



REPUBLIC OF KENYA



KENYA LAW
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**Too v Kagema (Civil Appeal 33 of 2019)
[2024] KEHC 16400 (KLR) (23 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 33 OF 2019
RN NYAKUNDI, J
DECEMBER 23, 2024**

BETWEEN

WILLY TOO APPELLANT

AND

PAUL KAGEMA RESPONDENT

*(Being an appeal from the Judgment/Decree of the Hon. Naomi Wairimu
(PM) delivered on 26th February, 2019, in Eldoret CMCC No. 779 of 2017)*

JUDGMENT

Representations:

Mwinamo Lugonza & Company Advocate

Ngaywa & Kibet Partners

1. The Appeal is mainly on quantum. In the trial Court, the Respondent had sued the Appellant claiming general damages, special damages of Kshs.8,000/= plus costs and interests of the suit. It was alleged that on or about 8/07/2017, the Respondent was being lawfully carried as a pillion passenger on motorcycle registration KMDM 465F along Eldoret- Elgonview Hospital Road when the Appellant and or his driver, servant, agent and or employee negligently drove, managed and or controlled motor vehicle registration number KCH 383K that he caused the aforesaid motor vehicle to knock down the motor cycle and as result of which the Respondent sustained severe injuries.
2. In a Statement of Defence dated 19/09/2017, the Appellant denied the occurrence of the accident and in the alternative he blamed both the Respondent and the rider and or owner of motorcycle registration number KMDB 465F for causing the accident.
3. After trial Judgment was delivered on 29th September, 2020 and the Appellants were found 100% liable and damages assessed as hereunder: -



- a. General Damages..... Kshs.600,000/=
 - b. Special Damages..... Kshs.8,000/=
 - c. Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (3) grounds: -
1. That the Honourable Learned Magistrate erred in law and in fact in warding the general damages to the Respondent amounting to Kshs.600,000/=.
 2. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the Respondent with regard to the circumstances of the case before the Subordinate Court and the weight of precedents in similar circumstances.
 3. That the Honourable Learned Magistrate erred in law and in fact in relying on extraneous evidence in arriving at the decision on general damages.
 4. That the Honourable Learned Magistrate erred in law and facts in relying on extraneous evidence in arriving at the decision on the general damages.

Submissions

5. The Appeal was canvassed vide written submissions and both the appellant and Respondent filed their respective submissions.

The Appellant's Submissions

6. In regard to quantum, Counsel for the Appellant submitted that the trial Court awarded the Respondent general damages amounting to Kshs.600,000/=, which the Appellant appeals against, that the Respondent sustained the following soft tissue injuries:-
- a. Blunt injury to the head
 - b. Blunt injury to the neck
 - c. Blunt injury to the back
 - d. Blunt injury to the pelvis
 - e. Blunt injury to both upper limbs
 - f. Dislocation of the right knee
 - g. Blunt injury to the left leg.
7. Counsel submitted that it settled principle that comparable injuries should attract comparable awards and that in the case relied upon by the Respondent in the trial court, Irene Egira Nthiga V Nairobi Bus Union HCCC No. 2425 of 1990, the Plaintiff sustained the following injuries; fracture of the right acetabulum, dislocation of the right knee joint with torn ligaments and popliteal severe injury, fracture of the left radical head, closed head injury, pain in the right hip, pain and stiffing of the right knee and weak right ankle.



8. Counsel added that in the second case relied upon by the Respondent, Amrateen D. Shah V Joseph Macklo Nyangawo Mombasa HCCC No. 228 of 1987, the Plaintiff sustained the following injuries; fracture dislocation of the central hip and fracture of the 12th rib of the left side.
9. According to Counsel, comparing the injuries sustained in the above case with that of the Respondent herein, Counsel contended that the injuries suffered are not comparable and that the authorities relied upon by the Respondent in the trial Court depict serious injuries than those suffered by the Respondent herein. Further, Counsel submitted that the learned Magistrate did not proffer any justifiable reasoning in support of the determination made in awarding the Respondent Kshs.600,000/= as general damages as her decision was not supported by any case law as anticipated by law.
10. Counsel therefore urged the Court to assess downwards the quantum of general damages that the Respondent may be awarded Kshs.200,000/=. Counsel further urged the Court to be guided by the decisions in *Mara Tea Factory Limited Vs. Joshua Makworo Onkoba* [2021] eKLR where the Court reduced the award for general damages from Kshs.400,000/= to Kshs.300,000/=: in *Pascal V Ouko* where the Respondent Kshs.150,000/=: in *Justine Nyamweya Ochoki & Another V Jumaa Karisa Kipingwa* where the Respondent was awarded Kshs.150,000/= for soft tissue injuries and in *FM (minor suing through mother and next friend MWM) vs. JNM & another* where the Respondent was awarded Kshs.100,000/=. Counsel maintained that the Plaintiffs in the said cases suffered comparable injuries to those suffered by the current Respondent.
11. In regard to whether the Appellant has raised grounds that would warrant interference of the Lower Court's decision. Counsel cited 78 of the *Civil Procedure Act* which espouses on the role of the first appellate Court. Counsel also cited the case of *Peter M. Kariuki V Attorney General* [2014] eKLR and the case of *Oluoch Eric Gogo Vs. Universal Corporation Ltd* [2015] eKLR and submitted that the Respondent has raised grounds and made out a case that would warrant this Honourable Court to interfere with award of the Lower Court. In conclusion, Counsel urged that the appeal herein be allowed with costs to the Appellant.

