**AIC Kijabe Hospital v Nyambura (Civil Appeal E348 of 2023)**
**[2025] KEHC 1671 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1671 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E348 OF 2023**

**JN NJAGI, J**

**JANUARY 23, 2025**

**BETWEEN**

**AIC KIJABE HOSPITAL ..... APPELLANT**

**AND**

**MARY NYAMBURA ..... RESPONDENT**

***(Being an appeal from the judgment and decree of Hon.Lucy Ambasi, Chief Magistrate in Milimani CMCC No. E1148 of 2020 delivered on 9/2/2024)***

## JUDGMENT

1. The respondent herein brought suit against the appellant after she received 2nd degree injury burns at their hospital facility while undergoing caesarian operation during child birth. The trial magistrate awarded Ksh.4,000,000/= in general damages and Ksh.600,000/= for future medical expenses. The appellant was aggrieved by the award and lodged the instant appeal.

2. The appeal raises 9 grounds of appeal which are in summary that the trial court failed to properly consider the medical reports on record as well as the degree of injury suffered by the respondent and failing to consider the appellant`s submissions on record and as a result awarded general damages that are manifestly excessive and erroneous that are not in line with the current awards for similar injuries. The appellant faulted the trial court for misdirecting itself and erring in law by awarding damages for future medical expenses when the same were not specifically pleaded in the body of the plaint and not addressed by the respondent at the trial.

3. The appeal was disposed of by way of written submissions.

**Appellant's Submissions**

4. The appellant submitted that the award of Ksh.4,000,000/= by the trial court was excessive and was not commensurate with the nature of injuries sustained by the respondent. They relied on the evidence of their witness, Dr. Thumbi DW2, who testified that the respondent had suffered burns and blistering that were minor and superficial wherein she made full recovery with no expected future complications.

5. The appellant submitted that an award of general damages must be reasonable and assessed in moderation as the same is not meant to punish the defendant or enrich the claimant but should be reasonable compensation for the loss suffered. The case of Crown Foods Limited v Emily Wangui [2011] eKLR was cited in support of that proposition.

6. The appellant submitted that an award of Ksh.250,000/= would have been adequate compensation for the injuries suffered by the respondent. They relied on the following authorities:Smokies Bar & Restaurant & another v Reuben Kieti [2015] eKLR where the court upheld an award of Ksh.250,000/= where the respondent suffered extensive burn wounds to the right leg between the knee and the ankle joint, extensive burns on the whole face with loss of skin, burn wounds to the lips with loss of skin colouring, burn wounds to both ears with loss of skin and colouring, deep and extensive burn wound on the entire right hand from the elbow to the fingers and palm and deep and extensive burn wound on the entire left hand from the elbow to the fingers and palm. Dr. Kimani Mwaura (PW2), a gynecologist who examined the Respondent stated that the Respondent had sustained 2nd degree burns on both arms and the right leg and 1st degree burns on the face.Endmor Steel Millers Limited v Emmanuel Wafula Wekesa [2021] eKLR where the court upheld an award of Ksh.290,000/= for 2nd degree burns to both arms and left leg below the knee. The respondent was left with scars on the left leg measuring 25cm x 5cm.Eldoret Steel Mills Ltd v George Ochieng Owino [2021] eKLR where the court upheld an award of Ksh.200,000/= for burns on the left side of the neck that healed and left the respondent with skin pigmentation.

7. On the award of future medical expenses, the appellant submitted that the respondent in his plaint did not plead any specific amount nor did she in her evidence lead any evidence on the same. Nor was there medical evidence by a doctor that she will require further treatment in future.

8. It was submitted that future medical expense is in the realm of special damages and must be pleaded and proved. Reliance was made on the case of Kenya Bus Services Limited v Gituma [2004] EA 91 where the Court of Appeal stated that:

> 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.

9. Also cited on the same point is the case of Zacharia Waweru Thumbi v Samuel Njoroge Thuku, HCCCA 445 of 2003, [2006] eKLR.

