



**China Railway No. 10 Engineering Group Co. Limited v Osugo (Civil Appeal 4 of 2022) [2024] KEHC 2662 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2662 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 4 OF 2022**

**JM CHIGITI, J**

**MARCH 4, 2024**

**BETWEEN**

**CHINA RAILWAY NO. 10 ENGINEERING GROUP CO.  
LIMITED ..... APPELLANT**

**AND**

**FRANCIS MAGETO OSUGO ..... RESPONDENT**

*(Appeal from the Judgment and Decree of the Hon. Barasa, Principal Magistrate (PM), Ogembo in Civil Suit No. 94 of 2020 delivered on the 14.12.2021))*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 18<sup>th</sup> January 2022 against the judgment on quantum of damages awarded is predicated on the following grounds: -
  1. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
  2. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
  3. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any) and failed to apply precedents and tenets of law applicable.
  4. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.



5. The Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
2. Reasons wherefore the Appellant prays that this Appeal be allowed with costs and that the judgment of the Learned Trial Magistrate be set aside with costs.

### **Appellant's case**

3. The Appellant herein being aggrieved by the Judgement of Honourable Barasa Principal Magistrate Ogembo Law Courts in Ogembo PMCC NO.94 OF 2020 FRANCIS MAGETO OSUGO -vs- CHINA RAILWAY as delivered on 14<sup>th</sup> December, 2021 lodged an appeal on Quantum against the Judgment and Decree vide a Memorandum of Appeal dated 18<sup>th</sup> January, 2022 and filed on 24<sup>h</sup> January, 2022 raising five (5) grounds.
4. The Trial Court its Judgment awarded damages in the following terms:  
General Damages - 800,000/-.  
Further medical report - 200,000/-.  
Special Damages - 30,000/-.  
Total Damages =- 1,030,000.00/-  
Less 20% = 206, 000/-  
Grand Total =824,000/-
5. According to the Appellant, this Honorable is under duty to reconsider and re-evaluate the evidence on record and draw its own independent and infirmed conclusion.
6. In considering and re-evaluating the evidence, the appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it and it is further an established principle of law that a judicial officer must analyze all elements of a case substantively before coming up with a determination. Reliance is placed in the cases of Mary Wanjiku Gachigi vs Ruth Muthoni Kamau (Civil Appeal No 172 of 2000) Tunoi, Bosire, Owuor JJA. Ann Wambui Nderitu vs Joseph Kiprono Ropkoi & Another Civil Appeal No 345 of 2000, Okubasu, Githinji, and Waki JA. Virani T/A Kisumu Beach Resort Vs Phoenix East Africa Assurance Company Ltd Kisumu High Court Civil Case No 88 of 2002. Reliance is also placed in The Supreme Court of India on the 27<sup>th</sup> day of April, 2015 in the case of K. Anbazhagan v. State of Karnataka and Others, as follows:

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind - sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable



from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

7. Reliance is also placed in *Jabir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others* Supreme Court Petition No. 4 of 2012, [2013] eKLR the Honourable Court laid emphasis and stated that;

"Adherence to precedent should be the rule and not the exception..."

8. According to the Appellant, the judgement of the trial court is not a reflection of the prayers sought in the subordinate court and a reflection of the in-depth analysis of facts and evidence and consequently a proper interpretation thereof.
9. The Plaintiff never called any other witness and only testified as PW-1 who testified that he had no proof that he was continuing with medication and in fact he was in a stable condition and had already resumed his duties.
10. Neither a doctor was ever called to testify before the trial Court to confirm that the injuries allegedly suffered by the Plaintiff were as a result of and are synonymous with injuries suffered by someone involved in a Road Traffic Accident.
11. Although the Plaintiff in his pleadings alleges to have suffered a fracture of the tibia/fibula without displacement as stated by Dr. Ombati produced as PExb - 4a PW-1 did not produce any x-ray request form as evidence before this court or a radiology report as proof that he suffered any accident that led fracture of any kind. Reliance is placed in *Sarkar on Evidence* 121h ED pp 506.R. that:

"Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgment becomes warped and they become incapable of expressing correct opinion."

12. In *Hellen Waruguru Waweru vs. Kiarie Shoe Stores Limited (NYR)* Civil Appeal No. 22 of 2015 it was held that;

"As a general principle, assessment of damages lies in the discretion of the trial court and 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. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, 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 the damages."

13. On the issue of future medical expense, the Trial Court awarded Kenya Shillings 200,000/- under this limb without basing its decision on any law and/or facts.



14. Future Medical expenses are special damages in nature as was held in the case of Koru Holy Family Mission Hospital v Koech (Civil Appeal E003 of 2021) [2022] KEHC 3082 (KLR) (17 June 2022) where the Honourable Court stated that:

“However, I find that future Medical Expenses are special damages, which have to be pleaded and proved.

