



**China Wuyi Company Limited v EK (Suing through EKN being Father and Next Friend)
(Civil Appeal 47 of 2023) [2024] KEHC 13489 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 47 OF 2023
JRA WANANDA, J
NOVEMBER 6, 2024**

BETWEEN

CHINA WUYI COMPANY LIMITED APPELLANT

AND

EK RESPONDENT

SUING THROUGH EKN BEING FATHER AND NEXT FRIEND

JUDGMENT

1. This Appeal arises from the Judgement delivered on 3/03/2023 in Eldoret Chief Magistrate’s Court Case No. E448 of 2021 in which the Respondent (as the Plaintiff) was awarded damages, interest and costs against the Appellant for personal injury.
2. The background of the case is that by the Plaint filed through Messrs Bundotich Korir & Co Advocates on 8/06/2021, the Respondent (minor suing through his father) pleaded that on 15/11/2020, he fell into a quarry crater/pit which had been dug and left open by the Appellant at a place known as Lemook, Kapsaret within Uasin Gishu County, that the Appellant negligently left the crater open after excavating it and harvesting murrum for the construction of the Eldoret bypass. The Respondent averred that as a result of the accident, the Respondent sustained serious injuries, namely, fracture of the right tibia and fibula and soft tissue injuries. He also sought special damages for medical expenses and other related costs incurred. He also prayed for a sum of Kshs 150,000/- on account of future treatment for removal of implants.
3. The Appellant, through the firm of J.C. Chumba & Co. Advocates filed its Statement of Defence on 16/09/2021, basically denying the claim. This was after interlocutory Judgment had been earlier entered but subsequently set aside by consent.



4. The matter then proceeded for trial in which 3 witnesses testified on behalf of the Respondent while the Appellant called 1 witness. After the hearing, the trial Court delivered its Judgment on 3/03/2023. The same was in favour of the Respondent and in the following terms:

i)	Liability at 100% against the Appellant	
ii)	Special damages	Kshs 337,000/-
iii)	Future medical expenses	Kshs 150,000/-
iv)	General damages	Kshs 800,000/-
	Total	Kshs 1,287,000/-

Respondent's (Plaintiff) evidence before the trial Court

5. PW1, Dr. Joseph Sokobe testified that he examined the Plaintiff on 2/06/2021. He produced his Medical Report and stated that he was paid Kshs 6,000/- for the same. He also produced the Receipt. In cross-examination, he stated that the Plaintiff was injured on 15/11/2020 and that the Plaintiff would require Kshs 150,000/- for removal of plates and screws but conceded that the Plaintiff must have recovered.
6. PW2 was the Plaintiff's father, EKN. He adopted his Witness Statement and testified that the Plaintiff was 17 years old (at the time that he testified). He testified that the Respondent was treated at Racecourse Hospital and produced medical and/or treatment notes, invoices and receipts.
7. PW3 was the Respondent (minor) EK. He testified that he was a student, that he suffered the fracture of the leg on 15/11/2020 when he was herding cows and fell into a ditch. He stated that the ditch was a hole excavated by the Appellant and that the ditch had no barrier around it. In cross-examination, he stated that the ditch was on their land, and not his aunt's land. When shown a photograph of the scene, he conceded that there was a barbed wire around the ditch but he claimed that he was walking along the pavement. Regarding travelling for medical check-up, he stated that they used to go by public means.
8. PW2, the Respondent's father was later recalled, upon which he produced Receipts from "Wasili Cabs". In cross-examination, he stated that the accident was reported to the Appellant after 1 month, that the Respondent was herding cows on his (PW2) land on which he shares a boundary with his (PW2) sister's land. He stated that between the fence and the edge of the quarry is a distance of 3 metres, that the quarry had remained open for 1 year and that he was aware of it. He conceded that there is a sign showing that the path is not passable, and stated that his homestead is 500 metres away. He further conceded that the cab Receipts do not show the dates when he used the cabs, that they live about 15 kms from the hospital and that he used to spend Kshs 5,000 - 6,000/-. He also stated that a nurse by the name Vivian from Kapteldon Hospital, would sometimes come to their home to take care of the Respondent and which she did for 2 months. He also stated that the Appellant was supposed to fence the quarry but that there was no wire around the fence, that the excavation was made about 15 months before the incident and that he incurred Kshs 600,000/- for medical treatment. In re-examination, he stated that there was an agreement with the Appellant that the Appellant would rehabilitate the site by backfilling the soil but that the same was never done and that no warning sign was placed.



