



REPUBLIC OF KENYA



**Dawe v Njoroge (Civil Appeal 526 of 2018)
[2025] KEHC 1662 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1662 (KLR)

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

CIVIL

CIVIL APPEAL 526 OF 2018

JN NJAGI, J

JANUARY 23, 2025

BETWEEN

WORKE WARKE DAWE APPELLANT

AND

DANIEL KIMEMIAH NJOROGE RESPONDENT

(Being an appeal from the judgment and decree of Hon.K.I.Oreng'e, Senior Resident Magistrate, in Milimani Civil Suit No.7227 of 2017 delivered on 9/10/2018)

JUDGMENT

1. The respondent herein brought suit against the appellant, Worke Warke Dawe before the lower court in Milimani CMCC case No. 7227 of 2017 claiming general damages for pain and suffering , special damages and future medical expenses after the respondent was knocked down by the appellant's motor vehicle registration No.KCB 222V. Parties entered consent on liability in the ratio of 70:30 in favour of the Plaintiff/ respondent and consented on future medical expenses at Ksh.75,000/= The court then assessed damages as follows:
General Damages..... Kshs. 800,000/=
Special Damages.....Kshs. 51,200/=
2. The appellant was aggrieved by said judgment and lodged this appeal on the following grounds:
 - (a) The Learned Magistrate erred in fact and in law in making an excessive award on general damages which are inconsistent with the injuries sustained.
 - (b) The Learned Trial Magistrate erred in fact and law in not taking into account the appellant's submissions before him on the issue of quantum.



- (c) The Learned Trial Magistrate erred in fact and in law in making an award on special damages which was unsupported by receipts adduced in court by the respondent.
3. The appellant prays that the judgment and decree of the lower court be set aside or otherwise reviewed and substituted with a suitable award. He also pleads for costs of the appeal.
 4. The Respondent opposes the appeal.
 5. The Appeal was disposed of by way of written submissions.

Appellant's Submissions

6. The appellant filed his submissions dated 5th November 2024 wherein he submitted that the trial court ought to have considered the medical reports adopted by consent during the hearing of the main suit and especially the medical report by Dr. P. M Wambugu who confirmed that the respondent had sustained fracture of the right femur which had since united. The appellant faulted trial magistrate for only adopting the respondent's proposal which had no backing.
7. Counsel for the appellant proposed an award of Kshs. 650,000/= and made reference to the case of Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR wherein the court reduced an award of Kshs. 600,000/= to Kshs. 400,000/= for compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damages on the right leg, head injury with cut wound on the nose and blunt chest. They also cited the case of Nahson Nyabaro Nyandiega vs Peter Nyakweba Omboga [2021] eKLR wherein the court reduced an amount of Kshs. 900,000/= to Kshs. 650,000/= for bruises on the face, compound fracture of the right tibia bone and cut wound on the right leg.
8. On Special Damages, the appellant relied in the case of Rukia Abdi Many & another v Officer Commanding Police Station Habaswein & another (2020) eKLR to submit that special damages must be specifically and strictly proved.

Respondent's submissions

9. The Respondent filed submissions dated 7th November 2024 and submitted that while the court should consider comparable awards for comparable injuries, there is need to consider each case on its own merits and peculiar circumstances. Counsel placed reliance in Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others [2019] eKLR to submit that past awards should be taken into account, their age and rate of inflation and the strength of the Kenyan Shilling when the said award was made.
10. Counsel for the respondent on the other hand submitted that the respondent sustained the following injuries; fracture right-femur, swollen and tender right thigh which were grievous and led to incapacitation of 5%. Reliance was made in the case of Kiautha vs. Ntarangwi (Civil Appeal E050 of 2021 [2022] KEHC 10595 (KLR) where an award of Ksh.800,000/= was awarded on appeal for comparable injuries and Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR wherein an award of Kshs. 800,000/= was made on appeal for comparable injuries.
11. It was submitted that special damages were pleaded and proved and there is therefore no basis for this court to interfere with the same. Counsel urged this court to find that the award by the trial magistrate was not only reasonable but also fair. The respondent urged the court to dismiss the appeal with costs.



