



**Atieno v Opondo (Civil Appeal E157 of 2023)
[2024] KEHC 7877 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E157 OF 2023
DKN MAGARE, J
JUNE 12, 2024**

BETWEEN

KENNETH WENWA ATIENO APPELLANT

AND

PAVINCE ANYANGO OPONDO RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. D.O. Mbeja (PM)
in Mombasa CMCC No. 1092 of 2020, delivered on 30th June, 2023)*

JUDGMENT

1. This is an Appeal from the decision of the Hon. D.O. Mbeja – PM given on 30/6/2023 in Mombasa CMCC No. 1092 of 2020.
2. The Appellant was the defendant in the matter. The Appellants filed an Appeal on quantum and set out the following grounds, that the learned Magistrate erred:
 - a. In the award of general damages that were inordinately high.
 - b. In the award of special damages without proof.
 - c. In the award of damages for future medical expenses.

Pleadings

3. The Respondent filed suit on 18/9/2020 claiming damages for an accident involving motor vehicle Registration No. KCG 912G in which the Respondent was a passenger and Motor Vehicle Registration No. KBA 850S which was driven by the Appellant.
4. The Respondent sustained the following injuries pleaded:
 - i. Fracture on the right femur thigh bone upper 1/3 head.



- ii. Dislocation of the right hip.
5. The Respondent is also said to have suffered mental, physical, psychological pain suffering and losses. He claimed General damages, special damages and future medical expenses. Special damages were pleaded at Kshs. 38,950/=. It is stated that the Respondent spent Kshs. 2,600,000/= which was paid by medical cover and NHIF. The Appellant was to attend hydrotherapy and physiotherapy until recovery. It was posited that future medical expenses were for:-
 - a). Removal of metal implant Kshs. 120,000/=.
 - b). Hip replacement Kshs. 350,000/=Total Kshs. 470,000/=
6. In their Defence, the Appellant denied liability and quantum as pleaded in the Plaint and invited the Plaintiff to strict proof thereof.

Evidence

7. The matter proceeded on 18/8/2021 before Lesootia A.S. - PM.
8. PC John Ominde testified on the occurrence of the accident.
9. Dr. Ajoni Adede produced exhibits 3(a), (b) and (c) medical report and receipts.
10. He stated that the costs will be half in a Public Hospital. The Respondent submitted that she suffered injuries. She was treated at Nairobi Hospital.
11. Dr. Jocelyn Nyokabi noted that a fracture of the right femoral head inferiorly presented with a small chip fragment in the joint space, hip joint alignment was normal while sacroiliac joints and pelvic cavity were normal. Conclusion was fracture of the right femoral head.
12. Dr. Ajoni Adede, examined the Respondent after 1 years 17 days where he was walking unaided with stiff right hip with 12cm scar, metal implant, arthritic changes in right hip joint. He suggested Kshs. 120,000/= for removal of implant and Kshs. 350,000/= to have a hip replacement.
13. Dr. Jenipher Kamukulu testified for the Defendant. She proposed Kshs. 100,000/= for removal of the metal plate. This examination was 2 years after the accident. She confirmed that future treatment could be needed.
14. In its Judgment, the court found the Appellant 100% liable. He awarded Kshs. 3,000,000/= as General Damages and Kshs. 38,950/= as Special Damages and Kshs. 470,000/= for future medical costs.

Submissions

15. The Appellant submitted in support of the grounds in the memorandum of appeal.
16. It was contended the awards on general damages and future medical expenses were excessive and not supported. Reliance was placed on the case of Mbogo v Shah, (1968) EA 93 to the extent that the lower court did not judiciously exercise its discretion and ended up awarded inordinately high damages.
17. They also cited authorities which the court has considered.
18. On the part of the Respondent, it was submitted that the awards by the lower court were commensurate and not excessive. They referred to authorities which the court has considered.
19. It was their prayer that the Appeal be dismissed.



Analysis

20. I have considered the appeal as well as submissions and authorities filed in court. The issue is whether the lower court erred in the award of general damages, damages for future medical expenses, loss of earning capacity and special damages.
21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
22. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
23. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
24. Therefore, the Trial Court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
25. I proceed to determine whether the court erred in the award on quantum. The principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of damages in discretionary.
26. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2)* [1985] eKLR as follows:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage.



27. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v. Shepherd* [1964] AC.326 (supra) where it was stated that:

...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”

28. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to;

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high.

29. With the above guide, if the award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so. For the Appellate Court to interfere with the Award, it is not enough to show that the Award is high or had I handled the case in the Subordinate Court I would have awarded a different figure.

Liability

14. There is no appeal on liability. It therefore remained at 100% against the Appellant.

Special Damages

30. The court awarded Special Damages of Kshs. 38,950/=. There is no indication of what was or was not proved. The amount pleaded as aforesaid was for Kshs. 38,950/=. A sum of Kshs. 35,200/= was transport charge. This are not arising from the accident. The court awarded the same. They are set aside. A police abstract is indicated to be free. The only sums payable are Kshs. 1,550 for the filling of P3 form and service. I therefore set aside the award of Kshs. 38,950. In lieu thereof I award a sum of Kshs. 1,550 as proved.

Future medical expenses

31. The expenses were agreed that between Kshs. 60,000/= to 120,000/= can be used for removal of the implant plate. Dr. Adede, suggested Kshs. 120,000/= while Dr. Jenipher suggested Kshs. 100,000/=.



The suggestion is negotiable. I find no reason to differ with the Honourable court on this. The same is allowed.

32. On the issue of hip replacement, the same has no basis. The Respondent suffered fracture of the femoral head. The Respondent did not prove the question of hip replacement. Dr. Ajoni Adede had after 2 years for this to occur.
33. The injuries had healed when the said doctor examined her. I therefore set aside the award of Kshs. 350,000/= for hip replacement.

General Damages

34. The Appellant indicated that a sum of Kshs. 4,500,000/= would suffice. The court awarded Kshs. 3,000,000. No comparable authorities were quoted. I agree that the injuries were serious. However not so serious as to get Kshs. 3,000,000/=.
35. This is a paraplegic. The Respondent suffered fracture of the femoral head. The Respondent did not use any authority. The nature of the injuries suffered attract damages of Kshs. 1,400,000/= on strength of the following authorities.
36. In Kirinyaga District Co-Operative Union & Another –V- Eustace Macheru Wilson (2014) eKLR, the plaintiff suffered compound fracture of the right elbow joint; transverse fracture of the upper 1/3 right femur; and dislocation of the right hip joint. The court in that case awarded Kshs.1,400,000 in general damages.
37. In Mary Pamela Oyioma v Yess Holdings Limited [2011] eKLR, the plaintiff sustained a comminuted fracture of the right femur; a compound fracture of the right tibia, a fracture of the left tibia; soft tissue injuries of the right shoulder and multiple cuts over the whole body. The court awarded Kshs. 900,000/=.
38. In Fred Ogada Azere & another v Ezekiel Kiarie Nganga [2019] eKLR the plaintiff suffered the following injuries and was awarded Kshs. 1,350,000/- in general damages:
 - a. Commuted fracture of the right acetabulum
 - b. Posterior dislocation of the right hip joint
 - c. Laceration on the left ear and the left eyelid
 - d. Mild head injury
 - e. Laceration on the right knee and Leg
 - f. Bruises on the right hand
39. In my view, the case of Kirinyaga District Co-Operative Union (supra) presents the close comparison of the injuries suffered. Considering the lapse of time and inflation, an award of Kshs. 1,400,000/- as above stated is appropriate. The award of Kshs. 3,00,000/- by the lower court was therefore inordinately high and I set it aside.
40. In the circumstance I set aside the award of Kshs. 3,000,000/= and substitute thereof the sum of Kshs. 1,400,000/= in general damages.

Determination

41. The upmost of the foregoing, I make the following orders:-



- a. The Appeal is allowed. I therefore set aside the Judgment dated 30th June 2023 and enter Judgment as follows:-
 - i. Liability against the Appellant 100%.
 - ii. Special Damages Kshs. 1,550/= with interest from the date of filing.
 - iii. Future medical expenses – Kshs. 120,000/=
 - iv. General damages - Kshs. 1,400,000/=Total – Kshs. 1,521,550/=
- b. Stay of execution of 30 days is granted.
- c. In the circumstances, each party shall bear its costs on the Appeal.
- d. The Respondent to have costs of the lower court case.
- e. File closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Nassanga for the Appellant

Ms. Jedidah for the Respondent

Court Assistant – Jedidah

