



REPUBLIC OF KENYA



KENYA LAW
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**Anyanya & another v Ochieng (Criminal Appeal E052 of 2021)
[2023] KEHC 27081 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E052 OF 2021
DK KEMEL, J
DECEMBER 19, 2023**

BETWEEN

RAYMOND OTIENO ANYANYA 1ST APPELLANT

WILLIAM NDINYA OMOLLO 2ND APPELLANT

AND

BELINDER ATIENO OCHIENG RESPONDENT

*(Being an appeal from the Judgment/decree of the Hon. Charles Mutai
(SPM) delivered on 28th August 2021 in Bungoma CMCC No. 110 of 2018)*

JUDGMENT

1. This judgment determines the Appellants appeal filed on 13th September 2021 *vide* Memorandum of Appeal dated 13th September 2021. This Appeal relates only to the issue of quantum.
2. The Respondent was the Plaintiff before the trial Court and pleaded that she was injured following a road traffic accident that occurred on 29th August 2017. The accident occurred while she was a lawful paying passenger aboard motor vehicle registration number KBV 749T make bus/coach along Bungoma-Mumias road, at Kabula area, when the 2nd Appellant herein, vide his authorized agent, the 1st Appellant herein, drove the motor vehicle registration number KBV 749T that he caused it to swerve and collide with tractor registration number KBE 667E/ZC 259 which collision occasioned serious injuries to the Respondent.
3. The issue of liability was settled by consent at 100% in favour of the Respondent. After conducting a hearing, the trial magistrate in his judgment awarded the Respondent Kshs 280,000/- for general damages, special damages of Kshs 4,440/-. The Respondent was also awarded costs of the suit plus interest.
4. It is that judgment that gave rise to this appeal where the Appellants have raised the following grounds:



- i. That the learned trial magistrate erred in fact and law in the assessment of quantum to a tune of Kshs. 280,000/= for general damages, an award which was excessive and erroneous compared to the injuries sustained by the Plaintiff/Respondent.
 - ii. That the learned trial magistrate erred in law and misdirected himself to the extent and value of the Respondent's injuries and thereby erred in his assessment.
 - iii. That the learned trial magistrate erred in law and fact in failing to find that the special damages pleaded had not been specifically proved as provided for by law.
 - iv. That the learned trial magistrate erred in law and fact in failing to pay regard to authorities as relied upon in the Appellants submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.
 - v. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.
 - vi. That the learned trial magistrate erred in fact and law in failing to consider the Appellants submissions on quantum by completely disregarding the submissions and authority of the Appellant and as a result arrived at unjustified decision on quantum.
5. As observed above, the appeal is against quantum of damages only. The appeal was admitted to hearing on 27th April 2023. This Court gave directions that the appeal be canvassed by way of written submissions. The Appellants counsel filed written submissions on 21st August 2023 whereas the Respondent's counsel filed no written submissions.
 6. In an appeal against assessment of damages, an appellate Court must be careful not to interfere with the trial Court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR thus:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
 7. The first issue for consideration is whether the Respondent proved that she suffered the injuries pleaded in her plaint.
 8. The Appellants in their submissions argue that the trial Court failed to critically consider and analyse the medical evidence it tendered before the subordinate court. It advanced that the initial treatment notes from Mwamba Health Clinic and the P3 form conflicted with the injuries highlighted in the Plaint and the medical report by Dr. Mulianga. Counsel submitted that the Respondent only sustained soft tissue injuries as captured in the initial treatment notes from Mwamba Health Clinic and that the said injuries as captured in the Plaint are not related to the accident that occurred on 27th July 2017.
 9. The Appellants did not at any point before the subordinate court produce the 2nd medical report they wished to form part of the defence case. Based on the ruling of the lower Court issued on 25th June 2021, the trial Court established that the Appellants had sought countless number of adjournments and that they were on their last. The Court also established that the 2nd medical report that they wished to form



part of the defence case was not annexed prompting the trial magistrate to dismiss their applications. At the end of the Respondent's case, the appellants simply closed their case. The evidence of the Respondent thus remained unchallenged.

10. Under Order 3 Rule 2, when filing a suit, the Plaintiff is required to file a verifying affidavit, list of witnesses, statements of witnesses (excluding expert witnesses), and copies of documents to be relied upon at the trial. However, there is a proviso that the written statements may, with the leave of the Court, be availed at least 15 days prior to the pre-trial conference envisaged under Order 11 of the [Civil Procedure Rules](#).

11. The same applies to a defendant when filing a defence and counterclaim (if any). The relevant provision is Order 7 Rule 5. I think it is best that I set it out in full, as it is the provision that ought to apply to the application herein. The same is drawn as follows:-

Order 7 Rule 5 Documents to accompany defence or counterclaim.

