



REPUBLIC OF KENYA



KENYA LAW
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**Bajber Stores Ltd v Mvunga (Civil Appeal E024 of 2021)
[2023] KEHC 19123 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E024 OF 2021**

GL NZIOKA, J

JUNE 5, 2023

BETWEEN

BAJBER STORES LTD APPELLANT

AND

PATRICK NJUE MVUNGA RESPONDENT

(Being an appeal against the judgment delivered by Hon. L. Sarapai (PM) dated 4th May 2021 at the Chief Magistrate's Court at Naivasha vide Civil Case No. 633 of 2018)

JUDGMENT

1. On 1st December 2015, the plaintiff (herein the “respondent”) was a lawful fare-paying passenger in a motor vehicle registration No. KBN 087P Toyota Matatu owed by the 1st defendant. That, at around 6:00 pm the motor vehicle was involved in a road traffic accident at Kikopey area along the Nairobi-Nakuru Highway wherein the respondent suffered severe injuries.
2. It is averred that the accident involved the subject vehicle and motor vehicle registration No. KBT 593C DAF Semi-trailer owned by the 2nd defendant (herein “the appellant”). Subsequently the respondent sued the defendants vide a civil suit No. 663 of 2018, in the Chief Magistrate’s court at Naivasha.
3. However, the 1st defendant did not to enter appearance and as a result a default judgment was entered against the 1st defendant pending formal proof of the case but the appellant filed a statement of defence and the matter proceeded to full hearing.
4. At the trial, the respondent testified that the 1st defendant’s driver caused the accident as he drove motor vehicle registration number KBN 087P without due care and skill, at a speed taking into account the circumstances of the case, failed to slow down or swerve to avoid a collision with another vehicle or protect the safety of passengers on board.



5. Similarly, the appellant's driver caused the accident by driving motor vehicle registration number KBT 593C DAF, on the wrong side of the road while overtaking, failed to brake and keep proper look out for other vehicles and generally failed to control the motor vehicle causing a head on collision.
6. That, as a result the respondent suffered serious injuries and was admitted at St. Mary's Hospital Gilgil for three days, before he was transferred to Coptic Hospital for admission from; 5th December 2015 to 22nd December 2015. where he underwent a surgery and metal plates and screws implanted to unite the fractures he had sustained.
7. That, he was re-admitted in February 2016 after developing sepsis at the area overlying the right hip joint and subsequently re-admitted for three weeks in April 2016 for the removal of the metallic implants. Further, in October 2016, after his wound had healed, he was re-admitted at Nairobi West Hospital for a period of three weeks to have the metallic plates re-inserted to unite his fracture.
8. The respondent averred that he was confined to a wheelchair for more than a year and as a result of the accident, his leg is shortened and he is now classified as a physically disabled person. Further he spent about Kshs. 1,500,000 in medical expenses.
9. The appellant did not call any witnesses at the hearing nor file any documents. At the conclusion of the trial the parties filed their submissions and on 4th May 2021, trial court delivered the judgment in favour of the respondent, and found the defendants jointly and severally liable. The liability was then apportioned in the ration of: 20:80 as against the 1st defendant and the appellant respectively.
10. In the resultant, the trial court awarded the respondent general damages in the sum of. Kshs 2,000,000, and special damages in the sum of Kshs 1,405,550, costs of the suit, and interest on the decretal sum at court rates from the date of the judgment.
11. It is against this judgment, that the appeal herein arises on the grounds in the memorandum of appeal, filed 21st May 2021 as follows:
 - a) That the learned Magistrate erred in fact and in law awarding the Plaintiff the sum of Kshs. 2,000,000 on account of general damages, the exact amount the Plaintiff/Respondent's Advocates had submitted and which amount was not commensurate with the injuries sustained by the Plaintiff/Respondent as purported or at all and which amount was unjustifiably too high.
 - b) That the leaned Magistrate erred in law and in fact in awarding the Plaintiff/ Respondent the sum of Kshs. 1,405,550.00 as special damages when the said amount had not been strictly proved as purported or at all.
 - c) That the learned Magistrate misdirected herself holding that the Plaintiff had produced a bundle of receipts as exhibit 9 to prove the claim for special damages, yet the said exhibit contained mostly invoices issued to the Plaintiff which were not proof of payment thereof and when even the amounts therein were not for the sum awarded.
 - d) That the learned Magistrate erred in law and in fact in wholly discrediting the Submissions filed on behalf of the 2nd Defendant/Appellant's Advocates and in wholly relying on the Submissions by the Plaintiff/ Respondent's Advocates.



