



REPUBLIC OF KENYA



KENYA LAW
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Oloo v Konge (Civil Appeal 604 of 2019)
[2023] KEHC 20561 (KLR) (Civ) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20561 (KLR)

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

CIVIL

CIVIL APPEAL 604 OF 2019

CW MEOLI, J

JULY 14, 2023

BETWEEN

STEPHEN OBOCK OLOO APPELLANT

AND

NORAH KOKI KONGE RESPONDENT

*(Being an appeal from the judgment of D.O. Mbeja, SRM Delivered
on 23rd September, 2019 in Milimani CMCC No. 1880 of 2013)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 23rd September, 2019 in Milimani CMCC No. 1880 of 2013. The suit was commenced by a plaint filed on 11th April, 2013 by Norah Koki Konge, the plaintiff in the lower court (hereafter the Respondent) against Stephen Obock Oloo, the defendant in the lower court (hereafter the Appellant). The claim was for general and special damages in respect of injuries allegedly sustained by the Respondent on or about the 31st day of May, 2010.
2. It was averred that the Respondent was on the material date lawfully walking as a pedestrian along Tom Mboya Street in Nairobi when the Appellant's driver, servant and/or agent so carelessly and or negligently controlled and or managed the Appellant's motor vehicle registration number KBK 059F Nissan Station Wagon (the subject motor vehicle) that he caused the motor vehicle to knock down the Respondent thereby occasioning her serious bodily injuries, loss and damage.
3. The Appellant entered appearance and filed the statement of defence dated 8th July, 2013 denying the key averments in the plaint and liability. Alternatively, the Appellant pleaded contributory negligence against the Respondent. Subsequently, on 19th June, 2019, the parties recorded a consent on liability in the ratio of 75:25 in favour of the Respondent and against the Appellant. The parties thereafter agreeing that the quantum of damages be canvassed by way of written submissions.



4. In its judgment, the trial court awarded damages in the manner hereunder:
 - a. General damages: Kshs. 2,000,000/-
 - b. Special Damages: Kshs. 111,655/-
 - c. Future medical expenses: Kshs. 115,000/-Total Kshs. 2,226,655/-
Less 25% contribution
Net: Kshs. 1,669,991.250
5. Aggrieved with the outcome, the Appellant preferred this appeal specifically challenging the quantum of damages. The appeal is premised on the following grounds:
 - “ 1) That the Learned Magistrate erred in law and in fact in awarding General damages for pain, suffering and loss of amenities of Kshs. 2,000,000.00 which award was excessive and not commensurate to the injuries.
 - 2) That the Learned Magistrate erred in law and in fact in awarding Future medical expenses of Kshs. 115,000.00 which award was not strictly proved.
 - 3) That the Learned Magistrate erred in law and in fact in awarding special Damages of Kshs. 111,655.00 which award was not strictly proved.
 - 4) That the Learned Magistrate erred in law in not taking into account entirely the submissions of the Appellant.
 - 5) That the Learned Magistrate’s finding and decision on General Damages of Kshs. 2,000,000.00, Future medical expenses of Kshs. 115,000,00 and Special damages of Kshs. 111,655.00 was against the weight of evidence adduced.” (sic)
6. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decision in *Kemfro Africa Limited t/a “Meru Express Services [1976]” & another v Lubia & another (No 2) [1985]* eKLR concerning the duty of an appellate court on a first appeal. And the guiding principles as to circumstances when an appellate court is entitled to interfere with the discretion of the trial court in assessing quantum of damages.
7. Regarding the award on general damages, counsel for the Appellant argued that it was inordinately high and not justified for the kind of injuries sustained by the Respondent. The Appellant therefore urged the court to substitute the award made in the sum of Kshs.2,000,000/- with a sum not exceeding Kshs. 250,000/-.
8. Counsel relied in this regard on inter alia, the case of *Kipkebe Tea Limited v Duke Nyang’au [2015]* eKLR where the court awarded general damages of Kshs.100,000/- for injuries involving dislocation of the right wrist joint, deep cut wound on the right elbow and bruises on the left shoulder; and the case of *Isaac Muriungi Mbataru v Silas Kalumani [2017]* eKLR in which the court awarded general damages amounting to Kshs. 200,000/- to the plaintiff who had sustained similar injuries save for the loss of two teeth. It was further argued that the trial court did not take into consideration the submissions and authorities relied on by the Appellant in assessing damages.



