO. 2086 of 2019)

JUDGMENT

1. The Appeal herein arises from Judgment of Hon. Maureen Nabibya Principle Magistrate delivered on 6.5.21 in Mombasa CMCC No. 2086 of 2019. The Respondent instituted the suit in the trial court against the Appellant by way of a plaint dated 6.11.19, seeking the following prayers:
 - a. General damages.
 - b. Special damages.
 - c. Costs of future medical expenses.
 - d. Costs of the suit.
 - e. Interest on (a), (b) and (c) above.
2. After hearing the matter, the trial court entered judgment in favour of the Respondent in the sum of Kshs. 388,000/= plus costs and interest made up as follows:
 - a. General damages Kshs. 350,000/=
 - b. Costs of future medical expenses Kshs. 30,000/=



- c. Special damages Kshs. 8,000/=
3. The Appellant being aggrieved by the said judgment preferred the appeal herein and the summarized grounds of appeal are that the trial Magistrate erred in law and in fact in:
1. Awarding damages of Kshs. 388,000/=, an inordinately high figure, in total disregard of the Appellant's evidence and submissions
 2. Awarding Kshs. 30,000/= for future medical expenses without proof.
 3. Arriving at a wrong decision and failing to do justice.
4. The Appellant prayed that the Appeal be allowed with costs and that the judgment in question be set aside.
5. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another –vs- Associated Motor Boat Company Ltd. & Others* (1968) EA 123 by Sir Clement De Lestang, VP. as follows:

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 made 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 (*Abdul Hameed Saif –v- Ali Mohamed Sholan* (1955), 22 EACA. 270).

6. Parties filed their written submissions which I have duly considered. It is quite evident that the Appellant is aggrieved by the award of Kshs. 350,000/= for general damages and Kshs. 30,000/= for future medical expenses. Accordingly, the only issue for determination is whether the award of is excessive, considering the nature of the injuries sustained by the Respondent. It is common ground that the Respondent was injured in a road traffic accident on 1.9.19. The record shows that as a result of the accident, the Respondent lost lower front teeth Nos. 31 and 32. He had lacerations on the head and a blunt object injury to the head and on the pelvis and back (lumbar sacral region). This was confirmed by Dr. Adede in his medical report dated 8.10.19 and in his testimony. He stated that as a result of loss of his teeth, the Respondent shall experience difficulties in chewing food and pronouncing certain words. He approximated the permanent/partial disability at 4%. He further stated that from his assessment and experience and using the fees guideline of the MPDB, 2007, the cost of implants for the lost teeth would be approximately Kshs. 30,000/=. The Appellant produced a medical report by Dr. Udayan. The record of appeal does not have a copy of the same and the Appellant did not refer to the same in his submissions.
7. It is well settled that the award of damages is an exercise of discretion by a trial court. As a general rule therefore, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. (See *Butt v Khan* [1982-88] KAR 1).
8. The nature of injuries sustained by the Respondent is not disputed. It is the award that the Appellant has taken issue with. It is the Appellant's contention that the trial court disregarded the authorities cited in the trial. The Appellant cited the case of *Ndungu Dennis v Ann Wangari Ndirangu & another*



[2018] eKLR where the court awarded Kshs. 100,000/= for similar injuries. Similarly, in the case of *Eddah Wangui Murimi v Nairobi Sports House Ltd* Nyr HCCA No. 11 of 2003, as cited in the case of *Francis Ochieng & another v Alice Kajimba* [2015] eKLR, the court awarded Kshs. 100,000/= for multiple soft tissue injuries and loss of 3 upper incisors suffered by the plaintiff therein. Also relied on was the case of *George Kinyanjui t/a Climax Coaches & another v Hussein Mabad Kuyale* [2016] eKLR, where the appellate court set aside an award of Kshs. 650,000/= and awarded Kshs. 109,890/= for injuries similar to those of the Respondent herein.

9. The Respondent opposed the submissions by the Appellant and relied on the case of *Joseph Mutua Nthia v Fredrick Moses M. Katuva* [2019] eKLR where the court awarded Kshs. 400,000/= for injuries to the left side of the face, loose teeth, loss of 2 teeth, blunt chest and back injury.
10. I have considered the authorities cited by the Appellant. It must be noted that although the court in the *Eddah Wangui Murimi case (supra)* awarded Kshs. 100,000/= for multiple soft tissue injuries and loss of 3 upper incisors, being a 2003 case, it is over 20 years old. Interestingly, in the 2015 *Francis Ochieng case (supra)* where the *Eddah Wangui Murimi case* is cited, the court awarded the sum of Kshs. 350,000/= for multiple soft tissue injuries without any fractures. In the *George Kinyanjui case (supra)* the appellate court found that there was no loss of teeth but multiple soft tissue injuries and hence the reduction of the award.
11. In the of *Joseph Mutua Nthia case, (supra)* the respondent was awarded Kshs. 400,000/= for injury to the face, loose teeth 41, 31 and 32, loss of two teeth, blunt chest injury and blunt back injury. The Respondent herein suffered soft tissue injuries and loss of 2 teeth. Accordingly, considering the cases cited and inflationary trends, I find that the amount of Kshs. 350,000/= as awarded by the trial Magistrate to be reasonable in the circumstances.
12. I now turn to the award on future medical expenses. It is the Appellant's submission that the general principle is that special damages must be specifically proved and pleaded. Future medical expenses fall in this category and the Respondent failed to discharge the burden of proof placed upon him. The same was not pleaded proved, though alluded to in the medical report. As such, the award of Kshs. 30,000/= made by the trial court was unjustifiable.
13. In the case of *Tracom Limited & another v Hassan Mohamed Adan* [2009] eKLR the Court of Appeal considered a challenge to an award of future medical expenses and 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 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 right should be pleaded.”
14. Flowing from the cited case, it is clear that future medical expenses though under the rubric of general damages is itself special damages that must be pleaded. This will form the basis for evidence being led thereon and an award to be made by the Court.



15. Notably, the Court of Appeal went to state:

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.

16. What I understand the Court of Appeal to be saying is that given that the exact amount of future medical expenses may not be known due to various variables, the specific amount need not be indicated in pleadings.

17. In the Plaintiff the Respondent included future medical expenses among the prayers sought. The medical report indicates that implants for the lost teeth cost approximately Kshs. 30,000/=. This was confirmed by Dr. Adede in his testimony. The Appellant had the opportunity to cross-examine Dr. Adede on the same but was unable to shake his testimony. Accordingly, my finding is that the contention by the Appellant regarding future medical expenses is unmerited.

18. In the end and in view of the foregoing, I find that no reason to interfere with the amount awarded by the trial Court as general damages and future medical expenses. The Appeal therefore lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED IN MOMBASA THIS 12TH DAY OF JANUARY 2024

M. THANDE

JUDGE

