



REPUBLIC OF KENYA



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**Kiptoo & another v Lel (Civil Appeal 80 of 2018)
[2023] KEHC 308 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 80 OF 2018
RN NYAKUNDI, J
JANUARY 27, 2023**

BETWEEN

TIMOTHY KIPTOO 1ST APPELLANT

ISAAC ODINGA WANJALA 2ND APPELLANT

AND

ELIUD KIPROTICH LEL RESPONDENT

*(Being an appeal from the judgment/decree of the Honourable Obulutsa
(C.M) delivered on 21st June 2018 in Eldoret CMCC No. 7 of 2017)*

JUDGMENT

Coram: Hon. Justice R. Nyakundi

Alwang'a & Co. Adv for respondent

Kimondo Gachoka & CO. Adv for the appellants

- 1 The appellant was the defendant in Eldoret CMCC No 7 of 2017 which was instituted by way of plaint dated January 5, 2017. The brief facts of the case are that on March 30, 2015, the respondent was a lawful passenger in motor vehicle registration number xxxx when it was involved in an accident along Eldoret-Webuye Road. According to the plaint dated January 5, 2017, as a result of the accident, the Respondent sustained the following injuries; Loss of consciousness Bruises on the face Bruises on the left upper limb Fracture of the lower 1/3 of the right femur exposing the bone.
- 2 Upon considering the pleadings, evidence and submissions of both parties, the trial court delivered judgment in favour of the respondent. The appellant was held liable and judgment entered in favour of the respondent herein for Kshs 1,400,000.00 awarded as general damages and Kshs 256, 000.00 as special damages less 10% contribution.



- 3 The appellant being dissatisfied with the decision of the trial court instituted the present appeal vide a Memorandum of Appeal dated June 13, 2018 on the following grounds;
1. The Learned Trial Magistrate erred in assessing an award, hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by the Plaintiff;
 - a. General damages Kshs 1,400,000/-
 - b. Special damages Kshs 256,000/-
 - c. Total Kshs 1, 656,000/-
 - d. Less 10% contribution Kshs 165,600/-
 - e. Grand total Kshs 1,490,400/-
 - f. Costs and interests to the suit
 2. The Learned Trial Magistrate erred in fact and in law in awarding the respondent special damages of Kshs 256,000/- which were not proved to the required standard.
 3. The Learned Trial Magistrate erred in law and misdirected himself when he failed to consider the appellants' submissions and legal authorities on both points of law and facts.
 4. That the Learned Trial Magistrate erred in law and fact by over relying on the respondents' submissions and legal authorities which were not relevant and without addressing the circumstances of the case.
 5. That the Learned Trial Magistrates' decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 6. The Learned Trial Magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced and submissions by appellant's counsel on quantum.
 7. The learned magistrates' decision albeit a discretionary one was plainly wrong.
- 4 Parties were directed to file submissions on the appeal.

Appellant's Case

- 5 The appellants filed submission on the appeal on October 31, 2022. He submitted that according to the abstract report dated December 29, 2016 the accident took place on March 30, 2015. The same date is indicated in the plaint but the Respondent was treated at Mediheal Hospital from the June 14, 2016, which was the date of admission to June 21, 2016, which was the date of discharge. The same is confirmed by the In-Patient Invoice from Mediheal Hospital Nakuru which is dated the June 21, 2016. This therefore means that after the accident took place on March 30, 2015, the Respondent was treated on June 14, 2016 for the injuries sustained in that accident. This indicates that either the Respondent did not sustain any injuries as a result of the accident of March 30, 2015 or the injuries that he was treated for at Mediheal Hospital did not result from the accident of March 30, 2015. The appellant urged the court to dismiss the suit and award granted by the trial court.
- 6 If, on the other hand this court is totally convinced that the circumstances and facts surrounding concur to lay blame on the Appellants, the appellants suggested that the sum of Kshs 400,000.00 will be sufficient and adequate compensation. They cited the case of [*Kenya Power Lighting Company limited*](#)



Ɖ another -versus- Zakayo Saitoti Naingola Ɖ another (2008) eKLR on the principle of assessment of damages. Further, they urged the court to consider the following cases in determining the appeal; Jackson Mbaluka Mwangangi v Onesmus Nzioka Ɖ another [2021] eKLR where the court awarded Kshs 600,000/- for a Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR, Titan Nagra v Abednego Nyandusi Oigo [2018] eKLR where the court reduced an award of Kshs 1,000,000/- to Kshs 450,000/- for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur among other authorities on damages.

7 The appellant sought that the appeal be allowed with costs to the appellant.

Respondent's Case

8 From the record of the court, when this matter came up for mention on November 1, 2022, learned counsel for the respondent sought to be served directly with the submissions of the appellants. The court directed that they be served within 7 days and they would then file their submissions within 14 days. There are no submissions on record for the respondent that were filed.

