

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E037 OF 2024

ANTONY OCHIENG OGWANG.....APPELLANT
VERSUS
ELKANA MOSIORI OBED.....RESPONDENT

(Being an appeal arising from the judgment and decree in Molo CMCC No. E133 of 2022 delivered on 26th February, 2024 by Hon. Mugo (RM))

JUDGMENT

1. The background of this matter is that the Respondent sued the Appellant herein before the trial court vide a Complaint dated 12th April, 2022 and Amended on 17th August, 2023, seeking Judgment against the Appellant for:-
 - a) General damages.
 - b) Special damages as per paragraph (7) and interest thereof.
 - c) Costs and interest of this Suit.
2. The claim was that on 5th March, 2022, the Respondent herein was a pedestrian on the Londiani-Muhoroni road when vehicle KCW 013B, allegedly owned by the Appellant herein, was driven so negligently that it veered off the road and caused an accident. The Respondent held the Appellant vicariously liable for the accident and the resulting severe injuries and damages.
3. The particulars of negligence include speeding, driving a defective vehicle, failing to obey traffic rules, and failing to warn the pedestrian.
4. The Respondent pleaded that as a result of the accident, he suffered a fractured right clavicle, a fractured right femur, bruises on the right elbow, and a cut on the left leg.
5. The Appellant denied the claim, challenging the ownership of the motor vehicle registration number KCW 013B. He vehemently disputes that the accident

occurred at the time, place, or in the manner described, and further denies that any negligence on his part caused the event or resulted in the Respondent's injuries. In addition, the Appellant herein argues that the court lacks jurisdiction over the matter and contends that the suit is premature and an abuse of process because no formal demand or notice of intention to sue was ever received.

6. In the alternative, He asserts that if an accident did occur, it was caused by external factors beyond his control, specifically an unexpected tyre burst, numerous potholes, or unannounced road surface changes.
7. The appellant herein raises a plea of contributory negligence, alleging that the Respondent was the sole or substantial cause of the incident by walking recklessly, failing to observe traffic rules like the kerb drill, and obstructing the vehicle's path. Consequently, he denies the applicability of the doctrine of res ipsa loquitur and requests that the suit be dismissed with costs.
8. The parties entered into a consent on liability in the ratio of 85:15 in favour of the Respondent as against the Appellant. Upon hearing the parties, on quantum, the trial court awarded general damages of Kshs. 800,000; Kshs. 200,000 as future medical expenses and Special damages of Kshs. 47,630 together with costs of the suit and interest at court rates.
9. Dissatisfied with this award, the Appellant herein, lodged this Appeal vide the Memorandum of Appeal dated 8th March, 2024 and Amended on 4th April, 2024, based on the following grounds;-

1) The learned trial magistrate erred in law and in fact by awarding General Damages of Kshs. 800,000.00, which is excessive under the circumstances.

2) The learned trial magistrate erred in law and in fact in disregarding the evidence on record, specifically the medical reports by both Dr. Sokobe and Dr. Otara, as well as the Defendant's submissions.

which led to an erroneous award of Kshs. 200,000.00 for future medical expenses.

3) The learned trial Magistrate erred in law and fact by failing to subject the awards for future medical expenses and special damages to the 15% contribution, hence arriving at an erroneous final decision.

4) The learned trial Magistrate erred in law and in fact in failing to accord due regard to the Appellant's Submissions on quantum and the applicable legal principles for the assessment of damages.

10. The Appellant therefore urged this Court to set aside the Judgement of the trial court and allow this Appeal as prayed with costs.

11. This Appeal was canvassed by written submissions.

Appellant submissions.

12. The Appellant argues that the trial court's award was inconsistent with established legal principles and should be reviewed downward. He argues that a first appeal is a retrial where the court must re-evaluate the evidence and draw its own conclusions, as held in *Selle and Another vs. Associated Motor Boat Company Ltd & Others [1968] 1EA 123* and reaffirmed in *Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR* that while the appellate court did not see the witnesses, it is not bound by the trial judge's findings if they failed to account for material circumstances.

13. On **general damages** awarded, the Appellant contends that the sum of Kshs. 800,000 was excessive, and the trial Court ignored the principle that comparable injuries should attract comparable awards, as stated in *Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR*. They cite *Jabane v Olenja [1986] KLR 1* and *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another [2017] eKLR*, which establish that awards should compensate rather than enrich the victim and should not be inordinately high.

