



**Ombeti & another v Muthuure (Civil Appeal E006 of 2023)
[2024] KEHC 3377 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E006 OF 2023**

LW GITARI, J

APRIL 4, 2024

BETWEEN

KOLPEMAXILLIAN MAKORI OMBETI 1ST APPELLANT

HEZRON NYAEGA OTERO 2ND APPELLANT

AND

STANLEY MUTHUURE RESPONDENT

JUDGMENT

1. By a Plaint dated 23rd September, 2021, the Respondent herein (the Plaintiff before the trial court) instituted a suit against the Appellants herein (the Defendants before the trial court) in Chuka CMCC No E193 of 2022. In the said suit, the Respondent sought judgment for general damages, special damages, future medical expenses and costs of the suit.
2. The Respondent's claim arose from a road traffic accident that occurred on or around 22nd June, 2021 along Meru-Chuka road at Kurugucha area involving motorcycle registration number KMFF 057J Bajaj Boxer and motorcycle registration number KMFJ 700Y. The Respondent was the rider of the motorcycle registration number KMFJ 700Y whereas the 1st Appellant was the rider of the motorcycle registration number KMFF 057J and the 2nd Appellant was and still is the registered owner of the motorcycle registration number KMFF 057J.
3. The Respondent blamed the 1st Appellant for riding the said motorcycle registration number KMFF 057J so carelessly and negligently that it veered off its lane and hit the said motorcycle that the Respondent was riding and thereby occasioning the Respondent serious bodily injuries.
4. After full trial, the learned magistrate entered judgment for the Respondent against the Appellants in the following terms:
 - a. Liability 70:30



- b. General Damages Kshs 1,000,000/=
 - c. Future Medical Expenses Kshs 100,000/=
 - d. Special Damages Kshs 22,897/=
 - Kshs 1,122,897/=
 - Less 30% Contribution (Kshs 336,869/=)
 - Kshs 786,028/=
 - e. Costs of the suits and interest at court rates
5. Aggrieved by the aforesaid decision of the trial court, the Appellants lodged this appeal vide the Memorandum of Appeal dated 22nd March, 2023. The following grounds of appeal were preferred therein:
- a. That the Learned Trial Magistrate's award of Kshs 1,000,000/= in general damages for pain and suffering, Kshs 100,000/= for future medical expenses and Kshs 22, 897/= in special damages are inordinately high and wholly unsupported by the facts of the case, the evidence tendered by the parties, the principles of law, and the applicable judicial precedents, therefore the same are erroneous and have occasioned a miscarriage of justice.
 - b. That the Honourable Magistrate erred in law and in fact in awarding the Respondent general damages for pain and suffering of Kshs 1,000,000/= which is inordinately high to constitute a miscarriage of justice in the circumstances of this case.
 - c. That the Learned Trial Magistrate erred in law and fact in awarding the Respondent Kshs 22,897/= special damages by failing to consider that the receipts produced were illegible and did not bear the mandatory stamp duty revenue stamps.
 - d. That the Learned Trial Magistrate erred in law and fact in awarding the Respondent Kshs 100,000/= for future medical expenses which was not proven which in the circumstances constitute a miscarriage of justice.
 - e. That the Learned Trial Magistrate erred in fact and in law by failing to consider the Appellant's authorities in their submission on quantum hence arriving to an erroneous decision.
 - f. That the Honourable Trial Magistrate erred in fact and in law in failing to consider the Appellant's documents that were filed and produced in court.
 - g. That the Honourable Trial Magistrate misdirected himself as to the facts of the case thus arriving at an erroneous decision.
 - h. That the Honourable Trial Magistrate's judgment as a whole is not supported by the evidence that was tendered in court by the parties.
6. The Appellants are thus seeking for this Appeal to be allowed by setting aside the impugned judgment of the trial court and in its place, this Court enters its own judgment on quantum under the heads of general damages for pain and suffering, future medical expenses, and special damages. The Appellants are also seeking for an award of the costs of the suit in the subordinate court as well as the costs of this Appeal.
7. The Appeal was canvassed by way of written submissions which I have summarized here below.



The Submissions

8. It was the Appellants' submission that the trial court erred in the award of Kshs 1,000,000/= as general damages for pain and suffering in view of the nature, severity, and magnitude of the injuries that the Respondent sustained and also in view of comparable case law. That as such, the award of general damages for pain and suffering, the trial court's award of Kshs 1,000,000/= as general damages for pain and suffering should be set aside and substituted with an award of Kshs 150,000/=. In this regard, the Appellants urged this Court to consider the awards made in the cases of *Ibrahim Kalema Lewa v Esteel Co. Ltd* [2016] eKLR and *Samuel Mungai Njau v Wanainchi Sanitary & Hardware Ltd* [2004] eKLR.
9. It was further the Appellants' submission that at the hearing of this case, the Respondent failed to particularize or prove the expenses claimed as future medical costs so as to guide the court on the award made under this head. That as such, the award of Kshs 100,000/= in future medical costs was erroneous and based on wrong principles and/or misapprehension of the evidence and thus, the same be set aside for lack of specificity.
10. Finally, the Appellants submitted that the special damages pleaded were not specifically proved and that as such, the trial court's award of Kshs 22,897/= in special damages was erroneous and based on the wrong principles and/or misapprehension of the evidence and that as such, the same should be set aside.
11. On the part of the Respondent, it was submitted that the trial court' reached an appropriate award of damages after considering awards in other decided cases where there were similar injuries. To this end, reliance was place on the cases of *DPL Festive Limited v Rose Akinyi Ochola* HCCA No 25 of 2018 and *Joseph Kimanathi Nzau v Johnson Macharia* [2019] eKLR. The Respondent thus urged this Court to dismiss the appeal with costs and uphold the decision of the trial court.

