



REPUBLIC OF KENYA



KENYA LAW
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**Saitoti v Almasi Bottlers (Civil Appeal 28 of 2021)
[2023] KEHC 18060 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 28 OF 2021
PN GICHOHI, J
MAY 25, 2023**

BETWEEN

GEORGE SAITOTI ALIAS PETER OMBOI KEBASI APPELLANT

AND

ALMASI BOTTLERS RESPONDENT

*(Being an appeal from the judgment and decree of Hon P K Mutai Resident
Senior Magistrate delivered on March 17, 2021 in CMCC No 369 of 2019 at Kisi)*

JUDGMENT

1. The background of this appeal is that through the firm of M/S Khan & Associates, Advocates, the appellant sued the respondent in CMCC No 369 of 2019 Kisii for injuries he allegedly sustained on February 3, 2019 when the motor cycle registration number KMEL767S on which the he was aboard along Kisii- Migori Road when the Defendant’s motor vehicle registration number KBX 385 L collided with the said motorcycle causing the Plaintiff grievous injuries. He attributed the accident on the negligence of the Defendant, his driver, agent, servant, employee and /or assignee.
2. The Defendant filed a defence dated July 26, 2019 through the firm of M/S Nyachiro Nyagaka & Co Advocates denying the claim and put the Plaintiff to strict proof thereof.
3. The parties however entered into a consent on liability on January 18, 2021 at the ratio of 70: 30 in favour of the Plaintiff. The matter was heard on quantum with only the Plaintiff as the witness in the case and parties filed their submissions with the Plaintiff seeking Kshs 1,000,000/= as general damages while the Defendant proposed an award of Kshs 400,000/=.



4. Ultimately, the trial magistrate rendered his decision in the judgment dated March 17, 2021 that ;

“I find the injuries suffered by the plaintiff in the authority cited by the plaintiff to be more intense compared with injuries in this case. The case cited by the Defendant to a large extent is applicable and relevant .

Taking into account injuries sustained , comparable awards and inflation I award the plaintiff Kshs 500,000 as General Damages.

Special damages must be specifically pleaded and strictly proved. The plaintiff pleaded Kshs 514,595 receipts for Kshs 215, 490 were produced. I award the plaintiff Kshs 215, 490 as special damages for the amount specifically pleaded and proved. The plaintiff shall also have costs and interest from the date of this judgment.”

5. The trial magistrate then awarded the plaintiff Kshs 715, 490 on both general damages and special damages less contribution on liability leaving the plaintiff with Kshs 500, 843/-.

6. Aggrieved by the said judgment, the appellant lodged this appeal vide a Memorandum of Appeal dated March 25, 2021 on the following grounds;

1 The trial magistrate erred in law and in fact by failing to give concise statement of the case, points of determination, decision thereon and reasons for judgment.

2 The learned trial magistrate erred in fact and in law by awarding the sum of Kshs 500,000/ = in general damages which inordinately low and unrealistic in the circumstances against the injuries sustained by the appellant.

3 The learned trial magistrate erred in fact and in law in failing to appreciate sufficiently or at all the evidence tendered by the appellant thereby failing to award future medical expenses.

4 The learned trial magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently failing to award special damages as pleaded and proved.

5 The learned trial magistrate erred in fact and in law in failing to consider the defendant’s submissions and more specifically on quantum by completely disregarding the submissions of the appellant hence exempting himself from arriving at a decision based on merit.

6 The learned trial magistrate acted in error when he failed to properly evaluate the evidence on record thus reaching an erroneous decision.

7 The learned magistrate acted in error when he relied on extraneous issues as a basis of determination of quantum.

7. The appeal was canvassed by written submissions. The appellant’s submissions are dated February 22, 2022 while those by respondent are dated March 24, 2022.

8. The appellant submitted that the award of 500,000 was too low and the same should be substituted with the award of 1,000,000. The appellant also sought for future medical expenses for Kshs 200,000.

9. On the other hand, the respondent submitted that the appellant failed to produce documentary evidence for future medical expenses. It was further submitted that the award of 500,000 was sufficient to compensate the appellant.



Determination

10. This court is being called upon to disturb the award of damages herein . In such a case, the Court of Appeal in the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J A 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.’