9. Counsel further submitted that the award in respect of future medical expenses was manifestly excessive in view of the medical evidence tendered. That similarly, the award made on special damages was excessive and wrong since the claim thereunder was not proved. The Court was therefore urged to disturb the awards.
10. The Respondent on her part defended the trial court's findings on quantum. Counsel relied on the Court of Appeal decision in *Peter Robert Kinuthia & another v Jackline Atieno Otieno* [2022] eKLR concerning the principles to be observed by an appellate court in deciding whether it is justified to interfere with an award of damages. Counsel contended that the trial court considered all relevant material and evidence tendered before it and therefore arrived at a reasonable award on general damages.
11. It was also contended that the respective claims for future medical expenses and special damages were correctly awarded as supported by evidence. Further, that the future medical expenses were guided by the opinion by Dr. Wakobi's medical report. In that regard, the case of *Angela Katunge Musau v China Wu Yi Limited & another* [2018] eKLR was cited.
12. The court has considered original record, record of appeal and the submissions made by the respective parties on this appeal. The duty of this court as a first appellate court is to re-evaluate the evidence and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* [1958] EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* [1968] EA 123 and *Williams Diamonds Limited v Brown* [1970] EA 1. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
13. The main contention in this appeal relates to the quantum of damages awarded by the lower court, which are viewed by the Appellant as being inordinately high or wrongfully awarded, but defended by the Respondent. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages.”
14. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low”.

See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001*; (2004) eKLR.



15. In the latter case, the Court of Appeal reiterated the discretionary nature of general damage awards and exhorted that:

“An appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance”.

16. In *Tayib v Kinany* (1983) KLR 14, the Court exhorted inter alia that:

“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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis added)

17. The Respondent particularized her injuries in the plaint dated 23rd November, 2011 as comprising injuries to the mouth causing loss of an upper incisor tooth, and fractures of the left humerus and distal radius and dislocation of the right wrist joint. The injuries were confirmed in the Respondent’s medical report prepared by Dr. W.M. Wokabi and dated 17th August, 2011, the doctor assessing functional disability arising from the injuries at 15%. The Respondent subsequently underwent a second medical examination before Dr. P.M. Wambugu who prepared the medical report dated 19th August, 2013 also confirming the injuries. The second doctor categorized the injuries sustained as skeletal, dental and soft tissue in nature, and assessed degree of permanent incapacity at 5%.

18. In his judgment, the learned trial magistrate correctly captured the Appellant’s injuries and stated that:

“The Plaintiff sustained the following injuries;

-Loss of upper incisor tooth.

-Fracture of the left humerus.

-Fracture of the distal radius.

On 19/6/2019 parties in the instant suit agreed by consent that judgment on liability be entered in favour of the plaintiff against the defendant in the ratio of 75:25. Parties also agreed that original documents in proof of special damages be attached to the submissions on quantum, with the plaintiff relying on the list of documents filed without calling the makers. The consent was adopted as an order of the court on 19/6/2019.

I have considered the medical evidence so far on record. The plaintiffs Advocates in their submissions filed in court on 8/8/2019 have proposed an award of Kshs. 5,500,000 in general damages for pain and suffering which I have considered. The defendants Advocates on the other hand in their submissions filed in court on 1/8/2019 have proposed an award of Kshs. 250,000 for pain and suffering which I have also considered coupled with the evidence before court and the case of *Mohamed Mahmoud Jabanev Highstone Butty Tongoi Olenja* [1986] eKLR where the court of appeal laid down principles to be followed by a judge for the correct approach in awarding damages...