10. The appellant urged the court to allow the appeal.

**Respondent`s Submissions**

11. The respondent submitted that the claim for future medical expenses was pleaded in the plaint as a prayer. That in the circumstances the appellant is misguided to allege that the same is not pleaded. The appellant cited the case of Tracom Limited & another v Hassan Mohamed Adan [2019] eKLR where the Court of Appeal stated that:

> " .....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."

12. Reliance was also made in the case of Mburu & another v Kinge (Civil) Appeal No. 277 0f 2023 [2024] KEHC 1889 (KLR) (29 February)2024) where the court stated as follows:

> The appellant faults the trial court for awarding Kshs. 90,000/- as future medical expenses for the sole reason that the same was not proved. The medical report by Dr. Koome dated 28/2/2017 indicated that the respondent would require further treatment to remove the implant in the left lower limb at an approximate cost of Kshs. 90,000/-. The respondent pleaded for future medical expenses in his plaint and proved the same through the medical report by Dr. Koome. The appellants did not produce any evidence to counter that of the respondent. Thus, it is my considered view that the award for future medical expenses was made in consideration of the applicable principles and ought not to be disturbed.

13. On quantum, the respondent submitted that the respondent suffered serious injuries at the hands of the appellant. That she stayed in hospital for a period of 47 days during which time debridement and skin grafting were done on the affected part. Therefore, that the award of Ksh.4,000,000/= was reasonable in the circumstances of the case. The respondent relied on the case of Kipkebe Land v Moses Karauri Masaku HCA 127 (2004) as cited in Bidco Oil Refineries Ltd v Pius Machuki Omboga & another (2020) eKLR where the court observed that:

> " It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however, be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such facts as previous awards for similar injuries and such other relevant factors."

14. The respondent urged the court to dismiss the appeal.

**Analysis and Determination**

15. This being a first appeal, the duty of the court is as was stated in Selle & another v Associated Motor Boat Co. Ltd.& others [1968] EA 123 in the following terms:

> " ...An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it

> should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan [1955], 22 E.A.C.A. 270)."

16. The appeal is on quantum of damages awarded by the trial court. The principles under which an appellate court may interfere with the trial court's decision on quantum are well settled. It must be established that the trial court acted on wrong principles and or misapprehended the law. In the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5, the Court of Appeal held that: -

> An appellate court will not disturb an award of 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 ....

17. The same principle was restated in Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini v A. M. M. Lubia & Another [1998] eKLR that:

> " .... It must be satisfied that either 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."

18. It was the evidence of the respondent that she developed large blisters on her back after the caesarean operation. The hospital confirmed that she was burnt in the theatre during the operation. She was taken to theatre twice after suffering the burns. At the time she testified in court, she stated that she could not lie on her back, stand or walk and sit for long nor could she lean backwards.

19. According to the medical report of Dr. Richard E. Davis, who was Director of Clinical Services of the appellant`s hospital, the respondent sustained a burn to her lower back while in theatre undergoing caesarean operation. She underwent debridement (cleaning of the skin) and skin grafting.

20. Dr. Peter Nthumba, a plastic surgeon doctor, who testified as DW2 in the case told the trial court that he reviewed the respondent on 30/5/2018 after she had undergone debridement of lower back burns some 5 days earlier. He noted that she had a burn roughly 25 x 15 cm. He did skin grafting surgery on her on 31/5/2018. She stayed in hospital until 27/6/2018 for home management. She was seen once post-operatively when she was noted to be doing well with 3 small areas that were still raw. She was asked to return for review after 2 weeks but she did not turn up.

21. It was the evidence of Dr. Nthumba that the burns were considered minor and minimal. That he was called to intervene because they appeared serious. He stated in cross-examination that the injuries were 2nd degree burns. He explained that debridement is done on serious injuries. That he did debridement on her and skin grafting.

22. The respondent in her submissions at the lower court made reliance in the cases of Umar Shibachi Omurunga v Wildfine Flowers Limited [2012] eKLR where the High Court awarded Ksh.350,000/= to the appellant who had suffered chemical burns on the leg and Turfena Achieng Abuko & another v William Ambani Mise c/o Ahero Total Service Station & another (1995) where the 1st appellant was awarded Ksh.350,000/= for first degree burns on the head and neck, hips and severe burns on the

left arm and right hand. The respondent urged for an award of Ksh.5,000,000/= on the basis that the second authority cited was made 27 years ago.