14. As regards the jurisdiction of this court to intervene and interfere with the award of damages by the subordinate Courts, reliance was placed on the case of **Kemfro Africa Limited v Aziri Kamu Mudika Lubia & Another [1984] eKLR** and **Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] 2 KLR 55**. Accordingly, the Appellant argues that intervention is justified when a trial court misapprehends evidence or arrives at an entirely erroneous estimate.
15. He argues that the trial court wrongly relied on **Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR**, where 4% permanent incapacity was found, whereas the Respondent in this case has no assessed permanent disability. Instead, the Appellant cites **Muttai & another v Nalunyu [2025] eKLR**, where Kshs. 400,000 was upheld for more severe injuries, suggesting a similar award here would be just.
16. In respect to **future medical expenses**, the Appellant asserts that future medical expenses are special damages that must be specifically pleaded and proved, citing **Tracom Limited & Another v Hassan Mohamed Adan [2009] eKLR** and **Kenya Bus Services Ltd v Gituma [2004] 1 EA 91**. He argues that the Respondent failed to plead these expenses in the Complaint, and that the parties are bound by their pleadings, as held in **Njeru & another v Nyakundi [2022] eKLR**.
17. The Appellant highlights that while Dr. Sokobe's report of 21st March 2022, proposed surgery for internal fixation, Dr. Otara's later report dated 3rd April 2023 confirmed the surgery had already been performed, and therefore the claim for future medical expenses was no longer tenable.
18. Regarding the apportionment of liability, the Appellant contends that since liability was settled by consent at a ratio of 85:15 in favour of the Respondent, this ratio should have been applied to all heads of damage. However, the learned magistrate only applied the 15% reduction to general damages, leaving special damages and future medical expenses at their full value. The Appellant

argues this was an error in principle and cites the case of **Muinde v Muthama (Civil Appeal No. E083 of 2023) [2025] KEHC 6579 (KLR)** to demonstrate that apportioned liability must be applied across all awards.

19. Consequently, the Appellant invites the Court to correct this injustice by subjecting any upheld special damages or future medical expenses to the agreed percentage of contributory liability.
20. In conclusion, the Appellant asserts that the appeal is merited and urges this Court to allow the Appeal with costs or, in the alternative, for the trial court's awards to be set aside or reviewed downward and replaced with reasonable figures.

Respondent's Submissions

21. The Respondent opposes the appeal, maintaining that the trial court exercised its discretion judiciously. He cites **Butt v Khan [1978] KECA 24 (KLR)**, which held that an appellate court will not disturb an award unless it is so inordinately high or low as to be an erroneous estimate. He also references **Ratemo v Ogaro [2024] eKLR** to emphasise that the assessment of damages is at the court's discretion.
22. Based on the foregoing, the Respondent argues that the injuries he suffered being fractures of the right clavicle and right femur, bruises of the right elbow and cut wound on the left leg, are commensurate to the net award granted by the trial Court of Kshs.680,000, which in his view, was reasonable and aligned with inflationary trends.
23. The Respondent asserts that, contrary to the Appellant's claim, he indeed pleaded and submits for Kshs. 200,000 in future medical expenses. They rely on **Tracom Limited & another v Hassan Mohamed Adan [2009] KECA 48 (KLR)**, which allows for reasonable estimates based on medical opinion. He argues the trial court was right to accept Dr. Sokobe's prognosis regarding the

future removal of implants, as Dr. Otara's report did not rule out future procedures.

24. On the issue of contributory negligence, he argues that while general damages are subject to the 15% liability reduction, special damages and future medical expenses are compensatory for actual or projected costs and should be payable in full. He contends that the trial court acted within its discretion by only applying the 15% reduction to the general damages award. In conclusion, the Respondent submits that the appeal lacks merit and is based on a misapprehension of the law. He urges that it be dismissed with costs.

Analysis and Determination

25. This being a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced before the trial court to arrive at its own independent conclusion, taking into account that it did not have the advantage of seeing and hearing the witnesses as they testified. See the case of **Selle vs. Associated Motor Boat Company Ltd [1968] EA 123.**

26. From the Memorandum of Appeal and the submissions filed, it is apparent that the following three issues are for determination:-

- 1. Whether the award of Kshs. 800,000.00 as General Damages was excessive.**
- 2. Whether the trial magistrate erred in awarding Kshs. 200,000.00 for future medical expenses.**
- 3. Whether the trial court erred in failing to apply the 15% liability contribution to the awards for special damages and future medical expenses.**

27. On the first issue, the parameters under which an appellate court will interfere with an award of damages were stated by the Court of Appeal in **Bashir Ahmed Butt v. Uwais Ahmed Khan (1982-88) KAR** as follows:-

“An appellate court will not disturb an award for general 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...”

