



**Pride Kings Security v Ambundo (Civil Appeal E008 of 2022)
[2023] KEHC 20047 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E008 OF 2022
WM MUSYOKA, J
JULY 17, 2023**

BETWEEN

PRIDE KINGS SECURITY APPELLANT

AND

GEORGE OPANGA AMBUNDO RESPONDENT

(An appeal arising from the judgment and decree of Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, delivered on 8th March 2022, in Busia CMCCC No. 56 of 2020)

JUDGMENT

1. The suit at the primary court was initiated by the respondent against the appellant, for compensation, on account of personal injury, arising from a road traffic accident. The respondent prayed for general damages, special damages, costs and interests. The respondent was alleged to be a pillion passenger, on a motorcycle that was cruising along the Busia-Mumias road, when the motorcycle was knocked down by motor-vehicle KCN 587V, alleged to have belonged to the appellant, causing his injury. The appellant filed a defence, in which it denied liability. It averred, in the alternative, that the respondent contributed to the accident by his own negligence, or that of the rider of the motorcycle on which he was a pillion passenger or that the accident was beyond the control of the driver of the vehicle belonging to the appellant.
2. A trial was conducted, in which only the respondent testified. A consent order was recorded on liability, on February 8, 2022, at 80:20 for the respondent against the appellant. Judgment was delivered on March 8, 2022. A total of Kshs 807, 700.00, being Kshs 500,000.00 for general damages, Kshs 300,000.00 for future medical expenses, and Kshs 7, 700.00 special damages, less contribution, was awarded.



3. The appellant was aggrieved, hence the instant appeal. The memorandum of appeal, dated March 6, 2022, lists 5 grounds, all revolving around the award of damages, on the basis that the same are inordinately high and excessive.
4. The appeal was canvassed by way of written submissions. Both sides have filed written submissions.
5. The appellant argues that the trial court did not apply the principles applicable in assessment of damages, and specifically that it did not rely on comparable awards made in the past, despite case law being placed before it. *Mohamed Mahmoud Jabane vs Highstone Butty Tongoi Olenja* [1986] eKLR (Kneller, Hancox & Nyarangi, JJA) and *Odinga Jactone Ouma Odera* [2016] eKLR are cited to support that proposition. It is submitted that the award made of general damages, at Kshs 500, 000.00, was too high, and *Joseph Mwendwa Kuti & 2 others vs Ibrahim Kunyaga* [2020] eKLR (Ougo, J), *Entertainer Trucks Company Limited vs George Karanja Maina* [2020] eKLR (T Matheka, J) and *Elizabeth Wamboi Gichoni vs JOO (minor suing through mother and next friend) VAA* [2019] eKLR (Aburili, J) are cited to submit that an award of Kshs 200, 000.00 would have sufficed. On future medical expenses, it is submitted that the sum of Kshs 300, 000.00 awarded was not supported by the available evidence. *Tracom Limited & another vs Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA) is cited to support the position that future medical expenses were in the nature of a special damage or loss, and it was trite that the same ought to be specifically pleaded and specifically proved. It is submitted that the award of Kshs 300, 000.00 was against the evidence tendered, for the medico-legal report only talked of Kshs 30, 000.00. The respondent submits that the awards by the trial court be upheld, as the amounts were not inordinately high nor excessive.
6. On general damages, the injuries pleaded in the plaint were a mild head injury with brief loss of consciousness for some hours, cut wound on the mid-forehead, traumatic uprooting of 1 tooth, and lacerations on both elbows, knees and lateral right ankle. The said injuries were lifted word for word from the medico-legal report by Dr JC Sokobe, dated January 29, 2020, which was put in evidence. The doctor did not testify. In his written submissions, the respondent cited *Telkom Orange Kenya Limited vs IOS Minor suing through his next friend and mother IN* [2018] eKLR (Majanja, J), where the plaintiff had sustained head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars on the left tempo-parietal area and bruises on the left leg, and the High Court awarded Kshs 500, 000.00 for pain and suffering, down from the Kshs 950, 000.00 that the trial court had awarded; and *GA (Minor suing thro' her father and next friend BZ) vs Paul Muthiku* [2020] eKLR (PJ Otieno, J), where the plaintiff had sustained multiple comminuted fractures of the frontal left orbital roof, right temporal bones or petrous, bleeding into the skull airspaces or haemosinus, and cuts on the front of the head and the chin, and an award by the trial court, of Kshs 300, 000.00, was enhanced to Kshs 500, 000.00. The appellant did not cite case law on general damages. The trial court did not review case law, to guide it in arriving at an appropriate compensation for pain and suffering, and the figure of Kshs 500, 000.00 appears to have been plucked from the air.
7. Other than the uprooting of the tooth, the respondent largely sustained soft tissue injuries, and an award of Kshs 500, 000.00 was on the higher side. The injuries sustained in *Entertainer Trucks Company Limited vs George Karanja Maina* [2020] eKLR (T Matheka, J) and *Elizabeth Wamboi Gichoni vs JOO (minor suing through mother and next friend) VAA* [2019] eKLR (Aburili, J) are comparable, and the awards made in the 2 cases are a useful guide. The trial court should have awarded nothing more than Kshs 250, 000.00 therefor.
8. On future medical expenses, I believe that there was an error, for, in the body of the judgment, the trial court had noted that the figure of Kshs 30, 000.00 was what was cited in the medico-legal report, but in the final orders the figure was enhanced to Kshs 300, 000.00. Even then the future medical expanses of



Kshs 30, 000.00, or Kshs 300, 000.00, were not pleaded in the plaint. Such expenses, as noted above, are in the nature of special damage, and it is trite that they ought to be specifically pleaded and specifically proved. See *Tracom Limited & another vs. Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA) and *Ibrahim Ndung'u Gikonyo vs Geoffrey Nyamweya Omae* [2021] eKLR (Chepkwony, J). The award in respect of future medical expenses ought not have been made.

9. The issue of the special damages pleaded has also come to my attention. The appellant asks that it be retained as it is. However, it would be important to set out the law. I repeat, it is trite that special damage is specifically pleaded and specifically proved. See *Agroline Hauliers Limited & another vs Michael Abongo Kisemba* Migori HCCA No 6 of 2015 (Majanja, J). The amount pleaded in the plaint is Kshs 6, 550.00, but the amount proved was Kshs 7, 700.00, and that was the amount the court awarded. That was wrong in principle. Parties are bound by their pleadings. The respondent pleaded a special loss or damage of Kshs 6, 550.00. He was entitled to nothing more than what he pleaded, Kshs 6, 550.00, even where he proved a much higher loss or damage. An award of an amount higher than what is specifically pleaded would amount to unjust enrichment.
10. In view of everything, I shall allow the appeal on the following terms:
 - a. General damages are hereby reduced to Kshs 250, 000.00;
 - b. The award of future medical expenses, at Kshs 300, 000.00, is set aside;
 - c. Special damages are reduced to Kshs 6, 550.00; and
 - d. Each party to bear their own costs.
11. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 17TH DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Menezes, instructed by LG Menezes & Company, Advocates for the appellant.

Mr. Mukisu, instructed by Mukisu & Company, Advocates for the respondent.

