



**Talam v Ali & another (Civil Appeal 67 of 2021)
[2023] KEHC 3763 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 67 OF 2021
WM MUSYOKA, J
APRIL 28, 2023**

BETWEEN

THOMAS KIPROTICH TALAM APPELLANT

AND

ALI MOHAMED ALI 1ST RESPONDENT

MERCY WANGARI NJOROGE 2ND RESPONDENT

(Appeal from judgment and decree by Hon. M Onyango, Resident Magistrate, RM, in Mumias RMCCC No. 21 of 2016, of 3rd December 2021)

JUDGMENT

1. The appellant had been sued by the 2nd respondent, at the primary court, for compensation arising out of a traffic road accident on January 18, 2019, within Mumias township. The 2nd respondent was a pedestrian, and was knocked down by motor vehicle registration mark and number KCF 709U, said to have belonged to the appellant and the 1st respondent, and liability was attributed to the appellant and the 1st respondent, on account of negligence. The appellant filed a defence, denying the accident, and everything else pleaded in the plaint. In the alternative, the appellant pleaded that, if any accident occurred, it must have been due to negligence on the part of the 2nd respondent, or she contributed to it, or it was beyond the control of the appellant.
2. Liability was agreed upon at 85:15 against the appellant, and the same was adopted as order of court on October 4, 2021. A trial was conducted on quantum, where only the 2nd respondent testified, and the court found in favour of the 2nd respondent, and awarded her Kshs 2, 500, 000.00 general damages, Kshs 356, 328.91 special damages, Kshs 624, 000.00 future medical expenses, in a judgment delivered on December 3, 2021.



3. The appellant was aggrieved, hence the appeal. He principally argues that the damages awarded were high, and the assessment was founded on wrong principles.
4. The appeal was canvassed by way of written submissions.
5. The appellant argues on 2 points: future medical expenses and general damages. On future medical expenses, he argues that they are in the nature of special damages, and ought to have been pleaded. He cites *Daniel Otieno Migore vs South Nyanza Sugar Co Ltd* [2018] eKLR (Mrima, J) and *Tracom Limited & another vs Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA). He submits that the award of Kshs 624, 000.00 ought not have been made. On general damages, he submits that the award was high, and urges the court to be guided by *David Kimathi Kaburu vs Dionisius Mburugu Itirai* [2017] eKLR (Gikonyo, J), *Mwavita Jonathan vs. Silivia Onunga* [2017] eKLR (Majanja, J) and *Civicon Limited vs Richard Njomo Omwancha & 2 others* [2019] eKLR (Majanja, J), to award Kshs 450, 000.00 for pain and suffering.
6. On future medical expenses, the 2nd respondent cites *Ibrahim Ndungu Gikonyo vs Geoffrey Nyamweya Omae* [2021] eKLR (Chepkwony, J), to make the point that future medical expenses can be pleaded, and proved in evidence by way of a medical report. On general damages, she cites *Rentco East Africa Limited vs Dominic Mutua Ngonzi* [2021] eKLR (Odunga J), where an award of Kshs 2, 500, 000.00, was made.
7. The law on future medical expenses is fairly straightforward and clear, the same must be pleaded. Where the same is not pleaded, it is not available. *Tracom Limited & another vs Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA) is the law on that. The 2nd respondent agrees, for she cites *Ibrahim Ndungu Gikonyo vs Geoffrey Nyamweya Omae* [2021] eKLR (Chepkwony, J), where *Tracom Limited & another vs. Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA) was applied.
8. Were future medical expenses pleaded in this case? Yes, they were, at paragraph 8 of the plaint. What was not done was that the figures for the future medical expenses were not pleaded or specified. The difficulty with pleading such figures was discussed in *Tracom Limited & another vs Hassan Mohamed Adan* [2009] eKLR (Tunoi, Waki & Onyango-Otieno, JJA), because of the uncertainties that surround them, and it was with respect to those uncertainties that it was said in *Ibrahim Ndungu Gikonyo vs Geoffrey Nyamweya Omae* [2021] eKLR (Chepkwony, J), that they figures could be proved in a medical report placed before the court at trial.
9. Were the future medical expenses proved in this case? When the 2nd respondent testified, she did not lead evidence on the future medical expenses, and conceded that the medical report she was relying on did not indicate the figures. I have read and re-read the medical report by Dr Mutoro, dated February 24, 2020, and I have not seen in it any reference to future medical expenses, leave alone citation of any figure. There was no proof of the future medical expenses, and the 2nd respondent was not entitled to an award on the same. I have been unable to find the basis upon which the trial court calculated the amount that was awarded. The award ought to be set aside. It is one thing to plead, and another to prove. There was a pleading, but there was no proof.
10. On general damages, the medical report by Dr Mutoro identified the injuries as severe unstable fracture of the left hip joint acetabulum and a displaced fracture of the sacroiliac joint. In making the award of Kshs 2, 500, 000.00, the trial court did not cite any authority, to guide. The authorities cited by the appellant are off the mark. The injuries in *David Kimathi Kaburu vs Dionisius Mburugu Itirai* [2017] eKLR (Gikonyo, J) were to the femur and foot. In *Mwavita Jonathan vs Silivia Onunga* [2017] eKLR (Majanja, J), the fracture was to the foot, and injuries to the spinal system at the neck and back