23. The appellant on the other hand had at the lower court urged the court to make an award of Ksh.250,000/= and relied on authorities where general damages of Ksh.200,000/= and 250,000/= were made.

24. The trial magistrate in making her award stated that it had carefully considered the nature of injuries sustained by the respondent and the authorities relied on. It then made an award of Ksh.4,000,000/=.

25. It is to be noted that while counsel for the respondent cited authorities where awards of Ksh.350,000/= were made, counsel for the appellant had cited authorities where awards of between Ksh.200,000/= and 250,000/= were made. The trial court did not give any reason for awarding Ksh.4,000,000/= when the awards in the authorities cited by the parties ranged between Ksh.200,000/= and Ksh.350,000/=. Even though inflation was a factor to be taken into account in respect of the authorities cited to the trial court, even then the award of Ksh.4,000,000/= was manifestly excessive and unjustifiable. I can't help concluding that the trial magistrate just plucked the figure of Ksh.4,000,000/= from the air as no authority was cited to support the hefty award. The award is for setting aside.

26. I have considered the awards in the following authorities:Bidco Oil Refineries v Pius Michuki & Another, Nyahururu Civil Appeal No. 50 of 2017[2020] eKLR, where the 1st plaintiff suffered sustained deep burn scalds right leg and hand, burns on the upper lip and anterior tongue and superficial burns adjacent to the deep burns. He was admitted in hospital for twelve (12) days and the doctor classified the injuries as maim. The second respondent suffered multiple burns left knee joint area (deep), superficial burns lower thigh and burns on the right 3rd finger dersum side. The second respondent was not admitted in hospital. The High Court upheld an award of Ksh. 350,000/= to the 1st respondent and Kshs.300,000/= to the 2nd respondent. These injuries appear to have been more extensive than those suffered by the respondent herein who however was in hospital for a longer period than the 1st respondent in the cited case.Peter Mwaura Ngang'a v Lucy W Kimani [2019] eKLR where an award of Ksh.900,000/= in general damages was upheld for the respondent who suffered deep burns on the right arm and forearm, deep burns on the right shoulder and axilla and deep burns to the upper back as well as a permanent and functional disability of 25%. It is to be noted that the injuries in that case were far more serious than those suffered by the respondent herein.

27. I have considered that the respondent herein sustained burns on the lower back that kept her in hospital for a period of 47 days during which time she underwent 2 operations. The injuries were therefore in my view serious and cannot have been dismissed as minor though there was no permanent disability.

28. Having considered the authorities relied on by both parties at the lower court and in this appeal as well as the authorities I have cited above, I find a sum of Ksh.400,000/= to be adequate compensation in general damages for the injuries suffered.

29. As for future medical expense, which are special damages, it is trite law that special damages must be pleaded and strictly proved. In *Hahn vs. Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows in regard to special damages:

> "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."

30. Though the respondent did pray for special damages in her final prayers in the plaint, the same were not mentioned in the body of the plaint. There was no mention of the amount of money the respondent was claiming in special damages. In my view this was not adequate pleading of special damages.

31. That notwithstanding, the respondent did not lead any evidence in proof of the said damages. Though the report of Dr. Nthumba indicated that the respondent was to continue with treatment after discharge from hospital, he stated that the respondent only honored one hospital appointment and did not turn up again. The doctor did not indicate the expected number of future appointments and their estimated cost. In any case when the respondent testified in court, she never indicated that she had been attending treatment. The trial magistrate did not give any reason for making an award of Ksh.600,000/= for future medical expense and neither did she cite any authority to support the award. It would seem, yet again, that the figure was just plucked from the air. I find that the respondent did not prove the claim for future medical expenses.

32. The upshot is that the award of the trial court in general damages is hereby set aside for being manifestly excessive and the same is substituted with an award of Ksh.400,000/= while the award of future medical expenses is set aside in its entirety.

As the appeal has partially succeeded, I order each party to bear its costs to the appeal.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT GARSEN THIS 23RD DAY OF JANUARY 2025.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Miss Waithera HB for Mr. Chengecha for Appellant

Miss Gitonga for Respondent

Court Assistant -