



**Danros Kenya Ltd & another v Kulubi (Civil Appeal 88 of 2019)
[2022] KEHC 11478 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 88 OF 2019
RN NYAKUNDI, J
MAY 20, 2022**

BETWEEN

DANROS KENYA LTD 1ST APPELLANT

MWANGOMBE MWALUGHA 2ND APPELLANT

AND

MERCY AYUMA KULUBI RESPONDENT

(Appeal from original suit CMCC No.109 of 2018 by Hon. C. Obulutsa – CM)

JUDGMENT

Coram: Hon. Justice R. Nyakundi

M/S Alwanga & Co. Adv

M/S Kibichy & CO. Adv

1. The appeal before me is against the award of damages by the trial court in the sum of Kshs 359,000/= for general and special damages with liability at 100%. The judgment was delivered on June 21, 2019. Being aggrieved by the judgment, the appellant filed a memorandum of appeal on the July 8, 2019. The appeal is mainly on the trial court's finding on liability and quantum. The (5) grounds of appeal are that:
 1. The finding on liability was erroneous vis-à-vis the issues entailed in the evidence tendered by the appellants.
 2. The learned trial magistrate's award on damages was inordinately high, improper, unrealistic and inappropriate under all the circumstances of the case.
 3. The learned trial magistrate erred both in law and fact in basing his finding on irrelevant matters without taking into consideration the evidence of the Appellants.



4. The learned trial magistrate erred in law and in fact in failing to appreciate or take into account the appellants submissions or at all.
5. The learned trial magistrate erred in law and in fact in as far as the award of damages is concerned.
2. At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123.) Both parties filed their written submissions in support of their cases.

Background

3. The plaintiff/respondent filed this suit against the defendant/appellant by way of an amended plaint filed on June 7, 2018 seeking for general damages, special damages, costs and interests at court rates for injuries sustained in a road accident on the December 21, 2017 along Nakuru-Eldoret road while at Mlango Nne area. The plaintiff/respondent was lawfully travelling as a passenger the 2nd defendant/appellant allegedly negligently drove trailer registration number KCG 578N/ZF 3975 allegedly occasioned an accident for which the respondent's motor vehicle was excessively damaged. The respondent blamed the 2nd defendant/appellant for causing the accident. The appellants herein denied the averments by the plaintiff/respondent in their amended defence filed on June 28, 2018.
4. The trial court after hearing the matter render its judgment on June 21, 2019 in favour of the plaintiff/respondent by finding liability at 100%. The trial court awarded general damages at Kshs 350,000/= and special damages at Kshs 9,000/= plus costs and interest.

Appellants' Submissions

5. Counsel for the appellants submitted that the trial magistrate erred in finding the appellants 100% liable to the respondent as the respondent's case was not supported by any evidence neither was it proved on a balance of probability as required by the law as was stated in *Securicor Security Services v Joyce Kwamboka Ongonga & another* Kisii HCCC No 230 of 2005.
6. Counsel for the appellants submitted that the respondent in her testimony failed to show the trial court how the alleged accident occurred being the one allegedly at the scene of the accident and why she was holding the defendants liable. Further counsel for the appellants submitted that the respondent's witness statement admitted as evidence in chief was never signed a fact that the trial court did not take into consideration. The appellants cited the case of *Samson Kabuthiuri Akotha v Ethics and Anti-Corruption Commission & 5 others* [2021] eKLR. Counsel for the appellants further submitted that the trial court ought to have struck out the witness statement allegedly written by plaintiff and not take its contents into consideration.
7. Counsel for the appellants submitted that the respondent did not call any eye witness to testify in support of her case, neither did she call the investigating officer to explain to the trial court the results of the investigations and who was blamed for the accident after the police investigation. Counsel for the appellants submitted that the trial court nonetheless went ahead to hold the appellants liable without any cogent evidence by the respondent. Further counsel submitted that the trial learned magistrate failed to take into consideration the fact that the respondent herein stated that she was a passenger in the motor vehicle and that being so, it was expected of her to have called the driver of the said motor vehicle who was in the best position to narrate to the trial court the circumstances in which the accident



occurred. The appellants cited the case of *Mary Wambui Kabugu v Kenya Bus Service Limited* [1997] eKLR.

