



**Obare & 2 others v Ochieng (Civil Appeal E215 of 2023)
[2024] KEHC 1077 (KLR) (Civ) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E215 OF 2023

DAS MAJANJA, J

FEBRUARY 12, 2024

BETWEEN

BERNARD OBARE 1ST APPELLANT

SMP CAPITAL LIMITED 2ND APPELLANT

PRIMA HOLDINGS LIMITED 3RD APPELLANT

AND

DAVID OLWANDE OCHIENG RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Wendy Micheni CM dated 3rd March 2023 at Nairobi Magistrates Court at Milimani in CMCC No. 2532 of 2019)

JUDGMENT

1. In their Memorandum of Appeal dated 22.03.2023, the Appellants are aggrieved by the award of Kshs. 1,500,000.00 as general damages terming it as excessive and not commensurate to the injuries suffered by the Respondent and the award of Kshs. 384,992.00 as special damages which they claim were not proved and were also excessive. They contend that the trial court ignored their submissions and rendered findings that were against the evidence adduced. They pray that that the respective awards be set aside and be reduced appropriately. The appeal is thus against the quantum of damages awarded by the Subordinate Court.
2. The case before the Subordinate Court arose from a road traffic accident that occurred on 02.01.2017 along Mbagathi way. According to the Plaintiff, the Respondent, who was pulling a handcart, was knocked down by motor vehicle KCG 128Z driven by the 1st Appellant and co-owned by the 2nd and 3rd Appellants. As a result of the said accident, the Respondent sustained the following injuries: fracture of the proximal femur (left leg), lower limb pain and Hip pain. He was thereafter admitted to



Kenyatta National Hospital for two months. At the time of his admission, the doctors at the hospital were on strike and the Respondent did not receive timely treatment. Upon release, the Respondent was admitted at Mother & Child Hospital for 2 days and booked for further surgery, having failed to secure re-admission at Kenyatta National Hospital.

3. As earlier stated, this is an appeal on quantum of damages. It is settled that an appellate court will not disturb the trial court's award on quantum of damages unless the trial court in assessing the damages took into account an irrelevant factor or left out a relevant one, or the amount awarded is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages (see Butt v Khan [1982 - 1988] 1 KAR 1 and Mariga v. Musila [1982 - 1988] 1 KAR 507).
4. In their submissions, the Appellants only recognized and acknowledged the fracture of the left femur as the single injury suffered by the Respondent. They proposed Kshs. 200,000.00 as general damages based on Brook Bond (K) Limited v John Mwangi Nganga [2011] eKLR where the court awarded of Kshs. 200,000.00 where the plaintiff sustained a fracture of the right femur.
5. In support of his case for general damages, the Respondent relied on several cases. He quoted the case of Pestony Limited & another v. Samuel Itonye Kagoko [2022] eKLR where an award of Kshs 1,400,000.00 in general damages was reduced to Kshs. 800,000.00. The plaintiff in that case suffered a fracture of the left femur and swollen tender thigh and was hospitalized for about three months. The Respondent recovered adequately from the injuries. He also cited on Van Den Berg (K) Ltd v. Charles Osewe Osodo [2022] eKLR where the court awarded Kshs. 1,000,000.00 for fracture of the left radices, fracture of femur, soft tissue injuries of pelvis. He relied on Anne Muriithi, Lilian Kathoki, Naomi Nzisa, Mary Nzomo, Anne Njeru & Jane Syombua Sammy v. The Headmistress MKS Girls, The Chairman Board of Governors & Wambua Makau [2003] eKLR where the court awarded Kshs. 1,200,000.00 for the plaintiff who sustained a compound fracture of the left femur and dislocation of the digital ulna radial. He also quoted other cases: Gathiriwa Ngugi v. Multiple Hauliers EA Limited & another [2015] eKLR, Franklin Chilbasi Spii v. Kirangi Liston [2017] eKLR and Geofrey Mwaniki Mwinzi v. Ibero (K) Limited & another [2014] eKLR which attracted general damages of Kshs. 1,500,000.00, Kshs. 1,800,000.00 and Kshs. 2,000,000.00 where the respective claimants sustained multiple fractures.
6. The Respondent led evidence to prove that he suffered fracture of the proximal femur (left leg); lower limb injuries, hip joint injuries. It is true that the Respondent sustained primarily a fracture plus other injuries but the case cited by the Appellant, Brook Bond (K) Limited v. John Mwangi Nganga (Supra), was quite dated having been made over 10 years prior to the judgment in this case and was therefore not a good comparator. The Respondent was admitted for a long period at Kenyatta National Hospital. He was re-admitted for surgery at Mother and Child Hospital and the injuries took a long period to heal. The cases cited by the Respondent are more recent and reflective of more serious injuries sustained than those sustained by the Respondent.
7. The trial magistrate observed that,

“compensation for damages in the various cases cited by the plaintiff range from Kshs. 800,000.00 to Kshs. 2,000,000.00. The plaintiff submits that Kshs. 1,200,000.00 as appropriate for general damages”

This points to an inference that in assessing the general damages, the trial court considered all the authorities cited by the Respondent indiscriminately without necessarily comparing the nature of injuries sustained by the claimant in each case. It is apparent from taking all these factors into



consideration and bearing in mind inflation, an award of Kshs. 800,000,00 would have been sufficient as compensation for pain and suffering.

8. It is trite that special damages be specifically pleaded and proved (see *Hahn v Singh* [1985] KLR 716 and *Kenya Breweries Limited v Kiambu General Transport Agency Limited* [2006] eKLR). Both parties cited *Zachariah Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR where the court stated as follows:

If I were to explain, or define, special damages to a layman, I would say

“they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act (s) complained of”.

This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test.

9. I agree with the above sentiments though I would not go as far as holding that only a receipt will suffice. The question is one of evidence and all the claimant must show it that he or she expended the amount claimed as special damages in whatever form. That is why in *Ratcliffe v Evans* [1892]2QB 524 Bowen L.J. stated:

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

10. The Respondents prayed for Kshs. 384,992.00 made up of Kshs. 363,922 as hospital bills, Kshs. 1000.00 for the police abstract and Kshs. 20,000.00 as transport from the hospital. The Respondent produced invoices from Kenyatta Hospital for Kshs. 167,522.00 and a credit form showing that he undertook to pay the amount by installments of Kshs. 2,000.00 per month. He produced an invoice of Kshs. 160,500.00 from Mother and Child Hospital. It has been held that an invoice is not evidence of payment (see *Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority* [2009] eKLR). However, the question whether the amount has been paid is a question of fact. A careful study of the Final Invoice for Kenyatta Hospital shows that the total bill was Kshs. 167,522.00 and it shows total receipts for the same amount leaving a net amount of zero. Although it is titled invoice, it shows that the amount was actually paid off hence the special damages to that extent was proved. As regards the invoice for Kshs. 160,500.00 from Mother & Child Hospital Ltd, there was no evidence that the same was settled save that the Respondent produced receipts totaling Kshs. 30,000.00 which I hold constitutes proof of this amount.
11. The appeal succeeds and is allowed and the Judgment of the Subordinate Court dated 03.03.2023 is varied to the following extent:
- a. The award of general damages is set aside and substituted with an award of Kshs. 800,000.00.



- b. The award of special damages is set aside and substituted with an award of Kshs. 170,522.00.
- c. The Respondent shall pay costs assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Mr Nyamwaya instructed by Masire and Mogusu Advocates for the Appellant

Mr Ongoro instructed by Rachier and Amollo Advocates for the Respondent.

