



REPUBLIC OF KENYA



KENYA LAW
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**Dhokia Transporters Limited v Azere (Civil Appeal 72 of 2023)
[2024] KEHC 7090 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 72 OF 2023
FN MUCHEMI, J
JUNE 14, 2024**

BETWEEN

DHOKIA TRANSPORTERS LIMITED APPELLANT

AND

FRANCIS KIRUI AZERE RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. B. M. Ekhubi
(PM) delivered on 10th February 2022 in Thika CMCC No. 925 of 2013)*

JUDGMENT

Brief Facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 925 of 2013 in a claim arising from a road traffic accident whereby the trial court found the appellant 100% liable and awarded the respondent general damages of Kshs. 3,004,920/- for pain, suffering and loss of amenities as well as special damages.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law in awarding Kshs. 3,004,920/- as general damages for pain & suffering which amount was inordinately high;
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant relies on the cases of *Southern Engineering Company Limited vs Musingi Mutia* [1985] KLR 730 and *Dorcas Mututho Ileve vs Muithya Lydia* (2018) eKLR and submits that the damages awarded were not commensurate with the nature of injuries suffered by the respondent. Furthermore,



the appellant argues that the trial court did not consider both medical reports produced by the parties by consent, but only considered the report by the respondent's doctor, Dr. Andrew Otieno in awarding special damages of Kshs. 604,920/-. The appellant argues that the award of Kshs. 604,920/- was not specifically proved save Kshs. 4,920/-.

5. The appellant relies on the case of *Tracom Limited & Another vs Hassan Mohammed Adan* [2009] eKLR and submits that although the respondent specifically pleaded for future medical expenses, he did not prove the said damages. Both the medical reports did not indicate that the injuries sustained by the respondent required total hip replacement. Furthermore, the appellant argues that the respondent's doctor indicated the cost of hip replacement was between Kshs. 400,000 – 600,000/- and thus the trial court erred by awarding a sum of Kshs. 600,000/-.
6. Relying on the case of *Simon Taveta vs Mercy Mutitu Njeru* [2014] eKLR, the appellant submits that the award of Kshs. 2.4 million as general damages was exorbitant and was not comparable to the injuries sustained by the respondent. The respondent in his amended plaint suffered an injury to the right eye with loss of vision, posterior dislocation of the left hip joint, fracture acetabulum and fracture of left inferior ramus. From the medical report relied on by the respondent, he did not prove the fracture of the acetabulum. As such, the appellant urges the court to revise the award of Kshs 2.4 million and substitute it with Kshs. 300,000/-. Additionally, the appellant submits that the authority relied on by the trial court being *Penina Waithira Kaburu vs LP* [2019] eKLR, included more severe injuries than the ones sustained by the respondent.
7. The appellant states that the trial court did not give any plausible, legal and logical explanation on how it arrived at an award of Kshs. 2.4 million. The appellant urges the court to revise the award given by the trial court and rely on the cases of *Peter Gichuru Mwangi vs James Kabathi Mwangi* [2001] eKLR where the plaintiff sustained head, facial and eye injuries leading to complete loss of vision to the right eye. The court awarded general damages at Kshs. 600,000/-. Further in *Charles Ochola vs Mumias Sugar Company Ltd* [2014] eKLR where the plaintiff sustained eye injuries resulting in eye loss and was awarded Kshs. 300,000/-. In *Duncan Mwangi Kioria vs Valley Bakery Limited & 2 Others* [2016] eKLR where the plaintiff sustained a segmental fracture to the left femur, fracture of the right femur, fracture right inferior pubic ramus, fracture left 5, 6 & 7 ribs, degloving injury groin and scrotum and pain, swelling and bleeding. The court awarded general damages at Kshs. 1.5 million.