Analysis and determination

12. This being a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its own conclusion. This position was taken in *Selle & Another v Associated Motor Boat Co. Ltd. & others* [1968] EA 123 where the Court of Appeal held that:

“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 demeanor of a witness is and inconsistent with the evidence in the case generally.”

13. The same Court in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004] eKLR 55 set out circumstances under which an appellate court can interfere with an award of damages in the following terms: -

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage’s awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate”.

14. Similarly, in *Jane Chelagat Bor v Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that: -

“In effect, the court before it interferes with an award of damages, should be other reasons satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

15. According to the medical report of Dr. Mwaura, the respondent had sustained fracture of the right femur with swelling on the right thigh. The fracture was immobilized with an interlocking nail. He assessed the degree of permanent incapacity at 5%.

16. The medical report of Dr. Wambugu similarly showed that the respondent sustained a lower third right femur fracture which was managed by open reduction and internal fixation using metal implant. The report indicates that at the time the doctor reviewed the respondent on 27/3/2015, the implants were still in situ and the fracture had reunited. The respondent walked with a normal gait. The doctor assessed the degree of permanent incapacity at 2%.



17. The trial court in awarding Ksh.800,000/= in general damages made reliance on the case of Dennis Nyamweno Openda v Anwarali & Brothers Limited & another (2015) eKLR where the plaintiff sustained multiple fractures of the left clavicle, right humerus, unstable multiple fractures of the pelvic bones (open book pelvic fracture), lacerated scalp wounds, right radial nerve injury leading to a right wrist drop and muscle wasting, blunt chest wall injury and urethral strictures complicating pelvic fracture and prolonged catheterization. A sum of Ksh.1,800,000/= was awarded for these injuries.
18. It is a principle in awarding general damages that comparable injuries should as far as possible be compensated by comparable awards, see Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR. It obvious that the plaintiff in the case that was cited by the trial court had suffered far more serious injuries than those suffered by the respondent herein. The authority was not a proper guide as far as the injuries suffered by the respondent were concerned.
19. In this appeal counsel for the appellant urges the court to reduce the award to Ksh.650,000/= while counsel for the respondent supports the award of Ksh.800,000/= by the trial court. I have looked at the authorities cited by both counsels in this appeal. I find the injuries in the case of Pestony Limited & another v Samuel Itonye Kagoko [supra] that were cited by the respondent to have comparable injuries to those suffered by the respondent in this appeal. The injury therein was a femur fracture for which an award of Ksh.800,000/= was made. To this case I can add the case of Peter Karoka aka Ngige vs Mbaluka Malonza aka Eric & 2 others [2018] eKLR where an award of Ksh.800,000/= was made for femur fracture. In the premises, the award of Ksh.800,000/= by the trial court can be supported by case law. The respondent had been left with a disability of between 2 - 5%. I therefore do not think that the award was excessive. The appeal on general damages is thereby dismissed.

Special damages

20. The respondent in his plaint claimed Ksh.51,200 in special damages which was made up as follows: medical report Ksh.3,000, medical expenses Ksh.47,650/= and copy of records Ksh.550/=. The trial court in its judgment stated that the sum pleaded was proved.
21. The appellant submitted that the law requires for special damages to be strictly proved. Reliance was made in the case of Rukia Abdi Manya & another v Officer Commanding Police Station Habaswein & another [2020] eKLR where the court cited the case of Bangué Indosuez v DJ Lowe and Company Ltd [2006] 2KLR 208 where it was held that:

“It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.”
22. The appellant submitted that the award of Ksh.51,200/= in special damages was not fully supported by receipts as the receipts tendered to the court amounted to Ksh.30,700/=.
23. I have looked at the copies of receipts as contained on page 15 of the Record of Appeal. I have noted that some of the copies of receipts are not clear and some are completely faded. In view of the fact that the appellant was disputing the totals in the receipts, it was his duty to file clear receipts in the Record of Appeal. In the absence of clear receipts, I cannot say that the receipts produced by the respondent amounted to Ksh.30,700/= as contended by the appellant. The award of special damages in the sum of Ksh. 51,200/= is thereby upheld.



24. The upshot is that this court finds no merit in the appeal and the same is dismissed with costs to the respondent.

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

J. N. NJAGI

JUDGE

In the presence of:

N/A for Appellant

Miss Kisiangani for Respondent

Court Assistant: Nasra

