



REPUBLIC OF KENYA



**Jahadh v Bwire (Civil Appeal E688 of 2023)  
[2024] KEHC 16783 (KLR) (Civ) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16783 (KLR)

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

**CIVIL**

**CIVIL APPEAL E688 OF 2023**

**NIO ADAGI, J**

**SEPTEMBER 18, 2024**

**BETWEEN**

**RUKYA JAHADH ..... APPELLANT**

**AND**

**STEPHEN MALOBA BWIRE ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. B. Cheloti (PM) in  
Milimani CMCC. No. E3089 of 2020 delivered on 30/06/2023)*

**JUDGMENT**

1. By way of a Plaint dated 03/07/2020, the Respondent instituted a suit against the Appellant seeking the following prayers:
  - a. Special damages of Kshs. 182,378/-
  - b. General damages for pain, suffering and loss of amenities.
  - c. Cost of the suit.
  - d. Interest on (a), (b) and (c) above at court's rate from the date when the cause of action arose.
  - e. Any other relief that this Court may deem fit and just to grant.
2. The Respondent averred that on or about 14/2/2019, he was heading home and was outside the main entrance gate of Geminia Insurance Plaza, Kilimanjaro Avenue, Upper Hill when the Appellant, her driver, servant, agent and/or employee negligently drove, managed and/or controlled motor vehicle registration number KCP 563M, Toyota Lexus that it lost control knocking down the Respondent causing him to sustain injuries, suffer pain, loss and damage. The Appellant took him to Kenyatta National Hospital for treatment. The Respondent averred he underwent surgery on his right leg which



- was inserted metal plates. He still undergoes physiotherapy. He relied on the doctrine of *res ipsa loquitur*. The Appellant had failed, refused and/or neglected to admit the Respondent's claim despite been given demand and notice of intention to sue.
3. The Appellant denied the Respondent's claim vide her Statement of Defence dated 10/02/2021 and put him to strict proof.
  4. The matter proceeded for main hearing.
  5. PW1, Stephen Maloba Bwire averred he was employed as a security guard. He adopted his statement dated 03/07/2020 as his evidence in chief. He produced the list of documents dated 03/07/2020 as exhibits save for the police abstract. During cross-examination, he averred the accident occurred near the entrance to the gate. He had been standing on the pavement. The said motor vehicle had not been approaching the gate. The said motor vehicle neither hit the gate nor the pavement. He had been coming off night shift duty. He was treated at Kenyatta National Hospital and later discharged.
  6. During re-examination, he averred that he had been standing on the pavement near the gate when he was hit by the motor vehicle.
  7. PW2, No. 86098 Lucas Esekon averred that he was attached at Kilimani Police Station. The accident occurred on 14/02/2019 at around 7:00 a.m., involving the Respondent and motor vehicle registration number KCP 563M, Toyota Lexus along Upper Hill area. The accident was booked under occurrence book number 95/14/2/19. He produced the police abstract as an exhibit. During cross-examination, he averred he had been the investigating officer and he visited the scene of the accident. He did sketches of the scene of the accident and the said sketches were in the police file which was not in court. The said motor vehicle was in the process of making a turn when the accident occurred. The motor vehicle had a minor dent. The Appellant was not charged for the accident. During re-examination, he averred the skid marks indicated that the Appellant had attempted to apply the brakes.
  8. The Respondent's case was closed.
  9. DW1, Rukya Jahadh adopted her statement dated 30/04/2021 as her evidence in chief. She produced a copy of her driving licence as an exhibit. During cross-examination, she averred she did not hit the Respondent. She heard a loud bang and saw the Respondent. During re-examination, she averred that the Respondent must have been exhausted as he was coming off night shift and might have dozed off while standing at the gate.
  10. The Appellant's case was closed.
  11. The suit was dispensed of by way of written submissions.
  12. Judgment was delivered on 30/06/2023 in which the trial court found the Respondent had argued his case beyond a balance of probabilities and the Appellant liable for causing the accident which occasioned the Respondent to sustain injuries, suffer pain, loss and damage.
  13. The Court assessed damages as follows:
    - a. Special damages at Kshs. 182,378/-
    - b. General damages at Kshs. 950,000/-
    - c. The cost of the suit be borne by the Appellant.
  14. The Appellant being aggrieved by the said award lodged a Memorandum of appeal dated 25/07/2023 raising 3 grounds of appeal which basically challenge the judgment of the trial court on award of (A)



general damages which it considers to be excessive as to be erroneous in the circumstances having regard to the nature and extent of the injuries and (B)wrongly assessing special damages based on invoices as opposed to proof of payment.

15. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) EA 123, (1958) EA page 424

16. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that: -

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

17. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

18. I have anxiously and carefully considered the grounds of appeal, the pleadings in the lower court, the evidence in the medical report and treatment notes adduced on the injuries before the trial court, the written submissions filed by respective counsels and the authorities cited as well as the trial court's judgment.

#### **A. General damages**

19. From the medical report by Dr. Antony Murage of Nairobi East Hospital Ltd dated 27/6/2019, the Respondent sustained open fracture of the Dista Tibia. He was attended at the hospital and had a debridement done at the hospital on 20/2/2019. He underwent a second operation in March 2019 for plating of the tibia. He has been on follow up since. Currently he is undergoing physiotherapy. He has a right ankle stiffness and has occasional pain. He will require future follow up and removal of the plates once the fracture has fully united.

