



**Achanga v Ndubi (Civil Appeal 106 of 2021)  
[2023] KEHC 1377 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 106 OF 2021  
CW GITHUA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**ERICK ACHANGA ..... APPELLANT**

**AND**

**JAMES MINCHA NDUBI ..... RESPONDENT**

*(An appeal from the judgment and decree of Hon. N.S. Lutta (CM)  
delivered on the 30th August 2021 in Kisii CMCC No.948 of 2019)*

**JUDGMENT**

1. The appellant, Erick Achanga was the defendant in Kisii CMCC No 948 of 2019. He was sued by the Respondent, James Ndubi vide his plaint dated December 13, 2019 who sought general damages for pain, suffering and loss of amenities as well as special damages in the sum of Ksh 7,410 following injuries sustained in a road traffic accident which occurred on May 2, 2019 along the Kisii-Nyamira Road.
2. According to the respondent, he was riding his motor cycle Registration No KMCEA 478 N when the appellant's driver, agent or servant negligently or recklessly managed or controlled motor vehicle Registration No KCT 228 L (the subject vehicle) causing it to ram into the rear of his motor cycle as a result of which he sustained the injuries pleaded in the plaint.
3. In his statement of defence filed on January 24, 2020, the appellant denied liability in toto and put the respondent to strict proof thereof. In the alternative, the appellant pleaded that if the accident occurred which was denied, it was caused by the negligence of the respondent as owner, driver, agent or servant of the motor cycle involved in the accident.
4. After a full trial, the learned trial magistrate rendered his decision on August 31, 2021 and entered judgment on liability in favour of the Respondent against the appellant at 100%.



On quantum, the respondent was awarded general damages in the sum of Kshs 250,000 and special damages of Ksh 7,410 together with costs of the suit and interest.

5. The appellant was aggrieved by the trial court's decision on both liability ad quantum. Through his advocates, Ms. Kimondo Gachoka & Company Advocates, he proffered the instant appeal through a memorandum of appeal filed on December 17, 2021.

In his memorandum of appeal, the appellant principally complained that the learned trial magistrate erred in law and fact by failing to apportion liability to the respondent against the weight of the evidence on record and in failing to appreciate the principles applicable to assessment of general damages thereby awarding the respondent general damages that were excessive and unjustified.

6. In compliance with the court's directions that the appeal be prosecuted by way of written submissions, both parties duly filed their respective submissions.

In his submissions filed on November 8, 2022, the appellant apparently abandoned his appeal against the trial court's finding on liability and submitted exclusively on his challenge against the quantum of damages awarded to the respondent. The appellant contended that the award of Kshs 250,000 general damages was erroneous since it was inordinately high considering that the respondent sustained only soft tissue injuries.

7. Relying on the authorities of *Godwin Ireri v Franklin Gitonga* [2018] eKLR; *Ndungu Dennis v Anne Wangari Ndirangu & Another* [2018] eKLR and *Eva Karemi & 5 Others v Koskei Kienge Another* [2020] where the claimants were awarded amounts ranging from Kshs. 40,000 to Ksh. 90,000 for soft tissue injuries, the appellant invited me to set aside the trial court's award and substitute it with an award of Kshs. 60,000 which in his view was adequate compensation for the injuries suffered by the respondent.

8. On his part, the respondent in the written submissions filed on his behalf by Ms Ochoki & Company Advocates on October 26, 2022 made elaborate submissions impugning the validity of the trial court's finding on liability which is no longer an issue for determination in this appeal considering that the appellant did not pursue his grievances on the question of liability when prosecuting his appeal.

9. Regarding the appeal against quantum, the respondent denied the appellant's claim that the award made by the trial court was inordinately high. He supported the trial court's award arguing that it was fair and reasonable considering the nature of injuries he sustained and previous awards made for comparable injuries.

10. In support of his submissions, the respondent relied on the authorities cited before the trial court, namely, *Vincent Cheruiyot Rono v Mombasa Maize Millers Ltd* [2006] eKLR where Justice D Musinga (as he then was) awarded Ksh 400,000 and the case of *Pan Paper Mills (EA) Ltd & Another Vabisa Hassan* [2007] eKLR where the late Justice Kaburu Bauni upheld an award of Ksh 300,000 for injuries allegedly similar to those sustained by the respondent but which were not disclosed in the respondent's submissions both before the trial court and this court.

11. It was the respondent's case that the learned trial magistrate applied the correct legal principles and considered the evidence on record as well as the parties rival submissions before arriving at her decision on quantum. He thus implored me to dismiss the appeal with costs for lack of merit.

12. As a general rule, an appellate court should be slow to interfere with an award of damages made by the trial court essentially because damages for personal injuries are at large and are dependent on the trial court's discretion.



The parameters within which an appellate court can disturb an award of damages have been set out in many authorities which I need not replicate here, suffice it to say that they were well articulated by the Court of Appeal in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR where the court held as follows;

“An appellate court will not disturb an award for general 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 legal principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”

13. Having laid down the general principle that guides appellate courts in determining appeals on quantum, I now turn to consider whether the trial court erred in awarding the respondent general damages amounting to Kshs 250,000. It is trite that in the assessment of damages, the general method of approach is that comparable injuries should as far as possible be compensated by comparable previous awards but bearing in mind that no two cases can be exactly similar. See: *Stanley Maore v Geoffrey Mwenda* CA No 147 of 2002 [2004] eKLR .

14. According to paragraph 5 of the plaint, the respondent sustained chest contusion, bruises on both legs, bruises on the right and left elbow, bruises on both forearms and blunt injury to the knees.

Although the above injuries were not disputed, it is important to note that they were confirmed by Dr Morebu Peter Momanyi who examined the respondent on September 30, 2019 about five months after the accident.

15. In making the impugned award, the learned trial magistrate relied on the authority of *TAM (Minor suing through her father and next friend JOM) Richard Kirimi Kinoti & Another* [2015] eKLR where the plaintiff sustained a fracture of the left femur which had to be fixed through insertion of a metal plate, laceration on the right temple and blunt chest injuries for which the minor was awarded general damages in the sum of Ksh 250,000 in the year 2015. The above injuries were clearly different and much more severe than the soft tissue injuries suffered by the respondent in this case.

16. Consequently, it is my finding that the learned trial magistrate applied the wrong legal principle by basing his award on an authority where the claimant had sustained more severe injuries which were not comparable to the superficial injuries suffered by the respondent. As a result, the learned trial magistrate arrived at an award which was inordinately high and not commensurate with the injuries sustained by the respondent.

The authorities cited by the appellant were more relevant but considering their age and taking into account the inflationary trends, it is my finding that an award of 180,000 would have sufficiently compensated the respondent for the pain and suffering he endured as a result of the injuries sustained in the accident.

17. For the above reasons, I find merit in the appeal and it is hereby allowed. I accordingly set aside the award made by the trial court and substitute it with an award of Kshs 180,000.

The award of special damages in the sum of Kshs 7,410 was not challenged on appeal and will therefore remain undisturbed.

18. The award of general damages will attract interest at court rates from the date of judgment of the trial court while the award of special damages will accrue interest at court rates from the date suit was filed.

19. Costs follow the event and the appellant is awarded half the costs of the appeal.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**C.W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Ndolo holding brief for Mr. Njuguna for the Appellant

Mr. Ochoki for the Respondent

Ms. Aphline Court Assistant

