



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mbaraka v Mutunga (Civil Appeal 98 of 2022)
[2023] KEHC 21088 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 98 OF 2022
DKN MAGARE, J
JULY 10, 2023**

BETWEEN

MBONDE MILIKI MBARAKA APPELLANT

AND

ANTHONY MUISYA MUTUNGA RESPONDENT

(An appeal from the judgement and decree of Honourable Senior Principal Magistrate J M Omido delivered in Kwale in Civil Case No. 156 of 2018 on 6th July 2022)

JUDGMENT

1. The appellant filed this an appeal from the judgement and decree of Honourable Senior Principal Magistrate J M Omido delivered in Kwale in Civil Case No. 156 of 2018 on 6th July 2022)
2. The appellant was the defendant in the matter. The appeal is on the quantum of damages that were awarded to the Respondent.

Duty of the first Appellate court

3. 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.
4. In the case of *Mbogo and Another v 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 is 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.”

5. The duty of the 1st Appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

“An appeal from the High 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.”

6. The Court is to bear in mind that it neither saw nor heard the witnesses. It is the trial court that has observed the demeanour and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court’s as parties cannot read into those documents matters extrinsic to them.

7. In the case of *Peters v Sunday Post Limited* [1985] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. In the case of *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

9. The duty of the court regarding damages is settled. The state of the Kenyan economy and the people generally and the welfare of the insured and injured public must be at the back of the mind of the trial Court.

10. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”

11. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being an exercise of discretion the exercise should be done judiciously to ensure that the award is not too high or too low as to be an erroneous estimate of damages.



12. The High Court, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another* [1987] KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

13. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in a case at the Privy Council, that is the case of *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

14. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

15. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

16. To be able to set aside the assessment on the above principles, the appellant must satisfy this court that the award is out of range with the decided cases, the award is not only high but inordinately high that it amounted to an erroneous estimate of damages.



17. Therefore, for me 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.
18. So my duty as the appellate court is threefold regarding quantum of damages: -
 - a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
 - b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.
 - c. The award is simply not justified from evidence.
19. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
20. The Respondent, who was the Plaintiff in the lower court, in his Plaint dated 23rd April 2018 pleaded the following injuries.
 - a. Fracture of the left tibia and left fibula legs bones
 - b. Cut on the head
 - c. Blunt object injury of the chest
 - d. Mild head injury
 - e. Further particulars of injuries to be furnished at the herring hereof by way of medical report
21. The injuries must be pleaded as precisely as humanly possible. Then and only then will the Respondent proceed to prove them. Injuries which are indicated in a medical report but not pleaded, are not taken cognizance. The medical documents that were produced meets produced were as follows:-
 - a. P3 form (Page 14) it is incomplete)
 - b. Case summary - Coast Provincial General Hospital
22. The same indicates that there was mild head injury and fracture of the left tibia and fibula. The patient was admitted on 6th February,2018 and discharged on 7th February 2018. There was a discharge abstract from Diani Beach Hospital for 11th February 2018 – 13th February 2018 produced in evidence. The diagnosis was a displaced left fracture of tibia and fibula.
23. Secondly the ORIT (open reduction internal fixation) was seen in the report by Dr Ajoni Adede of Gama medical clinic dated 7th March 2018. There is no residual disability from the injuries. The good doctor indicated an 8% permanent partial disability due to the fractures.
24. I also noted that the Appellant placed misplaced and inadmissible documents on the record. The examples are the strange documents in pages 24 and 25.
25. The Plaint was amended to read the suit motor vehicle as motor vehicle registration number KBV 335 F station wagon on 26th February 2020. After hearing, parties filed submissions. Given that the appeal is on quantum, I shall address both submissions during the hearing and submissions in this appeal together with my analysis.
26. The Respondent testified on 16th June, 2021 liability had been agreed by consent at 20 against the Respondent and 80 against the Appellant. The court awarded general damages of Ksh. 700,000, future medical expenses at Ksh. 120,000 and special damages and medical at Ksh. 17,550



Special damages

27. Special damages must be specifically pleaded before they are proved. There is no point producing documents to prove special damages in absence of pleadings. In *David Bagine v Martin Bundi* [1997] eKLR

“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 Sabbani 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 v 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 v Nairobi City Council* [1976] KLR 297 at page 304 and *Kenya Bus Services v Mayende* (1991) 2 KAR 232 at page 235. The evidence before the learned judge on the question of loss of user was just "thrown at him". The Respondent had stated that his profit margin was Kshs. 5,000/= to Kshs. 9,000/= per day from the sale of potatoes. Although the learned judge said that there was not a single receipt to show or prove those figures, the learned judge nevertheless proceeded to the damages under the heading of "loss of user" as general damages and said:"

28. The amended plaint pleaded special damages of Ksh 2,550. The court added the doctor court attendance. There is no room for moving targets in terms of court attendance. The sued parties will never know cases against them. The award of Ksh. 12,000 as a witness attendance expenses is thus misplaced. I set aside the award of Ksh 14,550 and in then thereof substitute with provided special of Ksh 2,550. The court had no authority to award witnesses expenses as special damages. These are witness expenses to be assessed with other costs using the normal scale. It is not just the receipt amount but a scale provided.
29. This will also be allowed when costs if there were witness summons served and the court will determine to what extent they are awarded while assessing costs.