Given the circumstances obtaining in the instant case, the injuries suffered by the plaintiff, the evidence so far adduced together with the submissions filed coupled with the authorities cited, judgment is entered in favour of the plaintiff against the defendants for Kshs.2,000,000, general damages for pain and suffering, plus a sum of Kshs.111,655 made up for special damages as pleaded and proved coupled with a further sum of Kshs. 115,000



for future medical expenses less 25% contribution on liability as agreed by consent of the parties all circumstances of this case considered. The above award shall carry costs plus interest at court rates.” (sic).

19. The Appellant has complained that trial court did not take into consideration his submissions and authorities filed before the trial court. The record of appeal filed herein contains respective submissions filed in the lower court by the parties on 01.08.2019 and found on pages 16 to 22 of the record of appeal. The claim by the Appellant is not discernible from a perusal of the record. On the contrary, reference was made in the lower court’s judgment to the Appellant’s proposals on general damages.
20. In addressing the head of general damages for pain, suffering and loss of amenities, the Respondent on the one hand had suggested the sum of Kshs. 5,500,000/- relying on the case of Michael Njagi Karimi v Gideon Ndungu Nguribu & another [2013] eKLR where the court therein awarded a sum of Kshs. 2,000,000/- for injuries comprised of bruises, swelling and tenderness of the right arm and forearm and a displaced fracture of the right humerus, deformity and swelling of the right forearm and fractures of the right radius and ulna with displacement, injury to the right lower limb involving the right leg which was tender, swollen and deformed. Further, in that case, X-ray examination had revealed a fracture of the right tibia and fibular and Swelling and deformity of the left thigh with apparent shortening; a segmental fracture of the left femur with marked displacement, resulting in multiple surgeries. These were severe injuries.
21. On his part, the Appellant had proposed a sum of Kshs.250,000/- with citing inter alia, the case of Isaac Muriungi Mbataru v Silas Kalumani (supra) also cited in this appeal.
22. In his assessment, the learned trial magistrate did not cite any guiding authorities. That notwithstanding, upon considering the respective authorities cited, the court is of the view that the Respondent’s authorities involved injuries of a more severe nature relative to the injuries sustained by the Respondent. Similarly, the court found the authorities cited by the Appellant to be rather dated or comprising less severe injuries than those suffered here.
23. According to the medical report prepared by Dr. W.M. Wokabi, the fracture of the left humerus had successfully been operated on and fixed with a metallic plate, resulting in pain to the Respondent. That the fracture of the distal right radius and partial dislocation of the wrist and radial ulna joint equally caused pain to the Respondent, with the partial dislocation giving resulting in persisting deformity. The doctor therefore assessed degree of permanent disability at 15%. In the second medical report prepared by Dr. P.M. Wambugu, he confirmed the insertion of the metallic plates and replacement of the lost incisor tooth with a permanent dental prosthesis, while noting that the fractures had united and the metal implants would not require removal. That the wrist injury predisposes the Respondent to early onset of osteoarthritic changes, hence the assessment of degree of permanent disability at 5%.
24. It is clear from the above medical reports that the Respondent’s injuries had gradually healed overtime, save for occasional pains, which probably explains the divergent degrees of permanent incapacity assessed between the two (2) medical reports. Dr. P.M. Wambugu examined the Respondent close to two (2) years since her first examination by Dr. W.M. Wokabi.
25. In the premises, the court considered the case of China Wu Yi Limited & another v Irene Leah Musau [2019] eKLR where an award of Kshs. 1,200,000/- was substituted with an award of Kshs. 800,000/- in general damages in respect of injuries involving a cracked upper left 3rd molar tooth, soft tissue injuries to the left upper limb, fractured left humerus bone, fractured pelvic bone and dislocation of the right hip joint. The court also considered the case of Ndungu & another v Munene [2022] eKLR in which an award of Kshs. 1,000,000/- for general damages was substituted with an award of Kshs. 700,000/- on



appeal, to a plaintiff who had suffered inter alia, apparent deformity on the left wrist with protruding distal radius bone, weakened grip of the left hand and a mouth injury with pain on upper central incisor teeth.

