



REPUBLIC OF KENYA



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**Bikeri v Kipkurui (Civil Appeal E083 of 2021)
[2023] KEHC 4087 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E083 OF 2021**

WA OKWANY, J

MAY 4, 2023

BETWEEN

DUKE MASIOMA BIKERI APPELLANT

AND

ELIJAH KIPKURUI RESPONDENT

(Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered at Nyamira on the 28th day of October 2021 in the original Nyamira Chief Magistrate’s Court Civil Case No. E15 of 2020)

JUDGMENT

1. The Respondent herein, Elijah Kipkurui, was the Plaintiff before the Lower Court where he sued the Appellant damages arising out of a road traffic accident that occurred on 19th February 2020. The Respondent’s case was that he was, on the material date, lawfully driving motor vehicle Registration No. KAL 558V along Kericho – Kisii Road when the Appellant’s driver drove motor vehicle Registration No. KBK 096M recklessly along the said road thereby permitting it to collide with the Respondent’s motor vehicle as a result of which the Respondent suffered serious injuries, loss and damage.
2. After hearing the case, the trial court found the Appellant 100% liable for the accident and awarded the Respondent Kshs. 900,000/= general damages, Kshs. 414,414.84 special damages together with costs and interest. The Lower Court judgment triggered the instant appeal.
3. A perusal of the grounds listed in the Memorandum of Appeal reveals that the appeal challenges the trial court’s findings on quantum of general damages and special damages.
4. Parties canvassed the appeal by way of written submissions.



5. The Appellant highlighted the injuries enumerated by the Respondent in the plaint and compared the said injuries with those contained in the treatment notes and discharge summary. The Appellant noted that even though the doctor who examined the Respondent, about 6 months after the accident, indicated that he sustained a fracture of the skull, the primary treatment documents did not contain such an injury. The Appellant submitted that the Respondent sustained only a fracture of the femur and soft tissue injuries as shown in the initial treatment documents.
6. It was therefore the Appellant's argument that the award of Kshs. 900,000/= general damages was inordinately high and not commensurate with the Respondent's injuries or in tandem with the past decisions. For the argument on the discrepancy between the injuries noted in the treatment notes and those on the medical report, the Appellant cited the decision in *Timsales Limited vs Wilson Libuywa* Nakuru HCCA No. 135 of 2006 wherein it was held: -

“A medical report by a doctor who examined him much later is of little, if any, help at all. Although it may be based on the doctor's examination of the plaintiff on whom he may, like in this case, have observed the scars, unless it is supported by initial treatment card it will not prove that the plaintiff indeed suffered an injury on the day and place he claimed he did. The scars observed on such person would very well relate to injuries suffered in another accident altogether.”

7. On special damages, the Appellant faulted the trial court for relying on invoices in awarding the Respondent Kshs. 414,414.84 when the same was not proved to the required standards. Reference was made to the decision in *Christine Mwigina Akonya vs Samuel Kairu Chege* [2017] eKLR where it was held: -

“Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. 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. 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.”

8. The Appellant referred to authorities where the claimants suffered similar injuries and urged this court to substitute the award of Kshs. 900,000/= with Kshs. 300,000/=.
9. On his part, the Respondent urged the court to uphold the trial court's award and submitted that the Appellant had not made out a case for this court's interference with the award on damages. It was the Respondent's case that the trial court's award on damages was reasonable in view of the serious injuries that he suffered in the accident.
10. I have carefully considered the record of appeal and the submissions made by counsel. The main issue for determination is whether this court should interfere with the trial court's findings on damages. The duty of the first appellate court is to re-evaluate and re-analyze the evidence presented before the trial court in order to come up with its own findings while bearing in mind that it neither saw nor heard the witnesses testify. In *Peters v. Sunday Post Limited* (1958) EA 424 it was held: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has



failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide. *Watt v. Thomas*, (1947) 1 ALL ER 582; [1947] A.C. 484, applied.”