The Respondent's Submissions

8. The respondent relies on the cases of *Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor* [2020] eKLR and *GNM vs Alex Waura & Another* [2022] eKLR and submits that the trial court took into consideration of the two medical reports filed by the parties, the injuries sustained by the respondent and submissions guided by the authority of *Penina Waithira Kaburu vs LP* (2019) eKLR before awarding the respondent Kshs. 2.4 million for pain and suffering and Kshs. 604,920/- as special damages. The respondent argues that the injuries he sustained were commensurate to the award given by the trial court and that it was in tandem with the medical evidence tendered by himself in the court below. The respondent states that he relied on the discharge summary form from Thika Hospital (Exhibit 2), discharge summary from Nyanza Provisional Hospital (Exhibit 3(a)) and medical report by Dr. D. O. Olima (Exhibit 7(a)) to prove his injuries. Further parties produced both medical reports by consent which the trial court scrutinized and revealed that both doctors arrived at a unanimous determination as to the nature of injuries sustained by the respondent. The respondent further submits that the second medical report by Dr. Andrew Otieno, relied on by the appellant, proved that the respondent sustained serious injuries following the road traffic accident which left him blind in one eye. Further that the injury is permanent and the degree of permanent disability is estimated at 50%.



9. The respondent further submits that as regard the award on special damages, the trial court was equally concise while assessing and awarding him the same and gave its reasons for the determination thereof. The respondent submits that the cost of future medical expenses was specifically pleaded and the court below awarded the sum of Kshs. 604,420/- whereby Kshs. 600,000/- was to cater for future medical expenses. Furthermore, the medical report by Dr. Andrew Otieno was the appellant's evidence and which was produced on a balance of probability against the respondent's medical report by Dr. Olima which was detailed on future medical expenses and which was never rebutted. The respondent relies on the case of *Abuga vs Northern Rangeland Trust* (Civil Appeal E104 of 2022) [2023] KEHC 23656 (KLR) (17 October 2023) and submits that he pleaded special damages through future medical expenses and proved the same based on Dr. Olima's medical report that stated that the respondent would require total hip replacement operation at the cost of between Kshs. 400,000 to Kshs. 600,000/-. Furthermore, the respondent states that the said medical report indicated that he developed right corneal opacity that would require corneal transplant at the cost of above Kshs. 350,000/-. As such, the respondent argues that the appellant has not demonstrated any error in principle by the trial court in awarding Kshs. 600,000/- and urges the court not to interfere with the award.
10. The respondent relies on the cases of *Butt vs Khan* (1982-88) 1 KAR 1, *Patrick Mwiti & Another vs Kevin Mugambi Nkunja* [2013] eKLR, *P. N. Mashru Ltd vs Omar Mwakoro Makenge alias Omar Masoud* HCCA No. 9 of 2017 and *Denshire Muteti Wambua vs Kenya Power & Lighting Company Limited* (2013) eKLR and submits that the award of damages is a discretionary act of a judicial officer and the duty of the appellate court is not to substitute the trial court's discretion for its own. The respondent submits that the trial court took into consideration the medical reports by Dr. Olima and Dr. Andrew Otieno and was guided by the decision in *Penina Waithira Kaburu vs LP* (2019) eKLR in reaching the award of Kshs. 2.4 million. The respondent further submits that although the trial court was guided by the Penina Waithira case, he suffered severe injuries comparable with those suffered by the plaintiff in the cited authority.
11. On the cases cited by the appellant on appeal, the respondent states that the cases are distinguishable from his case as he sustained injuries which are not comparable to those sustained by the parties in the respective cases. The respondent submits that in support of his submissions, he relies on the cases of *GNM vs Alex Wachira Waura & Another* [2022] eKLR; *Barnabas Biwott vs Thomas Kipkorir Bundotich* [2018] eKLR and *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and submits that the court ought not to interfere with the award by the trial court as the appellant has not tabled anything before the court to suggest that the award on quantum was inordinately excessive. The respondent urges the court to take into consideration the fact that the court below had the advantage of hearing him in his testimony and observed his incapacity including the shortening of his leg.

Issues for Determination

12. The main issues for determination are:-
 - a. Whether the award of general damages was inordinately high.
 - b. Whether the award on special damages was specifically pleaded and proved;
 - c. Whether damages for future medical expenses were properly awarded.



The Law

13. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

14. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated 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.

15. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether The Award Of General Damages Was Inordinately High.

16. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng* Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the 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 at first instance. The appellate court can justifiably interfere with the quantum of damages 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 factor 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.”



17. Similarly in *Sbeikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

18. The plaint dated 2nd November 2013 shows that the respondent suffered the following injuries:-

- a. Injury to the right eye with loss of vision;
- b. Posterior dislocation of the left hip joint;
- c. Fracture acetabulum;
- d. Fracture of the left inferior ramus.

19. The trial magistrate awarded a sum of Kshs. 2,400,000/- for general damages for pain and suffering. The appellant submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. On the other hand, the respondent submits that the award was justifiable and comparable to the injuries he sustained.

20. From the record, the injuries sustained by the respondent were confirmed by Dr. D. O. Olima in his medical report dated 18th February 2013. The doctor listed the injuries sustained by the respondent as follows:- central fracture dislocation of the left hip joint with upward displacement of the femur; fracture of the left inferior ischiopubic ramus; head injuries with loss of consciousness; blunt injuries to the left eye and facial bruises. The injuries were also confirmed by Dr. Andrew Otieno in his medical report dated 23/10/2015 who indicated that the respondent sustained dislocation of the left hip joint; fracture left ischio-pubic ramus and blunt injury right eye. The doctor assessed the degree of permanent incapacitation including blindness in one eye as 50%. Both medical reports were produced by consent of both parties and the said reports consisted of similar injuries sustained by the respondent save for the fracture acetabulum.

21. A cursory look at the decisions relied on by both parties shows that the decisions cited by the appellant contain injuries that were less severe than those sustained by the respondent. Further the decisions cited by the appellant were decided many years ago and are not comparable. The cases cited by the respondent are not quite comparable to the injuries he sustained in the current case. Particularly the case of *Penina Waitbira Kaburu vs LP* [2019] eKLR where the plaintiff sustained multiple fractures of the pelvis including bilateral superior and inferior pubic rami and rupture of the urethra. The magistrate relied on this case when it rendered its decision but upon perusal of the said case it is clear that the plaintiff in that case sustained injuries which were much more severe than those sustained by the respondent herein. In my view, the cases fairly comparable to the injuries sustained by respondent herein include:- i) *P.N. Mashru Limited vs Omar Mwakoro Makenge* [2018] eKLR where the plaintiff sustained loss of consciousness at the time of the accident, fracture of the femur distal third, fracture of the temporal bone with hematoma, head injury to the right frontal parietal bone with brain oedema, left subdural hematoma and the High Court did not disturb the award of Kshs. 1,200,000/- as general



damages for pain and suffering. Similarly, in the case of *Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd* [2013] eKLR the Court of Appeal substituted the award by the High Court and awarded Kshs. 1,500,000/- to the appellant whose injuries left him incapacitated to the degree of 50% as the respondent herein.

22. The learned magistrate in arriving at the award of Kshs. 2,400,000/- took into account the severity of the injuries, the current inflation trends and the time value of money concept. However, I am convinced that this is a suitable case for the exercise for this court to exercise its discretion and interfere with the lower court's finding on general damages for the reason that the quantum that was awarded was inordinately high. Taking into consideration the degree of permanent incapacitation, I find that a reasonable and adequate compensation for general damages is Kshs. 2,000,000/- which I hereby award.

Whether The Award On Special Damages Was Specifically Pleaded And Proved.

23. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of *Hahn v. Singh* Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not 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.

24. The respondent in his amended plaint dated 2nd August 2017 pleaded for special damages for the sum of Kshs. 954,920/- of which Kshs. 950,000/- was anticipated future medical expenses.

25. The Court of Appeal in the case of *Tracom Limited & Another vs Hassan Mohammed Adan* [2009] eKLR stated:-

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. In the case of *Kenya Bus Services Ltd vs Gituma* (2004) 1 EA 91, this Court 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 damage and is a fact that must be pleaded if evidence thereof 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 infringement of a person's legal right should be pleaded.

We understand that to mean that once the plaintiff pleads that there would 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 treatment is 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 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.

26. The medical report by Dr. D. O. Olima dated 18th February 2013 indicated that the respondent would require a total hip replacement operation at the cost of between Kshs. 400,000/- to Kshs. 600,000/- and



a corneal transplant at a cost of above Kshs. 350,000/-. The award of Kshs.600,000 for future medical expenses was based on the doctor's report. 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.

27. The plaintiff produced receipts of Ksh.4920/= for expenses such as the cost of Dr. Oluma's report, search and medicine. He was awarded Ksh.4920/=.
28. The total special damages of Ksh.604,920/= were pleaded and proved and as such rightly awarded by the magistrate.

Conclusion

29. Consequently, the award for general damages of Kshs.2,400,000/= is hereby set aside and substituted with Kshs.2,000,000/=.
30. The appeal is only partially successful.
31. The respondent shall have the costs of this appeal.
32. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

