



REPUBLIC OF KENYA



KENYA LAW
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**Omwoyo v Kemunto (Civil Appeal E040 of 2021)
[2023] KEHC 3459 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E040 OF 2021
WA OKWANY, J
APRIL 27, 2023**

BETWEEN

DAMARIS OMWOYO APPELLANT

AND

NANCY KEMUNTO RESPONDENT

(Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered at Nyamira on the 10th day of May 2021 in the original Nyamira Chief Magistrate’s Court Civil Case No. 8 of 2020)

JUDGMENT

Introduction

1. The Respondent herein sued the Appellant before the trial court through the plaint dated 24th January 2020 seeking general and special damages arising out of a road traffic accident that occurred on 14th October 2019.
2. The Respondent’s case was that she was, on the material day, a pillion passenger travelling on motor cycle reg no KMEN XXXP along Nyamira – Corner T Road when the Appellant’s motor vehicle Registration no KCK XXXE hit the motor cycle thus causing her the following injuries: -
 - a. Right shoulder dislocation.
 - b. Right hip dislocation.
 - c. Chest contusion.
 - d. Bruises on the right elbow.
 - e. Cut wounds on the right thigh.



- f. Cut wound on the knees.
 - g. Bruises on the knees.
3. The trial court heard the case and rendered a judgment in favour of the plaintiff as follows: -
 - a. Liability 100%
 - b. General damages – ksh 600,000/=.
 - c. Special damages – ksh 8,650/=.
 4. The Appellant was aggrieved by the Lower Court’s judgment and filed the instant appeal in which she raised 3 grounds of appeal that can be summarized to be an appeal over the issue of quantum only.
 5. Parties canvassed the appeal by way of written submissions which I have considered.
 6. The gist of the Appellant’s case is that the award of ksh 600,000/= general damages is inordinately high and not in line with the principles governing the award of damages. The Appellant cited the case of *George Kinyanjui T/A Climax Coaches & Another v Hussein Mahad Kuyala* [2016] eKLR where for similar injuries, the High Court, on appeal reduced an award of ksh 650,000/= to ksh 109,890/=. Reference was also made to the case of *Ndungu Dennis v Anne Wangari Ndirangu & Another* [2018] eKLR where the court reduced general damages for soft tissue injuries from ksh 300,000/= to ksh 100,000/=.
 7. It was the Appellant’s case that since the Plaintiff suffered soft tissue injuries only, the award of ksh 600,000/= was inordinately high and unjustified.
 8. The Respondent, on the other hand, urged this court not to disturb the award of ksh 600,000/= general damages while arguing that the award was a just and fair compensation for her injuries which included dislocation of the right shoulder joint and the right hip. The Respondent submitted that the Appellant did not tender any evidence to counter her evidence on the injuries.
 9. The Respondent relied on the decisions in *Veronica Mkanjala Mnyapara v Patrick Nyasinga Ameyya* [2021] eKLR where an award of ksh 300,000/= general damages was made in respect to the claimant who sustained contusion to the head, chest bruises on both hands, dislocation of left hip joint and bruises on both legs.
 10. Reference was also made to the case of *Agility Logistics Limited v John Wambua Musau & Another* [2017] eKLR where an award of ksh 500,000/= was made to the Respondent who sustained bruises on the face, tenderness over the chest, and left shoulder dislocation.
 11. As the first appellate court, the duty of this court is to re-evaluate and re-analyze the evidence presented before the trial court afresh in order to come up with its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See *Sumaria & Another v Allied Industries Ltd* [2007] KLR 1).
 12. I have perused the Treatment Notes, P3 Form and the Medical Report produced by the Respondent as exhibits before the trial court and I note that the documents confirm that the Plaintiff suffered the injuries highlighted in the plaint, the particulars of which I have highlighted elsewhere in this judgment. I have also perused the 2nd Medical Report, by Dr. Jenipher Kahuthu, which the Appellant produced as an exhibit and I note that it confirms that the Respondent was treated for the following injuries: - Cut wound on the right thigh and both knees bilaterally. Painful swollen right hip. Dislocation of the right hip. Dislocation of the right shoulder.



13. The medical evidence tendered by both sides reveals that the Respondent sustained mainly soft tissue injuries and dislocation of the right hip and right shoulder.
14. The P3 Form categorized the degree of injury as “harm” while the Medical Reports do not show the doctors’ respective assessment of the percentage of permanent disability. This court can therefore safely conclude that the Respondent has fully healed from the injuries that she sustained in the accident.
15. The issue for determination is whether this court should disturb the Lower Court’s award on damages.
16. On an appeal against assessment of damages, an appellate court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined 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.

17. The trial court held as follows on the issue of general damages: -

“The plaintiff submitted for a sum of ksh 600,000.00 as general damages while the defendant prayed for a sum of ksh 90,000.00. This court has considered the authorities relied upon by the rival parties herein.

The principles to consider in assessing general damages were set out by Nambuye J in the case of *Boniface Waiti & Another v Michael Kariuki Kamau* [2007] eKLR as follows: -

- a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.
- b. The award should be commensurate to the injuries suffered.
- c. Awards in decided cases are mere guides and each case should be treated on its facts and merit.
- d. Where awards in decided cases are to be taken into consideration then the issue of an element of inflation has to be taken into consideration; and
- e. Awards should not be inordinately high or too low.

Having considered the nature of the injuries sustained by the plaintiff, the above referenced principles and the authority cited by rival parties herein, this court awards the plaintiff the sum of ksh 600,000.00 as general damages. This court relies on the case of *George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi* [2016] eKLR, *Kennedy Kipkoech Kosgey v Kormoto General Agencies* [2015] eKLR and *Robert Ghonzi Kimani v David Bwire Khisa & Another* [2013] eKLR.”

18. In the instant case, the medical evidence showed that the Respondent had healed fairly well without any major complications. Furthermore, the medical reports produced by both parties did not show that any permanent disability was detected or assessed by the doctors.



19. My finding is that looking at the nature of the Respondent's injuries and the comparable authorities cited by the Respondent and the Appellant before both the Lower Court and this court, an award of ksh 350,000/= will adequately compensate the Respondent for the injuries that she suffered in the accident. I find guidance in the decisions in the case of *Coast Broadway Co. Ltd v Elizabeth Alaka Achebi* [2015] eKLR where the court affirmed an award of ksh 300,000/- for a plaintiff that had suffered a dislocation of the shoulder. Similarly, in the case of *Patrick Kinoti Miguna v Peter Mburunga G. Muthamia* [2014] eKLR the plaintiff was awarded ksh 300,000/- after he proved that he had sustained dislocation of the shoulder resulting to post traumatic arthritis and also had loose teeth.
20. For the reasons that I have stated in this judgement, it will allow the instant appeal and set aside the Lower Court's decision on quantum of ksh 600,000/= and substitute it with an award of ksh 350,000/= general damages.
21. Since the Lower Court's award on special damages was not contested, I will not disturb the finding on special damages.
22. In conclusion, I allow the appeal in the following terms: -
 - General damages – ksh 350,000/=
 - Special damages – ksh 8,650/=
 - Total – ksh 358,650/=
23. General damages will attract interest, at court rates, from the date of judgment in the lower court until payment in full. Special damages will earn interest from the date of filing suit until payment in full.
24. Since the appeal is only partially successful, I award the Appellant half the costs of the appeal which I hereby assess at ksh 25,000/=.
25. This file is marked as closed.
26. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 27TH DAY OF APRIL 2023.**

W. A. OKWANY

JUDGE