11. I will now turn to examine the evidence tendered before the trial court before considering whether the decision of the trial court should stand while at the same time bearing in mind the principles governing the appellate court in dealing with the award of damages.
12. The Respondent listed the particulars of his injuries in the plaint as follows: -
 - a. Fracture of the temporal region of the skull.
 - b. Loss of consciousness.
 - c. Fracture of the right femur.
 - d. Bruises with lacerations on the trunk and abdomen.
 - e. Elbow joint bruises bilaterally.
 - f. Bilateral cut wounds on the lower limbs.
13. The evidence presented before the trial court comprised a primary Discharge Summary, P3 Form and the Medical Report. The evidence regarding the Respondent’s injuries was given by Dr. Ombati Timothy Mokuwa who examined and filled the Respondent’s P3 Form dated 26th June 2020 which was produced as P Exhibit 4. He also produced the Medical Report dated 19th August 2020 as P Exhibit 5.
14. In the said Medical Report, Dr. Ombati noted that the Respondent sustained grievous harm with severe injuries in the accident and that he will, after healing, require Kshs. 200,000/= for an operation to remove the metal implants. Dr. Ombati assessed permanent disability at 25%.
15. The Appellant, on the other hand, produced the Medical Report by Dr. Jennifer Kahuthu (DW1) which showed that the Respondent sustained a head injury, fracture of the right femur and soft tissue injuries. Dr. Kahuthu assessed permanent disability at 20%.
16. The Appellant mainly contested the Respondent’s claim that he suffered a fracture of the temporal region of the skull while arguing that no such injury was noted in the Respondent’s Discharge Summary which was the primary document that the doctor relied on to fill the P3 Form and the Medical Report.
17. I have carefully perused the Discharge Summary and I note that nowhere in the said document is it indicated that the Respondent suffered a fracture of the skull. The Discharge Summary however indicates that the Respondent had “other specified injuries of the head” without disclosing the nature of the injuries.
18. I have perused the Referral Transfer Form that effected the Respondent’s transfer from Nyamira County Referral Hospital to Tenwek Hospital (P Exhibit 9) and I note that a CT scan of the Respondent’s head revealed that he sustained a fracture of the skull, temporal region. The Referral Transfer Form also shows that the Respondent sustained severe head injury and other bodily injuries.
19. In his judgement, the trial Magistrate captured the Respondent’s injuries as follows: -
 - a. Fracture of the temporal region of the skull.
 - b. Scars of injury on the head that are multiple.



- c. Bruises with lacerations; scars noted on the trunk and abdomen.
 - d. Bruise scars noted on the elbow joint bilaterally; and
 - e. Fracture of the right femur with scars on the bilateral lower limbs.
20. My finding is that there is no discrepancy between the injuries contained in the primary treatment documents and those in the P3 Form and Medical Report. I am satisfied that the trial court arrived at the correct conclusion regarding the nature of the injuries suffered by the Respondent.
21. Turning to the challenge on the assessment of the quantum of damages awarded to the Respondent, I note that it is trite that the appellate court should be slow to interfere with the trial court's award on damages.
22. The principles governing the award of damages and the circumstances under which the trial court can interfere with such awards have been the subject of numerous court pronouncements. The said principles were laid down by the Privy Council in *Nance vs British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga vs M. Manyoka* [1961] EA 705, 713 as follows:
- “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”
23. In the oft cited case of *Kemfro Africa Ltd t/a Meru Express Service (1976) & Another vs Lubia & Another* (1987) KLR 30; (1982-88) 1 KAR 727 it was held: -
- “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.
24. In the instant case, the Appellant's submission before the trial court was that an award of Kshs. 300,000/= general damages would be sufficient compensation for the Respondent's injuries. The Appellant did not cite any comparable authority before the trial court but cited the following cases before this court: -
- a. *Simon Mutisya Kavii vs Simon Kigutu Mwangi* (2013) eKLR where the court stated that an award of Kshs. 200,000/= is not manifestly low the appellant was admitted at Coast General Hospital and had sustained a compound comminuted fracture of the left tibia fibula with severe friction burn on the left thigh and leg.



