



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chebotuiya v Ngeno (Civil Appeal 25 of 2019)  
[2022] KEHC 3058 (KLR) (20 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3058 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL 25 OF 2019  
RL KORIR, J  
JUNE 20, 2022**

**BETWEEN**

**IRENE CHEBOTUIYA ..... APPELLANT**

**AND**

**SHADRACK KIPLANGAT NGENO ..... RESPONDENT**

*(Being an Appeal from the judgment in Sotik CMCC No. 46 of 2017) of Hon.  
B. Omwansa, Principal Magistrate at Sotik, delivered on 17th October 2019)*

**JUDGMENT**

1. The present Appeal was brought through a Memorandum of Appeal dated 24<sup>th</sup> October 2019. It emanated from the decision by the Principal Magistrate at Sotik, Hon. B. Omwansa in respect of Civil Suit No. CMCC No. 25 of 2019. The Appellant raised 5 grounds of appeal as follows: -
  - i) That the learned trial magistrate erred in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable.
  - ii) That the learned magistrate erred in applying wrong principles and failing to take into account material facts arriving at an erroneous award.
  - iii) That the learned trial magistrate erred in law and in fact in disregarding the Appellant's submissions on all points of fact and law in as far as the award of damages is concerned.
  - iv) That the learned trial magistrate erred in law and fact in awarding Kshs. 1,800,000/= as general damages which was excessive and unrealistic in the circumstances against the injuries allegedly sustained.
  - v) That the learned trial magistrate erred in law and in fact in awarding Kshs. 74,801/= as special damages for medical expenses yet the same was not pleaded and proved.



2. The Appellant prayed that the finding of the trial magistrate on quantum be set aside, be reviewed or revised or be substituted with the judgment of this honorable court and that this appeal be allowed with costs to the Appellant.
3. The brief facts of this case from which the present appeal arises were that on 30<sup>th</sup> July 2016, the Appellant's agent, one Wesley Kiprotich Korir was driving motor vehicle registration number KBY 569D registered to the Appellant. The said vehicle was involved in a road traffic accident, knocking down the Respondent along Cheplanget-Litein road at Lelach area. The Respondent sustained injuries on his leg and as a result was hospitalized for three months. He suffered total incapacity of a temporary nature for a period of six (6) months and a partial incapacity of a permanent nature.
4. In the course of the trial, the parties entered consent for liability in the ratio of 50:50 in favour of the Respondent on 26<sup>th</sup> September 2019 and the said consent was adopted as an Order of the court. In the judgment dated 17<sup>th</sup> October 2019, the trial magistrate awarded the Respondent General Damages in the sum of Kshs. 1,800,000/= and special damages of Kshs 81,301. The total amount awarded to the Respondent after 50% liability was Kshs. 940,650.50/=.

### **Submissions**

5. The Appeal was canvassed by way of written submissions.

### **Appellant's Submissions\*\***

6. The Appellant submitted that the award of Kshs. 1,800,000/- was excessive given the nature of the injuries sustained by the Respondent during the accident. She submitted that the trial court did not consider her submissions in the judgment. She outlined the injuries recorded in the discharge summary and submitted that they may not have been sustained during the accident. That historically, the Respondent had cases of convulsions emanating from a road traffic accident which occurred 8 years prior to the present accident. The Appellant submitted that it was unfair for her to compensate the Respondent for injuries suffered from a previous accident.
7. It was the Appellant's submission that had the trial magistrate considered her submissions in the trial court, he would have noted similar cases in which more serious injuries were sustained yet lower amounts were awarded to the claimants. She cited the case of *T A M (a minor suing through her father and next friend J O M) v Richard Kirimi Kinoti & another*, NRB. HCCA No. 82 of 2008 [2015] eKLR and *Bhachu Industries Limited v Peter Kariuki Mutura* NRB HCCA No. 503 of 2009 [2015] eKLR.
8. Finally, the Appellant submitted that the trial magistrate made an award for special damages which were never specifically pleaded or proven. It was their prayer that the final award should be set aside as it was excessive.

### **Respondent's Submissions**

9. The Respondent submitted that as a general rule, an appellate court should not be quick to interfere with the award of a trial court since the same was discretionary. He outlined the principles which should be considered in deciding whether to do so. Firstly, he submitted that the trial court must be guided by the limits set by comparable cases previously decided and within the limits that the Kenyan economy can afford. The Respondent submitted that the amounts awarded under the various headings were not inordinately excessive in light of the injuries he had sustained as confirmed by the treatment notes from Tenwek Hospital and the two reports from Dr. Zoga (PEX-5a) and Dr. Malik (DEX-1). To this end,



he cited the cases of *Eric Ndambuki Ndemanga Jackline Kakuvi Mutua* (2020) eKLR, *Easy Coach Limited v Emily Nyangasi* [2017] eKLR and *Poa Link Services Company Ltd & another v Sindani Boaz Benzemo* [2021] eKLR. It was his final submission that the Appeal lacked merit and ought to be dismissed.

