



REPUBLIC OF KENYA



**Semsum Construction Limited v Nzioka (Civil Appeal
E15 of 2022) [2024] KEHC 9646 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E15 OF 2022**

**H NAMISI, J
JULY 26, 2024**

BETWEEN

SEMSUM CONSTRUCTION LIMITED APPELLANT

AND

ANNASTACIA MBENYA NZIOKA RESPONDENT

*(Being an Appeal from Judgement of Hon. Opanga, Resident Magistrate
in Kangundo SPMCC No. 80 of 2019 delivered on 1st February 2022)*

JUDGMENT

1. This arises from a suit in the lower court filed by the Respondent against the Appellant seeking general damages, special damages of Kshs 5,550/-, costs and interest from the date of filing the suit. It was the Respondent's case that on 6 June 2018, the Respondent was a passenger aboard motor vehicle registration KAU 174N when the said vehicle collided with motor vehicle registration number KCK 845D, owned by the Appellant. The accident occurred along Tala – Kangundo, and the Respondent sustained the following injuries:
 - i. Bruise on the forehead
 - ii. Blunt injury to the lower abdomen with macerated still birth;
 - iii. Recurrent abdomen pains
2. The Appellant entered appearance and filed a Statement of Defence dated 6 September 2021. On 21 October 2021, Parties recorded a consent on liability in the terms of 85:15 in favour of the Respondent. Parties then filed their submissions on quantum of damages.
3. In her submissions, the Respondent urged the trial court to award Kshs 1,200,000/= in general damages. She relied on the case of Reuben Wekesa Kituyi & Anor -vs- Asmin Teresa Osundwa, Civil Appeal No 118 of 2016 [2021] eKLR,



4. On their part, the Respondent contended that a sum of Kshs 100,000 would be sufficient for general damages. They relied the cases of Isaac Mwenda Micheni -vs- Mutegi Murango [2004] eKLR, Shalimar Flowers Ltd -vs- Noah Muniango Mutianyi [2011] eKLR and Eastern Produce K Ltd -vs- Gilbert Muhunzi Makotsi, Eldoret HCCA No. 76 of 2012.
5. In its judgement, the trial court noted that no two cases can be exactly the same. In awarding the Respondent, the trial court took into account the decisions cited by the parties, the nature and extent of the Respondent's injuries, effluxion of time and inflationary trends. The judgement entered was as follows:
General Damages - Kshs 1,000,000/=
Special Damages - Kshs 5,550/=
Total - Kshs 1,005,550/=
Less 15% contribution - Kshs 150,825/=
Final Award - Kshs 854,717.50
6. Aggrieved by this decision, the Appellant lodged this appeal on the following grounds:
 - i. That the Honourable Magistrate erred in law and fact in awarding general damages to the Respondent amounting to Kshs 1,000,000/-;
 - ii. That the quantum of damages is excessive and an erroneous estimate of the damage that may be awarded to the Respondent considering the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances;
 - iii. That the learned trial magistrate erred in law and fact and misdirected herself in failing to consider the submissions by the Appellant together with the authorities relied on by the Appellant;
 - iv. That the Honourable Magistrate erred in law and facts by disregarding established principles in awarding damages in the case before her;
7. The Appeal was canvassed by way of written submissions.

Analysis and 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. I have considered the Record of Appeal as well as the submissions by the parties. In the trial court, the Respondent produced a Discharge Summary from the Maternity Unit Post Natal Ward of Kangundo General Hospital. The same evidenced that indeed the Respondent had had a miscarriage, having delivered still birth. The Respondent also produced a Medical Examination Report (P3 Form). The Medical Report by Dr. Cyprianus O. Okere dated 14 November 2018 classified the Respondent's injuries as grievous harm.

11. The Respondent's evidence was not controverted by the Appellant.

12. In addressing whether the general damages awarded by the trial court were exceedingly 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."

13. Having stated that, I am alive to the fact that no two cases are exactly the same. It is incumbent upon this court to analyse the damages awarded by the trial court in light of cases that may have comparable injuries.

14. In the case of *P B S & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016)* eKLR, the court stated thus:

"On the claim for damages for loss of full-term unborn baby, the plaintiff urged the court to award him kshs 5,000,000. His submissions, though not acknowledging the source of the material there under, can be found at www.ambridelaw.com in an article titled "How much compensation is awarded for a loss of an unborn baby in a car accident?" The above article can be found from Google search engine. It acknowledges that there is no question that the death of a child is one of the most traumatic events one can experience; and so is the case with the death of a foetus, whether it be a miscarriage or still birth. Further, that in especially unfortunate circumstances the loss of a foetus can be caused by either intentional or negligent acts of the third party: as with medical negligence and motor vehicle accidents. In such cases, the article concludes, those suffering this devastating loss may seek compensation for their pain and suffering."



15. In the case of *Fatuma Diyay Farah v Abdirahman Ali Galgalo & another* [2021] eKLR, the plaintiff sustained fracture of fibula and tibia, delgoris injury on the right leg, blunt injury to her pelvis, blunt injury to chest, blood loss and still birth. Based on the severity of injuries, the Court awarded Kshs 3,500,000/- in general damages.
16. Having considered the authorities cited by the Appellant and those that I have referred to hereinabove, I am not persuaded that the award by the trial court was excessively high. I, therefore, will not interfere with the same.
17. The upshot of the foregoing is that the appeal fails.
18. The Respondent shall have costs of the appeal assessed at Kshs 35,000/=.

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

HELENE R. NAMISI

JUDGE

In the presence of:

....N/A for the Appellant

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