Appellant's (Defendant) evidence before the trial Court

9. DW1 was one Linda Yano. She adopted her Witness Statement and testified that she is a social environmentalist. She stated that the Insurance company investigated the matter and she produced photographs which, according to her, showed the spot where the Respondent fell down and also showed that there was a fence around the area which was intact when they visited the site to investigate. She stated that the distance between the fence and the cliff is approximately ½ metre and that it is not therefore practical to drive cattle along the cliff and therefore blamed the Respondent. She insisted that the quarry is fenced off and that the wire is on the road and submitted that they placed warning signs, one at the entrance and one at the concerned parcel and that there was no through-way. She also insisted that the Appellant conducted road shows in which it sensitised members of the public on safety near their sites. She contended that the Plaintiff lives 8 km away from the hospital and denied that the Appellant was in breach of contract. She maintained that there was no contract to backfill the excavation and submitted that the contract was an ongoing one. Regarding the cab charges, she claimed that taxi charges was Kshs 150/- per km.
10. In cross-examination, she stated that the fencing was done before the excavation and was made of wooden posts and barbed wire. She conceded that a young child could go through the spaces but insisted that not one of the age of the Plaintiff. She stated that it is the neighbours told them what had happened but conceded that they had not called any of them as a witness. She also agreed that the photographs did not show any warnings but maintained that no wall could have prevented the accident. In re-examination, she stated that it is the duty of parents to take care of their children. She insisted that the space between the barbed wires was 2 feet and maintained that it was not possible to avoid creating a cliff while excavating.

Appeal

11. Aggrieved by the trial Court's said Judgment, the Appellant filed this Appeal on 20/03/2023. In the unnecessarily lengthy and verbose Memorandum of Appeal sounding more like Submissions, rather than grounds of Appeal, the following 8 grounds were cited:
 - i. That the learned trial Magistrate erred in law, equity and fact in holding that the Appellant was 100% liable for the injuries suffered by the Respondent, hence arriving at a decision against the overwhelming evidence tendered in Court, including the Respondent's own testimony that he had jumped or crossed the barbed wire fence before falling into the burrow pit.
 - ii. That the learned Principal Magistrate erred in law, equity and fact in awarding general damages that was inordinately high as to represent an entirely erroneous estimate that resulted to unjust and unfair decision against the Appellant.
 - iii. That the Learned Principal Magistrate erred in law, equity and fact in awarding special damages, inordinately higher than what was pleaded in the Plaint and relying on an invoice hence offending the principle of laws that special damages must be specifically pleaded and proved.
 - iv. That the Learned Principal Magistrate erred in law, equity and fact in awarding future medical damages without any medical proof, records or evidence.
 - v. That the Learned Principal Magistrate erred both in law and fact in failing to consider the Appellant's defence, evidence, tendered in Court by the Appellant's or submissions, hence



failing to consider the various critical issues raised by the Appellant and as such, arriving at unjust and unfair decision against the Appellant.

- vi. That the Learned Principal Magistrate erred both in law and fact and ended up awarding excessive general damages of Kenya Shillings Eight Hundred Thousand (Kes 800,000/=) and failing to consider the award of damages in light of injuries sustained and to the fact that the Respondent had fully recovered. The award of damages is not meant to enrich the victim but to compensate such victim for injuries sustained.
- vii. That the Learned Principal Magistrate erred in law, equity and fact by being biased against the Appellant/Defendant and favouring the Respondent/Plaintiff hence occasioning miscarriage of justice.
- viii. That the Learned Principal Magistrate in law, equity and fact by awarding costs of the suit to the Plaintiff.