8. On the issue of quantum, counsel for the appellants submitted that the learned trial magistrate erred in awarding the respondent damages given the circumstances of the case. Counsel submitted that he ought to have dismissed the respondent's claim with costs, for lack of sufficient evidence to hold the appellants responsible for the injuries. Further counsel submitted the trial court in assessing damages left out relevant facts and thus ended up awarding damages that was inordinately too high and manifestly excessive for the injuries allegedly suffered by the respondent. That the Respondent had soft tissue injuries that were recovering well in opinion of the doctor. Further that there no permanent incapacitation, facts that the learned trial magistrate did not take into consideration. The appellants cited the following cases in support of their arguments; *Sokoro Saw Mills Limited v Grace Ndut Ndungu* [2006] eKLR, *George Mugo & another v AKM* [2018] eKLR, *Godwin Ireri v Franklin Gitonga* [2018] eKLR and Nakuru HCCA No 162 of 20111 *Simon Kimani Kuria v Transpares (K) Ltd.*

Counsel for the appellants urged court to re-evaluate the quantum of damages awarded by the trial court and consider an award of Kshs 80,000/= as sufficient compensation for the injuries sustained by the respondent.

9. On the issue of special damages, counsel for the appellants submitted that the respondent prayed for special damages amounting to Kshs 9,000/=: however she did not produce any receipts to prove that she had incurred the alleged amounts. The appellants placed reliance on the case of *Kenya Power & Lighting Co Ltd v Clement Likobele Shikondi (personal representative of the estate of Desmond Tutu Likobele (deceased))* [2018] eKLR.

Respondent's Submissions

10. On the issue of liability, counsel for the respondent submitted that liability herein had been determined in CMCC No 110 of 2018 which is currently HCA No 89 of 2019 which was taken as the test suit. Further Counsel for the respondent submitted that the respondent was in fact an eye witness having been at the scene of the accident as she was a passenger in the subject motor vehicle. Counsel further submitted that the plaintiff in CMCC No 110 of 2018 was the driver of the motor vehicle in which the respondent was a passenger and that his testimony that was recorded in the said suit was also adopted in this matter.
11. In response to allegations that an investigation officer was never called, counsel submitted that PW3 was a police officer who testified in support of the respondent's case. Further, that PW3 had produced a police abstract to that effect. That as per the police investigation, the 2nd appellant being the driver of motor vehicle registration number KCG 578N/ZF 395 was blamed for the accident. In response to the averments that the 2nd appellant was never charged for causing the accident, Counsel submitted the said duty lies square on the police and not the respondent and in fact does not mean he is not to blame. The respondent cited the case of *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR.
12. On the issue of quantum counsel submitted that one of the issues that the trial court ought to consider is whether the plaintiff has so far healed from the injuries sustained. That as per as PW1, the respondent was still recovering from the injuries sustained and that at the time of examination she had not healed. The respondent cited the following cases; *Catherine Wanjiru Kingori v Gibson Theuri Gichubi*, *Martin Mugi v Attorney General* and *Geoffrey Nganga v Attorney General*. Counsel submitted that the award of Kshs 350,000/= as awarded by the trial court is adequate and fair and not inordinately high considering the injuries sustained by the respondent. That the trial court cannot be



faulted for its determination. Further that the authorities cited by the appellants at the trial court were irrelevant and not similar to the one being quoted now at the appeal level.

13. On the issue of the special damages having been pleaded but not proved, counsel submitted that the respondent had pleaded for Kshs. 9,000/= in her plaint and went ahead to produce two receipts for Kshs 9,000/= and Kshs 3000/=.

