



REPUBLIC OF KENYA



**Bodi & another v Gatobu (Civil Appeal 484 of 2018)  
[2022] KEHC 12882 (KLR) (Civ) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12882 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 484 OF 2018**

**DO CHEPKWONY, J**

**JULY 25, 2022**

**BETWEEN**

**DEWISH OUMA BODI ..... 1<sup>ST</sup> APPELLANT**

**PLATINUM CREDIT LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ERASTUS GATOBU ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Honourable Magistrate D.O. Mbeja (SRM) dated 12th September 2018 in CMCC NO. 1579 of 2014)*

**JUDGMENT**

1. This appeal arises from a Judgment dated September 12, 2014 by Hon. D.O. Mbeja (SRM) in Nairobi Milimani Commercial Civil Case No.1579 of 2014. Being aggrieved in the said Judgment, the Appellants herein lodged a Memorandum of Appeal dated October 1, 2018 raising the following grounds:
  - a) That the Learned Magistrate erred in law and in fact in awarding General damages at Kshs.1,000,000/= which award was excessive and unwarranted in light of the evidence adduced.
  - b) That the Learned Magistrate erred in law and in fact in awarding General damages at Kshs.1,000,000/= which award was excessive and not commensurate with the injuries sustained by the Plaintiff.
  - c) That the Learned Magistrate erred in law and fact in not finding that the special damages award of Kshs.402,600/= was not proved.



- d) That the Learned Magistrate erred in law in not taking into account entirely the written submissions of the Appellant.
- e) That the Learned Magistrate's decision was against the weight of evidence adduced.

It is proposed to ask the court for orders that: -

1. That this appeal be allowed.
2. That the award of General damages be set aside against the Appellants and the same be reduced appropriately.
3. That the Appellants be granted the costs of this Appeal.

### **Brief background**

2. The background of this Appeal is that by a Plaint dated October 14, 2013 and filed in court on March 26, 2014, the Respondent herein sued the Appellants in the lower court seeking for orders of special damages of Kshs.402,600/=, General damages, costs of the suit and interest.
3. The cause of action arose on or about June 21, 2013, along Ng'eno road off Lang'ata road, while the Respondent/Plaintiff was a lawful passenger on board a three wheeled motorized van commonly known as Tuktuk Registration Number KAW xxxx. The 1<sup>st</sup> Appellant, an agent of the 2<sup>nd</sup> Appellant drove, managed and/or controlled the Motor Vehicle Registration Number KBL xxxx in such a careless, reckless and/or negligent manner that the said vehicle violently collided with the Tuktuk. It is as a result of the said accident, that the Respondent suffered injuries resulting into the filing of the suit in the lower court.
4. The matter proceeded for hearing on 30<sup>th</sup> May, 2018 whereby the Respondent testified as PW1, adopted his witness statement and produced the list of documents filed as Plaint, exhibits in support of his case. On cross examination, the Respondent stated that he was in a Tuktuk Registration Number KAW xxx when Motor Vehicle Registration Number KBL xxxx veered to hit them. He blamed the minibus for the accident.
5. The Appellants did not call any witness to testify in the matter but by consent produced the 2<sup>nd</sup> Medical Report by Doctor Wambugu dated March 4, 2014 as Defendant Exhibit 1.
6. Subsequently, the Trial Magistrate delivered a Judgment in favour of the Respondent, the subject of this appeal, in the following terms:
  - a) General damages of Kshs.1,000,000/=
  - b) Special damages of Kshs.402,600/=
  - c) Costs of the suit plus interest at court rates
7. This Court admitted the appeal for hearing and issued directions on February 17, 2022, regarding the hearing of the same. Parties were directed to file their written submissions which directive was complied with by both parties. The Appellants filed their submissions dated March 30, 2022 in support of the Appeal while the Respondent's in opposition to the appeal are dated April 28, 2022.

### **Appellants' Submissions**

8. Counsel for Appellant has submitted on grounds 1 to 5 that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' contention that the damages awarded were excessive and unwarranted as the Learned Magistrate erred in fact and in law



by failing to follow the principles and rules of precedents in awarding general damages. The learned Magistrate awarded a sum of Kshs.100,000/= as general damages. The Appellants have relied on the case of *Kemfro Africa Limited t/a Meru Express Services (1976) & Another -vs- Lubia & Another* at page 3, where Kneller J.A said as follows;

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of appeal of Eastern Africa to be that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

