



REPUBLIC OF KENYA



KENYA LAW
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**Muthee v Kanyi & another (Civil Appeal E190 of 2021)
[2024] KEHC 13353 (KLR) (Civ) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13353 (KLR)

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

CIVIL

CIVIL APPEAL E190 OF 2021

JM NANG'EA, J

OCTOBER 29, 2024

BETWEEN

BEATRICE WANJIKU MUTHEE APPELLANT

AND

JAMES NJERI KANYI 1ST RESPONDENT

HOPE SCOPE PROPERTIES LIMITED 2ND RESPONDENT

*(Being an appeal from the judgement and decree of the Chief Magistrate's
Court at Nairobi, Milimani Commercial Courts (Hon. D.M Kivuti
– SRM) delivered on 7th August 2020 in CMCC No. 5845 of 2016)*

JUDGMENT

Grounds of Appeal and reliefs sought.

1. By a Memorandum of Appeal dated 4/9/2020, the appellant faults the trial court's judgment dated 7/8/2020 on grounds that may be condensed into four as hereunder:
 1. That the Learned Magistrate erred in law and fact in awarding the appellant, the plaintiff in the suit before the lower court, a sum of general damages that is manifestly low in the circumstances considering the injuries she suffered.
 2. That the Learned Magistrate erred in law and fact by awarding general damages against the weight of medical evidence adduced.
 3. That the Learned Magistrate erred in law and fact in failing to consider case law the appellant's advocates cited and thus arrived at a wrong assessment of damages awardable.



4. That the Learned Magistrate erred in law and fact by failing to award pleaded special damages of Ksh. 7,500/= without giving reasons.
2. The appellant therefore seeks the following orders;
 - a) That the appeal be allowed.
 - b) That this court does revise and enhance the damages awarded by the lower court.
 - c) That this court does award the appellant special damages in the sum of Ksh. 7,500/=.
 - d) That the appellant be awarded the costs of this appeal.

Background to the Appeal

3. This appeal is on quantum of damages only. It would appear that only the appellant filed submissions which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate granted the appellant Kshs. 150,000/= general damages for pain and suffering on account of a closed head injury that caused loss of consciousness for some hours due to haemorrhagic brain contusion as per Dr W.M Wokabi's medical-legal report dated 18/7/2016. . The appellant also sustained soft tissue swellings of the right scalp and abrasions on the right side of the head. At the time of the examination, she was still experiencing frequent headaches but was fully conscious and was not exhibiting any neurological deficits. A small scar was on the appellant's right side of the head. There were multiple scars on the back of both forearms. The doctor opined that the scars were permanent but would become smaller with time. It was concluded that the appellant healed reasonably well. She had suffered the injuries in a road traffic accident subject of the suit before the lower court that occurred on 24/3/2016, causation of which was blamed on the respondents.
4. The appellant pleaded for special damages totalling Kshs. 7,500/= made up of expenses incurred on the medical report (Kshs. 2,000), Motor vehicle search (Kshs. 500/=) and other medical expenses (Kshs. 5,000/=). In support of the claim, she tendered her bundle of documents as per list dated 15/8/2016. The documentary exhibits include a receipt for Kshs. 2,000/= in respect of medical examination fees. There appears to be no other payment receipts supporting the other claims relating to Motor vehicle search and other medical expenses. The trial court's judgement is silent on the claim for special damages.
5. Hearing of the suit was conducted ex-parte following default by the respondents to enter appearance in the suit and/or file defence. Apparently at the request of the appellant, the lower court on 18/7/2017 entered "judgement" in her favour as prayed.

Guiding Principles

6. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR cited in the appellant's submissions). The Court of Appeal for East Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- ii. 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 her; and
- iii. 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.”

Analysis and Determination

7. The appellant’s advocates in their submissions fault the learned trial magistrate for not seeking guidance from judicial precedents in assessing general damages. It is also pointed out that the trial court failed to give reasons for the failure to grant the special damages claimed or at all. Counsel once again place reliance on the judicial determination in *Brian Omwenga Nyabuto vs. Ringwani Investment T/A Orange Bus Service & Another* (2005) eKLR that was also cited in the appellant’s submissions before the lower court as well as the case of *Yobesh Makori vs. Elmmerrick Mobisa Bota* (2021) eKLR. In the former case, the claimant suffered cerebral haemorrhage and bilateral frontal oedema leaving him with limited developmental capacity and a chance of developing epilepsy. He was awarded Kshs. 2,500,000/= general damages in 2005 . In the latter case, the claimant who was a teacher by profession sustained head injury; deep laceration on the scalp; left clavicle fracture; bruises on the upper limbs; crushed left leg; dislocation of the left tarsal bone and a cut wound on the right leg. The fracture was corrected and metal implants were inserted. The claimant experienced headaches and pain on the amputated stump and was walking with crutches. He needed an artificial limb at a cost of Kshs. 250,000. The rate of permanent disability was assessed at 50%. Kshs. 2,000, 000/= in general damages for pain, suffering and loss of amenities were awarded in that case.
8. It must be noted that general damages are damages at large and no case is exactly the same as the other. The general method of approach in assessing general damages ought to 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 (see the often cited case of *Kemro Africa Ltd & Another Lubia & Another* (1982-88) KLR).
9. I have perused the brief judgement of the learned trial magistrate. Indeed the court neither considered the submissions proffered by the appellant’s advocates nor sought guidance from any other specific judicial or legal authorities. The award of Kshs. 150,000/= general damages does not therefore have any legal basis.
10. I, however, find the cases of *Brian Omwenga Nyabuto* and *Yobesh Makori* supra not quite comparable to the instant case given the relatively more extensive injuries and permanent incapacity suffered by claimants therein. I think the case of *Duncan Mwenda & 2 Others vs. Silas Kinyua Kithela* (2018) eKLR which I have looked up is more comparable to this case and I am so persuaded. In that matter, the claimant sustained severe head injury with intracerebral haematoma; damage to the exterior tendon of the left middle finger and soft tissue injuries on the chest wall. He was admitted in hospital for 5 months in an unconscious state . He complained of recurrent headache, chest pain, inability to extend the left middle finger and inability to hold tightly with the left hand. Like in the instant case the injuries, however, healed well without permanent disability. This court assessed and awarded general damages of Kshs. 350,000/= in that case.
11. Taking into account all the relevant factors including the incidence of inflation seeing that the decision in *Duncan Mwenda & 2 Others* supra was handed down way back in 2018, I find a sum of Kshs. 450,000/= to be reasonable compensation for the appellant herein.



12. Turning to the appeal on special damages, it has been noted that some of the claims are not supported by requisite documents evidencing actual expenditure. However, the lower court seemed to have allowed the special damages claim in its judgement entered on 18/7/2017 in default of appearance by the respondents by dint of the Civil Procedure Rules 2010.

Determination

13. The upshot is that the appellant is granted Kshs. 450,000/= and Kshs. 7,500/= in general damages and special damages respectively totaling Kshs. 457,500/=. All the Grounds of Appeal accordingly succeed.
14. Consequently, the trial court's judgement and decree are set aside and substituted with the sum of Kshs. 457,500/= being general and special damages.
15. The appellant will have the costs of the appeal.
16. Judgement accordingly.

J. M. NANG'EA , JUDGE

JUDGEMENT DELIVERED VIRTUALLY THIS 29TH DAY OF OCTOBER 2024 IN THE PRESENCE OF :

The appellant's Advocate, Mr Ombuna

The 1st respondent, Absent

The 2nd respondent, Absent

