



**Wabwire & another v Mwanganga (Civil Appeal 46 of 2021)  
[2023] KEHC 22229 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 22229 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL 46 OF 2021  
F WANGARI, J  
APRIL 20, 2023**

**BETWEEN**

**SHADRACK WABWIRE ..... 1<sup>ST</sup> APPELLANT**

**FOUNTAIN CONSTRUCTION COMPANY LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JAMESON WAMBUA MWANGANGA ..... RESPONDENT**

*(Being an Appeal from the judgment and decree delivered on 24th  
June, 2021 by Hon. I.G. Rubu, RM in Mwingi PMCC No. 58 of 2020)*

**JUDGMENT**

1. This matter arises from an appeal from the Judgment and decree of the Hon. I.G. Ruhu RM dated 24/6/2021 in Mwingi PMCCC 58 of 2020.
2. In that court entered Judgment as follows: -
  - a. Defendants are 80% liable.
  - b. General damages Ksh. 1,500,000
  - c. Future Medical expenses Ksh. 22,000
  - d. Special damages Ksh. 24,010Sub total Ksh. 1,546,010  
Less 20% liability  
Total award Ksh. 1,236,808
3. The Defendants, in the lower court, appealed and set forth the following grounds of Appeal.



- a. That the Learned magistrate erred in law and fact in failing to give weight to, fathom or to consider the Appellant's written submissions and authorities.
- b. That the learned magistrate erred in law and fact in assessing general damages excessively at Ksh. 1,500,000
- c. That the learned Magistrate erred in law and fact in awarding damages for future medical expenses of Ksh. 22,000 or at all when the same was not proven to the required standard.
- d. That the Learned Magistrate erred in law and fact in awarding special damages of Ksh. 24,000 when the same were not proven.

### **Issues**

4. The Appeal is basically whether the damages are inordinately high as to amount to an erroneous estimate of damages.

### **Special damages**

5. The case of David Bagine Vs Martin Bundi [1997] eKLR settles what is required of special damages. The law Lords posited as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it" We also refer to the cases of Ouma vs. Nairobi City Council [1976] KLR 297 at page 304 and Kenya Bus Services vs. Mayende (1991) 2 KAR 232 at page 235.”

6. The plaintiff pleaded special damages of Ksh. 24,010. In his testimony he produced Receipts for Ksh 200, Ksh 5000, Ksh 4460, Ksh 5000 and Ksh 550, all totaling up to 15,210.
7. Appellant consents that though pleaded, they are not strictly proved. I agree that the respondent duly proved Ksh.15,210. I set aside the award of 24,000 and substitute with 15, 210.

### **Future Medical Expenses.**

8. The test is not future treatment but diagnostic in nature. There is no evidence that the same was to be carried out. This does not fall into obligatory treatment. The award for the same is highly speculative. I therefore set it aside in entirety.



## General damages.

9. General damages are in a nature of discretionary orders. They are not to be interfered with unless the court did not properly exercise its discretion. The court of appeal of Eastern African had this to say in *Mbogo & Another v Shah* [1968] EA 93, the Court, (Sir Newbold, P.) stated at page 96:

A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been injustice.

10. Further in, *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR, the court quoted with approval the case of *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR (at paragraph 57 where the courts stated: -

‘it was emphasized that an appellate court should pay some deference to decisions made in exercise of discretion but should not follow them slavishly. Where there is a basis for upsetting such decisions, the court should do so if the findings in question are based on no evidence, or a misapprehension of the evidence; consideration of irrelevant matters or failure to consider what ought to have been considered. The court will interfere if it is shown demonstrably that the court acted on wrong principles in reaching a particular finding of fact or conclusion of law or if the decision is generally perverse and unsupportable’

11. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [Supra], the Court of Appeal, (Ouko, Kiage & Murgor JJ.A), stated as follows as a direction on my duty as a first appellate court:

‘We have given due consideration to those submissions, the authorities cited before us and the entire record of appeal in keeping with our duty as a first appellate court to re-evaluate and reassess the entire evidence with a view to arriving at our own inferences of fact and independent conclusions thereon. See *Abok James Odera T/A A.J Odera & Associates Vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR; *Mwana Sokoni Vs. Kenya Bus Services Ltd* [1985] 931. We are mindful that we do not have the advantage the trial court had of hearing and observing the witnesses as they testified and are therefore generally slow to disturb findings of fact arrived at, to which we pay due respect. We also pay some deference to decisions made in exercise of discretion but this is not say we follow them slavishly. Where there is a basis for upsetting such decisions we shall do so and that would be the case if the findings in question are based on no evidence, or a misapprehension of the evidence; a consideration of irrelevant matters of a failure to consider what ought to have been considered; or if the Judge is shown demonstrably to have acted on wrong principles in reaching a particular finding of fact or conclusion of law or if the decision is generally perverse and unsupportable’.

