



REPUBLIC OF KENYA



**Hitech Granite Industries Limited & another v Mutinda (Civil Appeal E278 of 2023) [2024] KEHC 9641 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9641 (KLR)

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

**CIVIL**

**CIVIL APPEAL E278 OF 2023**

**H NAMISI, J**

**JULY 26, 2024**

**BETWEEN**

**HITECH GRANITE INDUSTRIES LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ALEX KIOKO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EDWARD NGOVI MUTINDA ..... RESPONDENT**

*(Being an Appeal from the judgement of Hon. G.M. Gitonga (Mr.) Chief Magistrate delivered on 10th March 2023 in Nairobi CMCC No. E10234 of 2021)*

**JUDGMENT**

1. This appeal arises out of an accident that occurred on 20 November 2020 involving the Respondent who was a passenger travelling in motor vehicle registration number KBN 750P which collided with Motor vehicle registration number KCA 567T, belonging to the 1st Appellant and driven by the 2nd Appellant. As a result of the said collision, the Respondent sustained the following injuries:
  - i. Bruises on the right wrist, right knee and right thigh
  - ii. Recurrent pains on the right knee
  - iii. Bruised scars on the right knee and right thigh
2. By Complaint dated 12 July 2021, the Respondent instituted proceedings against the Appellants, seeking general damages, special damages of Kshs 3,550/-, costs of the suit and interest from the date of filing the suit.
3. The Appellants entered appearance and filed their Statement of Defence dated 25 October 2021.



4. On 26 October 2022, parties entered consent on liability in terms of 80:20 in favor of the Respondent. They further agreed to produce both the Respondent's and Appellants' documents without calling the makers. Parties then filed their submissions in respect of quantum of damages.
5. In his submissions, the Respondent contended that Kshs 380,000/- would be sufficient to compensate the Respondent for the injuries sustained. He relied on several cases, including *Poa Link Services Ltd & Another -vs- Sindani Boaz Bonzemo* [2021] eKLR and *Joseph Wambura -vs- Josepg Mwangi Obai* [2018] Civil Appeal No. 9 of 2017.
6. On their part, the Appellants submitted that Kshs 60,000/- would be sufficient in terms of general damages. They relied on the cases of *Eva Karemi & 5 Others -vs- Koskei Kienga & Anor* [2020] eKLR, *David Mwangi Wachira -vs- Anestar Secondary School* [2020] eKLR and *West Kenya Sugar Ltd -vs- Tom Muzee Mukhwana* [2021] eKLR.
7. In its judgement, the trial court awarded the Respondent Kshs 280,000/- in general damages, Kshs 3,550/- in special damages and costs of the suit. The computation was as follows:
 

General Damages - Kshs 280,000

Special Damages - Kshs 3,550

Total - Kshs 283,550

Less 20% - Kshs 56,710

Amount Payable - Kshs 226,840/-
8. The Appellants, being dissatisfied by the judgement lodged an Appeal on the following grounds:
  - i. That the Learned Magistrate's award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the Respondent;
  - ii. That the Learned Magistrate erred in fact and in law by ignoring the Defendants' written submissions and authorities cited therein in assessing general damages for pain, suffering and loss of amenities.
9. The appeal was canvassed by way of written submissions.

### **Analysis & Determination**

10. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) 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. 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 inconsistent with the evidence in the case generally".



11. In an appeal on quantum, the court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were set out in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be 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.

12. Similarly, in the case of *Catholic Diocese of Kisumu -vs- Sophia Achieng Tete* [2004] 2KLR 55, the Court of Appeal set out the circumstances under which an appellate court can interfere with an award of damages:

“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 the 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.”

13. It was the Respondent's case that he sustained injuries as a result of the accident. The Respondent produced copy of P3 Form and 2 Medical Reports. The first Medical Report from Waikiki Health Services dated 26th February 2020 is largely illegible. In the second report by Dr. Cyprianus O. Okere dated 11 February 2021, the Doctor classifies the Respondent's injuries as harm. The Appellants also produced a Medical Report by Dr. Wambugu dated 22 February 2022 in which the Doctor noted that there were no present complaints by the Respondent.

14. On the issue of whether the general damages awarded by the trial court were excessively high, I am guided by the principle in the assessment of damages that an award must reflect the trend of previous, recent and comparable awards. In the case of *Stanley Maore v Geoffrey Mwenda NYR* CA Civil Appeal No. 147 of 2002 [2004] eKLR, the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

15. I have looked at various cases for comparable awards. In the case of *Godwin Ileri v Franklin Gitonga* [2018] eKLR the plaintiff had sustained the following injuries: Contusion on the neck, left midleg and chest, blunt trauma to both shoulders and lower back, bruises on the right knee, left arm and hand and subluxation of left ankle. The plaintiff was awarded Kshs 90,000/-. In the *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR, the respondent sustained a cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee and was awarded Kshs. 140,000/-.



16. In the case of *Poa Link Services Co. Ltd & Another v Sindano Boaz Bonzemo, HCCA NO. 17 OF 2019*, Riechi J upheld general damages of Ksh. 350,000/- for the plaintiff who had sustained blunt injury to the chest, bruises to lower abdomen, bruises of the right hip joint, bruises of the thigh and bruises on the knee.
17. Based on the foregoing, and the range of compensation awarded for similar injuries, I am not persuaded to interfere with the award of the lower court. The appeal fails.
18. Considering the outcome of the appeal, each party shall bear its costs of this appeal.

**DATED AND DELIVERED AT NAIROBI THIS 26 DAY OF JULY 2024.**

**HELENE R. NAMISI**

**JUDGE**

Delivered on virtual platform in the presence of:

Ndegwa h/b Mege ..... for the Appellant

...Ms. Kasina ..... for the Respondent

