



**Barasa v Murabula (Civil Appeal E055 of 2021)
[2023] KEHC 1815 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E055 OF 2021
PJO OTIENO, J
FEBRUARY 27, 2023**

BETWEEN

AMUHAYA DIANA BARASA APPELLANT

AND

RHODA KUBOKA MURABULA RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. Reuben Akee (SRM)
in Kakamega CM's Civil Case No. E30 of 2021 delivered on 13th October 2020)*

JUDGMENT

1. Before the trial Court was a suit seeking both general and special damages. It was pleaded that on or about the 23.10.2020 the Plaintiff was lawfully a pillion passenger on a motor cycle when the Appellant's (then Defendant at trial) motor vehicle was carelessly and negligently driven that it knocked down the Respondent (then Plaintiff) and occasioned to him bodily injuries for which he claimed the two heads of damages.
2. Judgment on liability was entered by consent at 80:20% in favour of the Respondent and the only evidence led was that of the Appellant on the extent of injuries.
3. Before the trial Court the Respondent gave evidence by adopting his witness statement then produced the copies of documents filed as exhibits. The documents produced included a medical report from Lubinu Medical Clinic, P3 form and receipts for expenses claimed as special damages.
4. The two medical reports reveal the injuries suffered by the Respondent to have been friction burns on the right forearm, left forearm and right knee as well as abrasion on the left and right legs. The respondent was treated as an outpatient at St. Mary's Hospital Mumias where he received tetanus injections, stitching, dressing and given antibiotic and pain killer tablets. On the other hand the P3 form revealed that the Respondent had a 3cm long stitched wound on the supraorbital region of the head and hyperpigmented abrasion mark below the right eye. The same document that captured the



injuries to the left and right upper and lower limbs. In cross-examination the Respondent told the court that he suffered the injuries disclosed in the documents which did not include any fractures.

5. In the Judgment now subject of this appeal, the trial Court did award to the Respondent general damages in the sum of Kshs. 700,000/=. In coming to that figure, the Court said:-

“The injuries were captured by the medical report by Dr. Andai. This court notes that no amount of money can compensate or pay for body injuries but at least it can compensate for the injuries suffered.

In the case of *Nguku Joseph & Another vs Gerald Kibiu Maina* (2020) eKLR. The High Court of Kenya in Civil Appeal No. 65/2018 the court awarded General damages of Kshs. 500,000 amongst other soft tissue injuries.

The court therefore awards Kshs. 700,000 for tissue injuries suffered. This court has considered passage of time and inflation.”

6. That Judgment has been impugned by the Appellant solely on the assessment of general damages by the five grounds of appeal in the Memorandum of Appeal dated 25/10/2021. The summary of the grounds is that the trial Court was superficial in the treatment of evidence and submissions, ignored the applicable principles applicable in assessment of damages by ignoring precedents and therefore arrived an excessive award.
7. When an appellate Court would interfere with the discretion of the trial Court on assessment of damages is now well established. An Appellant must be satisfied that the trial Court considered irrelevant matters or failed to consider relevant matters and short of that; that the sum awarded is so very high or so very low as to demonstrate an outright error in assessment of damages¹.
8. In this appeal, the reliance by the Court on the decision in *Nguku Joseph –vs- Gerald Kibiu* [2020] eKLR where an award of Kshs. 500,000 was made was faulted on the basis that the injuries in that case were not comparable to the instant matter. The Appellant then cited *Michael Odiwuor –vs- Clarice Odera Ogada* where the Judge of Appeal reduced the damages for 300,000 to Kshs. 150,000 for comparable injuries.
9. For the Respondent, the submissions offered were to the effect that no error in principle was committed by the trial Court who used precedent and the law that comparable injuries ought to attract comparable awards. The Respondent cited to Court several decisions by the Court of Appeal that it is the duty and onus of the Appellant to prove error of principle by the trial Court. It was stressed that at trial the Appellant never challenged the severity or extent of injuries based on the treatment notes as opposed to the medical report and cited *Beatrice Ntheiya Sila –vs- Ruth Mbithe Kitsisa* [2014] eKLR. The decision in *Eric Juma –vs- Francis Gacheru* [2016] eKLR was cited to the proposition that the treatment notes would only be used to show consistency and to corroborate the other evidence but never a decisive evidence. The Respondents contends therefore that the trial Court considered all it was bound to consider and cannot be faulted.
10. On whether the award was commensurate, the Respondent cited two decisions of the High Court; *Beatrice Nthenya Sila’s* case supra and *Hussein Thuo Mohammed –vs- Stanley Thuo Gacheru* [2011] eKLR where an undisclosed award of was upheld and one of Kshs. 650,000 made respectively.

¹ *Bhatt –vs- Khan* [1982 -88] KAR 5



11. In executing the mandate of a first appellant correct, the court reminds itself that assessment of damages is a difficult discretionary matter in which the court should be slow to substitute its own opinion in place of that of the trial court.
12. Indeed precedence is a useful tool for purposes of keeping awards comparable so that the application of the law is equal and not arbitrary. In that context where parties take time to offer submissions to the court and cite decided cases, it behoves the court to consider such submission and give regards to the authorities cited of course, with the latitude to choose which of the authorities present comparable injuries to the matter in consideration.
13. In this matter, this court has perused the submissions offered at the trial and noted that both sides cited to the trial court a number of decided cases. To be precise the respondent cited to court two cases on quantum of damages as the appellant also cited two.
14. In the judgment no reference is made to the decisions cited by the appellant. The only reliance made was on one of the decision cited by the respondent were the claimant suffered among others injuries laceration of the liver, laceration of the gull bladder and fracture of the humerus and an award of Kshs.500,000 was made. It is that decision the trial court relied on to make an award of Kshs.700,000 while minded to appreciate the incidence of inflation.
15. The court considers the decision relied upon by the trial court to present obvious more extensive and debilitating injuries and that it was thus not a good guide in assessment of damages.
16. In addition, failure to consider the other cited decisions which equally had binding effect on the court, the court fell into the error of ignoring a relevant matter. For those two reasons, it is the finding of the court that demonstration has been made that the judgment of the trial court invite interference by this court.
17. The court has reviewed the evidence led on extent of injuries and their residual effects on the respondent and assesses damages for pain and suffering at Kshs.300,000.
18. Accordingly, general damages assessed by the trial court is reduced from Kshs.500,000 to Kshs.300,000/=. To that extent, the appeal succeeds and is allowed.
19. In coming to the above conclusion, the Court has given due regard to the incidence of inflation, the need to keep the awards low in order that the economy is not hurt and the overall need to compensate the respondent for his pain and suffering without appearing to enrich him, unduly. The Appellant gets ½ costs of the Appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Otieno Njoga for the Appellant

Mr. Mulama for the Respondent

Court Assistant: Polycap