## Issues

10. Having perused the Record of Appeal, the trial file and the respective submissions of the parties, the only issue for determination is whether the quantum of damages arrived at by the trial court was reasonable.

Whether the assessment of quantum of damages by the trial court was appropriate.

11. It is trite that the duty of a first appellate court is to re-evaluate the evidence in the trial court both on points of law and facts and come to its own findings and draw its own conclusions. This principle was aptly stated by Hancox JA (as he then was) in *Abane v Olenja* [1986] KLR 66 thus:-

“I accept this proposition so far as it goes and this court does have power to examine and evaluate the evidence and finding of fact of the trial court in order to determine whether the conclusions reached on the evidence should stand (See *Peters v Sunday Post* [1968] EA 424). More recently, the court has held that it will not likely differ from the finding of fact of the trial judge who had the benefit of seeing and hearing the witnesses and will only interfere with them if they are based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”

12. It is also common principle that an appellate court should not review the findings of a trial court simply because it would have arrived at a different result were it to hear the matter for the first time. The court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR 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.”

(See also *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 and *Savanna Saw Mills Ltd v George Mwale Mudomo* [2005] eKLR).



13. The above principles were broken down by Riechi J. in the case of *Charles Oriwo Odeyo v Appollo Justus Andabwa & another* [2017] eKLR as follows: -

“The assessment of damages in personal injury case by court is guided by the following principles: -

- (1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  - (2) The award should be commensurable with the injuries sustained.
  - (3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
  - (4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  - (5) The awards should not be inordinately low or high.”
14. Guided by the above precedents, I proceed to consider the evidence adduced in respect of the extent of injuries suffered and the subsequent costs incurred by the Respondent that were pleaded under special damages. ‘
15. The injuries suffered by the Respondent as per the Record in the trial court were as follows: -
- a) Left knee open with significant tissue loss
  - b) Right thigh abrasions with closed femur fracture
  - c) Deformity on the left limb
  - d) Lacerations on the neck
  - e) Loss of consciousness
16. In assessing quantum, courts must be guided by previously decided cases, as rightfully stated by the Respondent in his submissions. The main principle is the comparability of the injuries and the effects of the accident on the victim afterwards. Comparable injuries should attract comparable awards. (See *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR).
17. From the medical report by Dr. Ezekiel Zoga dated 24<sup>th</sup> January 2017 and produced as PEX-5(a), the extent of the injuries noted were indicated to be in the process of healing and were subsequently assessed as ‘maim’. From the second Medical report by Dr. Malik dated 3<sup>rd</sup> October 2017 and produced as DEX-1, the fracture of the Respondent’s right femur had fully united and his leg was strong and fully mobile. His left knee joint was stiff with a displaced patella. He had a limp as a result of loss of muscle power in the left leg which required him to walk with a stick. Dr. Malik drew the conclusion that the Respondent suffered total incapacity of a temporary nature for a period of six months followed by a partial incapacity of a permanent nature as at the date of the second examination. He assessed him at 10% permanent disability even though it could not be ascertained whether the same could be directly attributed to the accident in this appeal.
18. The trial court made the following awards after considering the case in its entirety:
- (i) General Damages Kshs. 1,800,000/=
  - (ii) Special Damages Kshs. 81,301/=



Less 50% liability Kshs. 940,650.50/=

19. The Appellant submitted that the trial court ought to have considered comparable authorities and awarded the Respondent a sum not exceeding Kshs. 500,000/= as general damages. The Respondents on the other hand argued that the trial magistrate considered their proposal of Kshs. 2,200,000/= and opted to award them Kshs. 1,800,000/= which was fair.

20. I have considered the awards made in comparable cases, some of which have been cited by the parties as follows.

In *Ram Gopal Gupta v Nairobi Tea Packers Ltd & 2 others* (2017) eKLR, an award of Kshs. 800,000/= was made towards the claimant who had compound fractures in his tibia and fibula with tears of the medial and collateral ligaments on the left knee. In *Benuel Bosire v Lydia Kemunto Mokora* [2019] eKLR, the court reduced an award of Kshs. 2,000,000/= to Kshs. 700,000/= where the respondent had a single compound fracture for which disability had been assessed at 40%. In *Sammy Mugo Kinyanjui & another v Kairo Thuo* [2017] eKLR, the respondent had sustained multiple fractures, severe injuries that healed, with no permanent disability. The award of General Damages of Kshs. 1,000,000/= was reduced to Kshs. 600,000/=. In *Robert Gitau Kanyiri v Charles R Kabiga & 2 others*; Nakuru HCCC No 22 of 2009, the Plaintiff sustained fracture of the right radius, fracture of the femur, and head injury. Kshs. 1,000,000/= was awarded.

