



**Wachira & 2 others v Kiburi (Civil Appeal E024 of 2021)  
[2023] KEHC 25952 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E024 OF 2021  
MA ODERO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JOYCE WANGUI WACHIRA ..... 1<sup>ST</sup> APPELLANT**

**PADDY DISTRIBUTORS ..... 2<sup>ND</sup> APPELLANT**

**ANCENT KIMEU MULI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**CHARLES NJOROGE KIBURI ..... RESPONDENT**

**JUDGMENT**

1. Before this court is the Memorandum of appeal dated 17<sup>th</sup> June 2021 by which the Appellants Joyce Wangui Wachika, Paddy Distributors And Ancent Kimeu Muli seek the following orders:-

- “(a) That this appeal be allowed
- (b) That, the judgment and Decree delivered in Karatina MCC 76 of 2018 be varied and/or set aside
- (c) That costs of this appeal be borne by the Respondent”

2. The Respondent Charles Njoroge Kiburi opposed the appeal. The matter was canvassed by way of written submissions. The Appellants filed the written submissions dated 3<sup>rd</sup> November 2023 whilst the Respondent relied upon his written submissions dated 31<sup>st</sup> May 2023.

**Background**

3. By way of an Amended plaint dated 5<sup>th</sup> August 2019, the Respondent alleged that on or about 29<sup>th</sup> June 2017, he was driving a motor vehicle Registration Number KBS 214K, Isuzu canter along Nyeri-Karatina Road. At the Tumu Tumu junction, the 3<sup>rd</sup> Defendant who was driving a motor vehicle



Registration number KBA 979G Isuzu lorry negligently steered and/or controlled his vehicle causing it to collide with the Respondents Isuzu canter. That as a result of the accident the respondent sustained serious injuries, loss and harm.

4. The Respondent stated in his plaint that he sustained the following injuries:-
  - i. Fracture of the right clavicle bone (collar bone)
  - ii. Blunt injuries to the right elbow with a small deep fracture
  - iii. Blunt injury to left foot
  - iv. Bruises on the back
5. The Respondent then filed in the lower court a suit seeking general and special damages as well as loss of user of the vehicle for a period of ninety (90) days.
6. The Appellant filed a joint statement of defence dated 2<sup>nd</sup> October, 2008 in which they denied liability for the accident and denied any liability for the injuries suffered by the Respondent.
7. The suit was heard inter partes and on 18<sup>th</sup> May 2021 the Honourable V.S Kosgei Resident Magistrate, delivered a judgement in favour of the Respondents and against the Appellant as follows:-
  - “(a) 100% liability for the accident
  - (b) Kshs.1,200,000/= as general damages
  - (c) Kshs.2,156,631/= as special damages
  - (d) Costs of the suit and interest from the date of delivery of judgement at court rates.”
8. Being aggrieved by the judgement the Appellants filed the Memorandum of Appeal dated 17<sup>th</sup> June 2021 in which the following grounds were raised.
  - “1. The learned trial magistrate erred in law and in fact in assessment of general damages for pain and suffering awarded to the Respondent leading to an excessive of Kshs.1,200,000/= considering the nature of the injuries sustained by the respondent.
  2. The learned trial magistrate erred in law and in fact in finding that the Respondent had proved loss of use of his motor vehicle at Kshs.540,000/= on a balance of probabilities.
  3. The Learned trial magistrate misdirected herself on the very nature of a claim for loss of use thereby arriving at an erroneous finding that the Appellants never contradicted the Respondent’s evidence adduced during trial.
  4. That the Learned trial magistrate erred in failing to give due consideration to the Appellants submissions on quantum specifically on the loss of use”

### **Analysis and Determination**

9. I have carefully considered the Appeal before this court as well as the written submissions filed by both parties.



10. This being a first appeal, the court is obliged to reconsider and re-evaluate the entire evidence and to draw its own conclusions on the same.

(see *Selle & Another – v- Associated Motor Boat Company Limited* [1968] [E.A]. This position was emphasized in the case *Abok James Odera & Associates v John Machira t/a Machira & Co. Advocate* [2013] eKLR (Civil Appeal No. 161 of 1999) in the following manner:-

“This being a first appeal, we are reminded of our primary role as a first appellant court namely, to re- evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

11. The Appellants do not take issue with the finding of the trial court on liability which was asses at 100% against the Appellants. The appellants do however take issue with the amounts awarded in general damages which they submit is excessive. Thus the only issue for determination in this appeal is that of Quantum.

12. As a general rule the award of general damages lies at the sole discretion of the trial court. The court in determining quantum will be guided by the evidence adduced as well as legal precedents, Comparable injuries ought to attract comparable (not necessarily identical) awards. The court must also take into account rising inflationary trends.

