



**Volcan Holdings Ltd v Wepukhulu (Civil Appeal E008 of 2021)
[2022] KEHC 3351 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E008 OF 2021**

SN RIECHI, J

MAY 31, 2022

BETWEEN

VOLCAN HOLDINGS LTD APPELLANT

AND

ABUITY MAKHETI WEPUKHULU RESPONDENT

*(An appeal from the Judgement and Decree of Hon. A. Odawo
S.R.M in Bungoma CMCC No. 6/2019 delivered on 28/9/2020)*

JUDGMENT

1. By an amended plaint dated May 7, 2019, the respondent sought general damages, Kshs 314, 798/= in special damages, costs and interest as a result of an accident which occurred on June 4, 2017 involving a motor vehicle that the respondent was travelling in and the appellant's truck. The respondent attributed negligence to the appellant's driver to wit driving at a high speed, driving without due care and attention, driving carelessly and in a dangerous manner, driving on the wrong lane and or failure to apply brakes.
2. That as result of the accident, the respondent sustained cut wound extending from the forehead to the right parietal region, cut wound to the back, cut wound to the right hand, cut wound to the right thumb, fracture to the right femur and fracture to the right acetabulum.
3. The appellant filed its defence attributing negligence to the driver of the motor vehicle carrying the respondent, denied the fact that the respondent was a fare paying passenger aboard the said motor vehicle as well as the injuries allegedly sustained.
4. The respondent was the only witness in the ensuing trial and testified that he was travelling in motor vehicle registration number KCC 045V from Webuye-Bungoma when on the way, a truck registration number KBV 593C/ZE 2548 travelling in the opposite direction overtook another car in front of it, crossed onto their lane and knocked down the car they were travelling in. He was rushed to St. Domiano



Mission Hospital where he was admitted for 4 days, St Lukes Hospital Eldoret where he was again admitted for 1 week then back to St Damiano and admitted for 2 weeks.

5. That as a result of the accident, he sustained injuries and blames the truck's driver for negligence. He stated that he now walks with pain and since one of the limbs is short, he has to balance on a crutch.
6. By a judgement of that court, liability was apportioned by consent at 20: 80 in favour of the plaintiff against the defendant. On quantum, the appellant (defendant in the subordinate court) was decreed to pay the respondent Kshs 2, 500,000/= in general damages, Kshs 314, 248/= in specials and Kshs 270,000/= in future medical expenses subject to the 20% contribution. The appellant was aggrieved thus the instant appeal which is premised on the following grounds;
 1. The learned trial magistrate erred in law and fact by awarding excessive damages which are inordinately high considering comparable awards.
 2. The learned magistrate erred in law by failing to uphold the doctrine of stare decisis and apply the well settled legal principles awarding general damages.
7. The appeal was disposed of by way of written submissions. The appellant identified the following issues;
 1. Whether the court has jurisdiction to re-evaluate the evidence adduced before the trial court.
 2. Whether the trial court erred in awarding quantum on general damages.
 3. Whether the appellate court can interfere with the discretion of the trial court on quantum and review it.
8. On the 1st issue, it is submitted that the duty of the court as an appellate court is to re-evaluate the evidence on record. That the respondent's oral evidence in court contradicted the medical evidence contained in Pexh 5 and 11 where the former indicated he would heal within 6 months while the latter assessed permanent disability at 40% which disability card was not produced.
9. On the 2nd issue, it is submitted that the respondent sustained soft tissue and borne injuries where the courts have awarded between Kshs 600,000/= and 700,000/= in comparable injuries. Counsel cites the following cases in support; *Stephen Mutisya v Peter Mutuku Katuli* (2008)eKLR where Kshs 600,000 was awarded, *Godfrey Wamalwa Wamba & anor v Kyalo Wambua* (2018)eKLR where Kshs 700,000/= was awarded, *Salome Mantai & anor v Lucia Wanjiru Mwangi* (2016)eKLR and *Mugecha Eliud v Ndavi Nziru* (2018) eKLR where Ksh 700,000/= was awarded.
10. That in light of the aforestated authorities, the respondent ought to have been awarded Kshs 600,000/=.
11. On the 3rd issue, it is submitted that the court is entitled to interfere with the award in line with the decision in *Butt v Khan* (1982-88)KAR 1 and award the respondent between the sum of Kshs 600,000/= and 700,000/=.
12. The respondent on their part submitted on the following issue;
 1. Whether the trial magistrate's award of general damages was in accordance with the law.
 2. Whether the trial magistrate applied the doctrine of stare decisis and the legal principles.
 3. Whether the appeal has merits.



13. On the first issue, counsel submits that the injuries sustained by the respondent were severe and led to the shortening of the right lower limb by 5 centimetres and would likely suffer future complications. The cases of *Florence Hare Mkaba v Pwani Tawakal Mini Coach & another* (2012)eKLR where Kshs 2,400,000/= was awarded, *Geoffrey Mwaniki Mwinzi v Ibero (K) & anor* (2014)eKLR where Kshs 2,500,000/= was awarded, *Agroline Hauliers Ltd v Kennedy Asiko Makhotsa* (2019)eKLR where Kshs 6,800,000/= was awarded and *Madina Gathoni v Ali Shalo Shosi & anor* (2009) eKLR where kshs 4,000,000/= was awarded have been cited in support.
14. On the second issue, counsel submits that in the above stated cases the injuries were similar to those in the instant case and the learned trial magistrate therefore acted on the right principles in arriving at her decision.
15. On the last issue, it is submitted that the award on general damages was in accordance with the law and the appeal lacks in merit.
16. This being a first appeal, the guiding principles are as enunciated in *Oluoch Eric Gogo v Universal Corporation Limited* [2015] eKLR, where the court held;

As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & another v Associated Motor Boat Co Ltd & another* (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....
17. This appeal turns on the quantum of damages awarded by the trial magistrate. It is trite law as held in *AA M v Justus Gisairo Ndareera & another* (2010) eKLR that;-

Money cannot renew a physical frame that has been battered and shattered and all the courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair---
18. The principles to guide the appellate court on the award of damages were well stated in the case of *Catholic Diocese of Kisumu v Tete* (2004) eKLR where the Court of Appeal held;

It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate
19. On whether the sum awarded was inordinately high, the court ought to examine the authorities cited by the parties as well as comparable award in similar cases as observed by the courts in *Stanley Maore v Geoffrey Mwenda* (2004) eKLR where it was held;

General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method



of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.

20. In *Mbaka Nguru and another v James George Rakwar* [1998] eKLR it was held that:-

The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.

21. In the instant appeal, it is not in dispute that the respondent suffered both soft tissue and serious bone injuries. His permanent disability is now assessed at 40% according to the medical report produced as Pexh 7. The respondent had sought Kshs 2, 800,000/= in general damages while the appellant did not submit but proposed the sum of between Kshs 600,000/= and 700,000/= on appeal.

22. The court has analysed the authorities cited by both parties in this appeal and finds that the authorities relied on by the appellant were less severe than the injuries that were sustained by the respondent herein. For instance, in those authorities, there was no permanent disability as was in this case. I have similarly looked at the respondent's authorities more specifically *Agroline Hauliers Ltd*(*supra*) and note that the injuries therein were more severe than in the instant case.

23. In the circumstances therefore, this court finds that the trial magistrate considered all the relevant factors in awarding sums in comparable situations and cannot be faulted for that.

24. In the final analysis, the court finds no merit in the appeal and is hereby dismissed with costs to the respondent who shall also have costs in the subordinate court.

DATED AT BUNGOMA THIS 31ST DAY OF MAY, 2022.

S.N. RIECHI

JUDGE