21. It follows then that such injuries would justify an award that did not exceed Kshs. 1,000,000/= as general damages. The claimant in the case of Robert Gitau (supra), which is the highest award I have noted, suffered more severe injuries than the Respondent in the present case (head injury) and was awarded Kshs 1,000,000/= in the year 2009. Taking the above cases into consideration and comparing the Respondent's injuries, it is my finding that the award of Kshs. 1,800,000/= as general damages made by the trial magistrate was inordinately high.

22. In the circumstances, I find the award of Kshs. 1,800,000/= to be excessive. I substitute therefore, an award of Kshs. 1,500,000/=. In so doing, I have considered the impact of inflation.

23. Under paragraph 5 of the Plaint, the Respondent pleaded the particulars of special damages as follows:

- (a) Police Abstract – Kshs 200/=
- (b) Medical Report – Kshs. 6500/=
- (c) Search for Motor vehicle – Kshs. 500/=
- (d) Treatment expenses – Kshs. 3,680/=
- (e) Future treatment expenses to be adduced at the hearing.

24. During the hearing in the trial court, the Respondent testified that he had incurred medical expenses in the sum of Kshs. 74,801/= from Tenwek Hospital and produced PEX2 (a-c) in this regard. The other expenses incurred were the medical examination costs by Dr. Zoga which also had a receipt produced as PEX-5(b). The Police Abstract which he claims to have paid for was not accompanied by any receipt to demonstrate proof of payment. This was the same case for the motor vehicle search and the treatment expenses pleaded under paragraph 5 (c) and (d) of the Plaint respectively.

25. The law on award of special damages was clearly articulated in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera Store* Civil Appeal No. 5 of 1990 [1990] eKLR where the Court of Appeal stated that special damages in addition to being pleaded must be strictly proved.

See also *Idi Ayub Shaban vs. City Council of Nairobi* (1982-1988) IKAR, 681 [Ur]).



26. In *Bonham Carter vs. Hyde Park Home Ltd.* (1948), 64 TLR 177, Lord Goddard C.J. underscored the importance of proving damages thus: -

“Plaintiffs must understand that if they bring actions for damage, it is for them to prove damage, it is not enough to write down the particulars and, so to speak them then at the head of the court saying ‘This is what I have lost, I ask to give me these damages.’ They have to prove it; sometimes it is impossible, though the justice of the case requires some award to be made or as Holmeysd CJ said in *Dantee v Jones* (1961) IWL 1103, 1109 C ‘arithmetic has failed to provide the answer which common sense demands.’ The England court in *Ashcroft v Curtin* (1971) IWL on the plaintiff’s loss of earnings capacity as a result of the injury which reduced his chances of any work in the laborer market or work, held that he was entitled to compensation for loss of earnings, capacity, which is awarded or real assessable loss proved by evidence, compensation for diminution of earning capacity is awarded as part of the general damages.”

27. The documentary evidence produced by the Respondent in the trial court as proof of special damages (PEX 2a-c) were inexact of the said claim for special damages. The receipts produced for the medical expenses at Tenwek Hospital in the sum of Kshs. 74,801/= were in respect of a patient named Josphine Cherotich who was admitted at the said Hospital on 19<sup>th</sup> October 2016 and treated on various dates as per the receipts, including 10<sup>th</sup> November 2016. Clearly, the receipts do not bear the name of the Respondent. From the trial Record, there is no explanation given for this discrepancy. I therefore disregard the receipts.

28. It is my conclusion therefore that the only amount proven by the Respondent as part of special damages was the costs incurred in respect of obtaining the first medical report, PEX-5b, in the sum of Kshs. 6,500/=.

29. In the final analysis, it is my finding that the appeal has merit. I set aside the award by the trial court and substituted the award of damages subject to the parties’ consent of 50:50 liability as follows: -

- a. General Damages Kshs. 1,500,000/=
  - b. Special Damages Kshs. 6,500/=
  - c. Sub-total Kshs. 1,506,500/=
- Less 50% liability (Kshs. 753,250/=)
- Total amount awarded Kshs. 753,250/=

30. The Appellant shall bear the costs of the suit in the lower court and interests thereof while each party shall bear their costs in this appeal.

31. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 20 TH DAY OF JUNE, 2022.**

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**R. LAGAT-KORIR**

**JUDGE**

Judgment delivered in the presence of Mr. Ruto holding brief for Ombui for the Appellant, in the absence of T.O Nyangosi for the Respondent, and Kiprotich (Court Assistant), and emailed to the parties at:

