



Barasa v Amisi (Civil Appeal E014 of 2022) [2024] KEHC 9192 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E014 OF 2022**

JN KAMAU, J

JULY 29, 2024

BETWEEN

BERNARD BARASA APPELLANT

AND

ARNOLD MAGE AMISI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M. M. Gituma (RM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No 60 of 2020 on 18th May 2022)

JUDGMENT

Introduction

1. In her decision of 18th May 2022, the Learned Trial Magistrate, Hon M. M. Gituma, Resident Magistrate, entered Judgment in favour of the Respondent as against the Appellant at 80%- 20% in favour of the Respondent herein in the following terms:-

General damages Kshs 800,000/=

Special damages Kshs 793,133/=

Kshs 1,593,133/=

Less 20% Kshs 1,274,506.4/=

Costs of the suit

Plus interest on general and special damages at court rates

2. Being aggrieved by the said decision, on 17th June 2022, the Appellant herein filed a Memorandum of Appeal of even date. He relied on five (5) grounds of appeal.



3. His Written Submissions were dated 12th February 2024 and filed on 13th February 2024 while those of the Respondent were dated 29th February 2024 and filed on 15th March 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that all the Grounds of Appeal were related and the issue that had been placed before this court for determination was whether or not the quantum that was awarded by the Trial Court was excessive in the circumstances warranting interference by this court.
7. The Appellant submitted that the Trial Court misdirected itself in treating the evidence and submissions on quantum before it superficially hence resulting to a wrong conclusion on the same. He contended that the general principle of the law was that for an appellate court to interfere with an award of damages, it must be shown that the trial court in awarding damages, took into consideration an irrelevant fact or the sum awarded was inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied as held in the case of *Butt v Khan* [1981] KLR 349.
8. He further submitted that it had also been settled in many decided cases that damages should represent a fair compensation but should not be excessive. In this regard, he placed reliance on the case of *Osman Mohammed & Another v Saluro Bundit Mohammed* Civil Appeal No 30 of 1997 (eKLR citation not given) where it was held that damages must be within limits set out by the decided cases and also within limits the Kenyan economy can afford.
9. It was his contention that the Trial Court erred by awarding Kshs 800,000/= for general damages as the same was excessive and unjustifiable. He asserted that as per the injuries sustained by the Respondent an award of Kshs 350,000/= would have been sufficient for compensation.
10. To buttress his point, he relied on the case of *Maina Onesmus v Charles Wanjobi Gitbome* [2019] eKLR where the plaintiff was awarded Kshs 350,000/= for similar injuries. He urged the court to interfere with the Trial Court's award, allow his appeal with costs.
11. On his part, the Respondent submitted that the Appellant had failed to show that the Trial Court proceeded on wrong principles and/or misapprehended the evidence in some material respect. He placed reliance on the cases of *Kihara & Another v Mutuku* Civil Appeal 27 of 2018 [2022] KEHC 15626 (KLR) and *Barnabas v Ombati* Civil Appeal E43 of 2021 [2022] KEHC 12136 (KLR) among other cases where the courts awarded general damages between Kshs 630,000/= to Kshs 800,000/= for similar injuries as those he had sustained.



12. He urged the court to enhance the award of Kshs 800,000/= to Kshs 1,500,000/=. He contended that he produced receipts of Kshs 793, 133/= which was awarded as special damages and the Appellant did not dispute. He urged the court to uphold the decision of the Trial Court.
13. According to the Medical Report of Dr Lamba Christian, the Respondent herein sustained left subtrochanteric and mid-shaft comminuted fracture, mid-shaft humerus fracture, left sided pulmonary edema, right sided pulmonary artery thromboembolism and burn wound on both lower limbs.
14. At the time of his medical examination, he had not healed and complained of severe pain and apparent respiratory distress.
15. It is well settled in law that an appellate court will not disturb an award of general damages unless the same was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of *Margaret T. Nyaga v Victoria Wambua Kioko*[2004] eKLR.
16. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.
17. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.
18. Indeed, in the case of *Kigaraari v Aya*(1982-88) 1 KAR 768, it was stated as follows:-

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”
19. It appeared to this court that besides the fractures sustained by the Respondent herein, he also suffered pulmonary edema and pulmonary artery thromboembolism and a burn on his lower limbs. A fracture was not a minor injury.
20. Remaining faithful to the doctrine of stare decisis, this court had due regard to the following cases with a view to coming to a fair and reasonable assessment of the general damages that ought to be awarded herein.
 1. In the case of *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR

this very court reduced the lower court award of Kshs 800,000/= to Kshs 500,000/= where the respondent therein had sustained a fracture on the right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. In his prognosis, the doctor had observed that the respondent therein had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain and estimated the permanent partial disability at three (3%) per cent. It was his opinion that the soft tissue injuries would leave no residual disability.



2. [Peter Namu Njeru v Philemone Mwagoti](#)[2016]eKLR

The court held that Kshs 700,000/= was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.

3. [Nguku Joseph & Another v Gerald Kibiu Maina](#) [2020]eKLR

The court awarded the plaintiff Kshs 500,000/= for sustaining soft tissue injuries and a fracture of the right humerus.

4. [Barnabas v Ombati](#) [2022]KEHC 12136 (KLR)

The court upheld the trial court's award of Kshs 800,000/= for general damages where the plaintiff had sustained soft tissue injuries together with fracture of the right femur, right humerus and fracture of the pelvic.

21. Taking into account the injuries that the Respondent sustained herein vis a vis the damages in comparable cases and the inflationary trends, this court came to the firm conclusion that the sum of Kshs 800,000 general damages was not inordinately high or manifestly excessive to warrant interference of this court.
22. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.

Disposition

23. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated and filed on 17th June 2022 was not merited and the same be and is hereby dismissed. The Appellant will bear the Respondent's costs of this Appeal.
24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JULY 2024

J. KAMAU

JUDGE