28. Upon perusal of the Amended Plaintiff dated 17th August 2023, this Court notes that the Respondent pleads a litany of injuries, specifically a fractured right femur and right clavicle, alongside a bruise and a cut wound. These findings are corroborated by the P3 Form dated 28th March 2022.
29. The medical evidence is further bolstered by Dr. Sokobe’s medico-legal report of 21st March 2022 and the subsequent assessment by Dr. Otara dated 3rd April 2022, the latter of whom specifically identifies the femoral injury as a comminuted fracture.
30. It is noted that the Appellant did not object much to the injuries sustained; it follows, therefore, that the injuries sustained by the Respondent herein are confirmed as Fractures of the Femur and Clavicle, Bruises on the right leg, and a cut wound of the left leg.
31. The trial court awarded Kshs. 800,000 for the said injuries, basing its argument on the case of ***Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR***, where a similar left femur fracture with a degree of incapacity assessed at 5% was awarded Kshs. 800,000.00.
32. In ***Litembekho v Namasaka [2025] KEHC 773 (KLR)***, the respondent sustained a closed fracture of the left femur and was awarded Kshs. 650,000 while in ***Sammy v Nguya & another (Civil Appeal E1249 of 2023) [2025] KEHC 8098 (KLR)***, the Respondent, whose principal injuries were the femur fracture and the degloving injuries, was awarded Kshs. 700,000.

33. Considering therefore that the Respondent herein suffered a fracture of the femur and, in addition, sustained a fracture of the Clavicle, this Court is satisfied that the award of Kshs. 800,000 made by the trial Court was reasonable and within the acceptable limits and thus not excessive as alleged.
34. The second issue is whether the award of Kshs. 200,000 as future medical expenses were pleaded and justified. The Court of Appeal in *Tracom Ltd & another v Adan (Civil Appeal 192 of 2006) [2009] KECA 48 (KLR)* held that;-

“The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. 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...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”(Emphasis added)

35. In the case of *Kenya Bus Services Ltd Vs Gituma, (2004) EA 91*, the Court of Appeal held stated:

“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 damages and is a fact that must be pleaded, if evidence thereon 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 the infringement of a person's legal rights should be pleaded”.

36. From the cited Authorities, it follows that an award of Future medical Expenses must be pleaded. The exact amount may not be indicated as they are futuristic costs that may vary depending on future circumstances, as stated in *Forwarding Company Limited & another v Kisilu; Gladwell (Third party) (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR)*.
37. It is not enough, in this Court view, that the said medical expenses are merely indicated in medical reports, they should be pleaded in the Plaint for the Court to consider them.
38. This Court has perused the Amended Plaint dated 17th August, 2023 and notes that the claim for Future Medical expenses was not made. The claim was merely indicated in the medical legal Report of Dr. Sokobe and argued in the Respondent's submission under the general damages claim.
39. Having failed to plead the said amount for future medical expenses in the Plaint, the same should not have been considered and awarded by the trial Court.
40. The third issue is whether Special Damages should be subjected to contributory negligence There are varied views by the High Court. For example, in *Evanson Ndungu Mukunya v JNM & MWN (Suing as The Legal Representative of the Estate of JMN) [2022] eKLR*, J.N.Njagi J held that an award on special damages is not subject to contributory negligence. A similar finding was also made by H.A.Omondi J in the case of *Hashim Mohamed Said & another v Lawrence Kibor Tuwei [2018] eKLR*.
41. In *Musembi & another v Mwai (Civil Appeal E001 of 2024) [2024] KEHC 8740 (KLR)*, Onyiego J was of the view that the entire amount should be subjected to apportionment. In doing so he relied on the of *Silverstone*

Quarry Limited & another vs Beatrice Mukulu Kang'uta & another (suing as administrators of the estate of Phillip Musyoka Muthoka [2020] eKLR, where the Court of Appeal subjected the entire quantum of damages to the apportionment of liability.

42. In view of the above decision by the Court of Appeal, the Special Damages should be subjected to contributory negligence, and therefore, that ground of Appeal succeeds.
43. In the end, this Court makes the following Orders:-
 1. **The award of Kshs. 800,000 for General damages less contributory negligence is retained.**
 2. **The Award of Kshs. 200,000 for future medical expenses is set aside in its entirety.**
 3. **Like general damages, the award of Special Damages shall be subject to contributory negligence.**
 4. **Each party to bear his own costs.**

Dated, signed and delivered at Nakuru this 27th Day of April, 2026.

PATRICIA GICHOH

JUDGE

In the presence of:

Mr. Kabata for the Appellants

Ms. Sitati for Respondent

Erickson , Court Assistant

ORIGINAL