



**Gantungu & another v Mwaya (Civil Appeal E178 of 2021)
[2023] KEHC 22789 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E178 OF 2021
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

JOHN MWANGI GANTUNGU 1ST APPELLANT

FREDRICK MBUIGA KAMAU 2ND APPELLANT

AND

JOSEPH NZUKI MWAYA RESPONDENT

*(Being an appeal from the judgment of Hon V.A. Ogotu delivered
on 24th September 2020, in Thika CMCC No. 893 of 2016)*

JUDGMENT

1. The Respondent sued the Appellants at the lower court seeking special and general damages after the Respondent was involved in a road traffic accident on April 17, 2018 at about 2.00 pm whilst he was a fare-paying passenger in Motor Vehicle KAY 469H along Thika Matuu Road at Kilimambogo road.
2. According to the plaint dated November 7, 2018, the Appellant's agent, driver, servant, or employee controlled, and or managed the motor Vehicle KAY 469H so carelessly and negligently and caused the same to lose control, veer off the road and violently overturn as a consequence the Respondent sustained personal injuries.
3. On August 13, 2020 the parties recorded consent on liability in the ratio of 90:10 in favour of the plaintiff as against the defendants. After a full trial, the trial magistrate awarded general damages of Kshs 300,000/= less 10 % contribution and special damages of Kshs 3,975/=.
4. Aggrieved by the court's finding, the Appellants filed the instant appeal vide the Memorandum of appeal dated September 25, 2021, challenging the judgment, citing the following 8 grounds:



- i. That the learned trial magistrate failed to apply herself judicially and to adequately evaluate the defendant's evidence and witness exhibits on record thereby arrived at an erroneous finding on quantum.
 - ii. The learned trial magistrate misdirected herself and erred in both law and in fact in failing to consider the defendant's overwhelming evidence on record and hence arrived at an erroneous finding on quantum.
 - iii. The learned trial magistrate erred in fact and law and misdirected herself in awarding general damages of Kshs 300,000/= and special damages of Kshs 3,975 which amounts is manifestly excessive as to be erroneous vis a vis the actual injuries sustained by the plaintiff.
 - iv. The learned trial magistrate misdirected herself and erred in law and in fact by totally failing to consider the defendant's submissions on record thus arrived at an erroneous finding on quantum.
 - v. The learned trial magistrate proceeded in wrong principles when assessing the damages to be awarded to the respondent (to apply precedents and tenets of law applicable).
 - vi. The learned trial magistrate erred in law and in fact in arriving at his said decision.
 - vii. The learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice.
 - viii. The learned trial magistrate erred in law and in fact in failing to consider conventional awards in cases of similar nature.
5. The Appellants proposed to ask the court to allow the appeal, set aside the judgment of the trial court and assess afresh the damages as well as the costs of the appeal be awarded to the Appellants.
 6. The appeal was canvassed through written submissions. The Appellants filed submissions on 1 January 6, 2023, while the Respondent filed submissions on March 27, 2023.

Appellant's submissions

7. Counsel submitted the award of Kshs 300,000/= for general damages was excessive in the circumstances and ought to be considerably reduced. The discretion of the court in awarding general damages should be exercised judiciously considering comparable injuries or similar injuries and awards.
8. Counsel submitted the award of general damages ought to be disturbed as the Respondent sustained soft tissue injuries. He cited several authorities to wit:

Ndungu Dennis v Ann Wangari Ndirangu & Anor (2018) eKLR - where Ngugi Joel, J reduced general damages for soft tissue injuries from Kshs 300,000/= to Kshs 100,000/=

George Kinyanjui T/A Climax Coaches & Anor v Hussein Mabad Kuyala (2016) eKLR - where the Respondent sustained injuries on his chest, neck, knees and lost two teeth and the High Court on appeal reduced an award of Kshs 650,000/= to Kshs 109,890/= upon a finding that the loss of teeth was unrelated to the accident in question, as the Respondent had sustained soft tissue injuries.



Godwin Ileri v Franklin Gitonga (2018) eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs 300,000/= was reduced to Kshs 90,000/=

9. It was the submission of counsel that considering comparable awards and injuries an award of Kshs 50,000/= would suffice as adequate compensation for the injuries sustained by the Respondent herein.
10. He urged the court to allow the appeal and award costs of the appeal to the Appellants.