were in the nature of sprains. None of the injuries in *Civicon Limited vs Richard Njomo Omwancha & 2 others* [2019] eKLR (Majanja, J) came anywhere close to those sustained by the 2nd respondent. Similarly, *Rentco East Africa Limited vs Dominic Mutua Ngonzi* [2021] eKLR (Odunga J), which the 2nd respondent cites, is unrelated to the injuries.

11. Authorities relating to the injuries sustained by the 2nd respondent are fairly uncommon. In *Geoffrey Maraka Kimchong vs Frechiab Hugiru* [2020] eKLR (Sewe, J), the court awarded Kshs 1, 000, 000.00 for a fracture of the right acetabulum, with cut wound to cheek and blunt trauma to the pelvis. The authorities for a fracture to sacroiliac joint are even rarer. Those available are aged. In *David Waweru Kamau vs Paul Ngugi Mwaura & another* [2002] eKLR (Hayanga, J), an award of Kshs 400, 000.00 was made for a fracture of the right superior and inferior public rami, separation of the left sacroiliac joint and paralysis of the left upper arm.
12. Awards touching on fracture of the acetabulum, in the of region Kshs 2, 500, 000.00 are for more severe injuries. For example, in *John Mutugi Kamau vs Kanini Haraka Enterprises Limited* [2019] eKLR (Mwongo, J), Kshs 2, 400, 000.00 was awarded for fractures of the pelvis, right acetabulum, right femur and wrist joint, plus extensive soft tissue injuries to the shoulder, head and groin. An award of Kshs 2, 500, 000.00 was made for a complex fracture associated with disastrosis of the hypophysis, fractures of 1.5 left traverse process, fracture of coveys, fracture of left 4th metatarsal, fractures of 2nd and 4th ribs, and extensive pineal tear, in *Wurano Tosha & another vs. DMK* [2021] eKLR (Chitembwe, J).
13. Taking all the above into account, I am of the persuasion that the award of Kshs 2, 500, 000.00 was on the excessive end, and a more reasonable award should have been Kshs 1, 800, 000.00. I shall accordingly reduce the general damages from Kshs 2, 500, 000.00 to Kshs 1, 800, 000.00.
14. I find merit in the appeal herein, and I dispose of the same in the terms proposed in paragraphs 9 and 13, hereabove. I set aside the award on future medical expenses, and I award Kshs 1, 800, 000.00 general damages. Each party shall bear their own costs. .

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023.

W MUSYOKA

JUDGE

Mr Erick Zalo, Court Assistant.

Appearances

Ms Miheso, instructed by LG Menezes & Company, Advocates for the appellant.

Mr Otsiula, instructed by JB Otsiula & Company, Advocates for the 2nd respondent.