26. Considering the just cited authorities that to my mind appear to compare well with the instant case, and discounting for the fact that no permanent incapacity was assessed therein, the court is of the view that an award of Kshs.2,000,000/- made by the learned trial magistrate is on the higher side. Doing its best in view of the material before it, the court will interfere and reduce the award of general damages for pain, suffering and loss of amenities to the sum of Kshs. 900,000/- (Nine Hundred Thousand).
27. Turning to the award in respect of future medical expenses, Dr. W.M. Wokabi's medical report indicated that in view of the loss of an incisor tooth, the Respondent would require a permanent bridge which would cost Kshs. 30,000/-. The doctor further indicated that the Respondent required the removal of the metallic plate fixed on the fracture at a cost of Kshs. 85,000/-. In contrast, Dr. P.M. Wambugu stated that at the time of examining the Respondent, he observed that the lost tooth had been replaced using a permanent dental prosthesis. The doctor also opined that the metal implants do not require removal and that the fractures had united. In his judgment, the learned trial magistrate awarded the sum of Kshs. 115,000/- under this head.
28. It is apparent that the learned trial magistrate's award was guided by the opinion offered by Dr. W.M. Wokabi. Be that as it may, it is also apparent that the magistrate did not take into account the second medical opinion by Dr. P.M. Wambugu on the replacement of the lost tooth with a permanent prosthesis. Moreover, the two medical reports imply that the removal of the metal implants is not mandatory. In addition, the Respondent did not canvass the claim for future medical expenses in her submissions. In the circumstances, the court is of the view that the learned trial magistrate had no basis for making any award under this head.
29. This leads to the award made on special damages. It is trite law that special damages must be specifically pleaded and strictly proved. This was the position acknowledged by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated that:

“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 Part 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.’”
30. Further Chesoni, J (as he then was) stated in the case of *Ouma v Nairobi City Council* [1976] KLR 304 that:

“Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English



leading case on pleading and proof of damages, *Ratcliffe v Evans* [1892] 2 QB 524 where Bowen LJ said at pages 532, 533; -

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.” (Emphasis added)

See also *Hahn v Singh* [1985] KLR 716.

31. Upon a re-examination of the record, the court notes that some of the documentation tendered by the Respondent on this claim was illegible while other documentation had been handwritten thus rendering difficult the task of ascertaining the sums claimed. From its own examination of the relevant legible documentation, the court found that the Respondent only tendered receipts in the sum of Kshs. 35,000/- in respect of taxi charges incurred; Kshs. 36,935.86 being receipts issued for payments to AIC Kijabe Hospital and Kenyatta National Hospital where the Respondent received medical treatment; and a further receipt dated 26.08.2011 in the sum of Kshs. 30,000/-. These amount to the sum of Kshs. 101,935.86. On that basis, the court finds that the trial court erred in awarding sums not proved. Consequently, the trial court’s award of special damages cannot stand and is reduced to the sum of Kshs. 101,935.86
32. The appeal has therefore succeeded. Accordingly, the court hereby sets aside the judgment of the lower court in regard to quantum and substitutes therefor judgment for the Respondent against the Appellant as follows:
 - a. General damages:
Pain, suffering and loss of amenities - Kshs. 900,000/-
 - b. Future medical expenses - NIL
 - c. Special damages - 101,935.86Total award - Kshs. 1,001,935.86 1,1935.86
Less 25% contribution
Net: Kshs. 751,451.90 (Seven Hundred and Fifty-one Thousand, Four Hundred and Fifty-One, and Ninety Cents).
33. The Respondent shall have costs of the lower court suit and interest. The parties will bear their own costs in this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr.Nyamwaya

For the Respondent: Mr. Mokaya

C/A: Carol