The defence and counterclaim filed under Rules 1 and 2 shall be accompanied by—

- a. An affidavit under Order 4 Rule 1 (2) where there is a counterclaim
- b. A list of witnesses to be called at the trial
- c. Written statements signed by the witnesses except expert witnesses and
- d. Copies of documents to be relied on at the trial.
- e. Provided that the statements under sub rule (c) may with leave of the Court be furnished at least fifteen days prior to the pre-trial conference under Order 11.

12. It can be seen from the above that both the Plaintiff and Defendant are required to furnish their evidence when filing their pleadings. It is only with the leave of the Court that documents may be supplied later, at least 15 days before the pre-trial conference. In practice, the Courts do conduct the pre-trial conference through a mention, where parties confirm that they have complied with Order 11 and that they have exchanged the requisite documents.

13. Back to this appeal, in the case of [John Wainaina Kagwe v Hussein Dairy Ltd](#) [2013] eKLR, the Court of Appeal held as follows: -

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”

14. The respondent who testified as PW2 adopted her statement dated 29th August 2017 as her evidence in chief. To begin, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form from Mwamba Medical Clinic and the Medical report by Dr. Mulianga Ekesa as:

- a. Painful swollen right cheek
- b. Penetrating wound over the right side of the mouth



- c. Painful teeth
- d. Neck pains especially on the right side
- e. Chest pains
- f. Low back pains especially on the right side
- g. Painful parvaginal bleeding
- h. Deformed right little finger

The medical report by Dr. Mulianga Ekesa indicated the Respondent's present complaints as:

- a. Right side toothache
- b. Right side headaches
- c. Fixed flexion deformity at PIP joint of the right little finger.

Dr. Mulianga Ekesa issued an opinion and prognosis that the Respondent suffered soft tissue injuries, dislocation of PIP joint of the right little finger and physiological trauma.

15. I now turn to consider whether the general damages awarded by the trial Court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

16. I have considered the Appellants' submissions on the quantum of damages, the authorities cited by Counsel in their submissions in this appeal. It must be noted that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable to the other person's injuries, and the after effects.
17. The Appellants in its lower Court submissions proposed an award of Kshs 50,000/= on the grounds that the Respondent sustained minor soft tissue injuries. They cited the cases of *Ndungu Dennis v Ann Wangari Ndirangu & Another* (2018) eKLR and *PF (Suing as next friend and father of SK (Minor)) v Victor O Kamadi & Another* 2018 eKLR in support of its case. In my view, the injuries are less serious than those sustained by the Respondent herein noting that she suffered soft tissue injuries and dislocation of PIP joint of the right little finger.
18. The Respondent before the trial court proposed an award of Kshs 500,000/- on general damages. She cited the case of *Francis Ochieng & Another v Alice Kajimba* (2015) eKLR; *Joseph Mutua Nthia v Fredrick Moses M. Katuva* (2019) eKLR and *Francis Njuguna Karanu v Rose Ndinda Kitema* (2021) eKLR. However, they argued that the injuries of the plaintiff therein were less serious as she only suffered a single dislocation.
19. In the case of *Joseph Mutua Nthia v Fredrick Moses M. Katuva* (2019) eKLR Kshs. 400,000/= was awarded as general damages in respect of similar injuries.
20. In *Coast Broadway Co. Ltd v Elizabeth Alaka Achebi* [2015] eKLR the Court affirmed an award of Kshs 300,000/- for a Plaintiff that had suffered a dislocation of the shoulder. In the case of *Patrick Kinoti*



Miguna v Peter Mburunga G. Muthamia [2014] eKLR the Plaintiff was awarded Kshs 300,000/- after he proved that he had sustained dislocation of the shoulder resulting to post traumatic arthritis and also had loose teeth.

21. In this regard, bearing the fact that the medical reports agree that the respondent suffered soft tissue injuries, and loss of teeth, it is probably true that the Respondent suffered the same and comparable awards by Courts are to the tune of Kshs 350,000/-to 400,000/-. In the case of *Isaac Muriungi Mbataru v Silas Kalumani* [2017] eKLR, the Court reduced an award of Kshs 350,000/- to Kshs 200,000/- for similar injuries. In *Joseph Mutua Nthia v Fredrick Moses M Katuva* (2019) eKLR where Kshs. 400,000/= was maintained by the High Court as general damages in respect of similar injuries. I find the award of 280,000/- was reasonable in the circumstances. I therefore retain the award of the trial Court as the same was not inordinately high as claimed by the Appellants.
22. The Respondent vide her plaint had claimed for special damages of Kshs 4,440/- and which the Court awarded the same. Because the amount is not disputed, I see no reason to disturb the same.
23. In sum, the appeal lodged by the Appellants lack merit. The same is dismissed with costs to the Respondent

It is so ordered.

Dated and delivered at Bungoma this 19 TH day Of December, 2023.

D. Kemei

Judge

In the presence of:

No appearance Ogato for Appellants

Onyando for Anwar for Respondent

Kizito Court Assistant

