



**Rongai Workshop v Mwita & another (Civil Appeal 71 of 2022)
[2023] KEHC 21674 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 71 OF 2022
SM GITHINJI, J
JULY 26, 2023**

BETWEEN

RONGAI WORKSHOP APPELLANT

AND

PLAIN AND RIDGES CO LTD 1ST RESPONDENT

JAMES MAGIGE MWITA 2ND RESPONDENT

*(Being an appeal from the judgment and Decree of the Chief Magistrate Hon.
N. C. Adallo in SRMCC No. 1 of 2017 Mariakani delivered on 29th July, 2022)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mogaka Omwenga & Mabeya Advocates for the Appellant

Wandai Matheka & Co. Advocates for the 1st Respondent

Muturi Gakuo & Kibara Advocates for the 2nd Respondent

1. Before the trial court was a claim commenced by a plaintiff dated November 4, 2016, amended on October 11, 2017 and further amended on March 19, 2019 in which the 1st respondent herein (the plaintiff in the trial court) sued the appellants herein seeking general damages for loss of amenities, pain and suffering, special damages as pleaded plus interest together with costs of the suit and interest thereon.
2. The 1st respondent pleaded that on or about June 23, 2016 at around 12:30 am while he was in the course of employment as a turnboy accompanying the driver of motor vehicle registration number KBW 965C ZE 3614 travelling to Mombasa along Nairobi- Mombasa road at Barracks Junction (Mariakani) another motor vehicle registration number KBJ 690Y ZN 8932 belonging to the 1st



Defendant and being driven on the wrong side of the road recklessly and negligently, collided with the motor vehicle in which the Plaintiff was travelling in causing him to suffer grave injuries from which he claimed both special and general damages.

3. The appellant denied the claim by their defence dated May 16, 2017 and prayed for the 1st respondent's suit to be dismissed.

The Appeal

4. The appeal before this court is against the award of damages by the trial court in the sum of Kshs 1,000,000/= for general and special damages with liability at 100% against the appellant. The judgment was delivered on July 29, 2022. Aggrieved by the judgment, the appellant filed a memorandum of appeal on the 19th day of August, 2022. The appeal is mainly on the trial court's finding in respect of assessment of damages. The grounds of appeal are that: -

1. The Learned Magistrate erred in law and in fact in awarding excessive quantum on damages in the sum of Kshs 1,000,000/- which is manifestly excessive and inordinately high in the circumstances and not commensurate with the injuries sustained by the Respondent.
2. The Learned Magistrate erred in law and in fact in awarding Kshs 422,446/- as special damages.
3. The Learned Magistrate erred in Law and in fact in failing to consider all the evidence and the Defendant's submissions on record.
4. The Learned trial Magistrate misdirected herself on the applicable principles of law by failing to take into consideration and appreciate the authorities submitted to the court by the appellant. He urges the court for the following orders;

- a. The Judgment delivered on July 29, 2022 by Honourable N C Adallo, Senior Resident Magistrate at Mariakani Law Courts in Civil Suit No 1 of 2017 be varied and/or set aside.
- b. The Appeal be allowed with costs.

Summary of the Evidence

5. PW1 James Magige Mwitwa told the court that he signed a witness statement on 6.6.2019 which was adopted as his evidence in chief. He further told the court that he worked for Plains and Ridges as a turn man and that on the fateful day he was from Nairobi with Tom, their driver and when they got to Barracks there was heavy traffic on the Mombasa- Nairobi Road side, but they were on the Nairobi-Mombasa Road side. He also stated that while they were on their lane of travel in motor vehicle registration number KBW 965C/ ZE 3614 another motor vehicle belonging to Rongai left its lane and entered on their lane. He told the court that the registration number of that vehicle was KBJ 690Y/ ZA 5932. That the Rongai vehicle got to their lane from the opposite direction and hit their vehicle head on.
6. It was his testimony that he lost consciousness and found himself at Mariakani Sub County Hospital at 1pm and was later taken to Jocham Hospital, then to Coast General Hospital where he was admitted for 3 days. He told the court that he was operated on thrice at Kijabe Hospital; that the first surgery costed Kshs 146,000/= which amount was paid by NHIF. That the 2nd and 3rd surgeries costed Kshs 323, 113/= to which NHIF paid Kshs 130,000/- and he paid the balance. It was his further testimony that he also incurred travel and medication expenses from the various hospitals to which he presented receipts.