13. In the case of *Bashir Ahmed Butt – v- Uwais Ahmed Khan* [1982-88]KAR, the Court of Appeal stated thus:-

“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 respects, and so arrived at a figure which was earlier inordinately high or low”

14. Further in *Jabane – v- Olenja* [1986]KLR the Court of Appeal stated as follows:-

“The reported decision of this court and its predecessors lay down the following points, among others, for the approach by this court to an award of damages by a judge:-

- (1) Each case depends on its own facts
- (2) Awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or body policies.
- (3) Comparable injuries should attract comparable award.
- (4) Inflation should be taken into account, and
- (5) Unless the awards is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately higher or low or to be an entirely erroneous estimate for an appropriate award have well alone”

15. Finally on this point the court in *Price And Another – v- Hilder* [1996]KLR held that:-

“In considering the exercise of judicial discretion, as to whether or not to set aside a judgement the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set



aside or vary the judgement. the court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

16. I have considered the injuries sustained by the Respondent in light of the above principles. The medical report produced gave disability at 8%.
17. I have also taken into accounts similar cases. In *Joseph Kimanthi Nzau – v- Johnson Macharia* [2019]EKLR where the victim sustained fracture of the skull bone, fractures of two ribs and fracture of the clavicle bone, the court of Appeal reduced the award of Kshs.1,000,000/= made by the trial court to Kshs.800,000/=.
18. Again in *Catherine Gatwiri – v- Peter Mwenda Karaai*[2018]EKLR where the victim sustained a fracture of the left scapular, fracture of right clavicle and fracture of 3 ribs with compound fracture of tibia and fibula, the court made an award of Kshs.500,000/= as general damages.
19. The injuries which the Respondent in this matter sustained were far less severe than those cited above. Even taking into account inflationary trends the award of Kshs. 1,200,000/= was in my view excessive.
20. Considering the nature of injuries sustained by the Respondent and current economic trends I surmise that an award of Kshs.700,000/= would be more appropriate.
21. The appellants also challenge the award made by the trial court on loss of user being Kshs.540,000/=.
22. In the case of *Jimnah Munene Macharia v John Erera* Civil Appeal No. 218 of 1998 it was stated:-

“Special damages must be pleaded with as much particularity as the circumstances permit and it is not enough to simply aver that the particulars of special damages are to be supplied at the time of trial. If at the time of filing the suit those particulars are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing and it is only where particulars of special damages are included in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars.”
23. The Respondent claimed loss of use for three months following accident which happened on 29<sup>th</sup> June 2017. The lower court relied on the receipts tendered by the Respondent. The lower court has not shown how it arrived at Kshs.6,000/= per day yet the receipts in court which span from 11<sup>th</sup> July 2017 to 29<sup>th</sup> July 2017 total to Kshs.122,000/=.
24. On a 30 day calendar month this would average Kshs.4066/= per day. Of note is the testimony of the 1<sup>st</sup> Respondent who stated in cross-examination “ .....I would get an average of Kshs.6,000/= monthly or so the basis of Kshs.6,000/= would be for about a month it could be less or more in average. In business there is no constant earning.”
25. It is trite law that parties are to be bound by their pleadings. In his plaint the respondent claims for loss of user at Kshs.6,000/= per day yet in cross-examination he states that he was earning Kshs.6,000/= per month. Clearly the testimony of the Respondents in court does not support what he had pleaded in his plaint.
26. In the circumstances, I find that the trial court erred in awarding Kshs.6,000/= per day yet the Respondent himself testified that his earnings amounted to Kshs.6,000/= per month.



27. Taking into account the receipts produced by the respondent which showed that the average amount earned in July 2017, was Kshs.122,000/= this would amount to Kshs.4,066 per day (taking a month to have thirty (30) days). Therefore the amount for loss of user should be 4,066x90(three months) which comes to 366,000/=.
28. I therefore reduce the amount awarded for loss of user downwards from Kshs.540,000/= to Kshs.366,000/=. The awards made for special damages will remain the same.
29. Finally this appeal partially succeeds and I hereby make the following orders:-
- (1) The judgement delivered on 18<sup>th</sup> May 2021 in Karatina PMCC No. 76 of 2018 be and is hereby varied as follows:-
    - a) The award made for general damages is revised downward from Kshs.1,200,000/= to Kshs.700,000/=.
    - b) The Award for loss of user is similarly revised downward from Kshs.540,000/= to Kshs.366,000/=
    - c) All other awards will remain as made by the trial court.
  - (2) Each party to bear their own costs.
  - (3) It is so ordered

**DATED IN NYERI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023**

.....

**HON. MAUREEN.A ODERO**

**JUDGE**