11. According to the medical report by Dr. Morebu Peter dated February 12, 2019, the injuries sustained by the appellant herein are; Right Femur fracture Bruises on the right shoulder Bruises on the right foot Bruises on the right elbow Bruises of the right leg Bruises on the right hand Bruises on the left hand Bruises on the face

12. In his conclusion, the doctor opined;

“Following the RTA George sustained grievous harm i.e right femur fracture with multiple severe soft tissue injuries that are on the process of healing. He is currently unable to walk without support thus can’t undertake his daily chores as the sole breadwinner to his family. Recovery is expected to take a long time. He requires physiotherapy with occupational therapy. He would require to undergo another operation to remove the metal implants costing approximately Kshs 200,000/=. Permanent disability is anticipated.”

13. There is no doubt that the trial magistrate took into consideration submissions by parties herein as far as case law cited is concerned. In the case of *David Kimathi Kaburu v Dionisius Mburugu Itaiari* [2017] eKLR relied on by the plaintiff, the injuries sustained therein were fragmental fracture of the mid shaft femur and intertrochanteric fracture of the femur , was a fair general condition. On appeal, High Court upheld the lower court award of Kshs 630,000/= under this head.

14. In the case of *Barnabas v Ombati* (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) (28 July 2022) (Judgment) , the plaintiff suffered a head and chest contusion, bruises on his right hand and waist and fracture of the right femur, fracture of right humerus and fracture of the pelvic. On appeal, high Court did not disturb the award of sh. 800,000/= by the lower court. In the case of *Nguku Joseph & another v Gerald Kibiu Maina* [2020] eKLR, the plaintiff sustained Mild head injury, Lacerated wound on the left supra orbital region of the face, Blunt injury to the anterior abdominal wall leading to gall bladder laceration and liver laceration, Fractured right humerus and Lacerated wound on the scalp about four (4) cm long. High Court set aside the award of Kshs 2.5 million by the lower court and substitute it with Ksh 500,000/=.



15. It is now settled law that an award of damages being discretionary, “...an appellate court is not justified in substituting a figure of its own for an award by the court simply because it would have awarded a different figure if it had tried the case at the first instance...” Considering the comparable awards, and in particular the award in *David Kimathi Kaburu v Dionisius Mburugu Itaiari [2017] eKLR* which was made several years ago and putting into consideration the inflation since then, I am satisfied that award of Kshs 500,000 is rather low in the circumstances. The same is set aside and substituted with an award of Kshs 800,000 which is reasonable compensation.
16. On the issue of future medical expenses, the same was specifically pleaded in the plaint and the doctor confirmed the same in his report. The plaintiff had also pleaded Kshs 310,490= for treatment expenses, Kshs 5,000/= for preparation of medical report, Kshs 105 for registration of demand, Kshs 6,000/= being doctors charges to attend court and Kshs 3,000/- being reasonable expenses to attend an anticipated 2nd medical examination. In his evidence, the plaintiff states; I was admitted for six days . Metal was implanted on the leg and placed on bandage. I used Kshs 310,024/= as cost of treatment, I was examined by another doctor . I paid him Kshs 5,000/= The implant was to be removed at a cost of Kshs 200,000/-. It is yet to be done.”
17. It is noted that the trial magistrate did not specifically mention award of future medical expenses but lumps the award of special damages as Kshs 215,490. Future medical expenses carry Kshs 200,000/= Receipts for specials amount to Kshs 115,490. The total amount then under this head would be Kshs 315, 490/=. To that extent , there was an error on his part that warrants intervention by this court.
18. The judgment dated March 17, 2021 is hereby set aside and substituted as follows :
- | | | | | | | |
|-----------------------------|----------------------------|--------------------------------|----------------------------|---------------------------|---------------------------|---------------------|
| General damages..... |Kshs 800,000/= | Future medical expenses |Kshs 200,000/= | Special damages |Kshs 115,490= | Total |
| |Kshs 200,000/= | Special damages |Kshs 115,490 | Less 30% liability |Kshs 334,647/ | =Total..... |
| | | | | | | Kshs 780,843 |

The appellant is awarded the costs of this appeal.

DATED, SIGNED AND DDELIVERED IN OPEN AT KISII THIS 25TH DAY OF MAY, 2023

PATRICIA GICHOHI

Judge

In the presence of:

Mr Oroyo for Appellant

Mr Nyachiro for Respondent

Kevin Isindu, Court Assistant