Hearing of the Appeal

12. The Appeal was then canvassed by way of written Submissions. The Appellants' Submissions was filed on 12/09/2023 while the Respondent his filed earlier on 11/08/2023.

Appellant's Submissions

13. Counsel for the Appellant submitted that pursuant to a Lease Agreement made between the Appellant and the Respondent's father, the Appellant took possession of, fenced off the 2-acre land and extracted murram for construction of the Eldoret bypass road. Regarding liability, he submitted that the Respondent who was 15 years old, left his home, about 500 metres away from the site, jumped or went through the barbed wire fence into the Appellant's property where the burrow pit existed, walked on the pavement and fell into the pit and that his actions were voluntarily, obstinate and self-willed. She added that the excavated area measuring 2-acre land was wide and conspicuous, that the accident occurred during the day, that the Appellant had taken all the safety measures to ensure the place was safe and secure. She submitted further that the Appellant had fenced the area, erected a wooden barrier with a cross sign indicating no through way, carried out public awareness campaigns in schools and markets and restricted the place from the public prior to commencing the excavation but that the Respondent, against all odds, accessed the area from his father's farm, by defying security and safety measures.
14. According to Counsel, the Respondent could not feign ignorance as the excavated area was wide enough to be seen from far, that the narrative that the Plaintiff was tending his father's cattle is superfluous, that the exhibits produced by the Appellant, which the Respondent accepted to be genuine, proved existence of a barbed wire perimeter fence which prevented any entry. Counsel pleaded further that the distance between the barbed wire and the burrow was ½ metre or 2 feet, proving that no cow could graze within such limited space and also no vegetation could exist on its environs as the whole area was covered with soil and rocks. She contended that to hold the Appellant 100% liable meant that the Appellant had full control and management of the Respondent (minor) which was not the case, that the Respondent is a free willed person with the power to decide and act as he wills and that his decision to breach the rules of safety and expose himself to danger was obstinate, voluntary and self-willed. She also contended that the trial Court erred by holding that the allegation of negligence was not rebutted by the Defence yet the Appellant denied and rebutted all such allegations through DW1 and also through the Respondent's admission of having jumped or gone through the fence.
15. In respect to special damages, Counsel submitted that special damages must be specifically pleaded and proved, and that no new evidence can be introduced in appeal, and that the Learned Magistrate



rightly dismissed the claim for home care for Kshs 125,000/- but wrongly entered judgment for medical expenses and Kshs 150,000/- for future medical expenditure that were not pleaded in the Plaint. She pointed out that the Respondent filed a Supplementary Record of Appeal and introduced an updated Plaint with different figures. She also contended that no receipt or evidence was tendered to demonstrate how the figure of Kshs 302,000/- was incurred, and that the Learned Magistrate erred in relying on an invoice yet an invoice is not proof of payment. According to her, what was pleaded and proved was Kshs 6,000/- for medical report, Kshs 19,143/- for medical expenses and Kshs 11,600/- for car hire (5 kms by cab at a distance of 7.5 kms, and that besides, the Plaintiff testified that they used public means to travel to hospital) totalling Kshs 45,143/-.

16. In respect to the award of general damages at Kshs 800,000/-, Counsel testified that the Respondent healed well without any permanent disability. She contended that the guiding principle in assessment of damages is that an award must reflect the trend of previous recent and comparable awards. She then suggested an award of Kshs 400,000/- as being sufficient.
17. Counsel also complained that the lower Court ignored and/or disregarded the defence evidence and held that the Respondent's evidence was not rebutted yet the Appellant's witness testified and produced exhibits. She contended that the trial Court erred in shifting blame to the Appellant.