- e) That the learned Magistrate erred in law and in fact in apportioning liability at 20% against the 1st Defendant and against the 2nd Defendant/Appellant when there was no clear evidence at all on how the accident herein occurred and thus should have apportioned the same at 50:50 basis as between the Defendants.
- f) That the learned Magistrate misdirected herself in failing to take into account 01 ignore the Plaintiff/Respondent's evidence on cross examination that at the time of the accident herein he was dozing/sleeping, which was a key issue on liability.
- g) That the learned Magistrate erred in law and in fact in being partisan and thus arriving at a biased and unbalanced decision.
- h) That the Learned Magistrate erred in law and in fact in relying on evidence irrelevant and/or evidence not tendered by the Plaintiff herein and thus arrived at an unfair and unjustified decision.
- i) That the learned Magistrate erred in fact and in law by failing to consider the Appellant's arguments and Submissions and in wholly relying on the Respondent's arguments and Submissions and thus reached a biased and unbalanced decision.
- j) That the Magistrate misdirected herself by taking a partisan position which effectively made her to arrive at a decision which was bad in law ab initio.
- k) That the Learned Magistrate relying on alleged evidence which was not tendered in this matter, thus irrelevant to the proceedings and cited decisions which had no nexus to the case before her.
- l) That the Learned Magistrate erred in law and in fact in making all efforts to make a decision in favour of the Plaintiff which in effect disqualified her from being an impartial umpire.

12. The appeal was disposed of by filing of submission. The appellant filed submissions dated 16th May 2022, wherein it abandoned its appeal on liability. It was submitted on quantum, that while assessment of damages is discretionary, the Court of Appeal in *Butt vs Khan (1981)* held that an appellate court will only interfere with the trial court's award of damages where it is inordinately too high or too low, or that the trial court proceeded on the wrong principles or misapprehended the evidence in some material aspect.
13. That the trial court in the instant matter misdirected itself by taking into account injuries that were not pleaded and ought not to have been considered while assessing the damages and thereby resulting to inordinately high damages.
14. That parties are bound by their pleadings. Reliance was placed on the case of *Daniel Otieno Migore vs South Nyanza Co. Ltd [2018] eKLR* where the court held that evidence adduced must be in consonance with pleadings and any evidence however strong that is invariance with the pleadings must be rejected.
15. Further reliance was placed on the case of *Galaxy Paints Company Limited v Falcon Guards Limited [2000] EA 885* where it was held that a trial court can only pronounce judgment on issues arising from pleadings or as framed by the parties.



