



REPUBLIC OF KENYA



**Maina v Naekana Route 138 Co-op & Credit Society Limited (Civil Appeal
E186 of 2021) [2024] KEHC 9277 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E186 OF 2021

H NAMISI, J

JULY 26, 2024

BETWEEN

EUNICE WANJA MAINA APPELLANT

AND

**NAEKANA ROUTE 138 CO-OP & CREDIT SOCIETY
LIMITED RESPONDENT**

*(Being an Appeal from the judgement of Hon. B. Kasavuli (Mr.) Principal
Magistrate delivered on 11 November 2021 in Mavoko CMCC No. 78 of 2020)*

JUDGMENT

1. This appeal arises out of an accident that occurred on 10 November 2019 involving the Appellant who was travelling as a fare paying passenger in motor vehicle registration KCU 270C Toyota Minibus, when the same lost control and collided with motor vehicle registration number KBP 376Q. As a result of the said collision, the Respondent sustained blunt injuries to the interior chest wall right side.
2. By Plaint dated 24 January 2020, the Appellant instituted proceedings against the Respondent, seeking general damages, special damages of Kshs 3,550/-, costs of the suit and interest. The Respondent entered appearance and filed a Statement of Defence dated 5 March 2020.
3. At the hearing in the trial court, the Appellant called 3 witnesses; the Appellant, a medical doctor and Police officer. The Respondent did not call any witnesses nor adduce any evidence.
4. In her submissions, the Appellant argued that a sum of Kshs 300,000/- would be sufficient compensation with respect to general damages. She relied on the case of *Catherine W. Kingori & 3 Others -vs- Gibson Theuri Gichubi, Nyeri HCCC No. 320 of 1998*. The Respondent, on the other hand, submitted that Kshs 40,000/= would be sufficient under the head of general damages. They relied on numerous cases, including *HB (Minor suing through mother and next friend DKM) -vs- Jasper Nchonga & Another [2021] eKLR*.



5. In its judgement, the trial court found the Respondent to be 100% liable for the accident. The Court awarded general damages in the sum of Kshs 40,000/-, special damages of Kshs 3,550/=, costs of the suit and interest.
6. The Appellant, being dissatisfied by the judgement lodged an Appeal on the following grounds:
 - i. That the learned Magistrate erred in law and fact and ended up misdirecting himself in awarding extremely low quantum of damages of Kshs 40,000/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted to the appellant herein;
 - ii. That the learned magistrate erred in law in making such a low award as to show that the magistrate acted on a wrong principle of law;
 - iii. That the learned magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable award and hence ended up making a low award in view of the medical evidence presented before the court;
 - iv. That the learned magistrate erred in law and fact in failing to consider the plaintiff's submissions and authorities in making a finding on quantum;
 - v. That the whole judgement was against the weight of evidence before the court.
7. The appeal was canvassed by way of written submissions.

Analysis & Determination

8. 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".
9. 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.

10. 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.”

11. It was the Appellant’s testimony that as a result of the collision, she sustained injuries and was taken to Machakos Level 5 Hospital for treatment. She produced the treatment notes that showed that she was treated for soft tissue injuries and discharged. The Respondent was also seen by Dr. Titus Ndeti Nzina, who prepared a report dated 13 December 2019. In the Doctor’s opinion, complete healing was anticipated.
12. In her submissions herein, in arguing for an award of kshs 400,000/= for general damages, the Appellant relied on the case of Michael Okello -vs- Priscilla Atieno [2021] eKLR where the High Court set aside the lower court’s decision and awarded Kshs 250,000/ for multiple soft injuries to the legs, chest and back.
13. The Appellant also relied on the case of Anthony Nyamwaya -vs- Jackline Mora Nyandemo [2022] eKLR where the High Court upheld the lower court’s decision to award Kshs 250,000/- for multiple soft injuries to the head, neck, back, shoulders and legs.
14. On its part, the Respondent submitted that the lower court’s award of Kshs 40,000/- for general damages was sufficient. The Respondent relied on the case of Ndungu Dennis -vs- Ann Wainaina Ndirangu & Anor [2018] eKLR where the High Court revised an award of Kshs 300,000/- to Kshs 100,000/- for soft tissue injuries to the lower right leg and to the back.
15. In addressing the issue of whether the general damages awarded by the trial court were excessively low, 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.”
16. I have looked at various cases for comparable awards. In the case of Godwin Ireri 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/-.



17. 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/-.
18. In *Joseph Mwangi Kiarie & Another -vs- Isaac Otiemo Otiemo HCCA No. 30 of 2018*, the award of Kshs 300,000/- was reduced for Kshs 180,000/- for soft tissue injuries.
19. In *Michael Odiwuor Obonyo -vs- Clarice Odera Obunde HCCA No. 01 of 2020*, the award of Kshs 500,000 was reduced to Kshs 200,000/= for soft tissue injuries.
20. In view of the foregoing, I am persuaded that the award by the learned trial magistrate fell on the lower side in comparison to comparable awards. However, I am not persuaded that the sum proposed by the Appellant is reasonable and fair, in light of the injuries suffered.
21. Upon considering the damages awarded in the authorities I have just cited, and their age, I find that an award of Kshs 100,000/= to be reasonable and adequate to compensate for the injuries suffered in this case.
22. Accordingly, I allow the appeal and set aside the award of Kshs 40,000/- by substituting it with Kshs 100,000/-. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT MACHAKOS THIS 26 DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

.....Ms. Ketta..... for the Appellant

.....Ms. Nanjira h/b Njuguna for the Respondent

