



**Pride Kings Security v Ekaalet (Civil Appeal E009 of 2022)
[2023] KEHC 20284 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E009 OF 2022
WM MUSYOKA, J
JULY 17, 2023**

BETWEEN

PRIDE KINGS SECURITY APPELLANT

AND

PAUL EKAALLET 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. 55 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, where 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 968, 500.00, being Kshs 750,000.00 for general damages, Kshs 200,000.00 for future medical expenses, and Kshs 18, 500.00 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, which revolve around the award of damages, on the basis that they 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 award of general damages, at Kshs 750, 000.00 was too high, and cites *Third Engineering Bureau China Construction Group Limited vs Edwin Kinanga Atuya* [2021] eKLR (Ougo, J) and *Lyaka Mwombe vs Francis Namatsi & 2 others* [2019] eKLR (Musyoka, J), to submit that an award of Kshs 300, 000.00 would have sufficed. On future medical expenses, it is submitted that the sum of Kshs 200, 000.00 was not pleaded, and so there was no basis for the award. *Provincial Insurance Company EA Limited vs Mordechai Mwanga Nandwa* Kisumu CA No 179 of 1995 is cited to support that contention. The respondent submit 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, deep lacerations on the occipital scalp, lacerations on the left elbow posteriorly, bruises on the right knee anteriorly and an open fracture of the right tibia and fibula. The said injuries were lifted word for word from the medical 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 *DG (minor suing through her next friend MOR) vs. Richard Otieno Onyisi* [2021] eKLR (Ndung'u, J), where the plaintiff had sustained multiple fractures and soft tissue injuries, and the High Court awarded Kshs. 400, 000.00 for pain and suffering, up from the Kshs. 350, 000.00 that the trial court had proposed. He also relied on *Hussein Dairy Limited & another vs. Asba Moteo Athman & 3 others* [2021] eKLR (Chepkwony, J), where the plaintiff had sustained contusions to the scalp, jaw and chest, and a fracture of the femur bone, which was operated on and a nail and screw fixed. There was a shortening of the affected leg, and permanent incapacity was assessed at 5%. The award by the trial court, of Kshs. 600, 000.00, was enhanced to Kshs. 1, 600, 000.00. The appellant relied on *Lyaka Mwombe vs. Francis Namtsi & 2 others* [2019] eKLR (Musyoka, J), where an award of Kshs. 300, 000.00 was upheld, for a cut wound on the anterior aspect of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula, and a cut wound on the face; and *Edwin Otieno Japaso vs. Easy Coach Bus Company Limited* [2016] eKLR (Majanja, J), where Kshs. 500, 000.00 was awarded for fracture dislocation of the right little finger, soft tissue injuries to the chest, dislocation of the right hip with fracture of the acetabulum, fracture of the pelvis involving both the superior and inferior pubic rami bilaterally, lacerated cut wound on the anterior left leg and lacerated wound on the anterior right leg. The trial court did not review case law, to guide it in arriving at an appropriate compensation for pain and suffering, and there is a sense that the figure of Kshs. 750, 000.00 was plucked from the air.
7. Looking at the authorities cited before the trial court, which I have recited above, and those cited before me, there is no doubt that the award of Kshs 750, 000.00 was inordinately high and excessive. An award of Kshs 450, 000.00 would have been more appropriate.
8. On future medical expenses, I note, from the plaint, that the same were not pleaded. Such expenses are in the nature of special damage, and it its trite that for special damages to be awarded, special damage must not only be specifically pleaded, it must equally be specifically proved. The law on future medical expenses is fairly straightforward and clear, future medical expenses must be pleaded. Where the same are not pleaded, they are not available. *Tracom Limited & another vs. Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA) is the law on that. See also *Ibrahim Ndung'u Gikonyo vs. Geoffrey Nyamweya Omae* [2021] eKLR (Chepkwony, J).



9. The respondent had the medical report by Dr. Sokobe, dated January 29, 2020, when he filed his plaint in court on February 2, 2020. The future medical expenses are mentioned in that medico-legal report. They ought to have been pleaded in the plaint. The respondent testified on May 25, 2021, there was time before then, to have the plaint amended, so that there was a specific pleading of the future medical expenses. I agree, that the future medical expenses were specifically proved through the medico-legal report of Dr. Sokobe, but the fact remains that those expenses had not been specifically pleaded. The respondent specifically proved special damages that he had not specifically pleaded. Without the specific pleading of those future medical expenses, the specific proof of them did not help. As they were not pleaded specifically, they were not available for awarding.
10. The issue of the special damages pleaded has also come to my attention. The appellant has not bothered to submit on them, perhaps because the amount affected is negligible, although it did submit on it at trial. However, it would be important to set out the law. I repeat, it is trite that special damage is specifically pleaded and specifically proved. The amount pleaded in the plaint is Kshs 18, 220.00, but the amount proved was Kshs 18, 500.00, 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 18, 220.00. He was entitled to nothing more than what he pleaded, Kshs 18, 220.00, even where he proved a much higher loss or damage.
11. In view of everything, I shall allow the appeal on the following terms:
 - a. General damages are hereby reduced to Kshs 450, 000.00;
 - b. The award of future medical expenses, at Kshs 200, 000.00, is set aside;
 - c. Special damages are reduced to Kshs 18, 220.00; and
 - d. Each party to bear their own costs.
12. 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.