Analysis And Determination

9 First and foremost, the ultimate question both at the trial court and an Appeal is whether the limb on damages was fairly and proportionately dealt within the settled of principles of law. The assessment of damages is mainly influenced by the principles in the case of British Transport Commission –v Gourley (1956) AC 185 in which the court explains it self:

'In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. The basic principle so far as loss of earnings and out-of-pocket expenses are concerned is that the injured person should be placed in the same financial position, so far**

10 The award of damages in tort is so important for it makes wrong doers accountable for their negligent acts. Nevertheless being discretionary remedy sometimes it possess challenges in arriving at an acceptable quantum to the victims. The common law principle in this branch of law is as expressed in the case of: Kalinda –vs- Attorney General (1992) 15 MLR 170 at p 172 as follows: 'On the law and principles governing assessment of damages, it is trite that the purpose of awarding damages is to compensate the injured party as nearly as possible as money can do. That is to say, to place the claimant in a position he would be had he not suffered the damage or loss. This is what is termed the principle of *restitutio intergrum*. It is not possible to quantify damages with exactitude. However, courts use comparable cases as a guide in coming up with a reasonable quantum of damages.

11 It is customary to set out only one figure for all non-pecuniary including such factors as pain and suffering, loss of amenities or loss of expectation of life. This is usually the sound practice in our courts. The difficulty only arises for the very reason that these elements are distinct in nature but they overlap and merge at the edges. The extensive review, of a case law paints a picture of pain and suffering, loss of amenities assessed as one cluster. This is largely the convergence of litigation grounds on appeal in



which appellant's arguments are on the quantum being punitive of excessive. This essentially is the contestation put forth by the appellant.

- 12 This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123*, this principle was enunciated thus:

' This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.'

- 13 The memorandum of appeal reveals that the appeal is mainly on quantum as the issue of liability was determined by consent.

Whether the trial court erred in its award of damages

- 14 The appellants' contention is that the special damages were not proved to the required standard and therefore the award of Kshs 256,000/- was an error on the part of the court.

- 15 It is trite that special damages must be pleaded and proved. The respondent had claimed special damages of Kshs 956,000/- in the plaint. UAP insurance settled Kshs 700,000/- which left behind a balance of Kshs 250,000/- as evidenced by the receipts produced by the respondent in the trial court. The appellant has not shown how the trial court erred in its award of special damages. As a matter of fact, the appellant has only challenged the award for general damages.

- 16 The principles of interfering with the discretionary power of the trial court on the assessment on quantum was stated by Lord JA in *Bashir Ahmed Butt —vs- Uwais Ahmed Khan [1982-881 1 KAR 1* at page 5 as follows;

- 17 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.'

- 18 The respondent sustained the following injuries; Loss of consciousness Bruises on the face Bruises on the left upper limb Fracture of the lower 1/3 of the right femur exposing the bone.

- 19 It is trite that while awarding damages the courts look at comparable awards for comparable injuries. The Court of Appeal observed in [Simon Taveta vs Mercy Mutitu Njeru \[2014\] eKLR](#) that—

- 20 The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

- 21 The respondent mainly suffered soft tissue injuries and one fracture. In the case of [David Kimathi Kaburu v Dionisius Mburugu Itirai \[2017\] eKLR](#), the plaintiff sustained two fractures, fracture mid shaft femur and intertrochanteric fracture and was awarded Kshs 630,000/-.

- 22 In [Civil Appeal No 82 OF 2008, T A M \(Minor suing through her father and next friend JOM\) Richard Kirimi Kinoti and Another \(2015\) eKLR](#) where the Plaintiff sustained fracture of the left femur and laceration on the right temple, and blunt chest injuries. A metal plate was inserted in the fractured leg. He was awarded general damages of Kshs 250,000/= in November 2015.



- 23 In the case of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR* the court awarded the respondent a sum of Kshs 600,000/= as compensation for a compound fracture of the tibia/fibula bones on the right leg, deep cut wound on the right leg, head injury with cut wound on the nose, blunt chest injury, soft tissue injury on the left lower limb involving the high and ankle region.
- 24 It is evident that in the cited cases, the injuries were more severe than in the present appeal. I therefore find that the award of Kshs 1,400,000/- as general damages was excessive. Besides application of the principles in the past awards I have taken into account the inflationary trends since 2020
- 25 The appeal succeeds and the order of the trial court is hereby set aside and substituted as follows;
- a. General damages – Kshs 700,000/-
 - b. Special Damages – Kshs 256,000/-
 - c. Less 10% - Kshs 860,400/-
 - d. Interest on the award shall be at court rates on general damages from the date of the trial court judgment whereas, interest on special damages accrue from the date of filing suit.
 - e. Costs of this appeal be shared equally.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY 2023

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R. NYAKUNDI

JUDGE

