



REPUBLIC OF KENYA



**Barnabas v Ombati (Civil Appeal E43 of 2021)  
[2022] KEHC 12136 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E43 OF 2021  
REA OUGO, J  
JULY 28, 2022**

**BETWEEN**

**ACHACHI BARNABAS ..... APPELLANT**

**AND**

**DORIS NYANDUKO OMBATI ..... RESPONDENT**

*(Appeal from the Judgment and Decree of Hon. Nathan Shiundu Lutta (CM) dated and delivered on the 30th day of March 2021 in the original KISII CMCC 727 OF 2019)*

**JUDGMENT**

1. The respondent's claim arose following a road traffic accident that occurred on May 9, 2019. The respondent was on the material day walking along Kisii-Kisumu road when at Daraja Mbili area the appellant's driver negligently controlled his motor vehicle KBF 381K causing it to knock down the respondent. The respondent sustained injuries, suffered pain loss and damages as a consequence of the accident. She suffered a head and chest contusion, bruises on his right hand and waist and fracture of the right femur, fracture of right humerus and fracture of the pelvic.
2. The appellant in his statement of defence denied the occurrence of the accident and also pleaded without prejudice denied that he was not vicariously liable for the accident. He alleged that in the event the accident occurred, it was solely caused by recklessness on the part of the respondent.
3. Before the hearing took off before the trial court, on August 19, 2020, the parties entered consent on liability in the ratio of 70:30 in favour of the respondent. Doris Nyanduko Ombati testified as Pw1 while the appellant closed its case without calling any witness. However, parties by consent produced a 2<sup>nd</sup> medical report by Dr J.S. Kumenda as D exhibit 1. The trial magistrate after concluding the hearing made the following award:
  - a. Liability in the ratio of 30:70 in favour of the plaintiff against the defendant.



- b. General damages Kshs 800,000/- plus special damages of Kshs 199,350/- making a total of Kshs 999,350/- less contribution.
4. The appellant's appeal is therefore against the award of quantum. The appeal raises the following grounds:
    1. That an award of general damages awarded to the respondent was manifestly and inordinately excessive in the circumstance.
    2. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.
    3. That the learned trial magistrate erred in law when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.
    4. That the learned trial magistrate erred in law and in fact when the same relied on extraneous issues as a basis for his determination on liability.
  5. The appeal was disposed by way of written submissions and both parties have complied by filing their respective submissions.
  6. In an appeal against quantum of damages awarded by the subordinate court, the court should not ordinarily interfere with the findings of a trial court unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This was the Court of Appeal's finding in *Kemfro Africa Ltd t/a Meru Express & another v A M Lubia & another (No 2)* [1987] KLR 30 where the court stated:

[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.
  7. The appellant in his submissions contend that the second medical report by Dr JAS Kumenda affirmed that the injuries sustained by the respondent had healed well without disability. It was argued that the respondent failed to table any evidence during hearing that she was undergoing further treatment. It was pointed out that the trial magistrate relied on the decision of *Joseph Kimanthi Nzau v Johnson Macharia* (2014) eKLR in which the court awarded Kshs 800,000/- where the plaintiff had sustained head injuries, chest injuries lower limb injuries, fracture of the skull bone, fracture of the 1<sup>st</sup> and 2<sup>nd</sup> ribs, fracture of the clavicle bone and blunt haematoma on the head. I agree with the appellant's observation that the decision that the trial magistrate place reliance on, at arriving at his award of damages, did not have similar injuries to those sustained by the respondent.
  8. The appellant has urged the court to consider the case of *David Kimathi Kaburu v Dionisius Mburugu Itirai* (2017) eKLR where the High court awarded Kshs 630,000/- to a plaintiff that sustained a plated fracture midshaft femur; intertrochanteric fracture; wobbly gait; severe pain on the right hip and entire hip with injuries. The appellant proposed that an award of Kshs 700,000/- would be appropriate.
  9. The respondent in opposing the appeal submitted that the discharge summary of Kisii Teaching and referral hospital confirms that the respondent sustained the injuries pleaded. The respondent relied on the following decisions:



- i. [\*Peter Namu Njeru v Philemone Mwangoti\*](#) [2016] eKLR the court held that Kshs 700,000/- was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.
  - ii. [\*Joseph Njeru Luke & 3 others v Stellah Muki Kioko\*](#) [2020] the court awarded Kshs 750,000/- where the respondent sustained a fracture of the pelvis and soft tissue injuries.
  - iii. [\*David Kimathi Kaburu v Dionisius Mburungu Itirai\*](#) [2017] the court held that Kshs 630,000/- was appropriate where the respondent sustained fracture of the femur and soft tissue injuries.
10. The respondent sought for the dismissal of the appeal.
  11. According to the initial treatment notes, when the respondent was taken to Kisii Teaching and Referral Hospital for treatment on the 9/5/2019, she sustained injuries on the head, right limb, and hand and had pain around the waist. After an x-ray, it was established that she had sustained fractures of the femur, humerus and pelvis. The same is reflected on the respondent's discharge summary. The injuries have also been captured in the P3 Form and classified the respondent's injuries as grievous harm. The report by Dr. J.A.S Kumenda which indicates that the respondent was examined on the 15/7/20 confirms that the respondent bruises were healing well. He was of the opinion that the respondent sustained fracture on the upper arm, femur and pelvis with permanent disability at 5%. The respondent therefore proved that she suffered soft tissue injuries together with fracture of the right femur, right humerus and fracture of the pelvic.
  12. At the hearing of the case before the subordinate court, the respondent through her advocate moved the trial court to amend the plaint to include special damages of Kshs 199,350/-. From the record, Mr. Kiage, counsel for the appellant who was present stated that he did not oppose the respondent's application. The trial court in its ruling allowing the amendment. The receipts for the respondent's medical expenses show that the respondent paid Kshs 199,350/- for treatment. I therefore find that the trial magistrate made no error in awarding the respondent special damages of Kshs 199,350/-.
  13. I now turn to the award of general damages. 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.”
  14. Although the trial magistrate award on general damages was based on the decision of [\*Joseph Kimantbi Nzau versus Johnson Macharia\*](#) (2014) eKLR which I have found do not have injuries similar to those sustained by the respondent, I am however of the view that the award was not excessive to warrant this court's interference.
  15. In [\*Peter Gakere Ndiangu v Sarah Wangari Maina\*](#) [2021] eKLR the court made an award of Kshs 500,000/- for a plaintiff/respondent sustained pelvic fracture, soft tissue injury to the right thigh and chest. In [\*Joseph Njeru Luke & 3 others v Stellah Muki Kioko\*](#) [2020] eKLR the court awarded a respondent who sustained pelvic fractures and soft tissue injuries Kshs. 750,000/-. In [\*Daneva Heavy Trucks & another v Chrispine Otieno\*](#) [2022] eKLR the plaintiff therein sustained a fracture of the pelvis and fracture of tibia and fibula and was awarded Kshs 800,000/-. The court in [\*Nguku Joseph & another\*](#)



*v Gerald Kibiu Maina* [2020] eKLR awarded the plaintiff Kshs 500,000 after sustaining soft tissue injuries and a fracture of the right humerus.

16. I do not find that an award of Kshs 800,000/- awarded by the trial magistrate as excessive warranting interference by this court. The appellant has also failed to show that the trial court proceeded on wrong principles, or misapprehended the evidence in some material respect.
17. The upshot is that the appeal is devoid of merit and is hereby dismissed. The respondent shall have the cost of the appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Miss Wakiaga For the Appellant**

**Mr. Nyangosi For the Respondent**

**Ms. Aphline Court Assistant**