Issues For Determination

14. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Liability

15. The appellant's case is that the trial magistrate erred in law in finding the appellants 100% liable. It is not in dispute that on December 21, 2017 an accident occurred along Nakuru-Eldoret Highway at Mlango area. The same was as a result of the 2nd appellant herein who negligently drove trailer registration number KCG 578N/ZF 3975 causing it lose control and hit motor vehicle registration number KBP 178L from behind in which the respondent was travelling as a passenger and as a result she sustained injuries. The respondent was a passenger, having no control of the accident vehicle. It is trite that no contributory negligence in the manner of driving and or control of a vehicle ought to be attached to a passenger, unless it is shown by evidence, in what manner the passenger contributed to the accident. (See *West Kenya Sugar Co Ltd v Lilian Auma Saya* [2020] eKLR.)
16. The appellants did not tender any evidence that could have pointed and established any contributory negligence on the respondent. It is not enough to state in a defence, evidence must be tendered to corroborate the averments in the defence.
17. Further from the evidence on record it is clear that the appellants' trailer rammed into the motor vehicle in which the respondent was travelling in from behind. Similarly, In the test suit filed by the driver of motor vehicle registration number KBP 178L in which the respondent herein was travelling as a passenger the appellants were found to be 100% liable for occasioning the said accident. In this appeal, the appellants did not tender any submission on the matter of contributory negligence.
18. Going by the foregoing, the only irresistible conclusion which the trial court arrived at, is that the 2nd appellant was wholly to blame for the occurrence of the accident. The respondent is thus absorbed from blame. The court upholds the trial court's finding that the 2nd appellant was wholly liable for the occurrence of the accident.



Quantum

19. The issue for determination here is whether the award of general damages of Kshs 350,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that

“comparable injuries should attract comparable awards”.

20. The injuries suffered by the appellant were listed in the treatment notes, the P3 form and the Medical report by Dr Joseph C Sokobe as:

- 1) Blunt injury to the head;
- 2) Blunt injury to the neck;
- 3) Blunt injury to the right forearm;
- 4) Blunt injury to the right hip.

21. For this court to disturb the award by the trial court, it must be shown by the appellants that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect, and thus arrived at a figure that was inordinately high. In *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 the Court of Appeal held 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”

22. In the case of *Savanna Saw Mills Ltd v Gorge Mwale Mudomo* [2005] eKLR the court stated as follows: -

“It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ...”

23. The award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the learned trial magistrate which advantage an appeal court by its mode of delivery lacks.

24. The court has taken into account that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained, which damages should be commensurate with the injuries and comparable with previous similar awards, and such other factors like inflation. In assessing the damages, the trial magistrate considered the nature of the injuries sustained by the respondent herein. The trial magistrate was of the view that the proposal of Kshs 40,000/= by the appellants was on the lower side whereas the authorities relied upon by the respondent were so old. He also considered the passage of time. Counsel for the respondent submitted that general damages of Kshs 350,000/= would be adequate with reference to the cases relied upon. The trial magistrate taking into account inflation awarded the respondent Kshs 350,000/= as general damages.



25. In view of the foregoing, I am persuaded that the award made by the learned trial magistrate was commensurate with the injuries sustained by respondent. There is therefore no justification for me to interfere with same.
26. I have perused the pleadings and the record of the trial court and in her plaint, the respondent pleaded for special damages as follows:
- a. Medical expenses Kshs 3,000/=
 - b. Medical Report Kshs 6,000/=
27. The law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. The Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716, at P 717, and 721 where the learned judges of Appeal - Kneller, Nyarangi JJA, and Chesoni, Ag JA - held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
28. In the instant case it plain from the record of appeal that the respondent did not any plead for special damages but also annexed copies of payments receipts to show that indeed the said costs were incurred by her. A perusal of pages 32 & 33 of the record of appeal clearly indicates that the respondent paid Kshs 6,000/= for the medical and Kshs 3,000/= for medical expenses. Consequently, on special damages I find that the respondent had clearly proven the amount pleaded as special damages and as such I find no reason to vary the learned trial magistrate’s decision on that.
29. Accordingly, and for the reasons aforementioned, I hereby dismiss this appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 20TH DAY OF MAY, 2022.

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R. NYAKUNDI

JUDGE