7. On cross examination by Mr Kirui, he told the court that he was employed by Plains and ridges as a turn man where he worked for three months. That on the day of the accident they were from Nairobi heading to Mombasa and the Rongai vehicle was from the Mombasa direction heading to Nairobi. That the accident happened as a result of a head on collision and that the other vehicle suddenly emerged while trying to overtake as there was heavy traffic on its lane of travel. He also told the court that he was admitted in hospital on April 23, 2018 and was in hospital for 53 days. NHIF paid part of the medical bill and that he paid part of it.
8. PW2 Mohamed Hassan Abdi No 236xxx attached to Mariakani Police Station told the court that on 23.06.2016 at about 11: 00pm at Barrack Junction Mariakani along the Mombasa-Nairobi highway, there was a fatal accident that involved Motor Vehicle Registration Number KBW 905C/ZE 3614 Actros and Motor Vehicle Registration Number KBJ 690Y/ZF 8932 make ERF DAF.
9. According to him, the circumstances of the accident were that Motor Vehicle KBJ 690Y was from Mombasa heading to the Nairobi general direction and while overtaking a fleet of vehicles in traffic collided head on with Motor Vehicle Registration Number KBW 905C/ZE 3614. That as a result of the accident, one of the drivers died while undergoing treatment at Mariakani Sub County Hospital while a turn man and a driver were treated and referred to Mombasa for further treatment. That the vehicle that was blamed for causing the accident is motor vehicle Registration Number KBJ 690Y/ZF 8932.
10. Upon cross examination by Miss Nyaga, he told the court that he was not the investigating officer and he didn't visit the scene. He added that the driver of KBJ 690 Y was overtaking and was on the wrong side. He was after the accident charged with causing death by dangerous driving. The said driver of KBJ 690Y was entirely to blame for the accident.
11. DW1 John Maina Wangenye told the court that he was a truck driver with Rongai Workshop and that he recorded a statement dated August 9, 2018 which was adopted as his evidence in chief. He further told the court that on June 22, 2016, he was driving Motor Vehicle Registration Number KBJ 690Y/ ZD 8932 from the general direction of Mombasa heading to Nairobi and when he got to Barracks Junction, he was behind other vehicles, and there was a bus from Mombasa behind them heading the same direction.
12. The said bus started overtaking and that he slowed down. According to him, the oncoming vehicle swerve and they met head on. That the vehicle swerved to the extreme left and when the driver wanted to get back to the road, it lost control and swerved towards his side and when he noticed that he was going to hit the vehicle, he swerved and there was a collision. Further the accident was caused by the driver of KBW 965C.
13. DW2 PC Gilven Oduor No 91xxx told the court that the accident in question occurred on 23.06.2016 at 11:00pm at Barracks Junction along Nairobi- Mombasa Road involving Motor Vehicles Registration Number KBW 905C/ZE 3614 and KBJ 690Y/ZA 8932. That Motor Vehicle Registration Number KBJ 690Y ZA 8932 was being driven from Mombasa facing Nairobi direction and on reaching the scene of the accident, overtook a fleet of motor vehicles hence collided head on with an oncoming motor vehicle heading towards the Mombasa direction. That according to the police abstract dated September 14, 2016 KBJ 690Y/ ZA 8932 belonging to Rongai Workshop was blamed for the accident.



Determination

14. I have carefully considered the appeal herein, the grounds raised and the parties' submissions. The court is alive to the fact that it did not hear the witnesses testify and nor did it observe their demeanor and therefore should make an allowance for that. This court is also alive to the fact that an appeal is in a way a retrial and the court must therefore reconsider the evidence, evaluate it and draw its own conclusion. In *Peter M Kariuki -vs- Attorney General* (2014) eKLR the court held inter alia as follows:
- “We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
15. The issue for determination is whether the award of general damages of Kshs 1,000,000.00/= in light of the injuries sustained is inordinately high to persuade this court to interfere with it and whether the trial court erred in awarding Kshs 422,446/- as special damages. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* (2016) eKLR stated that “comparable injuries should attract comparable awards”.
16. To begin, the injuries suffered by the appellant were listed in the treatment notes, the P3 form and the medical report by Dr Ajoni Adede as:
- a. Comminuted displaced fracture of the right femur thigh bone.
 - b. Cuts on the right forearm.
 - c. Cut on the head (occipital)
17. On the issue of quantum, I do rely on the Court of Appeal's decision in the case of *Gitobu Imanyara & 2 Others vs Attorney General* (2016) eKLR, where the Court of Appeal 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, JA 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.’
18. PW1, the Plaintiff testified that after the accident he was treated at Mariakani Sub County Hospital and was later taken to Jocham Hospital then to Coast General Hospital where he was admitted for 3 days. He also told the court that he was operated on thrice at Kijabe Hospital where he incurred medical expenses as he was admitted for a total of 53 days.



19. I have also considered the medical report prepared by Doctor Ajoni Adede where he opined that the respondent had an Eight percent (8%) permanent partial disability due to comminuted displaced fracture of the right femur thigh bone, stiffness of the right knee, fracture site remains a weak point for life and the metal implant insertion and need for removal which weakens the bone. He further concluded that the femur thigh bone contributes to the knee joint complex contributing to the knee joint becoming stiff. As at the time of examination, the doctor recommended that the femur metal implant is to be removed after 2 years at a cost of Kshs 90,000/-.
20. I am alive to the fact that an award of general damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law. The mandate of an appellate Court to interfere with damages awarded by a trial court is limited. It is confined to certain circumstances.
21. I have had the opportunity to go through the authorities availed by both parties to the trial Court supporting their respective proposals on quantum. I note that the injuries sustained by the Respondent were severe going by the medical reports by both doctors. I further note that the learned trial magistrate in her judgment clearly indicated that she had considered the submissions made by each of the parties, the nature of the injuries sustained and effects of inflation in awarding Kshs 1,000,000/= as sufficient compensation for the injuries sustained.
22. Given the evidence on record, I find no fault in the learned trial magistrate's award for both general and special damages, considering the injuries that were suffered by the Respondent in the instant case. I am of the considered position that the finding of the Learned Magistrate is well within the acceptable limits that reflects the nature and gravity of the injuries suffered by the Respondent.
23. In the end, the appeal lacks merit and is hereby dismissed with costs to the Respondents.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Mayieka for the Appellant
2. Mr Mathare is for the 1st Respondent (Absent)