16. The appellant further submitted that in arriving at its decision on quantum, the trial court ignored the authorities relied on by the parties in their submissions and instead cited the case of; *Mbaka Nguru & Anor v James George Rakwar Civil Appeal No. 133 of 1998* which was not relevant in the circumstances of the case as the injuries suffered therein were severe and distinguishable from the present case.
17. That the court in *Jabane v Olenya [1989] KLR 1* set out the principles of assessment of damages while the court in the case of; *Jane Wanja Mwangi v Anestar Secondary School [2020] eKLR* stated that the sum awarded must be in proportion to awards in other cases where the injuries suffered are comparable. The appellant also relied on the case of; *John Mwangi Kiiru v Salome Mwangi [2019] eKLR* where the court upheld an award of Kshs. 450,000 for similar injuries as herein.
18. It was submitted that, furthermore, in the case of; *Daniel Otieno Owino & Anor v Elizabeth Atieno Owour [2020] eKLR* the court reduced the award of the trial court of Kshs. 600,000 to Kshs. 450,000 where the claimant suffered a fractured tibia-fibula bone and other soft tissue injuries.
19. The appellant submitted that the principles of awarding special damages were stated in the case of *Banque Indosuez vs DJ Lowe & Company Limited [2006] eKLR* that special damages must be strictly proved and that the degree of proof depends on the circumstances and nature of the act.
20. That, the trial court awarded special damages of Kshs. 1,405,550 yet the documents relied on to prove special damages amounted to Kshs 1,273,323.20. Further, the court in the cases of; *Total (Kenya) Limited formerly Caltex Oli (Kenya) Limited v Janevans Limited [2015] eKLR*; *Zacharia Waweru Thumbi v Samule Njoroge Thuku [2006] eKLR* and *Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR* held that special damages can only be proved by receipts and not invoices.
21. The appellant submitted that in the present case the respondent relied on invoices that did not have corresponding payments receipts. That, the only receipts that met the threshold totalled; Kshs 70,965 and urged the court to set aside the special damages as awarded.
22. However, the respondent vide his submissions dated 20th June 2022 opposed the appeal and submitted that on the issue of liability, the appellant never availed any witnesses to rebut his evidence adduced during trial. That, in the circumstances the appellant should shoulder total liability for occasioning the accident. Reliance was placed on the case of *Karugi & Another v Kabiya & 3 Others [1987] KLR 347* where the Court of Appeal stated that where the plaintiff adduces evidence that convinces the court on a balance of probability and the defendant fails to adduce rebuttal evidence, the plaintiff will have proved the claim.
23. On whether the trial court took into account injuries that were not pleaded, the respondent submitted that the injuries pleaded are captured in paragraph 7b of the plaint under the umbrella of severe bodily soft tissue injuries. That, from his statement it can be inferred that he underwent at least five (5) surgeries to treat the fractured femur.
24. Further, the medical report of Dr. Wambugu was admitted in evidence by consent and the appellant elected not to refer the respondent for a second medical examination by a doctor of their choice, thus conceding to the extent of injuries as observed by the Dr. Wambugu and that the challenge of the injuries is an afterthought.
25. The respondent reiterated that the appellant court will not interfere with an award of damages save where its demonstrated that the same was erroneous based on the wrong principle and/or are inordinately high as stated in the case of; *Kemfro Africa Ltd t/a Meru Express Service, Gathogo Kanini v A.M. Lubia and Olive Lubia (1987) KLR 30*.



26. That the trial court did not take into account irrelevant factors in arriving at the impugned judgment. Further, the trial court considered authorities cited by the parties contrary to the misleading submission that the court ignored the same. That the plaintiff relied on the case of; Maqsooda Begum Sroya vs Sunmatt Limited [2017] eKLR where the Court of Appeal upheld the award of Kshs. 1,000,000 for a fracture of the femur in 2008. That taking into account inflation since 2008, the award of Kshs 2,000,000 in the present case is not inordinately high to warrant disturbance by the court.
27. Lastly, the respondent submitted that on special damages the Court of Appeal in Great lakes Transport Co (U) Ltd vs Kenta Revenue Authority [2009] eKLR held that an invoice that has been endorsed to the effect that the items therein have been paid for, is as good as a receipt.
28. That the receipts produced were admitted in evidence without objection and therefore the challenge thereto by the appellant is an afterthought. That, the complaint that receipts were not supplied was never raised in pre-trial and in any event the trial court confirmed they had been tendered in evidence.
29. Furthermore, receipt No. 27289 dated 5th December 2015 is for a sum of Kshs. 1,000,734, while invoice No. COP 41095 dated 5th December 2015 is for the sum of Kshs. 511,667. Thus, the total of the two payments is Kshs. 1,512,401 which is more the sum pleaded.
30. Moreover, if the sum of Kshs. 70,965 the appellant has conceded to is factored in special damages, the amount payable will be Kshs. 1,583,366, in the given circumstances, the award of Kshs. 1,405,550 as special damages is sound in law.
31. Having considered the appeal in the light of the material placed before the court and the arguments advanced vide submissions, I find that, the main issue is to determine is whether the learned trial magistrate was properly guided while determining quantum herein.
32. The law is settled that, the 1st appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another v Shah [1968]EA and Mkube v Nyamuro 1983 KLR 403.
33. In the same vein the Court of Appeal in Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257).”
34. To revert back to the matter herein, in considering the issues on general damages I find that the respondent's claim is based on the injuries pleaded that he sustained “communited long standing /non-union fracture of the right femur and several bodily soft tissue injuries soft tissue injuries.”
35. To support of the subject injuries, the respondent produced medical reports which includes discharge summaries from Nairobi West Hospital, St. Mary's Rift Valley Mission Hospital and treatment notes from Coptic hospital and three (3) discharge summaries there from dated; 2nd December 2015, 1st march and 7th May 2016 and P3 medical form, which was unfortunately incomplete.



