



REPUBLIC OF KENYA



**KENYA LAW**  
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**Anyumba & 2 others v Chepkwony (Civil Appeal 7 of 2020)  
[2023] KEHC 24459 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24459 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL 7 OF 2020  
RL KORIR, J  
OCTOBER 17, 2023**

**BETWEEN**

**BENARD OCHIENG ANYUMBA ..... 1<sup>ST</sup> APPELLANT**

**ESTHER C. KENDUIYO ..... 2<sup>ND</sup> APPELLANT**

**JOHANA K. LANGAT ..... 3<sup>RD</sup> APPELLANT**

**AND**

**GEOFFREY CHEPKWONY ..... RESPONDENT**

*(Being an Appeal from the Judgment of Honourable E. Muleka (PM) dated 23rd April 2020 in the Principal Magistrate's Court at Sotik, Civil Suit Number 182 of 2018)*

**JUDGMENT**

1. The Plaintiff (now Respondent) sued the Defendants (now Appellants) for General and Special Damages arising out of an accident that occurred on 7th July 2018 between Motor Vehicle Registration Number KAB 845Z driven by the 1st Appellant and co-owned by the 2nd and 3rd Appellant and Motor Cycle Registration Number KMDG 442K that was under the control of the Respondent.
2. In its Judgement delivered on 23rd April 2020, the trial court awarded the Plaintiff (now Respondent) Kshs 247,600/= plus costs and interest of the suit.
3. Being dissatisfied with the Judgment of the trial court, the Defendants/Appellants appealed to this court through the Memorandum of Appeal dated 3rd July 2020 and raised the following grounds: -
  - I. The learned trial Magistrate erred in law and in fact in relying on extraneous evidence and thereby arriving at an erroneous conclusion condemning the Defendant to general damages of Kshs 300,000/= which was manifestly excessive in the circumstances.



- II. The learned trial Magistrate erred in law and in fact in failing to appreciate the impeccable defence of the Defendant and thereby arriving at a wrong and erroneous conclusion condemning the Defendant to special damages of Kshs 7,600/= without concrete documentary evidence.
  - III. The learned trial Magistrate erred in law and in fact in failing to appreciate the impeccable defence of the Defendant thereby arriving at a wrong and erroneous conclusion condemning the Defendant to net damages of Kshs 247,600/=.
  - IV. The learned trial Magistrate erred in law and in fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
  - V. The learned trial Magistrate erred in law and in fact in failing to appreciate as follows: -
    - i. That the plaintiff's pleadings and evidence tendered in support thereof was incapable of sustaining the excessive award of damages.
  - VI. The learned trial Magistrate erred in law and in fact in entering Judgment in favour of the Plaintiff against the Defendant in spite of the Plaintiff's miserable failure to establish his case more especially on quantum.
  - VII. The learned trial Magistrate erred in law and in fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.
4. The Appellant prayed that this court set aside the trial court's Judgment and the appeal be allowed with costs.
  5. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The Court of Appeal in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR*, stated that: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way

### **The Plaintiff's/Respondent's Case**

6. Through a Plaint dated 15th October 2018, the Plaintiff/Respondent stated that he was involved in a road accident on 7<sup>th</sup> July 2018 between Motor Cycle Registration Number KMDG 442K where he was a pillion passenger and Motor Vehicle Registration Number KAB 845Z which was driven by the 1st Appellant.
7. It was the Respondent's case that the 1st Appellant was negligent in causing the accident. The particulars of the negligence were set out in paragraph 6 of the Plaint.
8. That as a result of the accident, he suffered the following injuries: -
  - a. Deep cut wound on the left temporal region.
  - b. Deep cut wound on the right leg leading to soft tissue injuries.



9. The Respondent prayed for Special and General Damages against the Appellants.

### **The Defendants/Appellants' Case**

10. Through their joint Statement of Defence dated 19th November 2018, the Defendants (now Appellants) denied the occurrence of the accident on 7<sup>th</sup> July 2018 involving Motor Cycle Registration Number KMDG 442K and Motor Vehicle Registration Number KAB 845Z. The Appellants further denied being the driver and owners of Motor Vehicle Registration Number KAB 845Z.
11. It was the Appellants' case that if the accident occurred then it was caused by the negligence and carelessness of the Respondent who was the rider of the Motor Cycle registration number KMDG 442K. The particulars of negligence of the Respondent were contained in paragraph 5 of the Defence.
12. The Appellants stated that the Respondent did not suffer any injuries and was therefore not entitled to any damages, whether general or special.
13. Following this court's directions on 12th October 2022, the Appeal was canvassed through written submissions.