The Respondent's Submissions

12. On liability, Counsel for the Respondent chose to submit on the issue of liability or the same it not contested by the Appellant. I will therefore not reproduce the Respondent's submission under this heading.
13. With regard to quantum, Counsel for the Respondent submitted that the trial Magistrate awarded the Respondent, general damages of Kshs.600,000/=: Special damages of Kshs.8,000/= and costs of the suit and interest. Counsel added that they support the trial Court finding on the issue of quantum of damages. According to Counsel the trial Court's finding on quantum is not inordinately too low or so high so as to amount to a wholly erroneous estimate and that the Appellate Court should not therefore disturb this award. Counsel maintained that the trial Magistrate followed the proper principle in making the award, that from the medical documents, the Respondent sustained the following injuries;-
 - a. Blunt injury to the head
 - b. Blunt injury to the neck
 - c. Blunt injury to the back
 - d. Blunt injury to the pelvis
 - e. Blunt injury to both upper limbs



- f. Dislocation of the right knee
 - g. Blunt injury to the left leg.
14. Counsel submitted that in view of the injuries sustained the award of Kshs.600,00/= as general damages sufficed as just and adequate compensation to the Respondent for injuries sustained. Counsel relied on the following cases in support of his submissions; Irene Egira Nthiga V Nairobi Bus Union HCCC No.2425 of 1990, Amrateen D. Shah V Joseph Macklo Nyangawo Mombasa HCCC No. 228 of 1987 and Moses Ndumia Vs. Rebecca Aswa Mwirisha.
15. In the conclusion, Counsel submitted that the trial Magistrate did not err in making the award both on liability and quantum of damages.

Determination

16. This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and arrive at an independent determination. This position was held in the case of *Selle & Another Vs Associated Motor Boat Co. Ltd & Others* (1968) E.A 123 where the court stated as follows:

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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...”

17. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v AM. Lubia and Olive Lubia* {1982-88} 1 KAR 727 at p. 730 Kneller J. A. held that:

“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 that 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.”

18. Similarly, in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, where the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended



the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

19. From the foregoing, this court can only interfere with assessment by the trial court where it is satisfied that the court took into account an irrelevant factor or left out a relevant factor or the award was either inordinately high or low as to amount to an erroneous estimate of the damage or that the assessment was not based on evidence.
20. The facts speak for themselves that an accident indeed occurred on 8/07/2017 involving motorcycle registration number KMDB 465F and motor vehicle registration number KCH 383K and as result of which the Respondent sustained injuries.
21. The issue for determination here is whether the award of general damages of Kshs.600,000/=in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
22. To begin, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical report by Dr. Joseph C. Sokobe as:
 - a. Blunt injury to the head
 - b. Blunt injury to the neck
 - c. Blunt injury to the back
 - d. Blunt injury to the pelvis
 - e. Blunt injury to both upper limbs
 - f. Dislocation of the right knee
 - g. Blunt injury to the left leg.
23. He observed that the Respondent had sustained soft tissue injuries which were recovering well.
24. From my re-evaluation of the evidence, I find that the learned trial Magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made.
25. At the trial Court Counsel for the Appellant proposed an award of Kshs.100,000/= as general damages considering the evidence by the Plaintiff’s witnesses on the injuries he sustained. The Appellant relied on the decision in *Mumias Sugar Company Ltd Vs. Julius Abuko Shibia HCCA No. 112 of 2011* where a similar award was made for a blunt injury to the head and neck, back and other soft tissue injuries.
26. On the hand, the Respondent proposed an ward of Kshs.700,000/= as general damages considering the injuries he sustained. The Respondent relied on the decision in *Nairobi HCCC No. 2425 of 1990, Irene Egira Nthiga V Nairobi Bus Union Limited* where the Court awarded Kshs.450,000/= and *Mombasa HCCC No. 228 of 1987, Amrateen D. Shah V Joseph Macklo Nyangawo* where the Court awarded Kshs.420,000/=.
27. In awarding Kshs.600,000/= as general damages, the trial Magistrate made the following observations; that since the injuries sustained by the Plaintiff are minor compared to those sustained by the Plaintiff’s in those authorities cited by the Plaintiffs are more severe than those sustained by the Plaintiff in the authorities cited by the Defendant.



28. It must be noted that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects. In the authorities cited by the Respondent it is clear that the injuries therein were more severe than those in present case whereas in the authority relied upon by the Appellant the injuries therein are less severe than those in the instant case. It is also important to appreciate the passage of time and issues of inflation (See *Ugenya Bus Services v Gachoki* [1982] eKLR) when dealing with the award on quantum.
29. With foregoing in mind, it cannot therefore be said that the lower Court committed an error of principle; or that it took into account irrelevant factors; or even that the award of Kshs.600,000/= was so inordinately high as to represent an erroneous estimate of the compensation due to the Respondent for his injuries
30. In *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become



crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

31. With regard to special damages, the same were not contested by the Appellant. However, the Respondent pleaded for Kshs.8,000/= and he was able to provide proof by way of receipts.
32. In the premises, I opine that the amount awarded by the trial Court was sufficient and I reaffirm the same.
33. In the final analysis, I find that this Appeal is devoid of merit and I hereby dismiss it with costs to the Respondent.
34. It is so ordered.

DATED SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 23RD DECEMBER 2024

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R. NYAKUNDI
JUDGE