36. It has been settled in law that special damages have to be unequivocally pleaded for a n d strictly proved. In the current case, future medical report[sic] expenses were neither pleaded for nor proven by the Plaintiff, thus the same cannot be awarded.”

15. The Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

16. PW-1 did not testify that he had metal implants in his leg and the Plaintiff never incurred any cost on having any metal implants put on his leg.

17. On the issue of costs, under section 27(1) of the *Civil Procedure Act* (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit...It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech.”

### **Respondents case**

18. The trial court’s decision on the issue quantum of general damages was rendered within the following evidentiary context;

“PW-gave oral testimony on 09.03.2021. He adopted his written statement dated 21.04.2020 as part of his testimony. He stated that he sustained the following injuries: -

- a. Head injury with cut wound on the scalp;
- b. Blunt trauma to the neck;
- c. Chest contusion;
- d. Right shoulder dislocation;
- e. Bruises on the lower back;
- f. right tibia fracture;
- g. right fibula fracture;



- h. He was yet to fully recover as at the time of testifying before the trial court;
19. The following documents were tendered by the Respondent as exhibits on the issue of the nature and gravity of injuries sustained by the Respondent;
- a. Discharge summary (Lenmek)
  - b. Clinical appointment card (KTRH) Treatment notes (KTRH)
  - c. P3 Form
  - d. Medical report
20. The Appellant did not tender any evidence on the issue of the nature and gravity of injuries sustained by the Respondent;
21. The substance of the Respondent's evidence on the issue of the nature and gravity of injuries sustained by the Respondent stood entirely uncontroverted and its preponderant weight wholly undiscounted;
22. Reliance is placed in the case of *Peters v Sunday Post Ltd (1958) EA 424* where the former Court of Appeal for Eastern Africa observes as follows at p 429: -
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness...But the jurisdiction "(to review the evidence) should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”
23. The Court of Appeal in the celebrated case of *Butt vs. Khan [1977] 1 KLR* states as follows: -
- “An appellate court will not disturb an award for damages unless it is 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”
24. The trial court's award on general damages was in its entirety properly based on evidence and fact.
25. The award is not only commensurate with the nature of injuries suffered by the Respondent but also manifestly consistent with precedent awards made in similar cases. He relies on the findings of the medical report; Treatment notes (KTRH), discharge summary(KTRH) and P3 Form tendered as 'pExh: 4a, 1(c),1(a) and 2; the Plaintiffs' oral testimony as 'PW-I';
26. Dr Ombati assessed permanent disability assessed at 15% and opined that the Respondent the fractured right/tibia fracture that had been reduced through ORIF would need a surgery for removal of the metal implants at cost of Ksh 200,000/= and that the Respondent would later suffer osteoarthritis. This was not controverted.
27. He relies in the case of *Catholic Diocese of Kisumu vs. Sophia Achieng Tete (2004) 2KLR 5* where the Court of Appeal observes as follows: -
- “It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded different figure if it had tried the case at first instance.



The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.

28. The foregoing is reiterated by the Court of Appeal in *Jane Chelagat Bor vs. Andrew Otieno Onduu* 1988-921 2 KAR 288: /1990-1994| EA 47: -

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere. whether on the ground of excess or insufficiency.”

29. The amount awarded in general damages was not only commensurate with the nature of injuries suffered by the Respondent but also consistent with other awards made in similar cases. Reliance was also placed on *Naomi Momanvi v G4S Security Services Kenya Limited & another*[2018] eKLR where this Honourable Court observes that: -

“9. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service vGachoki NKU CA Civil Appeal No. 6 of 1981 /1982/ eKLR and Jabane vOlenja (1986) KLR 661*).”

30. A perusal of awards made in relatively similar cases indicated that an award of between Ksh 800,000/= and Ksh 1,500,000/= is wholly commensurate with and fairly compensatory of the claimants/ Plaintiff who suffered injuries such as the ones before this court.

31. A perusal of the Appellant's submissions shows that he is relying on cases where the injuries are far less severe than the ones sustained herein.

32. On the heading of Future Medical Expenses, the Respondent has in their submissions faulted the Honourable court for awarding the Respondent an amount of Ksh 200,000/= as future medical expenses to cater for the removal of metal implants engraved in his right tibia and fibula bones and the same should not disturb this award as the same was rightfully awarded and after the Honorable trial court assessed the findings D.r. Ombati Timothy Mokua who opined that the respondent herein would require another surgery so as to remove the metal implants that were inserted in the Respondent's right lower leg and this will cost approximately Ksh 200,000/=.