Issue for Determination

12. I have considered the grounds of appeal, the record of appeal and the submissions of the parties. It is clear that this Appeal is only against the quantum of damages awarded by the trial court as the parties conceded on liability at the ratio of 70:30 in favour of the Respondent against the Appellants. As such, the main issue that arises for determination of this Court is whether the award of general and special damages and future medical expenses by trial court was erroneous or unjustified and/or excessive in the circumstances of this case.

Analysis

13. This is a first appeal. As a first appellate court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'
14. This position was also buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR where it was held that:

“We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions



and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

[See also: *Selle v Associated Motor Boat Co. Ltd* [1968] EA]

15. As observed above, the appeal is against quantum of damages only. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No 147 of 2002 [2004]eKLR where the Court of Appeal held:

“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.”

On General Damages for Pain and Suffering

16. It is not in dispute that the Respondent in this case sustained the following injuries:
- a. Tender swollen left thigh
 - b. Fracture left femur
 - c. Bruises on the arms and face
17. On behalf of the Respondent’s case, the case of Joseph Kimanthi Nzau (supra) was cited and it was suggested an award of Kshs 1,000,000/= as general damages for pain and suffering was appropriate in this case. In the said case of Joseph Kimanthi Nzau (supra), the Appellant sustained fracture of the skull, right clavicle, left 1st and 2nd ribs and multiple soft injuries and the appellate Court substituted the award of Kshs 450,000/= on general damages with an award of Kshs 800,000/=.
18. On the other hand, Counsel for the Appellant relied on the cases Ibrahim Kalema Lewa (supra) and Samuel Mungai Njau (supra). In the case of Ibrahim Kalema Lewa (supra) the appellate court upheld the trial court’s award of Kshs 300,000/= in general damages where the Appellant sustained intertrochanteric fracture of the left femur and physical and psychological pains. The recorded evidence further showed that the Appellant was admitted in hospital for two months and thereafter he attended outpatient clinics. The doctor who examined the said Appellant also opined that he had suffered 25% permanent incapacity.
19. In the other case of *Samuel Mungai Njau* (supra), cited by the Appellants, the court assess the damages under the head of pain and suffering at Kshs 150,000/= where the Plaintiff had sustained fracture to the right tibia and fibula, fracture of 1st, 2nd, 3rd and 4th metatarsal of right foot with swollen foot; and superficial multiple wounds over right arm.
20. In the impugned judgment, the learned trial magistrate was also guided by her own chosen authority the same being the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR in which the appellate court set aside an award of Kshs 1,400,000/= and substituted it with an award of Kshs 800,000/= where the Respondent had sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh and permanent incapacity was assessed at 5% for the left lower limb.
21. I have reconsidered the injuries sustained by the Respondent, the respective submission of the parties and the cited authorities therein. In my view, the trial court correctly considered the evidence that was placed before it as well as the precedents cited by the parties in support of their proposals. In my view, the learned magistrate cannot be faulted for standing guided by the case of *Pestony Limited* (supra) as



the same referred to injuries which are similar to those sustained by the Respondent herein. However, I agree with the submission of the Appellant that there was no justification in fact or law for the trial magistrate to enhance an award made in the same year (2022) from Kshs 800,000/= to Kshs 1,000,000/= on account of the inflationary tendencies. For this reason, this ground of appeal succeeds and in my opinion, the award of damages for pain and suffering should be reviewed downwards to Kshs 800,000/=.

On Future Medical Costs

22. On the award of future medical expenses, the learned magistrate made an award of Kshs 100,000/= under this head on account that the Respondent's medical report stated that the Respondent would require removal of metal implant. The learned magistrate correctly noted that the estimated sum that would be required for the said removal of metal implant was not given by the attending physician. Despite this observation, I trial court proceeded to award future medical costs in the sum that the Respondent had pleaded. In my view, this was erroneous as the pleading of future medical cost alone does not satisfy the requirement for an award of future medical costs. As such, this ground of appeal should succeed.

On Special Damages

23. On the award of special damages, it is now firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded by the court. Suffice it to quote from the decision of 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 - 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 degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

24. In this regards, Courts have naturally insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See: *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR; *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR; *Sanya Hassan v Soma Properties Ltd.*)
25. In this case, the Respondent pleaded for an award of Kshs 22,897/= as special damages, the same being comprised of Kshs 550/= for copy of records, Kshs 9,747/= for medical expenses, Kshs 2,600/= for purchase of clutches and Kshs 10,000/= as cost of demand notice.
26. I have carefully perused and evaluated the evidence presented in support of special damages by the Respondent. In my view, the trial magistrate cannot be faulted for awarding the said sum of Kshs 22,897/= as this is what was specifically pleaded although the receipts produced before the court exceeded the said sum.

Conclusion

27. From the foregoing analysis, I hold that the appeal partially succeeds in the following terms:



- a. The award of Kshs 1,000,000/= as general damages for pain and suffering is set aside and substituted with an award of Kshs 800,000/=.
- b. The award of Kshs 100,000/= for future medical expenses be set aside.
- c. The trial court's award of special damages is upheld.
- d. The total award is Kshs 822,897.00
Less 30% Kshs 246,869.00
Total Kshs 576,028.00

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF APRIL 2024.

L.W. GITARI

JUDGE