Respondent's Submissions

18. Counsel for the Appellant submitted that it is not in dispute that the crater/pit was dug by the Appellant as this was confirmed by DW1, that the Learned Magistrate faulted the Appellant for failing to refill the crater to avert accidents and for failure to fence it off, that the Learned Magistrate arrived at the right conclusions in view of the fact that the Appellant owed a duty of care to the Respondent. He cited the case of *Mwangi v Wambugu* (1984) KLR 453 on the principle that an appellate Court will not normally interfere with a finding of fact by the trial Court. He submitted further that the Respondent relied on the doctrine of Occupier's Liability which is adequately answered by Section 3 of the Occupier's Liability Act which defines the scope of the duty of care that an occupier owes to visitors in his premises. He submitted further that since the occupier owes a duty of care generally, it does not matter whether the specific act is pleaded or not. She cited the case of *MNK (suing thru father and next friend) Patrick Kyalo Maundu v Joseph Mwaura*, Nrb HCCA No. 59 of 2011 [2017] eKLR, the case of *Soma Properties Limited v HAYM*, Nrb CA Civil Appeal No. 74 of 2005 [2015] eKLR and also the case of *Butt v Khan* (1981) 1 KLR 349.
19. In regard to general damages, Counsel submitted that 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 should be recalled that no two cases are exactly alike. He cited the case of *Stanley Maore v Geoffrey Mwenda*, Nyeri CA, Civil Appeal No. 147 of 2002 [2004] eKLR and also submitted that the Learned Magistrate awarded the sum of Kshs 800,000/- after relying on authorities where injuries were comparable to those suffered by the Respondent.
20. On special damages, he submitted that the Respondent produced an invoice for Kshs 302,000/- from Racecourse Hospital which had been endorsed with the words "paid". According to him therefore, the trial Magistrate did not err in awarding that amount. He cited the case of *Total (Kenya) Limited formerly Caltex Oil (Kenya) Ltd vs Janevams Limited* (2015) eKLR which, he submitted, was cited with approval in the case of *Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority* (2009) eKLR 720. He then denied the allegation that the special damages were not pleaded and submitted.



Determination

21. The duty of an appellate Court was set out in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze 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.”

22. In my view, the issues that arise for determination in this appeal are the following;

- i. Whether the finding of liability at 100% against the Appellant was justified.
- ii. Whether the awards of the sums of Kshs 800,000/- as general damages, Kshs 150,000/- as future medical expenses, and Kshs 337,000/- as special damages were justified.

23. I now proceed to analyse and determine the said issues.

i. Whether the finding of liability at 100% against the Appellant was justified

24. It is now settled that an appellate Court will only interfere with the conclusions and findings of facts of a trial Court if the same were not supported by evidence or were premised on wrong principles of law. This was the import of the holding in the case of *Mwangi V. Wambugu* (1984) KLR 453, where the Court of Appeal held, inter alia, as follows:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge’s finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

25. The cause of action herein being one of negligence and thus attracting an analysis of liability and which may as well, in turn, lead to a consideration of apportionment of liability. Connected to this is the fact that the Respondent was at the time of the incident, 15 years old and thus a minor. Considering that in its Defence, the Appellant attributed liability to the Respondent and also considering that generally, minors are rarely held to be contributorily negligent, I will first consider whether in this case, the Respondent could lawfully be found to have been negligent, either in full or contributorily. In respect to this issue, I refer to the case of *Bottorff v. South Construction Company*, 184 Ind. 221, 110 N.E. 977 (1915), where the Indiana Supreme Court stated the following:

“It has been laid down by law writers and the courts that the time of infancy is divided into three distinct periods, during each of which different presumptions prevail; the first period is that up to the age of seven years, during which the infant is conclusively presumed to be incapable of understanding the nature of crime and can in no way be held responsible therefor; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act. The third period is after the age of fourteen years when the infant is presumed to be



capable of committing a crime and can be held the same as an adult. It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases.” [emphasis mine]