36. In addition, he produced a medical report dated 11th April 2018 prepared by Mr. Wambugu, which indicates that he suffered the following injuries: -
- a. Multiple cuts on the head and face, both legs and hands
 - b. Fracture of the right proximal femur
 - c. Loss of three (3) one (1) upper left incisor and two (2) lower molars and multiple teeth chipping of upper incisors

37. In the evidence in chief, the plaintiff stated that, he was injured on the legs, hands, teeth, eyes and other parts of the body. That he has not fully recovered and was still on crutches. That, he experiences lots of headaches, and has loss of memory.

38. The trial court in considering the aforesaid evidence stated as follows

“The plaintiff has established vide Exhibits No’s 3 (Treatment notes and discharge summary form from St. Mary’s and Coptic hospital respectively), No. 4 (P3 form), No. 6 (Medical report by Dr. S. Wambugu) and even vide Exhibit No. 9 (bundle of receipts for medical expenses related to the injuries from the accident) that they suffered a severe long term fracture to the right femur and also multiple other cuts and soft tissue injuries to several parts of his body.

Dr. Wambugu’s report specifically finds that the plaintiff recovered poorly from the accident; noticing that at the time of preparation of the report, the plaintiff had memory lapse, had a shortened leg with stiffness of the right knee and painful hip joint with scars, three missing frontal teeth and multiple breakages. The doctor noted that the injuries, especially the fracture had occasioned a major permanent disability as further witnessed by Ex – P.2 (NCPWD card). The court notes from the evidence on record that the plaintiff was extensively hospitalized at several healthcare facilities (St. Mary’s, Guru Nanak, Midhill, Coptic and Nairobi West Hospitals) on diverse dates between the time of the accident (01/12/2015) and the 26/10/2016; undergoing no less than five (5) surgeries to attend to the fracture. He was bound to a wheelchair at some point and was noted to be using crutches by Dr. Wambugu. When he testified the court also noted that the plaintiff could not stand unaided by the crutches and had to give his evidence while seated.

39. Having analysed the evidence adduced, I find that, there is no dispute that, the plaintiff/respondent sustained a fracture of the right femur. What is in dispute is the additional injuries, described in generality as “several soft tissue injuries”. It is trite law that parties are bound by their pleadings. The plea that the plaintiff suffered “several” soft tissue injuries lack specificity and clarity. It opens room for speculation.
40. In that case recourse has to be placed purely on the medical documents produced. The P3 form filed on, 9th June 2017, does not indicate any soft tissue injuries and indeed, the first time the soft tissue injuries are tabulated is in Dr. Wambugu’s report. However, the Doctor’s finding on multiple cuts seem to be supported by the presence of the healed by the healed ugly scar marks noted.
41. However, the question still remains as to whether the subject injuries were sustained in the accident in that the initial treatment notes which Dr. Wambugu allegedly relied on three (3) years after the accident were not produced.



