



REPUBLIC OF KENYA



**Ogeto t/a Ariad Ltd v Nyakego (Civil Appeal 171 of 2021)
[2023] KEHC 18327 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 171 OF 2021
REA OUGO, J
MAY 26, 2023**

BETWEEN

GEOFFREY ONSUNGO OGETO T/A ARIAD LTD APPELLANT

AND

SHEILA NYABATE NYAKEGO RESPONDENT

(Being an appeal from the judgment of the Honourable Principal Magistrate, Hon. S.K. Onjoro dated 29th day of November 2021 in CMCC No 247 of 2015 at Kisii)

JUDGMENT

1. The respondent filed a suit against the appellant before the subordinate court. The suit was filed after a road traffic accident which occurred on the 13th day of March 2015 involving motor vehicle registration number KBP 546T and the respondent a pedestrian. The respondent claimed that accident due to the negligent acts of the appellant. She sustained the following injuries: blunt trauma to the back and both elbows; contusion on the chest, hip joint and both legs; and bruises on both ankles. The trial magistrate after considering the evidence before him found the appellant to have been 100% liable for the accident. The trial court awarded the respondent Kshs 180,000/- as general damages and Kshs 4,500/- special damages.
2. The appellant dissatisfied with the judgment of the lower court has filed his memorandum of appeal dated 29th December 2021 challenging the award of damages. The grounds on the face of the memorandum of appeal are as follows:
 1. The learned magistrate erred in law and fact in relying on extraneous evidence and thereby arriving at an erroneous conclusion condemning the defendant to quantum of general damages of Kshs 180,000/- which was manifestly excessive in the circumstance.



2. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs 4,500/- without concrete documentary evidence.
 3. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs 184,500/-.
 4. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
 5. The learned magistrate erred in law and fact in failing to appreciate:
 - i. That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.
 6. The learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish his case more specifically on quantum.
 7. The learned magistrate erred in law and fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.
3. The appeal was canvassed through the parties' rival submissions. The appellant submits that the respondent failed to tender evidence proving that the appellant was negligent. It was submitted that there was no eye witness to prove the respondent's case and that the reality was that the plaintiff was talking on phone while crossing the road without due regard to her safety. The police abstract also revealed that the matter was still pending under investigations. The appellant submits that the respondent failed to discharge the burden of proof. The respondent on the other hand submits that liability was proved as the respondent adopted his witness statement as his evidence in chief and testified that the appellant's vehicle veered off the road and hit her.
 4. The grounds of appeal in the memorandum of appeal are solely challenging the damages awarded by the trial magistrate. The appellant has however sneaked in the issue of liability and has in his submissions attempted to give evidence as to how the accident occurred. Curiously, the appellant did not call any witness before the subordinate court. Even if this court were to take into account the issue of liability, I cannot find any fault with the trial magistrate's finding as he considered the evidence of the only eye witness, Sheila Nyabate Nyakego (Pw1). Pw1 testified that on 13th March 2015 she was standing at the verge of Kisii-Nyamataro by-pass near Uchumi supermarket area when the appellant's motor vehicle registration no. KBP 546T lost control and knocked her. She blamed the driver of the vehicle since she was off the road. Her evidence remained unshaken during cross examination and the appellant did not lead any evidence to displace the testimony of Pw1. The trial magistrate was therefore correct in finding the appellant 100% liable for the accident.
 5. I now turn to consider the issue of quantum. In dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“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”

6. The appellant submits that an award of Kshs 90,000/- is appropriate as the respondent sustained soft tissue injuries with nil residual disability. They relied on the cases of *FM (Minor suing through Mother and next friend MWM) v INM & Another* [2020] eKLR and *Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 Others* [2019] eKLR.
7. The respondent on the other hand submitted that the award by the trial magistrate was well within the range of awards for similar injuries and does not require the court’s interference. It relied on the cases of *Charles Gichuki v Emily Kawira Mbuba & Another* [2018] eKLR and *Joseph Kimani Gathanga & Another v Dickson Ndungu Njoroge* [2019] eKLR.
8. It is not in dispute that the appellant sustained the following soft tissue injuries: blunt trauma to the back and both elbows; contusion on the chest, hip joint and both legs; and bruises on both ankles. In *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR the plaintiff therein sustained blunt injury right shoulder and a blunt injury to the right big toe and the court upheld an award of Kshs 120,000/-. *Injyoti Structures Limited & another v Truphena Chepkoech Too & another* [2020] eKLR one of the plaintiffs sustained blunt injury to the head, neck, chest, back, both thighs while the other plaintiff therein suffered bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand and were each awarded Kshs 125,000/-.
9. The injuries in these decisions are comparable with what the respondent suffered and I am therefore persuaded that the award of general damages awarded by the trial magistrate was excessive. The award of special damages was pleaded and proved.
10. In the end, I set aside the award of the learned trial magistrate of Kshs 180,000/- and substitute it with an award of Kshs.125, 000/=. The appellant shall have half costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MAY 2023.

R.E. OUGO

JUDGE

In the presence of:

For the Appellant

For the Respondent

Aphline C/A

