



REPUBLIC OF KENYA



**Nyakonyu & another v Tabaa (Civil Appeal E550 of 2023)  
[2024] KEHC 15928 (KLR) (Civ) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15928 (KLR)

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

**CIVIL**

**CIVIL APPEAL E550 OF 2023**

**H NAMISI, J**

**DECEMBER 18, 2024**

**BETWEEN**

**MONICA MUKAMI NYAKONYU ..... 1<sup>ST</sup> APPELLANT**

**WILFRED THUKU GICHAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FRANCIS ELAIN TABAA ..... RESPONDENT**

*(Being an Appeal from the judgement of Hon. Selina Nelima Muchungi,  
delivered on 9 June 2023 in Milimani CMCC No. E 13496 of 2021)*

## **JUDGMENT**

1. This appeal arises out of an accident that occurred on 30 June 2021, involving the Respondent, a pedestrian crossing along Jogoo Road and the 1st Appellant's Motor vehicle registration number KCZ 056C, which was driven by the 2nd Appellant. As a result of the accident, the Respondent sustained the following injuries:
  - i. Blunt and bruise injuries on the head;
  - ii. Major chest injuries consisting of blunt soft tissue injuries to the chest;
  - iii. Fractures of 8 ribs;
  - iv. Left hemothorax (blood in left chest cavity);
  - v. Fracture of the left collar bone;
  - vi. Fracture of the left inferior pubic ramus;



- vii. Abrasions on both knees.
2. By Plaintiff dated 26 October 2021, the Respondent instituted proceedings against the Appellants seeking general damages for pain, suffering and loss of amenities, special damages of Kshs 3,550/= and costs of the suit.
3. The Appellants entered appearance and filed a Statement of Defence dated 3 March 2022.
4. The Appellants filed an incomplete Record of Appeal which did not contain the pleadings or decree. The provisions of Order 42 Rule 13 (4) of the Civil Procedure Rules are clear. Whereas a Judge may dispense with the production of documents or part of documents, certain documents must be contained in the Record of Appeal for the same to be considered complete. These are: the Memorandum of Appeal, the pleadings and the Judgement, Order or Decree appealed from. This is not something that an Appellants can simply wish away. A complete Record of Appeal must be placed before the court to enable the court understand and appreciate the factual or legal controversies before it. Furthermore, despite the clear provisions on extension of time, and the numerous opportunities accorded to them to do so, the Appellants did not seek any extension of time to file a complete Record of Appeal. The very last document in the Record of Appeal is a letter dated 11 January 2024 to the Registry, requesting typed proceedings, certified copies of the judgement and decree.
5. That notwithstanding, from the lower court file I am able to discern that the trial entered judgement in favour of the Respondent as follows:
  - i. General Damages - Kshs 2,800,000/-
  - ii. Special Damages - Kshs 3,550/=
  - iii. Costs of the suit plus interest at court rates
6. The Appellants, being dissatisfied by the judgement, lodged an appeal on the following grounds:
  - i. That the learned Magistrate in the matter herein delivered judgement on 9 June 2023 in favour of the Respondent herein this contrary to the law and facts availing before the Honorable Court;
  - ii. That the learned Magistrate erred in fact and law in finding that the Plaintiff herein was entitled to damages of Kshs 2,803,550/= for injuries sustained that were too high in view of the fact that compared to the injuries suffered by the Respondent;
  - iii. That the learned Magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, precedent thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages;
  - iv. That the learned Magistrate erred in law and fact by failing to take account authorities stated in the Appellants; submissions particularly authorities stated therein in order for her to arrive at a reasonable sum awardable to the Respondent herein;
  - v. That the learned Magistrate erred in law and fact in failing to appreciate that the Respondent's pleadings and evidence tendered in support thereof was incapable of sustaining the award of damages.
7. Directions were given to canvass the appeal by way of written submissions. By the time of writing this judgement, neither party had filed their submissions.