12. Furthermore, in *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR, the Court of Appeal reaffirmed the age old principle that: -:

‘It is trite that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be



convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled’.

13. The Court awarded Ksh. 1,5000,000. The pleaded injuries were
  - a. Moderate head injury with loss of consciousness for three (3) days.
  - b. Bruises and swelling on the right upper quadrant
  - c. Tenderness over the abdomen and
  - d. Grade 3 liver injury and hemoperitoneum
14. The injuries suffered were serious but not as serious as the court below took them. These are usually sub capsular with less than 50 % surface area or expanding, ruptured subcapsular or parenchymal hematoma. Intraparenchymal hematoma up to 10 cm. lacerations are usually less than 3 cm. these are common liver injuries that heal with non-operative methods. The Respondent suffered liver injury, whilst he did not take for assessment. Without assessment it is not possible for the court to reach an accurate.
15. Only those with more than grade four require operation. In the circumstances, awarding a sum of Kshs 1,500,000 for such injuries is not judicious. The injuries are way out of the range and inordinately high as to amount to erroneous assessment of damages.
16. The respondent relied on the authority of Catholic Diocese of Kisumu v Tete (2004) eKLR. The injuries were far serious moderate to severe contusion, fractures of both inferior and superior public rami comminuted fracture of the left femur. The other decision relied on are way out of the range for injuries suffered.
17. The Appellant used the decision of Angeline Akinyi Odhiambo v Teresia Mbaika Kanyo & another [2016] eKLR. In that decision the court referred to a 2006 decision where the court varied damages from Ksh. 340,000 to 200,000, where the plaintiff sustained a traumatic extraction of the upper left incisor, blunt abdominal trauma to the liver and gall bladder, laceration wound on perinea region and bruises on the lower limbs.
18. On the authority of Nguku Joseph & another v Gerald Kihiu Maina [2020] eKLR, Justice Mumbua T. Matheka awarded a sum of Ksh. 500,000 on 27<sup>th</sup> day of February, 2020 for far more serious injuries. Upon considering all these evidence and the record, I am of the considered view that a sum of Ksh. 500,000/= is sufficient.
19. In am reminded by the decision of Justice Matheka used in the case of (supra) where it was stated as doth: -

“I find it necessary to interfere with the trial magistrate’s finding on general damages, bearing in mind the principles that guide assessment of damages as espoused in West (HI) And Sons LTD Vrs Shepherd (1964) AC 326 which was adopted in the case of Cecilia Mwangi & Another vs Ruth Mwangi CA 251 /1996, and in the Nancy Oseko case where the Judge adopted what Lord Morris said:

“But money cannot renew a physical frame that has been battered and shuttered. 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.”

20. I am also alive that the applicant for one reason or another did not get examined for final prognosis. We therefore do not have full professional help. The court has no reason to suppose that the doctors will have found more serious injuries.

### **Determination**

21. Consequently, I make the following orders: -

The Appeal is allowed in the following terms: -

- a. The Appeal on special damages for Ksh. 24,010 is set aside and substituted with Ksh. 15,210 as proved. Special damages attract interest from the date of filing of the suit.
- b. Cost of future medical care of Ksh. 22,000 is set aside in entirety. The claim is dismissed.
- c. The award of Ksh. 1,500,000 is set aside. It is replaced with General damages of Ksh. 500,000, which shall attract interest from the date of judgment in the lower court.
- d. Costs to the Appellant in this court.
- e. Costs of the lower court to the Respondent to be assessed a fresh on a basis of quantum in this Appeal.

**DATED, SIGNED AND DELIVERED, AT MOMBASA ON THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**F. WANGARI**

**JUDGE**

**In the presence of:**

N/A by Parties

Guyo, Court Assistant