20. The Respondent's counsel submitted for Kshs.1,500,000/= as general damages and cited the several cases. I have considered the cases as listed on the Respondent's list of authorities and the general damages awarded as follows:

1. In *Mulwa Msyoka* case in 2004, Kshs.150,000/= was awarded where the Plaintiff suffered bruises on the face & head, unconsciousness of 30 mins and fracture of mid shaft left tibia.



2. In Joyce Muthoni's case in 2018, Kshs.280,000/= was awarded for a serious fracture of the ankle and soft tissue.
  3. In Jackline A. Obondo's case in 2007, Kshs.750,000/= was awarded for severe comminuted compound fracture of the left radius and ulna bones which led to amputation of the left forearm below the elbow, sprained left hip and brain concussion. Permanent disability was assessed at 50%.
  4. In George William's case in 2020, Kshs.1.2M was awarded for fractures of the right femur & left tibia fibula. Nail is in situ to be removed by surgery.
  5. In Patrick Kinyanjui's case in 2022, Kshs.1.5M was awarded for serious soft tissue injuries & skeletal injuries, fracture of right femur mid shaft segmental fracture of right tibia shaft, segmented fracture of right fibula, fracture of left 3rd metatarsal bone. Permanent disability was assessed at 30%.
  6. In Simon Taveta's case in 2014, Kshs.3.5M was awarded for totally paralysed lower limbs with no voluntary movement of any part of the lower limbs, inability to walk on her lower limbs, spinal cord injury, disturbed bladder and bowel functions so she had to wear diapers which need to be changed twice daily. Permanent disability assessed at 100%.
21. The Appellant submitted for Kshs.250,000/= as general damages and cited the case of Triad Coaches Ltd & Anor vs Mary Mutheu Kakemu (2020) eKLR but unfortunately the injuries sustained in that case were not outlined in the submissions. I have had a chance to peruse through the cited authority and I notice the Plaintiff in the case suffered a fracture of the tibia fibula and soft tissue injuries on the wrist, which soft tissue injuries healed without any incapacity. The trial court awarded Kshs.300,000/= in general damages which was reduced to Kshs.250,000/= on appeal.
  22. In her judgment, the learned Magistrate did not cite any precedent case or authority that guided her in arriving at an award of Ksh.950,000/=.
  23. For an Appellant Court to interfere with an award of damages, it must be shown that the trial court in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that the wrong principle of law was applied.
  24. In the case of Maraga V Musila (1984) 1 KLR 251, where the Court of Appeal when addressing its mind to this issue expressed itself thus;
 

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles”.
  25. The approach taken by courts in the assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards although the court should bear in mind that no two cases are exactly the same. The court will also consider factors such as the state of the economy and the rate of inflation in its assessment of damages. (See Stanley Maore v Geoffrey Mwenda [2004] eKLR and Ugenya Bus Service v Gachoki [1982] eKLR).



26. Having given due consideration to the injuries sustained by the Respondent, I find the following more recent authorities to be more comparable on the aspect of general damages in this case :-
1. *Ndwiga & another v Mukimba (Civil Appeal E006 of 2022) [2022] KEHC 11793 (KLR) (13 July 2022) (Judgment)*, Kshs.400,000/= was given for the following injuries:
    - i. Tenderness and swelling of the left leg.
    - ii. Fracture of tibia and fibula left leg.
  2. *Wainaina v Wagacha (Civil Appeal 16 of 2019) [2023] KEHC 26226 (KLR) (9 November 2023) (Judgment)*, the lower court judgment of general damages in the sum of Kshs.700,000/= was set aside and substituted with an award of Kshs.500,000 as general damages where the Plaintiff sustained the following injuries:-
    - i. Fracture of the left distal radius and laceration.
  3. *Mbae (Suing as the Legal Representative of the Estate Koome Mbae) v Kinya (Civil Appeal E018 of 2022) [2024] KEHC 2285 (KLR) (6 March 2024) (Judgment)*, the lower court award of Kshs.1,750,000/- was on appeal reduced to Kshs.600,000/= where the Plaintiff suffered the following injuries:-
    - i. Open fracture tibia-fibula,
    - ii. Fracture of femur, Fracture of ulna
    - iii. Soft tissue injury
27. On the foregoing comparison, the lower court's award of Kshs.950,000/= as general damages for pain suffering and loss of amenities can be said to be manifestly excessive as to amount to a wrong assessment. In the premises, there is sufficient cause, in my view, for disturbing the award made by the lower court under the general damages head.
28. I set aside the award by the trial court and substitute it with an award of Kshs.300,000.00 in general damages.

#### **B. Assessment of special damages**

29. The Appellant submits that the learned magistrate erred in law and in fact in assessing and allowing special damages based on invoices as opposed to proof of payment.
30. I have considered the Appellant's submissions in the lower court and there is no doubt they raised the issue of special damages and even cited the case of County Government of Laikipia vs. John Macharia Muraguri t/a Clerverline Auctioneers (2021) eKLR, however the learned magistrate did not address this issue in the judgment and this court is now invited to address the same.
31. In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and 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.”

32. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury.
33. 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.)
34. This court has carefully perused and evaluated the evidence presented in support of special damages by the Respondent.
35. As is readily obvious, some of the documents presented in support of the Respondent’s special damages are invoices and not receipts as our case law requires. I thus find that the award of special damages in the sum of Kshs.182,378/= was erroneous and the same is set aside and substituted with an award of Kshs.32,578.20 which was the only amount proved by evidence in accordance with the standards required in law.
36. The general and special damages are awarded with costs and interest.
37. Each Party to bear its own costs to the appeal.
38. Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS this 18<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**NOEL I. ADAGI**  
**JUDGE**