42. Be that, as it were, it suffices to note that Dr. Wambugu's report is an expert report. There is no other medical report to rebut it. The rebuttal would have been laid by the defendant/appellant. That was not done. The rebuttal cannot be canvassed from the bar and/or submissions. Therefore, Dr Wambugu's report is admissible in so far as it supports the pleadings.
43. To revert back to the pleadings, the trial court ought to have noted that, the only major injury is the fracture of the right proximal femur in that as already stated the others were described as "soft tissue injuries".
44. Furthermore, the several surgeries the plaintiff underwent were partly due to the poor management at the hospital. It is clearly indicated in evidence that, the plaintiff "developed wound sepsis at the area overlying the right point and healed incision gapped. The question is can the defendant/appellant be held liable for that mismanagement which resulted in several other surgeries?
45. Similarly, there are injuries that were apparently serious in my considered opinion which include inter alia; loss of three (3) teeth, loss of memory and permanent disability arising from shortening of the right leg but not pleaded, save for indication thereof in Dr. Wambugu's report these injuries. In fact, the trial court suo moto observed the plaintiff was on crutches and unable to stand.
46. Even then the medical documents by Dr. Wambugu does not indicate the degree of what he describes as a major permanent disability and/or whether the plaintiff will require further treatment and if so, the amount required. The trial court ought to have considered the aforesaid issues in assessing the general damages.
47. As regards the amount proposed by the parties, the plaintiff/respondent prayed for a sum of; Kshs 2,000,000 and relied on the case of Maqsooda Begum Sroya -vs- Sunmatt Ltd (2017) eKLR. Apparently, the trial court did not evaluate the subject authority. However, I note that the injuries therein were: a comminuted fracture of the left femur with the shortening of her left thigh by 2.0 cm, which left the victim with a permanent disability of 20% on that thigh. Further, the claimant suffered a re-fracture that the court held was directly linked to the first injury as the original injury made the bone on the spot delicate bearing in mind her age.
48. The Court of Appeal upheld Kshs 1,000,000 awarded by the High Court as general damaged for the fracture of the femur and described the amount as "generous".
49. That decision was rendered in the year 2017 and the subject matter herein was filed in 2018, the accident having occurred in 2015. In my considered opinion, the amount awarded therein is comparable to the matter herein, despite the fact that, the trial delayed from 2018 to 2021 when the decision was rendered.
50. On the other part, the appellant relied on the cases of: Mwavita Jonathan v Silivia Onunga [2017] eKLR where the claimant sustained a fracture at the hip joint with the level of permanent disability at 85% leaving her to walk with crutches and soft tissue injuries. Further in the case of; Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR the plaintiff sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur.
51. Again the trial court did not address these authorities by the appellant. Be that as it were, taking into account the expenses incurred by the plaintiff for in-patient, it is clear, he suffered more serious injuries, and the injuries in the afore cases are of less magnitude and so the sum suggested of Kshs 400,000 is not adequate or reasonable.