9. It was the Appellants’ contention that the injuries sustained as per the Medical Reports of Dr. Prof. Kiama dated 31<sup>st</sup> July, 2013 and Dr. P. M Wambugu’s dated March 4, 2015 (at page 104 and 144 respectively), of the Record of appeal dated October 21, 2021 were that the Plaintiff sustained a fracture of the right clavicle and fracture of 4 ribs. The medical reports and treatment notes also confirm that the respondent’s injuries have healed. That the Learned Magistrate did not consider the 2<sup>nd</sup> Medical report by Dr. Wmbugu P. M dated March 4, 2015.
10. Counsel for the Appellants have submitted that it was pleaded in their submissions at page 96 that ..... “the Plaintiff is entitled to a sum not exceeding Kshs.400,000/= and supported their submissions with the authorities of *George Kinyanjui T/A Climax Coaches & Another -vs- Hassan Musa Agoi* (2016) eKLR, where Justice Kimondo reduced award of Kshs.800,000 /= to Kshs.450,000/= where the Respondent had suffered two loose teeth, fracture of the left clavicle, and fracture of the 4<sup>th</sup> and 5<sup>th</sup> left ribs”.
11. It has been argued by the Appellant’s Counsel that the Judgment delivered in the lower Court failed to take into consideration the 1<sup>st</sup> and 2<sup>nd</sup> Appellants submissions as it can be elucidated in the Judgment which is on Pages 151 to 155 of the Record of Appeal which clearly demonstrates the need for this Court to relook at the 1<sup>st</sup> and 2<sup>nd</sup> Appellants submissions filed in the lower court at Page 95 to 100 of the record of appeal.
12. As for special damages, Counsel for the Appellants has submitted that the same must not only be specifically pleaded but also proved by way of production of receipts which adhere to the provisions of the *Stamp Duty Act* which the Respondent failed to comply with and as such the claim for special damages ought to have failed.
13. Finally, the Appellants submitted that the appeal be upheld and the lower court’s Judgment on award be reduced accordingly as per the Appellants’ submissions.

### **Respondent’s Submissions**

14. Counsel for the respondent begun their submissions with a brief background of the circumstances that had to the filing of the lower court suit. He has submitted that the Respondent sustained grievous injuries from an accident and was taken to Lang’ata Hospital where he underwent surgery and was confined in bed for a month.
15. The Respondent’s Counsel has also submitted that the General damages awarded of Kshs.1,000,000/= is commensurate to the injuries sustained and the Honourable Magistrate abided by the principles and rules that guide the award of general damages.



16. The Respondent has submitted that he produced two medical reports by consent. One is dated 3 June 1, 2013 by Dr. Kiama Wangai which confirms that the Plaintiff suffered:
- a. A fractured clavicle
  - b. Fractured ribs (5 in total)
  - c. Right sided effusion
  - d. Liver laceration
  - e. Blunt injury on the left thigh
  - f. Pains and soft tissue injuries
17. In the result, the Doctor concluded that indeed the respondent suffered grievous harm and that he requires surgery to remove the metal implant at an estimated cost of Kshs.95,000/=.
18. The Respondent also submits that at the Appellants' request, he went for a second medical evaluation done by Dr. P. M. Wambugu and the report is dated March 4, 2014. In this report, the Doctor was of the opinion that the Respondent sustained skeletal and soft tissue injuries that have occasioned him pains and morbidity. He further noted that the Respondent's fractured ribs and right clavicle have united and the metal implants may be removed at an estimated all-inclusive cost of Kshs.65,000/=.
19. The Respondent contends that the two medical reports were produced by consent of the parties and they are not contradictory as both confirm the injuries suffered by the Respondent. The Respondent thus submits that the Honourable Magistrate was well guided by the medical reports and the principles and rules of awarding general damages.
20. Counsel for the Respondent relied on the case of *Boniface Waiti & Another -vs- Michael Kariuki Kamau* (2007) eKLR, where the Court provided for the principles for assessment of damages in personal injury as follows;
- a) An award of damages is not meant to enrich the victim with the injuries sustained.
  - b) The award should be commensurable with the injuries sustained.
  - c) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
  - d) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  - e) The awards should not be inordinately low or high.
21. The Respondent submits respectfully that the Honourable Magistrate was right in awarding General damages at Kshs.1,000,000/=. The Respondent cited several case in support of and for instance in the case of *Alex Wachira Njagua -vs- Gathuthi Tea factory & Another* (2010)eKLR, where the court awarded Kshs.3 million where the plaintiff suffered blunt injuries of the head with confusion, fracture of the left tibia, fracture of the right fibula, cut wound on the forehead, bruised elbow and bruised knee.