- b. [*Kenya Power & Lighting Company Ltd vs Zakayo Saitoti Naingola & Another*](#) (2008) eKLR where the plaintiff who sustained a fracture of the femur mid shaft and blunt injuries to the lower jaw and left shoulder was awarded Kshs. 300,000/= in general damages. The above noted injuries are more severe than the plaintiff sustained yet he was awarded Kshs. 300,000/=.
- c. [*Kenyatta University vs Isaac Karumber Nyuthe*](#) [2014] eKLR where the court substituted an award of Kshs. 700,000/= to Kshs. 350,000/= for injuries of fracture of the right femur, soft tissue injuries to the head and bruises on the right knee and temporarily lost consciousness.
- d. [*Joshua Mwaniki Nduati vs Samuel Muchiri Njuguna*](#) [2005] eKLR, where the Magistrate awarded Kshs. 250,000/= for pain suffering and loss of amenities. The plaintiff had sustained a fracture of the femur and fracture of the right sided 3 ribs.
- e. *Samuel Ndirangu Ng'ang'a vs Lucy Wambui Wachira* Civil Appeal Number 117 of 2008, the Court awarded Kshs. 250,000 plus special damages for similar injuries as sustained by the plaintiff herein.
- f. [*Ibrahim Kalema Lewa vs Esteel Company Limited*](#) (2016) eKLR, the Appellant sustained intertrochanteric fracture of the left femur and physical and psychological pains and was awarded Kshs. 300,000/=.
- g. Kisii HCCA No. 66 of 2017, [*Erick Ratemo v Joash Nyakweba Ratemo*](#) (2018) eKLR where the High Court upheld an award of Kshs. 300,000/= as general damages for the claimant who sustained abrasion and deep cut wound on the face, cut wound on the upper lip, contusion on the anterior chest wall, dislocation of the right shoulder, bruises on the right hand, blunt injury on the left and right knee, epistaxis and fracture of the right femur.
25. The Respondent, on the other hand, proposed compensation of Kshs. 1,800,000/= and relied on the following authorities: -[*Kyoga Hauliers \(K\) & another vs Philip Nyingi*](#) [2017] where the court held that Kshs. 1,000,000/= would suffice where the plaintiff sustained only a fracture for the skull. [*David Kimathi Kaburu v Dionisius Mburugu Itirai*](#) [2017] eKLR where the court held that Kshs. 630,000/= would suffice where the plaintiff sustained only the fracture of the femur. [*Poa Link Services Co. Ltd & another vs Sindani Boaz Benzemo*](#) [2021] eKLR where the court held that Kshs. 350,000/= shall suffice where a plaintiff sustains soft tissue injuries.
26. I have considered the authorities cited by the parties herein and the gravity of the injuries sustained by the Respondent. I note that the injuries led to the Respondent's admission in hospital for 3 weeks. The degree of permanent disability was assessed at 25% and 20% by the Respondent's and Appellant's doctors respectively. I find that the trial Magistrate was not off the mark in his assessment of general damages at Kshs. 900,000/=. I do not find any reason to interfere with the said award which I hereby uphold.
27. Turning to the award on special damages, I note that the contest was on whether invoices can be treated as proof of special damages.
28. The trial court held as follows on special damages: -
- “It is trite law that special damages must be specifically pleaded and proved. In *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* [2013] eKLR the Court of Appeal held: -
- “We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that



degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

The plaintiff pleaded for a sum of Kshs. 464,239.00 as special damages. The defendant submitted that an invoice is not a receipt. Hence, it is not proof of payment. The defendant further submitted that the outstanding medical bill of Kshs. 380,390.84 was paid by the medical cover and therefore the plaintiff is not entitled to the same.”

29. The Appellant faulted the trial court for awarding the Respondent the sum of Kshs. 414,414.84 as special damages based on an invoice dated 9th March 2020 when the receipts produced by the Respondent showed that he only paid Kshs. 27,006/=. The Respondent did not make any submission on the issue of special damages.
30. It is trite that Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice is to quote from the decision of the Court of Appeal in *Hahn vs 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.”
31. Courts have also insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. In this regard, it is not enough for a party to provide pro forma invoices sent to the party by a third party as 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 vs Janevams Limited* [2015] eKLR; *Zacharia Waweru Thumbi vs Samuel Njoroge Thuku* [2006] eKLR; Sanya Hassan vs Soma Properties Ltd.)
32. Guided by the findings in the above cited cases, I find that the award of Kshs. 414,414.84 special damages, based on an invoice, was erroneous. Consequently, I set aside the judgment of the trial court on special damages and substitute it with an award of Kshs. 27,006/=.
33. In conclusion, I allow the appeal, albeit in part, and set aside the award on special damages by the subordinate court and substitute it with an award of Kshs. 27,006/=. I however uphold the award of Kshs. 900,000/= general damages. The total amount payable to the Respondent is Kshs. 927, 006/=.
34. Considering that the appeal is partially successful, I will award the Appellant half the costs of the appeal which I hereby assess at Kshs. 30,000.
35. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 4TH DAY OF MAY 2023.**

W. A. OKWANY

JUDGE

