



**Kenfreight East Africa Limited v Galu (Civil Appeal E147 of 2023)  
[2024] KEHC 5134 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5134 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E147 OF 2023  
DAS MAJANJA, J  
MAY 13, 2024**

**BETWEEN**

**KENFREIGHT EAST AFRICA LIMITED ..... APPELLANT**

**AND**

**CHIZI MERI GALU ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. R. N. Akee, SRM dated 15th June 2023 at the Magistrates Court at Mombasa in Civil Case No. E413 of 2021)*

**JUDGMENT**

1. The Respondent, who was a pillion passenger on a motorcycle, was injured as a result of a collision with the Appellant's motorcycle on 23.10.2020. The trial court found the Appellant fully liable and awarded him Kshs. 1,082,000.00 as damages made up of Kshs. 500,000.00, Kshs. 205,000.00 on account of loss of earning capacity, Kshs. 292,000.00 as future medical expenses and Kshs. 40,000.00 as special damages. The Appellant appeals against the award of damages on the basis of the memorandum of appeal dated 04.07.2023.
2. The Appellant sustained a fracture of the left patella bone and fracture of the distal 1<sup>st</sup> phalanx left foot with nail damage. The injuries were confirmed by the report of Dr Darius Wambua Kiema dated 04.02.2021. He was of the opinion that the Respondent would suffer post traumatic deformity, arthritis and stiffness of the left knee and left big toe, a life time of recurring post fracture pains especially during the cold seasons, when walking and during periods of cold weather, weakness at fracture sites and diminished capacity to work and undertake other daily activities. He estimated that open reduction and fixation of fracture of the left patella would cost about Kshs. 120,000.00 and physiotherapy estimated at Kshs. 50,000.00 for at least two years and purchase of medicine at a cost of Kshs. 3,000.00 per month. He assessed permanent disability/incapacity at 10%.



3. Dr Udayan R. Sheth who examined the Respondent prepared a report dated 20.05.2021. On examination he noted that the Respondent was unable to actively move the left knee but passive movement was full. That there was no deformity of the left big toe and movement was full and painless. He observed that surgery was needed to fix the patella estimated at a cost of Kshs. 30,000.00. He assessed permanent disability at 5%.
4. On the issue of general damages, the Respondent proposed Kshs. 650,000.00 as general damages based on *Benard Musuu John v Jesman Distributors Limited* and Another Civil Appeal No. 44 of 2016 (UR). The Appellant proposed Kshs. 350,000.00 based on *Damaris Ombati v Moses Mogoko Levis and Another* [2019] eKLR where the claimant sustained tenderness on the neck, lower back, anterior chest wall and abdomen, cut wound on the pate of the scalp and a fracture of the right patella. The court set aside an award of Kshs. 800,000.00 and substituted with an award of Kshs. 350,000.00.
5. It is trite that 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 inordinately high or low (see *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5).
6. The question in this appeal is whether the award of Kshs. 500,000.00 is inordinately high in the circumstances and disproportionate to the injuries sustained and not in keeping with the other comparable awards made in similar cases. In determining general damages, the trial court has to examine the extent and gravity of the injuries suffered by the plaintiff, relevant and comparative case law to ensure fairness and where necessary take into account the rate of inflation. In sum, as was stated by the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR, “comparable injuries should attract comparable awards.”
7. The Appellant is correct to submit that the trial magistrate did not consider the case it cited. Further, the court relied on a case that was not cited by either party; *Said Abdullahi and Another v Alice Wanjira* [2016] eKLR where the plaintiff sustained a fracture of the right humerus bone and the degree of permanent disability assessed at 10% and was awarded Kshs. 300,000.00. Further, I note from the record that the report of the case cited by the Respondent was not furnished to the Subordinate Court or this court. This leaves the case cited by the Appellant; *Damaris Ombati v Moses Mogoko Levis and Another* (*Supra*) which was similar as it involved a fracture to the patella. Taking into account the element of inflation, I would award Kshs. 400,000.00 as general damages.
8. Turning to the award for future earning capacity, the Appellant complains that it was made in the absence of documentary evidence. The trial court made this award on the basis that the Appellant’s injuries were assessed at 10% permanent disability and that he would be compelled to use crutches for the rest of his life and would not be able to work efficiently as he was before the accident.
9. As this head of damages suggests, the claim must be based on loss of earning. In *Robert Jeriot v Geoffrey Nyakundi Abere* [2021]eKLR, the court held that, “as for loss of future earnings the same can only be awarded for real assessable loss proved by evidence...” In other words, the claimant must demonstrate a diminution in income as a result of the accident. Although the Respondent pleaded that his capacity to work was diminished, he did not state or provide evidence of the kind of work he was doing that was in fact affected by the accident and resultant injuries. Simply stated, the award was not supported by any evidence. It is therefore set aside.
10. The Appellant complains that the trial court erred in awarding the Respondent Kshs. 292,000.00 for future medical expenses when the same had not been pleaded and there was no documentary evidenced led before him. I disagree, the Respondent gave the particulars of future medical expenses in the



plaint. There was a provision for reduction and fixation of the left patella bone for Kshs. 100,000.00, physiotherapy sessions for 2 years estimated at Kshs. 50,000.00 and purchase of pain killers for the two years estimated at Kshs.30 per month for at least two years. There is no rule of law or evidence that a claim for future medical expenses must be supported by documents. However, in this case, Dr Kiema gave evidence of the costs of future medical expenses in his report and testified on the same. Nothing was raised in cross-examination to suggest that the claim lacked any factual basis. There is no reason to disagree with the doctor's proposal. I reject the Appellant's case on this point.

11. The general rule regarding special damages is that they must be pleaded with particularity and proved (see *Hahn v Singh* [1985] KLR 716). The Respondent was awarded Kshs. 40,000.00 as special damages yet he had only pleaded Kshs. 14,000.00. This was an error that must be remedied hence the sum of Kshs. 26,000.00 is set aside.
12. For the reasons I have set out above, I allow the appeal and set aside the judgment of the Subordinate Court dated 15.06.2023 and substitute it with the following judgment:  
General Damages Kshs. 400,000.00  
Future Medical Expenses Kshs. 292,000.00  
Special Damages Kshs. 14,000.00  
Total Kshs. 706,000.00
13. The award shall accrue interest from the date of the judgment in the Subordinate Court.
14. The Respondent shall pay costs of the appeal assessed at Kshs. 40,000.00.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT MOMBASA THIS 13<sup>TH</sup> DAY OF MAY 2024.**

**OLGA SEWE**

**JUDGE**