22. The Respondent also cited the Court of appeal in the case of *Bashir Ahmed Butt –vs- Uwais Ahmed Khan* (1982-88) KAR which set out the parameters under which an appellate court will interfere an award in general damages when it held that;
- “An appellate court will not disturb an award for general 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...”
23. The Respondents submitted that the Appellants have not shown that the Honourable Magistrate relied on the wrong principles or misapprehended evidence in granting his award. Therefore, this Honourable Court need not disturb the award granted.
24. On the issue of whether special damages was proved. The Respondent submitted that his claim was supported and evidenced by receipts which the Appellants did not object to their production and their authenticity stands unchallenged. The respondent relied on the case of *Coast Bus (MSA) Ltd – vs- Fatimabhai Osman Suleiman & Another*, the Court stated that;
- “On the question of special damages, the Appellants conceded such damages as were supported by receipts. In the judgment the Learned Trial Magistrate has enumerated the damages and the supporting evidence. There was no challenge at the Trial. No challenges can be now put forward.”
25. In conclusion the Respondent submitted that there is no arguable appeal raised and invites the Court to dismiss the Appeal. Further it was submitted for the Respondent that award of damages is discretionary and based on the facts and evidence presented before Court of special damages.
26. The Respondent pray for the Appeal to be dismissed, the decision of the lower court made on 12<sup>th</sup> September, 2018 be upheld and the Appellants bear the costs of this appeal.

### **Analysis and Determination**

27. In this appeal, I have critically considered the grounds cited by the Appellant, the determining written submissions by both parties in support and in opposition to the appeal before court and the cited authorities therein. The issues for determination before this Court which can be deduced from the five(5) grounds of appeal as raised by the Appellants as being:-
- a) Whether the award of General damages was appropriate;
  - b) Whether the award of special damages was proved in the circumstances; and,
  - c) Whether the trial court considered the Appellants submissions.
28. The Appellants have preferred this appeal against the Judgment delivered by the lower court where the Appellants were aggrieved by the court for granting an award of general damages which to them was inordinately so high and not commensurate to the injuries suffered by the Respondent, and special damages which were not proved alongside to consider the Appellants’ submissions by the trial court.



29. This being a first appeal this, Court has a duty to evaluate the evidence submitted before the trial court afresh before drawing its own inference. This is the position that was taken by the Court of Appeal in *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others*[1968]EA 123 in the following terms:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

30. Similar position was reiterated by the Court of Appeal in the case of *Abok James Odera & Associates – vs- John Patrick Machira T/A Machira & Co. Advocates*[2013]eKLR, where the court states as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

31. Based on the cited authorities, this is the first Appellate court in this matter and its role is therefore to consider the evidence, re-evaluate and draw its own inference depending on the material evidence that has been placed before it from the record.

32. On the issue of whether the award of general damages was appropriate, reliance is placed on the case of *Bashir Ahmed Butt –vs- Uwais Ahmed Khan* (1982-88) KAR, where the court set out the parameters under which an appellate Court would interfere with an award in general damages as follows:

“An appellate court will not disturb an award for general 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...”

33. The Appellants have submitted that the award of Kshs.1,000,000/= as general damages was inordinately so high and not commensurate with the injuries sustained by the Respondent. The Appellants cited the authority of *George Kinyanjui t/a Climax Coaches & Another –vs- Hassan Musa Agoi* (2016) eKLR, “where Judge Kimondo reduced an award of Kshs.800,000/= to Kshs.450,000/= where the respondent had suffered two loose teeth, fracture of the left clavicle and fracture of the 4<sup>th</sup> and 5<sup>th</sup> left ribs”.

34. The Respondent on the other hand cited several authorities and one being the case of *Charles Wanyoike Gitbuka –vs- Joseph Mwangi Thuo & 2 others* [2008]eKLR, where the Plaintiff was awarded Kshs.2 Million. The Plaintiff therein had suffered med-shaft of the right femur, segmental fractures of the left femur, compound fracture of the right lower leg (fibia & fubula bones), fracture of the right tibia plateau (knee), and fracture of the right ankle joint.



35. In the instant case, the Discharge Summary from the Aga Khan University Hospital shows that the Respondent sustained a fractured clavicle, five fractured ribs, right sided effusion, liver laceration, blunt injury left thigh and soft tissue injuries. The P3 Form and the medical report filed by Prof. Kiama Wangai indicate similar injuries consistent with the injuries in the discharge summary. I find the injuries sustained by the Respondent herein more commensurate to the injuries sustained by the Respondent in the case of *George Kinyanjui T/A Climax Coaches & Another -vs- Musa Agoi* [2016] KLR. I hence proceed to find the award of Kshs.1,000,000/= as being a bit high and reduce the quantum of damages awarded to the Plaintiff to Kshs.800,000/= as general damages.
36. On the issue of special damages, the same were specifically proved by production of receipts and I do not see the need of interfering with the amount awarded.
37. In the upshot, the appeal is partially successful and I proceed to hold that the Respondent be and is hereby awarded:-
- a) Kshs.800,000/= as general damages.
  - b) Kshs.402,000/= as special damages
  - c) Interest at courts' rates.
  - d) Since the appeal has partially succeeded, each party to bear its own costs.

It is hereby ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THI 25<sup>TH</sup> DAY OF JULY, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Nyamwanya counsel for Appellant

No appearance for and by Respondent

Court Assistant - Kevin