### **The Appellants' Written Submissions**

14. In their written submissions dated 14th December 2022, the Appellants submitted that they had agreed liability to be in the ratio of 80:20 in favour of the Plaintiff (now Respondent).
15. It was the Appellants' submission that the medical report relied upon by the Respondent revealed that the Respondent suffered deep cut wounds on the left temporal region and on the right leg and that the injuries were classified as harm with no permanent disability assessed. That the soft tissue injuries suffered by the Respondent often heal without specialized treatment. It was the Appellant's further submission that there was no documentation to show that the Respondent went back for treatment after he had been discharged.
16. The Appellants submitted that the award of Kshs 300,000/= was inordinately high with respect to the injuries suffered by the Respondent. That an award of Kshs 90,000/= would suffice in their opinion. They relied on *Nyambati Nyaswabu Erick vs Toyota Kenya Ltd (2019) eKLR* and *West Kenya Sugar Co. Ltd vs Stephen Nasiali Nyifu (2019) eKLR*.
17. It was the Appellants' submission that an award for damages was not meant to enrich the victim but was meant to compensate him for the injuries suffered. It was their further submission that the award should be as near as possible to awards given to similar injuries.
18. With regard to special damages, the Appellants submitted that they needed to be specifically pleaded and strictly proved. They urged the court to only award what had been proved by production of receipts.

### **The Respondent's Written Submissions.**

19. In his written submissions dated 24<sup>th</sup> April 2023, the Respondent submitted that the trial Magistrate's finding on quantum was reasonable, just, fair, adequate, commensurate and comparable to similar injuries. He further submitted that in assessing general damages, courts are usually guided by compensation from similar injuries. He relied on *John Kipkemboi & Another vs Morris Kedolo (2019) eKLR*.



20. It was the Respondent's submission that a court could interfere with an award of damages if it was convinced that the trial court acted upon some wrong principles of law or took into account an irrelevant factor or left out a relevant factor. He relied on *Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini vs AM Lubia and Olive Lubia (1982-88) 1KAR 727* and *Gicheru vs Morton and Another (2005) 2 KLR 333*.
21. The Respondent submitted that after suffering the injuries stated in the Complaint, he went to A.I.C Litein Hospital where he was treated and discharged. That he produced treatment notes, a P3 form and a Medical Report dated 11th September 2018 as evidence. The Respondent further submitted that they recorded a consent on liability in the ratio of 80:20 in his favour. That all the evidence adduced in court left no doubt as to the extent and degree of the Respondent's injuries which caused him pain, suffering and consequently led to the loss of earning capacity.
22. It was the Respondent's submission that the award of Kshs 300,000/= for the injuries he suffered was just, fair, adequate and commensurate. He relied on *Equity Bank Kenya Ltd & 2 others vs David Githuu Kuria (2020) eKLR*.
23. Regarding special damages, he submitted that she produced receipts to prove payment of the Kshs 7,600/= she claimed as special damages.
24. I have considered the Record of Appeal dated 10<sup>th</sup> August 2020, the Supplementary Record of Appeal dated 15th February 2022 the Appellants' Written Submissions dated 14<sup>th</sup> December 2022 and the Respondent's Written Submissions dated 24<sup>th</sup> April 2023. I find that the only issue for my determination was whether the award of Kshs 247,600/= was appropriate.
25. This is one of the sister Appeals brought before this court for determination. They are the present Appeal, Bomet High Court Civil Appeal No. 5 of 2020 and Bomet High Court Civil Appeal No. 6 of 2020. They arose from sister civil suits at the Principal Magistrate's Court in Sotik being Sotik Principal Magistrate's Court, Civil Suit Number 180 of 2018 – Joshua Kiplangat Towett vs Benard Ochieng Anyumba and 2 others, Sotik Principal Magistrate's Court, Civil Suit Number 181 of 2018 – Nelly Cherono Towett vs Benard Ochieng Anyumba and 2 others and Sotik Principal Magistrate's Court, Civil Suit Number 182 of 2018 – Geoffrey Chepkwony vs Benard Ochieng Anyumba and 2 others.
26. For the present Appeal, on 18th February 2020, parties entered into a consent on liability in the ratio of 80:20 in favour of the Respondent and the same was adopted as an order of the court. My task is therefore limited to the determination of the quantum payable.

