



REPUBLIC OF KENYA



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**Barasa v Ojwang & another (Civil Appeal E012 of 2023)
[2024] KEHC 14952 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E012 OF 2023
WM MUSYOKA, J
NOVEMBER 27, 2024**

BETWEEN

BEATRICE NASIMIYU BARASA APPELLANT

AND

NDINDI OJWANG 1ST RESPONDENT

ROBERT JARED WEKESA 2ND RESPONDENT

*(An appeal arising from the judgment of Hon. T Madowo, Resident Magistrate,
RM, delivered on 19th January 2021, in Busia CMCCC No. E132 of 2018)*

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondents, for compensation, arising from a motor vehicle accident, which allegedly happened on 7th March 2017, along the Busia-Mumias road, at Daraja Mbili, involving the appellant and motor vehicle registration mark and number KAC 315B, which was allegedly owned or controlled by the respondents at the material time. The appellant was allegedly a fare-paying passenger in motor vehicle registration mark and number KBY 443Y, a matatu, when motor vehicle KAC 315B was allegedly so negligently driven, that it caused an accident, wherein the appellant sustained injury. The respondents filed a defence, in which they denied everything pleaded in the plaint. In the alternative, they attributed negligence on the motor vehicle in which the appellant was a passenger.
2. Liability was settled, vide a consent that was recorded in court, on 24th July 2020, at 80:20, in favour of the appellant, and against the respondents. Thereafter, the appellant testified, and called 1 witness, the doctor who had prepared the medico-legal report placed on record. Judgment was delivered on 19th January 2021, where general damages were awarded at Kshs. 550,000.00, subject to contribution, while special damages were assessed at Kshs. 59,150.00, with costs.



3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 29th May 2023, largely turn on the quantum of the damages awarded being too low.
4. Directions, on the disposal of the appeal, were given on 16th September 2024, for canvassing of the appeal by way of written submissions. Both sides have filed written submissions.
5. The appellant has submitted that the quantum of general damages, assessed by the trial court, was inordinately low, and the decisions, in *Denshire Muteti Wambua vs. Kenya Power & Lighting Company Limited* [2013] eKLR (GBM Kariuki, Kiage & Murgor, JJA), *Civicon Limited vs. Richard Njomo Omwancha, Gladys Nyakerario Omwancha & Rebecca Nyaboke Machogu* [2019] KEHC 8373 (KLR) (Majanja, J), *Mbaka Nguru & another vs. James George Rakwar* [1998] eKLR (Omolo, Tunoi & Shah, JJA), *Judy Ngochi vs. Kamakia Ele Selelo Ledamoi* [2019] KEHC 2980 (KLR) (Odunga, J), *Pestony Limited & another vs. Samuel Itonye Kagoko* [2022] eKLR (Meoli, J), *Lawrence Wairimu Wanyoike & another vs. Joseph Letting* [2021] eKLR (Ogola, J), *China Railway No. 10 Engineering Group Co. Limited vs. Osugo* [2024] KEHC 2662 (KLR)(Chigiti, J), *James Gathira Ngungi vs. Multiple Hauliers (EA) Limited & another* [2015] eKLR (Aburili, J) and *Joseph Oduor Anode vs. Kenya Red Cross Society* [2012] eKLR (Odunga, J), are cited in support.
6. The respondents wholly support the award by the trial court, and rely on *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* [2004] eKLR (Tunoi, O’Kubasu & Githinji, JJA), *Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 others* [1986] eKLR (Kneller, Hancox & Nyarangi, JJA), *Isabel Nyambura, minor suing by her father and next friend, Reuben Kangethe Marandi vs. Sanric Supplies Limited Nyeri HCCC No. 349 of 1996* (Okwengu, J), *Raphael Musyoka Mailu (a minor suing through his uncle and next friend Thomas Muoka Muthoka) vs. Ernest Jacob Kisaka* [2009] eKLR (Khamoni, J), *Gabriel Kariuki Kigathi & another vs. Monica Wangui Wangechi* [2015] eKLR (Aburili, J), *Ahmed Mzee Kamau t/a Najaa Coach Limited & another vs. Veronica Ngii Muia aka Veronica Muiya aka Veronica Ngui Muiya* [2017] eKLR (Chitembwe, J), *Joseph Mwangi Thuita vs. Samuel Chamgamure & another* [2017] eKLR and *Mbae (suing as the legal representative of the estate of Koome Mbae) vs. Kinya* [2024] KEHC 2285 (KLR)(Gitari, J).
7. The appeal turns only on assessment of general damages.
8. The injuries sustained by the appellant were particularised in the plaint, as fractures of the right femur, left ulna and radius and a facial cut wound. The same injuries were reflected in the medico-legal report, dated 19th February 2018, that Dr. Andai presented in court. The respondents did not subject the appellant to a second medical examination, and there was, therefore, no second medical opinion.
9. The trial court was not persuaded by any of the authorities placed before it by the parties, in the assessment of quantum, and cited no authorities of its own, which might have influenced and guided it in the assessment of damages.
10. It would appear that this was a case of fractures of the right femur, left ulna and radius and a facial cut wound.
11. I have done a survey of recent decisions, where claimants had sustained comparable injuries.
12. In *TAM (a minor suing through her father and next friend JOM) vs. Richard Kirimi Kinoti & another* [2015] eKLR (Njuguna, J), the claimant had sustained a fracture of the left femur, and the court awarded Kshs. 250,000.00. In *Jackson Mbaluka Mwangangi vs. Onesmus Nzioka & another* [2021] eKLR (Odunga, J), the claimant suffered a fracture of the left femur, with blunt injury to the right shoulder, and Kshs. 600,000.00 was awarded. In *Reuben Mongare Keba vs. LPN* [2016] eKLR (Okwany, J), the injuries were a fracture of the tibia-fibula bones of the right leg, fracture of the right