33. The Respondent the plaint dated 21/04/2020 sought future medical expenses at paragraph 8. Reliance is placed in the case of *Kenya Bus Services Ltd Vs. Gituma (2004) 1 E A 91* as cited in the case of *Racom Limited & Another -Vs-Hassan Mohamed Adan /2009/ eKLR* where the court gave a decisional distinction on future Medical Expenses as follows:

“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.



34. 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 and is a of general damages, the need for future medical care is itself special damages make an fact that must be pleaded if evidence thereof is to be led and the court award in respect thereof. According to him, once the plaintiff pleads that there would be a need for further medication and hence future medical expenses will be need the plaintiff may not need to specially state what amount it will be necessary, the amount of that future expenses.

Indeed, the exact amount where the treatment will be undertaken will depend on other matters such as the place, particularly Kenya currency at the time of treatment, and the strength of the currency.

It is his case that all that one should plead is the approximate sum of money the expenses will require...”

35. The award for Future Medical Expenses was in its entirety a just and fair compensation for the Respondent's injuries.

#### **Analysis and determination;**

36. In *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA The court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

37. Upon hearing the evidence as adduced by the parties herein, the trial Court the trial court awarded damages in the following terms:

General Damages - 800,000/-

Further medical expenses - 200,000/-.

Special Damages - 30,000/-.

Total Damages -= 1,030,000.00/-.

Less 20% = 206, 000/-

Grand Total = 824,000/-

38. The Supreme Court of India on the 27<sup>th</sup> day of April, 2015 in the case of *K. Anbazhagan v. State of Karnataka and Others*, as follows;

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind -



sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

39. This court has looked at the Plaintiff where in the Respondent pleaded that he sustained the following injuries as further set out in the medical report; Head injury with cut wound on the scalp Blunt trauma on the neck Chest contusion Right shoulder dislocation Bruises on the lower back Right tibia/fibula fracture.

40. In the case of *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* CA 142/2003 (UR) which was cited in the case of *Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi* (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR the court said:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga vs. Musila* [1984] KLR 257).”

41. This court is further guided by the cases of:

“In the case of *George William Awuor v Beryl Awuor Ochieng* [2020] eKLR the plaintiff sustained fractures of the right femur and left tibia fibula. The High Court awarded of Ksh 1,200,000/= as general damages.

In *Kimathi Muturi Donald v Kevin Ochieng Aseso* 2021] eKLR the plaintiff sustained a fracture of the upper right tibia, fracture of the head of the right fibula and fracture of the floor of the socket of the left hip joint (acetabulum). The High Court awarded Ksh 1,200,000/= as general damages;

In *Kakuli v Ngase & another* (Suing as the legal representatives of the Estate Stanley Alemba Chavasi - Deceased) (Civil Appeal E192 of 2021) |20221 KEHC 12132 (KLR) (Civ) (21 July 2022) (Judgment) the plaintiff sustained fractured right tibia and fractured right fibula. The High Court awarded Ksh 1,300,000/= as general damages;

In *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another* 12015] eKLR the plaintiff sustained fracture of left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula. The High Court awarded Ksh 1,500,000/= in 2015;

In *Jitan Nagra vs. Abednego iVvandusi Oigo* (2018) eKLR, the appellant had sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region. blunt trauma to the chest, bruises on the left elbow. compound fracture of the right tibia/fibula, and a segmental distal fracture to the right femur. The trial court awarded Kshs. 1,000,000.00 general damages. which were reduced to an award of Kshs. 450,000.00 on appeal. The injuries sustained by the respondent in the above decision, are more or similar to the injuries suffered by the Plaintiff herein.”

42. Upon assessing the nature of the injuries sustained by the Respondent alongside the above cases I have come to the conclusion that the trial court did not act on wrong principles of law. The Appellant has not demonstrated how the trial Court misapprehend the law.





43. The appellant has not demonstrated how the trial court made a wholly erroneous estimate of the damages suffered. I see no reason to interfere with the award for general damages.

**Special Damages:**

44. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985/ KLR 716, at P. 717, and 721 where the Learned Judges of Appeal — Kneller, Nyarangi JJA, and Chesoni Ag. J.A. — held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved. For they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

45. The Respondent did not prove the special damages. No evidence was adduced to demonstrate that there was a need to remove the plates. No evidence of the cost was produced. The amount claimed under this heading did not feature in the reliefs. The same is disallowed.

**Disposition**

46. The appeal succeeds partly.

**Order**

47. The following are the orders of this court:

1. The Appeal dated 18<sup>th</sup> January, 2022 succeeds partly.
2. The amount awarded for general damages shall remain intact.
3. The award for special damages is disallowed.
4. Total damages are recomputed to Ksh. 830,000 less 20% net Kshs 664,000.
5. Costs of the appeal to the Applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH, 2024**

**J. CHIGITI (SC)**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