### **General Damages**

27. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 of the *Evidence Act* provide as follows:-
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
28. In determining the general damages awardable to the Respondent, the court has to examine the extent and gravity of the injuries suffered by the Respondent. The Respondent stated that he had suffered deep cut wounds on the left temporal region and on the right leg. The Medical Report by Dr. Obed Omuoyoma dated 11th September 2018 was produced by consent and was marked as P.Exh 8. The



Respondent was examined on 11th September 2018 and found that he had suffered a deep cut wound on the left temporal region and a deep cut wound on his right leg.

29. Based on the Medical Report (P.Exh 8), I am satisfied that the Respondent suffered from deep cut wounds on his left temporal region and on his right leg.

30. In the case of Stanley Maore vs Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 (2004)eKLR, the Court of Appeal stated that:-

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

31. I am also persuaded by the decision in Civil Holdings Co. Ltd v Hellen Anyango Okeyo & another (2020) eKLR, where Ougo J. held that:-

“Awards in general damages vary however in considering the award the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. Further in assessing damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards noting that no two cases are exactly alike....”

32. The injuries suffered by the Respondent were soft tissue injuries. I have found the following cases quite helpful in terms of comparison: -

I. In Godwin Ireri vs Francline Gitonga (2018) eKLR, the Plaintiff was awarded KShs.90,000/= for injuries involving two cuts on the forehead, cuts on the scalp to the occipital region, bruises on the left ankle and bruises on the right knee.

II. In Buds and Bloom Ltd vs Lawrence Emusugut Obwa (2016) eKLR, the lower court had awarded Kshs. 70,000/= for a deep cut wound on the left leg and soft tissue injuries on the leg. The High court reduced the award to Kshs. 50,000/=.

III. In Nyambati Nyaswabu Erick Vs Toyota Kenya Limited & 2 others (2019) eKLR, the High Court set aside an award of Kshs. 55,000/= for a deep cut on the scalp extending to the maxillary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs and substituted it with one of Kshs. 90,000/=.

33. The Court of Appeal in Kemfro Africa Ltd t/a Meru Express & Another vs A.M. Lubia & Another (No.2) (1987)) KLR 30 that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”

34. Guided by the case law above and the injuries suffered by the Respondent, I find that the Kshs 300,000/= awarded as General Damages by the trial court as excessive and not commensurate with the injuries suffered. Consequently, I set aside the award of Kshs 300,000/= and substitute it with an award of Kshs 120,000/=.



35. It is trite law that Special Damages ought to be specifically pleaded. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* (1992) KLR 177 stated that:-

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

36. The Respondent particularized the Special Damages as follows: -

Medical Report Kshs 3,000/=

Motor Vehicle Search Kshs 550/=

Medical Expenses Kshs 4,050/=

Future Medical Expenses

37. The Respondent produced a receipt marked as P.Exh 4 (b) which indicated that he had paid Kshs 3,000/= for the Medical Report and a receipt marked as P.Exh 7(b) which indicated that he had paid Kshs 550/= for the Motor Vehicle Search. The Respondent also attached a bundle of receipts to support his claim for medical expenses. The cumulative sum of the money that he paid to the hospital was Kshs 4,050/=. I am therefore satisfied with the trial court’s award of Kshs 7,600/= for special damages.

38. The Respondent had also prayed for future medical expenses. A prayer for future medical expense is not an ordinary prayer that a court can grant in its discretion but it is a special award that must be pleaded specifically and proved. In the case of *Tracom Limited & another vs Hassan Mohamed Adan* (2009) eKLR, the Court of Appeal stated: -

“...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 vs. Gituma* (2004) 1 EA 91, this Court, stated:

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“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...”

39. In the present case, the Respondent pleaded but was not specific with the amount of money he needed for the future expense. Additionally, he did not lead any evidence to suggest or indicate the amount needed. This prayer therefore fails as this particular expense was neither specifically pleaded nor proved.
40. The General Damages of Kshs 120,000 less 20% contribution by the Respondent comes to Kshs 96,000/=.
41. The summation of the Special Damages is Kshs 7,600/=
42. In the final calculation, the summation of the General and Special Damages awarded is Kshs 103,600/=.
43. In the end, the Memorandum of Appeal dated 3rd July 2020 succeeds as the Damages awarded to the Respondent are reduced from Kshs 247,600/= to one hundred and three thousand six hundred shillings (Kshs 103,600/=.)
44. The Appellant is awarded half the costs of the Appeal while the Respondent shall have costs of the suit and interest thereof as awarded by the trial court.
45. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 17TH DAY OF OCTOBER, 2023**

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**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the absences of Mose & Mose for the Appellant, Kebongo & Co. for the Respondent.  
Siele (Court Assistant)