Future medical expenses.

30. The Respondent pleaded a sum of Ksh 120,000 as future medical expenses. Future medical expenses are general damages of a special kind. They need to be specifically proved and pleaded. The court of appeal in *Tracom Limited & v Hassan Mohamed Adan* [2009] eKLR held as doth: -

“... We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, this Court, stated:-

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person’s legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

31. They are not normal special damages that must be particularised and proved to have been marked. They are like other general damages at large but can be estimated almost to precession. Receipts are not necessary for these kinds of damages. The doctor testified that there are metal plates in place that require removal; they will be done at a cost of Ksh 120,000. The court exercised its discretion properly in respect thereof.

General damages

32. The court awarded a sum of Ksh 700,000 for the following injuries;

- a. Fracture of the left tibia and fibula leg bones
- b. Mild head injury
- c. Blunt injury of to the chest
- d. Cut on the head

33. The Respondent had submitted for Ksh 1,200,000 and relied on the decision of *Francis Ndungu Wambui 2 Others v VK* (2019) eKLR, where Justice Florence Muchemi, awarded 1,000,000 on 13th November 2019 for compound fracture of distal tibia and fibula as well as loss of consciousness for 30 minutes

“General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method



of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR).

15. I would also add what the Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

In reaching an appropriate award, the court ought to consider the value of the shilling and the state of the economy. The court should avoid astronomical awards but strive to ensure that the final award makes sense and fairly compensates the claimant (see *Kigaraari v Aya* [1982-88] 1 KAR 768, *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and *Jabane v Olenja* [1986] KLR 661)."

34. The Appellant on the other hand submitted for a sum of Ksh 400,000. They relied on the case of *Daniel Owno Owuor & Another v Elizabeth Atieno Owino* (2020) eKLR where the court awarded 400,000 on 29th May, 2020.

35. The court in that matter found that 50% incapacity awarded was without basis as the wound had healed. The appellant also relied on the case of *Joseph Karisa Baya v Cefis Giorgio & Tofika Hilau* HCCA No. 39 of 2019 –Mdalindi decided on 9th March 2020 the plaintiff suffered the following injuries;

“Based on the medical report of Dr Adjoi added dated 17.1.2018 according to the report the appellant suffered fractures of the right tibia and right fibula let bones on examination the right leg has 12 cm surgical scar while the right ankle is stiff. Dr Adede’s conclusion was that the appellant injury occasioned 8% permanent partial disability. That the fracture area remains weak and painful experiences for live even if the bones unite. Further, the mental implant is to be removed after two years at a cost of Ksh 90,000:

The court went on to hold

“having carefully considered the material before this court and circumstances of the case the discretion of the trial court is hereby interfered with pursuant out the principles in *Mbogo V Shar* (1958) EA 93”

36. They also relied on the case of *Civicon Limited v Richard Njomo Omwancha & 2 others* (2019) eKLR on of the plaintiffs suffered the following injures;

“deep cut wound on the left ear lobe, tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint. The 2nd Respondent was examined Dr Morebu Peter Momanyi on 2nd March 2018. He confirmed the injuries sustained and noted that the 2nd Respondent was having occasional pains in the affected areas. He also observed that was unable to walk without



support and was using crutches. Dr Morebu concluded that she sustained multiple severe soft tissue injuries, fractures and dislocations which were in the process of healing. He assessed permanent disability at 30%. He expected recovery to take a long time.”

37. The appellant has used less similar authority in the High Court. I come to the inevitable conclusion that given that the injury healed with 8% disability the award Ksh 700,00 is inordinately excessive and out of range with comparable authorities.
38. I therefore set the same aside the judgement for general damages at Ksh 700,000/ and substitute thereof with a sum of Ksh 550,000. The appellant will have costs of 35,00 stay 30 days.

Determination

39. The upshot of the foregoing is that I make the following orders;
- a. I set aside the award of general damages and special damages and in lieu therefore enter judgement for the Respondent against the appellant as doth;
 - i. General damages 550,000
 - ii. Special damages 2,550
 - iii. Future medical care 120,000

Sub total 672,550

Less 20% contribution
 - iv. Sum due 537,600
 - a. Costs of 35 000 to the appellant.
 - b. 30 days stay of execution
 - c. File is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Owiti for the Respondent

Mr. Jengo for the Appellant

Court Assistant- Brian