8. I have considered the Memorandum of Appeal, Record of Appeal, and proceedings in the lower court file. This appeal relates only to the issue of the quantum of damages assessed by the trial court.

### **Analysis & Determination**

9. 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.

10. 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.

11. The Respondent was the only witness to testify at the hearing in the lower court. It was the Respondent's testimony that he while crossing the road at Rikana area of Jogoo Road, he was knocked down by the 1st Appellant's motor vehicle. He lost consciousness and awoke five days later at Nairobi West Hospital. He was admitted at the hospital for 18 days. In support of his claim, the Respondent produced copy of Police Abstract, copy of Medical Report (P3 Form), Medical Report by Dr. Wokabi dated 23 September 2021 and Discharge Summary from the Nairobi West Hospital.
12. In the Medical Report, Dr. Wokabi's prognosis was that the Respondent had suffered a lot of pain from the multiple injuries that he sustained following the road accident. Each of the injuries was healing well. The fractures would reunite fully within 8 to 10 months, during which period he would not be able to work effectively. Long term, the Respondent would experience chest pains if he indulges in strenuous activities.
13. The Appellants did not call any witness or adduce any evidence to controvert that of the Respondent.
14. Once again, due to an incomplete Record of Appeal, I am not able to appreciate the submissions by the Respondent since the same only contains the Appellants' submissions. The Lower court file is of no help either since the submissions are not contained therein. I am, therefore, left to rely on the judgement which indicates that the Respondent submitted that an award of Kshs 4 million would be sufficient as general damages. The Respondent relied on the cases of *Duncan Kimathi -vs- Ngugi David & 3 Others* [2016] eKLR, *Gabriel Mwasuma -vs- Mohammed Sajjad & Another* [2015] eKLR and *Sabina Nyakenga Mwanga -vs- Patrick Kigoro & Another* [2015] eKLR.
15. In their submissions filed in the lower court, the Appellants relied on the case of *George Raini Atungu -vs- Jared Ogwoka Ondari* [2018] eKLR, but did not make any proposal as to the amount of damages the court should award the Respondent.
16. Turning to 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.”

17. I have looked at comparable cases. In *Mehari Tewoldget T/a Mehari Transporters v Damus Muasya Maigi* [2013] eKLR where an award of Ksh.1,500,000/= was confirmed on appeal in the year 2013 for the following injuries; Blunt injury to the chest, fracture 3 ribs 4,6,7 on the right side with puncture of the pleural leading to heamathorax, blunt injury to the abdomen with a tear in the liver and severe internal bleedings leading to heamoperitoneum, deep cut on the upper right arm with skin and muscle deficit near the axilla, many cuts and bruises on the whole right arm, fracture right scapula and several fractures on the right tibia and fibula at the ankle joint.
18. In *Edward Mzamili Katana v CMC Motors Group Ltd & Another* [2006] eKLR, the court awarded a sum of Kshs. 2,000,000/ to a plaintiff who had sustained head injury leading to concussion, cut wound and bruises of the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injury with multiple fractures of left 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ribs and fracture of the left femur upper 1/3 shaft.
19. In determining whether to interfere with the award of general damages herein, I am guided by the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and Olive Lubia* (1985) 1 KAR 727: where the Court of Appeal observed:-

“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”
20. In the case at hand, I find the award by the trial court on general damages to be within the range of similar awards for comparable injuries. This court is, therefore, not persuaded to disturb the same.
21. With regard to special damages, it is trite law that special damages ought to be specifically pleaded. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (1992) KLR 177 stated that:-

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
22. The Respondent pleaded special damages of Kshs 3,550/=. In its judgement, the trial court found that the Respondent had proved the same and awarded the said amount. I have looked through the lower court file and found some receipts amounting to Kshs 3,550/=.



23. The upshot is that the appeal has no merit and is hereby dismissed with costs to the Respondent, assessed at Kshs 50,000/=.

**DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2024.**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

..... for the Appellants

..... for the Respondent