Respondent's submissions

11. Counsel submitted the award of the trial magistrate was commensurate to the injuries sustained by the Respondent. Further, the trial magistrate correctly exercised her discretion and directed her mind to the applicable principles. That the injuries sustained were not mere soft tissue injuries and urged this court not to interfere with the trial court's award.
12. It was submitted that the appellants had failed to demonstrate that the trial magistrate acted on wrong principles or misapprehended the evidence to warrant the court to disturb the award of general damages. According to counsel, the Respondent sustained injuries being; loss of 4 canines, blunt abdominal injury, blunt chest injury and abrasions on both hands and shoulders. The injuries were supported by the medical report and treatment notes. Counsel submitted these were not mere soft injuries as suggested by the Appellants, since Dr. Okero opined the Respondent would require future medical expenses to replace the teeth.
13. Counsel pointed to the fact that though the Appellants submitted that an award of Kshs 50,000/= would suffice as compensation, in the trial court they had submitted an award of Kshs100,000/= and they had failed to explain the variance. None of the cited authorities in the appeal were placed the trial court. And in any case, none related to loss of teeth and only relate to soft tissue injuries.
14. Counsel submitted the authorities cited by the Respondent in the trial court have comparable injuries as compared to those cited by the Appellant. In *Bellita Kennedy & Anor v Angelina Kitili Musyoka* (2016) eKLR - the Respondent sustained loss of two upper incisor teeth, fractured one upper tooth, deep cut wound on the lower lip and soft tissue injuries to the right cheek, right knee, and right side of the face. The court upheld a general damages award of Kshs 350,000/=.
15. In conclusion counsel urged the court to find that the trial magistrate took into account relevant factors, evidence and the law in the assessment of damages, and the award was neither excessive nor manifestly high, find the appeal lacks merit and dismiss the same with costs.

Analysis and determination

16. In the trial court, Pw1 (the Respondent) testified that on April 17, 2018, he was involved in an accident and was injured on the shoulder, tummy, and legs and lost 4 teeth. He told the court his hand had not completely healed and he had not replaced the teeth.
17. I have considered the appeal, the submissions by the parties in support of their various argument and the trial court record. The issue for determination is whether this court should disturb the trial court's award on general damages.



18. This Court is guided by the Court of Appeal decision in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR where the learned judges set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

“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 principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

19. The Appellants contention in the instant appeal is that the Respondent sustained soft tissue injuries in the accident and thus the award of general damages of Kshs300,000/= was excessive.

20. The injuries sustained by the Respondent are not disputed by the parties. According to the treatment notes from Immaculate Heart of Mary Hospital Kilimambogo, the injuries are multiple abrasions right hand and shoulder while the treatment notes from Ngoliba Health Centre indicate painful gums, abdominal right-sided, and the Respondent was referred to a dentist who indicated a loss of 4 canines. Further, the Medical report by Dr. Okere dated July 10, 2018, the respondent sustained the following injuries: a loss of 4 canines, blunt abdominal injury, blunt chest injury and abrasions on both hands and shoulders. The doctor opined that the Respondent would require Kshs 40,000/= to replace the lost teeth with prosthesis.

21. In view of the evidence adduced in the trial court, this court is not persuaded that the injuries sustained by the Respondent are soft tissue in nature. The medical report and treatment note clearly show the Respondent suffered loss of 4 canine teeth. In the circumstances, I am not persuaded that the award of the trial court was excessive.

22. The authorities cited by the Appellants have no comparable injuries to those sustained by the Respondent herein. On the other hand, the authorities cited by the Respondent are more comparable.

23. In *Joseph Mutua Nthia v Fredrick Moses Katuva* (2019) eKLR the High Court maintained an award of general damages of Kshs 400,000/= where the soft tissue injuries on the right ankle joint, fractured right malleolus, soft tissue injuries on the right foot and occasional pains on the injured sites of the body.

24. It is my finding that the award of general damages of Kshs 300,000/= was not excessively high. The same was fair and commensurate to the injuries sustained by the Respondent. This court will uphold the award of general damages of Kshs 300,000/=.

25. In the circumstances, I find that the trial magistrate did not proceed on wrong principles, or misapprehended the law. She rightfully exercised her discretion in awarding the general damages.

26. The upshot is that the appeal lacks merit. The same is dismissed with costs to the Respondent. The award of damages in the lower court is upheld.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER 2023.

P.M. MULWA

JUDGE

In the presence of:



Kinyua/ Duale – Court assistant

N/A- for the Appellants

N/A - for the Respondent

Both counsel for parties had notice

