



Marube v Ongere (Civil Appeal 74 of 2020) [2022] KEHC 12160 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII**

CIVIL APPEAL 74 OF 2020

REA OUGO, J

JULY 28, 2022

BETWEEN

ABEL MAINGA MARUBE APPELLANT

AND

OLFAH ONGERE RESPONDENT

(Being an appeal from the Judgment and Decree of Honorable D Mikoyan (Senior Principal Magistrate) delivered on October 27, 2020 in Ogembo PMCC No 251 OF 2018)

JUDGMENT

1. The respondent who was the plaintiff before the trial court claimed that on September 1, 2018 while he was walking at the verge of Kenyenyia-Magonga Road, the appellant's driver negligently managed his motor vehicle KCN 621K permitting it to knock down the respondent and as a consequence the respondent sustained injuries, suffered loss and damage. According to the plaint the respondent sustained the following injuries:
 - a. Swollen lips
 - b. Loose upper and lower incisors teeth
 - c. Pelvic fracture
 - d. Fracture of the left humerous
 - e. Dislocation of the left shoulder
 - f. Bruises on both thighs
 - g. Swollen thighs
2. The appellants in their defence denied the occurrence of the accident or negligence on its part. He also claimed that he was not vicariously liable to the tortuous acts of his driver. It was pleaded in



- the alternative that if an accident did occur, the same was occasioned by the negligent acts of the respondent.
3. The parties entered consent on liability in the ratio of 70:30 in favour of the respondent. Olfah Ongeru testified as Pw1 while the appellant closed its case without calling any witness. 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. Quantum
 - i. General damages for pain, suffering and loss of amenities Kshs 980,000/- (less 30% contribution Kshs 294,000/-) = Kshs 686,000/-.
 - ii. Special damages Kshs 94,500/-.
 4. The appellant dissatisfied with the finding of the trial court has preferred this instant appeal on the following grounds:
 1. THAT the learned trial magistrate erred in law and in fact in failing to dismiss the Respondent's suit on quantum as they had not proved their case on a balance of probability.
 2. That the learned trial magistrate erred in law and in fact in awarding the respondent a sum of Kshs 780,000/- an amount which was excessive thus amounting to an erroneous estimate of loss or damage suffered by the respondent.
 3. That the learned trial magistrate erred in law and fact by awarding the respondent special damages of Kshs 94,500/- which were not proved to the required standard.
 4. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions and legal authorities relied upon in support of the defence thereof.
 5. That the learned trial magistrate erred in law and fact by overly relying on the Respondent's submissions and legal authorities which were not relevant and without addressing her mind to the circumstance of the case.
 6. That the learned trial magistrate erred in law and fact in failing to subject the special damages to contributory negligence without any legal basis and/or justification.
 7. That the learned trial magistrate decision albeit, a discretionary one was plainly wrong.
 5. The appeal was disposed by way of written submissions, the appellant filed his submissions on November 3, 2021 and the Respondent on September 24, 2021.
 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 appellants in their submissions argue that that the respondent's injuries were exaggerated and that she failed to prove the injuries alleged in her plaint. The second medical report by Dr Z Gaya produced by consent of the parties reveal that the respondent only sustained soft tissue injuries. The respondent on the other hand contends that the injuries were proved as per the discharge summary from Ram Hospital. The injuries were corroborated by the P3 and medical report by Dr Daniel Nyameino.
8. According to the discharge summary from Ram Hospital, the Appellant was admitted to the hospital on September 1, 2018 and discharged on September 5, 2018. While at the hospital x-rays were performed and the P3 form reveals that the respondent suffered a fracture on the left humerus and pelvis. According to the medical report dated October 18, 2018 by Dr Ombati Timothy Mokuu, the respondent sustained a pelvic fracture, left humerus fracture, dislocation of the left shoulder with multiple severe body injuries that are in the process of healing. According to Dr Z Gaya, he noted that the x-rays reveal that the respondent suffered a dislocation of the left shoulder; undisplaced partial fracture of the left supracondylar area of the Humerus; and non-displaced fracture of the right ischio-pubic ramis. Dr Gaya noted that the injuries had healed well however the respondent was at risk of developing post traumatic osteoarthritis of the left shoulder and elbow joints. The evidence from the medical reports which were not challenged before the trial court, point to the fact that the respondent proved that she sustained soft tissue injuries, dislocation of the left shoulder, pelvic fracture and fracture of the left humerus. Therefore, the injuries claimed in her plaint were proved.
9. The appellant has challenged the award of special damages on grounds that they were not proved. The respondent availed receipts from Ram Hospital issued on September 5, 2018 which revealed that the respondent sent Kshs 80,000/- for hospital bill, she bought medication worth Kshs 8,000/- and spent Kshs 6,500/- on the medical report prepared by Dr Ombati Timothy Mokuu. I therefore find no reason to disturb the trial magistrate's award on special damages.
10. The appellant also challenged the fact that special damages were not subjected to the 30% contribution. He relied on the case of *Kennedy Ogando v Dennis Bosire Nyangena* [2021] eKLR where the court observed as follows:
 - “ 35. On the issue whether the contribution should also apply to special damages, even though courts have discretion on how to deal with such an issue, I will agree with the appellant that it's only fair that the contribution be also charged on special damages. I place reliance on the case of *Margaret T Nyaga VS Victoria Wambua Kioko* [2004] eKLR where the court held *inter alia* “I see no basis, and no logical reason for not applying the contribution to the special damages, and no reasons nor authorities were provided to this Court to persuade it otherwise”
11. In my view, the award of special damages does not need to be subjected to apportionment of liability. I agree with the finding of the court in *Evanson Ndungu Mukunya v JNM & MWN (Suing as The Legal Representative of the Estate of IMN)* [2022] eKLR where it was held that an award on special damages is not subject to contributory negligence. A similar finding was also made in the case of *Hashim Mohamed Said & another v Lawrence Kibor Tuwei* [2018] eKLR.
12. The appellant argued that the trial magistrate ought to have made an award of Kshs 260,000/- on the head general damages as the fractures sustained by the respondent were minor fractures. The appellant relied on the case of *Joshua Mwaniki Nduati v Samuel Muchiri Njuguna* [2005] eKLR where the plaintiff sustained a fracture of the pelvis- roof of the right acetabulum and fracture of the right side 3 ribs and was given an award of Kshs 250,000/- for pain suffering and loss of amenities. In *Bildad*



Mwangi Gachuki v TM. AM Construction group [2000] eKLR the court awarded a sum of Kshs 250,000/- to a plaintiff who sustained a fracture of the pelvis, fractured ribs (3) and segmented fracture of the left femur bone.

13. The respondent supported the trial magistrate's finding on general damages. It relied on the cases of Agility Logistics Limited v John Wambua Musua & Another [2017] eKLR; and Board of Trustees Anglican Church of the Kenyan Diocese of Marsabit v Naomi Galma Galgalo [2019] eKLR.

14. 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.”

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/-. The appellant's proposal for an award of Kshs 260,000/- on the head general damages is therefore too low. In this case the respondent also suffered a fracture of left humerus and dislocation of the left shoulder. 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/-. I therefore do not find that an award of Kshs 980,000/- is excessive after taking into account the decisions cited, the rate of inflation and other imponderables.

16. 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 28TH DAY OF JULY 2022.

R E OUGO

JUDGE

In the presence of:

Mr Wanjohi For the Appellant

Mr Nyangosi For the Respondent

Ms Aphline Court Assistant