26. In view of the foregoing, being 15 years old at the time of the incident, the Respondent was way above the description of a child of “tender years”. He was therefore in the third category described above, namely, after the age of 14 years at which age he was presumed to be capable of being treated as an adult for the purposes of determining negligence.
27. Having found as above, I note that the Respondent has submitted that its case was based on the provisions of the Occupiers Liability Act. Section 3 of that Act provides as follows:
- “(1) An occupier of premises owes the said duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
- (2) For the purposes of this Act, ‘the common duty of care’ is duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
- (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases –
- a. an occupier must be prepared for children to be less careful than adults, and
- b. an occupier may expect that a person, in the exercise of his calling will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
- (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) -
- (a) where damage is caused to a visitor by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe;
- (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
- (5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question



whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

- (6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.”

28. In this case, it is not in dispute that the Appellant was in possession or occupation of the 2 acre-piece of land in question and had excavated it and extracted murrum for construction of the Eldoret bypass road. The Respondent was 15 years old boy who lived about 500 metres away from the site. From the evidence on record, it is clear that the excavated area was wide and conspicuous and that the accident occurred during the day. The evidence on record is that the Appellant had fenced off the area using wooden posts and barbed wire as seen from the photographs supplied. On this fact, I find that the Respondent and his father was untruthful insofar as he tried to mislead the Court by advancing the narrative that there was no fence.
29. The evidence on record also indicates that the Appellant had placed a cross sign indicating that there was no way or access through the site. The Appellant’s witness testimony that the Appellant carried out public awareness campaigns in schools and markets and restricted the place from the public prior to commencing the excavation is also not controverted. As contended by the Appellant, the narrative that the Respondent was tending his father’s cattle appears doubtful since the photographs showed the presence of a barbed wire perimeter fence which would have prevented any entry. The evidence also indicates that the distance between the barbed wire and the excavation was about ½ metre or 2 feet, thus disproving the Respondent’s theory that a herd of cows could graze within such limited space. Similarly, no vegetation existed on the environs of the excavation for the cows to feed on since the whole area was covered with soil and rocks.
30. Considering the above evidence of record, I am persuaded that the Appellant had, indeed, taken and/or put in place some safety measures to ensure the site was safe and secure.
31. Under the above circumstances, it is evident that the Respondent accessed the site by defying security and safety measures. It is clear to me that the Respondent inexplicably but voluntarily decided to breach the rules of safety and thus exposed himself to danger. It is evident that the Respondent either jumped over or forced himself through the fence.
32. In the case of Catherine Wangechi Wariahe (Suing as the Administratrix of the Estate of the late James Mwambiro Njeri) v Meridian Hotel Limited [2016] eKLR, Hon Lady Justice L. Njuguna very aptly analyzed the concept of occupier’s liability and also the doctrine of “volenti non fit injuria” and stated the follows:

“This provision imposes a duty of care on an occupier and proceeds to define the standard of care necessary to fulfill that duty. The words “reasonable” and “reasonably” used in the above extract emphasizes the standard of care expected of an occupier. It is a standard measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected. The standard of reasonableness is not one of perfection. The occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger.



As is the case with any tort, the party advancing the claim, bears the burden of proof the standard of which, is on a balance of probability. Section 3 aforesaid, does not create a presumption of negligence against the occupier of the premises whenever a person is injured on the premises. A Plaintiff who invokes that Section must still be able to point to some act or omission on the part of the occupier which caused the injury complained of, before liability can attach.

As Githinji JA observed in the Suma Properties Case, it is clear from Section 3(2) of the Act that from the definition, the common duty imposed by the Act is to take reasonable care in all the circumstances of the case to see that the visitor is reasonably safe. The Act neither imposes on the occupier, an absolute Common Duty of Care, nor guarantees a visitor absolute safety but the standard or degree of care depends on the facts of each case.

According to the evidence on record, the deceased was taking swimming lessons with the Defendant, he was an adult of sound mind and at the material time of the accident, he had held the session for that day for one hour with a life guard. The lifeguard on taking a lunch break had warned him from entering the swimming pool alone until he was back, which warning he ignored and entered the pool in total disregard of his own safety. In my view, the Defendant in providing a lifeguard to take care of the Defendant had taken reasonable care to ensure reasonable safety of the deceased. It is also on record that there are instructions on the pool side warning the pool users of the dangers of using the pool in the absence of a life guard.

On issue number two, counsel for the Defendant submitted that the doctrine of *volenti non fit injuria* is applicable as the deceased quietly moved into the pool making sure that the other swimmer did not hear and that he was not pushed into the deep end.

The general principles applicable to this defence were stated by the judicial committee in *Letang Vs Ottawa Electric Railway Company* in the following terms quoted from the judgment of Wills J in *Osborne Vs the London and North Western Railway Company*.

“If the defendant desires to succeed on the ground that the maxim *volenti non fit injuria*” is applicable they must obtain a finding of fact that the Plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.”

Volenti non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

Am of the view that the deceased knew the nature and the extent of the risk when he ventured into the swimming pool, in the absence of the lifeguard and took the risk to his own death.

33. That said, I however also note that that the evidence adduced by the Respondent and his father was that there was no signage around the trench dug by the Appellant warning of the danger that the trench posed. The Appellant did not controvert this allegation. In the circumstances, this is one omission that I find attributable to the Appellant. Although placing warnings would not necessarily block a determined intruder from forcefully accessing the site in the manner that the Respondent did, I believe it would have stressed the need for the public steer clear of the site. The fact that the Respondent



managed to easily access the site also indicates that the fencing may not have been adequate or was not sufficiently secured and may have fallen into a state of disrepair. The Appellant could also have hired a few security personnel to patrol the area and thus serve as a reminder to the public that the excavated site was a dangerous place to stray into and, where possible, they would also chase away intruders.

34. I therefore find that both the Appellant and the Respondent must shoulder blame, and equally so for that matter. For these reasons, I set aside the trial Court's finding of 100% liability and substitute the same with an apportionment of liability, equally at 50:50.

ii. Whether the awards for general damages, special damages and future medical expenses and/or the quantum assessed were justified

35. In *Kemfro Africa Limited t/a 'Meru Express Services [1976]' & Another V. Lubia & Another (No. 2) [1987]* KLR, the Court of Appeal held that:

.... The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that 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 damage."

36. This principle was reiterated in *Dilip Asal v Herma Muge & another [2001]* eKLR [2001] KLR as follows:

..... Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

37. An appellate Court will not therefore disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. For the appellate Court to interfere, it must be shown that the trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was unsupported.

38. In respect to "general damages", in this instant case, the Medical Report dated 2/06/2021 prepared by Dr. Sokobe described the injuries suffered by the Respondent as "fracture right tibia/fibula". The treatment administered was then listed as antibiotics, analgesics, open reduction and internal fixation and use of crutches. According to the Report, the Respondent still experienced occasional right leg pain and there are healed scars thereon. The doctor then stated that the Respondent sustained soft and bony (fracture) tissue injuries from which he has recovered and that he shall require further treatment (removal of implants at an estimated cost of Kshs 150,000/-).

39. On the mode of assessing damages, the Court of Appeal in the case of *Odinga Jacktone Ouma v Moureen Achieng Odera [2016]* eKLR stated that "comparable injuries should attract comparable awards". Similarly, in *Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014]* eKLR the Court of Appeal observed that:

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

40. In this instant case, the Appellant's Counsel submitted that the award of general damages at the sum of Kshs 800,000/- was excessive and inordinately high. He suggested that a sum not exceeding Kshs 400,000/- would have been sufficient. To establish comparable awards, I have perused various relatively



recent authorities in which the injuries suffered were similar or closer to those suffered herein. I have for instance, come across the following:

- a. *Ndwiga & Another v Mukimba (Civil Appeal E006 of 2022)* [2022] KEHC 11793 (KLR) (13 July 2022) (Judgment), where L. Njuguna J, on appeal, reduced an award of Kshs 1,200,000/- to Kshs 500,000/-.
- b. *Kiama v Mutiso (Civil Appeal 40 of 2023)* [2024] KEHC 5135 (KLR) (13 May 2024) (Judgment), where Sewe J, on appeal, reduced an award of Kshs 700,000/- to Kshs 400,000/-.
- c. DG (Minor suing through her next friend MOR v Richard Otieno Onyisi [2021] eKLR where A.K. Ndun’gu J, on appeal, enhanced an award of Kshs 350,000/- to Kshs 400,000/-.
- d. *Munene v Mbarire (Civil Appeal 488 of 2015)* [2023] KEHC 18417 (KLR) (Civ) (19 May 2023) (Judgment), where, J.N. Njagi J, on appeal, enhanced an award of Kshs 350,000/- to Kshs 450,000/-.

41. Using the above decisions as comparable awards, and applying the principles earlier enunciated, I am persuaded that the award of Kshs 800,000/- was manifestly excessive and inordinately high. I therefore reduce the same to Kshs 450,000/-.

42. Regarding “special damages”, it is trite law that the same must be both pleaded and proved. In the Court of Appeal case of Hahn v. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, it was held as follows:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

43. Similarly, in the Court of Appeal case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR the principle was advanced in the following terms:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

44. In this case, the Plaintiff in the lower Court file, dated 8/07/2021, was particularized as follows:

i)	Medical Report	Kshs 6,000/=
ii)	Medical expenses	Kshs 302,000/=
iii)	Hire of taxi/transport	Kshs 75,000/=
iv)	Hire of home care/nurse	Kshs 125,000/=

45. Out of the said items, the trial Magistrate awarded item (ii), medical expenses, in full at Kshs 302,000/- and for item (iii), hire of taxi/transport, he awarded only Kshs 35,000/-. He did not mention anything regarding item (i), medical Report, (although I note that a Receipt was produced) and rejected item (iv), hire of home care/nurse, in its entirety.



46. My perusal of the lower Court file reveals that in respect to item (ii), - medical expenses at Kshs 302,000/-, indeed, the Respondent produced an invoice with the “paid” stamp affixed thereon. The trial Magistrate was therefore right in awarding this sum in full. Regarding item (iii) - hire of taxi/transport - I note that the Respondent produced two Receipts from “Wasili Cabs”, for Kshs 35,000/- and Kshs 35,000/-, respectively. The trial Magistrate however only awarded the sum of Kshs 35,000/-. In view thereof, it is clear that the amounts awarded were pleaded and particularized in the Plaint, and sufficiently proved at the trial.
47. Regarding the award of Kshs 150,000/- under the head of “future medical expenses” for removal of metal implants from the Respondent’s right leg, apart from being pleaded, the same was also confirmed by Dr. Sokobe in his testimony and also expressly mentioned in his medical Report. In the absence of any controverting evidence therefore, I do not find any fault on the part of the trial Magistrate in awarding the same.

Final Order

48. In the premises, the Judgment entered in favour of the Respondent against the Appellant in the lower Court suit, Eldoret CMCC No. E448 of 2021, is interfered with but only to the extent that the finding of liability at 100% against the Appellant is hereby altered and liability apportioned at 50:50, and the award of general damages at Kshs 800,000/- is hereby reduced to Kshs 450,000/-.
49. For avoidance of doubt therefore, the lower Court Judgment is hereby set aside and substituted with the following, (in favour of the Respondent, against the Appellant):

i)	Liability at 50% against the Appellant	
ii)	Special damages	Kshs 337,000/-
iii)	Future medical expenses	Kshs 150,000/-
iv)	General damages	Kshs 450,000/-
	sub-total	Kshs 937,000/-
	less 50%	Kshs 468,500/-
	Net	Kshs 468,500/-

50. Each party shall bear his or its own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024.

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms. Chumba for Appellant

Mr. Korir for Respondent



Court Assistant: Brian Kimathi