femur, dislocation of the right hip joint, degloving injury of the right leg, and bruises on the chin, and the award was Kshs. 800,000.00.

13. In EWO (suing as a friend and minor COW) vs. Chair Board of Governors Agoro Yombe Secondary School [2018] eKLR (Aburili, J), the injuries suffered were a fracture on the right mid-shaft femur with tibio-fibular fracture, and the court awarded Kshs. 800,000.00. I note here that the claimant sustained fractures of the femur, in addition to fractures of the tibia and fibula bones, and, therefore, the injuries were comparable to what the appellant herein suffered. In Francis Nzivo Munguti & South Sioux Farm Limited vs. Jotham Wanyonyi Nakasana & Falcon Coach[2020] KEHC 4312 (KLR) (SM Githinji, J), the injury was a fracture of the right radius/ulna and multiple cuts on the forehead, right leg and foot which were stitched, and Kshs. 600,000.00 was awarded.
14. In Osebe vs. Njoroge [2024] KEHC 9654 (KLR) (Mbungi, J), the injuries suffered were a fracture of the left distal radius, fracture of the left distal ulna and pain on the left wrist, and the court awarded Kshs. 550,000.00. In Bonareri vs. Onger[2024] KEHC 1401 (KLR) (Gichohi, J), the injuries sustained were facial bruises, dislocation of the left shoulder joint, fracture of the left ulna and radius, fracture of the left 2nd finger and little finger and bruises on the left arm, and an award of Kshs. 400,000.00 was made. Kshs. 650,000.00 was awarded, in Kamaliki vs. Paul [2023] KEHC 2540 (KLR) (Lagat-Korir, J), for left radius fracture, left ulna fracture and deep cut wound on the chin. In Munyala vs. Mwikya & another [2023] KEHC 19405 (KLR) (Limo, J), the injuries were fracture of the distal radius (right upper limb), soft tissue injuries on the back and soft tissue injuries on the left mid leg, and an award of Kshs. 400,000.00 was made.
15. Assessment of damages is at the discretion of the court. I have noted that the decisions I have surveyed relate to relatively lesser injuries than those suffered by the appellant, and the appellate courts, in those decisions, made awards similar to what was awarded by the trial court in the instant case, pointing, no doubt, to the fact that the award made by the trial court was founded on a wrong principle, for the award made was not similar to awards in comparable cases.
16. I find guidance in Reuben Mongare Keba vs. LPN [2016] eKLR (Okwany, J) and EWO (suing as a friend and minor COW) vs. Chair Board of Governors Agoro Yombe Secondary School [2018] eKLR (Aburili, J). Consequently, I shall set aside the award made by the trial court, and substitute it with an award of Kshs. 700,000.00 general damages, subject to contribution. The appeal herein is disposed of in those terms. The appellant shall have the costs of the appeal. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 27TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

ADVOCATES

Ms. Mbuga, instructed by Munyaga Githaiga Advocates LLP, Advocates for the appellant.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the respondents.

