



REPUBLIC OF KENYA



**KENYA LAW**  
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**G. A Insurance Company Ltd & another v Mupa (Civil Appeal  
26 of 2021) [2023] KEHC 24485 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24485 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 26 OF 2021  
SM GITHINJI, J  
OCTOBER 30, 2023**

**BETWEEN**

**G. A INSURANCE COMPANY LTD ..... 1<sup>ST</sup> APPELLANT**

**CHARLES AGADE CHILSON ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RUTH SARA MUPA ..... RESPONDENT**

*(Being an Appeal against the entire awarded on quantum of the Learned  
Honorable S.D.Sitati – Resident Magistrate delivered on the 17th March,  
2021 in Kilifi Senior Principal Magistrate’s Court Civil Suit No.175 of 2019)*

**JUDGMENT**

1. This appeal emanates from the judgment and decree of Honourable D.S Sitati delivered on 17<sup>th</sup> March 2021 in Kilifi SPMCC No. 175 of 2019 wherein judgment was entered in favour of the respondent herein where she was awarded a sum of Kshs. 1,445,408 as damages arising out of a RTA.
2. Dissatisfied with the decision, the parties herein lodged separate appeals being Malindi High Court Civil Appeal No. 26 of 2021 and Malindi High Court Civil Appeal No. 27 of 2021. The two appeals were consolidated by the court on 19<sup>th</sup> July 2023.
3. Grounds of Appeal in HCCA No. 26 of 2021
  - a. That the learned resident magistrate erred in law and in fact by failing to take into account the appellant submissions that were on the court records prior to the judgment date.



- b. That the learned resident magistrate erred in law and in fact by making general damages award that were inordinately low and incommensurate to the nature of injuries sustained by the appellant.
  - c. The learned magistrate erred in law and in facts in relying on obsolete authorities in reaching the decision on general damages.
  - d. The trial magistrate erred in law and in fact in failing to hold that the appellant required domestic help and likewise erred in law and in facts in failing to make an award for domestic help's salary.
4. Grounds of Appeal in HCCA No. 27 of 2021
- a. That the learned trial magistrate erred in failing to appreciate and correctly apply the requisite principles in evaluating the evidence in awarding of special damages.
  - b. That the trial magistrate erred and misdirected himself in law by awarding medical expenses which were catered for by APA insurance Ltd under an employer's medical insurance scheme.
  - c. That the learned trial magistrate erred and misdirected himself in law by awarding special damages that were not expended by the plaintiff.

#### **Evidence at Trial**

- 5. Pw1 Ruth Sarah Mupa the plaintiff adopted her witness statement as her evidence in chief. She produced as PEX 1-9 a bundle of documents as per the list of documents dated 25/4/2019. On cross examination by Mr. Wairagu for the defendants, she stated that she spent Kshs. 347,000 and the invoices were addressed to APA Insurance Company which is her insurer.
- 6. The defence did not call any witnesses.

#### **Analysis and Determination**

- 7. The appeal was canvassed by way of written submissions. I have considered this appeal, submissions by parties and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach at its own independent conclusion. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.
- 8. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:
 

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
- 9. The issue for determination here is whether the award of general damages of Kshs. 1,200,000.00/= in light of the injuries stated above is inordinately low to persuade this court to interfere with it and whether the trial court erred in awarding Kshs. 347,480 as special damages for medical expenses. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* (2016) eKLR stated that “comparable injuries should attract comparable awards”.



10. To begin, the injuries suffered by the appellant were listed in the treatment notes, the P3 form and the medical report by Dr. S.K Ndegwa as:
- a. Displaced fracture of the left clavicle
  - b. Severe back injuries involving Wedge compression fracture of thoracic vertebra spine number 9 and 11 Fracture of transverse process of thoracic spine 7,8 and 9 Fracture of the spinous process of thoracic spine 7 and 8 Loss of normal cervical spine curve due to muscle spasms
  - c. Severe chest injuries involving
    - fracture of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> posterior ribs on the left side of the chest
    - Left lung partial collapse
    - left sided hemo-pneumo thorax
  - d. Blunt injury to the left peri-orbital area
11. On the issue of quantum, I shall rely on the Court of Appeal’s decision in the case of *Gitobu Imanyara & 2 Others v 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, 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.”
12. PW1, the Plaintiff testified that after the accident she was treated at Memphi Health services and was later taken to Pandya memorial Hospital where she was admitted for 4 days. I have also considered the medical report prepared by Doctor S.K Ndegwa where he opined that the respondent had a seven (7%) permanent partial disability due to multiple weak bone unions that can easily fracture following future lesser traumas and chronic pains. As at the time of examination, the doctor recommended that the surgical metal implants are to be removed after 2 years at a cost of Kshs. 150,000/-.
13. I am cognizant of 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 not unlimited. It is confined to certain circumstances.

14. I have had an 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 report by the doctor. I further note that learned trial magistrate in his judgment clearly indicated that he had considered the submissions made by the defendant but plaintiff's submissions were not on record at the time of writing his judgment, the nature of the injuries sustained and cost of inflation in awarding Kshs. 1,200,000/= as sufficient compensation for the injuries sustained.
15. Given the evidence on record, I find no fault in the learned trial magistrate's award for general damages, considering the injuries that were suffered by the Respondent in the instant case. I am of the considered view that the finding of the Learned Magistrate was well within the acceptable limits that reflected the nature and gravity of the injuries sustained by the Respondent.
16. As regards special damages, the appellants fault the trial court for awarding the sum of Kshs. 347,480 as special damages incurred in medical expenses. Their position is that the same was covered by APA Insurance Co. Ltd, the respondent's insurer. It is trite that special damages must be specifically pleaded and proved. The respondent pleaded Kshs. 352,480 for special damages. From the record, the respondent produced various receipts, invoices from Pandya memorial Hospital in proof of the cost of medical expenses pleaded. Notably however, it is a well settled principle of law that an invoice is not proof of payment. Special damages can only be proved by producing actual receipts or invoices endorsed with the word "Paid" (See: [\*Total \(Kenya\) Limited Formally Caltex Oil \(Kenya\) Limited v Janevams Limited\*](#) [2015] eKLR.)
17. To prove the sum of Kshs. 352,480/- pleaded as special damages for medical expenses, the Respondent herein produced several invoices from Pandya Memorial hospital addressed to APA Insurance Co. Ltd totaling to Kshs. 347,480/=. There is no indication that the Respondent paid the said amount. Indeed, it was her evidence that the said amount was covered by the insurance.
18. Be that as it may, I note that the respondent produced the following actual receipt: a receipt of Kshs. 3,000/- from Dr. S.K Ndegwa. The other items listed as special damages were not supported by any receipts. This means that the Respondent only proved special damages of Kshs. 3,000/-. In the premises, I find that the trial magistrate erred by awarding the Respondent the sum of Kshs. 350,480- for special damages. The same is hereby set aside and substituted with Kshs. 3,000.
19. To the said extent both appeals are hereby determined with no order as to costs.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Mr Mbithi for the Appellant in 27 of 2021
2. Sharrif and Co. Advocates are for the Respondents (absent)