52. On its part the trial court relied on the case of Mbaka Nguru v James George Rukwar (NBI) CA Civil Appeal No. 133 of 1998 [1998] eKLR. In that matter, the plaintiff suffered the following injuries
- a) Paraplegia resulting from a fracture of the T.12 thoracic vertebra with spinal cord damage; and
 - b) Several distal phalanxion the left index finger cuts on the right cheek and the right eye brow area
53. Further as a result of these injuries the said plaintiff suffered incontinence of urine and stool and had recurrent bed sores, painful back due to implanted hardware, painful involuntary spasm, especially on the left lower limb and difficulty immobility, especially in transferring himself from bed to wheel chair and vice versa. His disability was medically assessed at 100%.
54. In considering the matter, the Court of Appeal held, the amount of 2,500,000 by way of damages was so inordinately high that it was appropriate to reduce it to Kshs 1,500,000. The total award of Kshs 6,793,210 was reduced to Kshs 1,500,000.
55. In the instant matter, the trial court did not explain why it relied on this decision where the plaintiff injuries much more serious injuries than herein.
56. In the final finding, I consider the following as I make an award for general damages.
- a) The main injury pleaded is the fracture
 - b) Soft tissue injuries not pleaded with specificity and therefore fluid
 - c) The degree of permanent disability not indicated
 - d) No indication for future medical treatment
 - e) Special damages already taken care of the expenses incurred
 - f) The authority by plaintiff/respondent in the trial court more reliable
57. In the circumstances, I reduce the general damages amount from Kshs 2,000,000 to Kshs 1,000,000.
58. As regards the special damages, the trial court relied on the documents produced as P. exhibit 9, noted as follows: -
- a) Receipt No. 8382, dated 5th December 2015, issued by Mid-Hill Nursing Home for; Kshs. 1, 400;
 - b) Discharge summary report, dated 22nd December 2015, issued by Coptic Hospital for; Kshs. 511,667;
 - c) Receipt No. 867819 dated 23rd December 2015, issued by Coptic Hospital for; Kshs. 367;
 - d) Discharge Summary report, dated 26th March 2018, issued by Coptic Hospital for Kshs. 108,515;
 - e) Discharge Summary report printed on 26th March 2018 issued by Coptic Hospital for Kshs. 318,470; and



f) Duplicate copy of bill, dated 26th October 2016, issued by Nairobi West Hospital for Kshs. 551,892.

59. The total amount as per exhibit 9 is Kshs 1,492,311, the trial court awarded the special damages of Kshs 1,405,550 as pleaded. Further, although the respondent in his submissions refers to receipt No. 27829 dated 5th December 2015 issued by Coptic Hospital for the sum of Kshs. 1,000,734, there is no such receipt in the trial court file or the record of appeal.
60. Be that as it were, parties are bound by pleadings and the trial court correctly awarded the special damages as pleaded. The appellant has faulted the documents relied on as having failed to meet the test of “receipts” as required under the law.
61. In the submissions filed in the trial court, the appellant at paragraph 10 argued that the discharge summaries from Coptic Hospital do not qualify as receipts and in particular in relation to the sums of: Kshs 511, 667. 00, Kshs 108,515.00 and Kshs 318,470.00, as there is no evidence of payment thereof.
62. I note that the trial court did not address that issue and merely stated that;
- “ the bundle of receipts, Exh p9, demonstrates that the cost of attending the said injuries was at the time Kshs 1, 492, 811 9(including Kshs 550 for receipt of copy of records-Exh 7 9b). However, the plaintiff only prayed for Kshs 1, 405, 550)
63. Be that as it may, it suffices to note that, these impugned documents were filed alongside the plaint and plaintiff’s statement and served upon the appellant. They were subsequently produced by the plaintiff on 26th March 2019, when he testified and admitted in evidence thus forming part of the record. There is no evidence that the appellant objected to the production thereof. The appellant cannot and could not thereafter attach the admissibility thereof in the submissions.
64. To allow the appellant argument on the evidential value of the documents as argued will prejudice the respondent as he will not have an opportunity to adduce further evidence to deal with the issues in dispute as he was led by the appellant to believe that they were not objecting to the production or admissibility of those documents. The appellant is thus estopped from questioning the subject documents at his stage.
65. Even then it is not far-fetched to take judicial notice of the fact that hospitals are not charitable organization and that discharge summary is prima facie evidence of hospitalization, incurred costs and legitimate expectation of payment. Similarly, no hospital will release a patient without payment and/or security thereof. The bill was incurred in the year 2018 and it is unlikely that it is still unpaid.
66. In the given circumstances I uphold the sum awarded as special damages.
67. The upshot of the afore said is that general damages is awarded in the sum of Kshs 1,000,000 and special damages in the sum of; Kshs 1,492,311, plus interest and costs. The judgment takes effect from the date judgment in the trial court.

It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 5TH DAY OF JUNE 2023

GRACE L. NZIOKA

JUDGE

In the presence of;



Ms Mugor for the Appellant

Mr Terer for the Respondent

Ms Ogutu Court Assistant

