



**Lochab Bros Limited & another v Hinga (Civil Appeal 79 of 2017)  
[2022] KEHC 14339 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 79 OF 2017  
DAS MAJANJA, J  
OCTOBER 27, 2022**

**BETWEEN**

**LOCHAB BROS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**GEOFFREY WANJALA SIMIYU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DORCAS WANGUI HINGA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. D. N. Musyoka, PM dated 8th May 2013 at the Magistrates Court, Kikuyu in Civil Case No. 77 of 2013)*

**JUDGMENT**

1. This is an appeal against the judgment and decree of the subordinate court awarding the respondent Kshs 1,500,000.00 and Kshs 31,204 as general damages and special damages respectively following a road traffic accident where the appellants were found fully liable in a test suit.
2. In the memorandum of appeal dated May 30, 2017, the appellant attacks the judgment on the basis that the trial magistrate erred in awarding damages contrary to the law and in not following the principles relating to the award of damages. That the trial magistrate failed to consider the evidence placed before court in order to award fair and reasonable damages commensurate with the injuries. They complain that the trial magistrate failed to consider their submissions and ought to have dismissed the suit for want of proof instead of awarding damages.
3. Both sides filed written submissions in support of their positions which I have considered. They agree that the general principle applicable in considering an appeal on quantum of damages is that while the assessment of damages is within the discretion of the trial court, the appellate court will only interfere where the trial court in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or



that the assessment is based on no evidence (See *Lukenya Ranching and Farming Co-op Society Ltd v Kavoloto* [1979] EA 414 and *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5).

4. Before the subordinate court, the respondent produced the police abstract, P3 medical form dated September 20, 2011, discharge summary from PCEA Hospital and medical report prepared by Dr Wokabi dated March 26, 2012. Following the accident that took place on August 13, 2011, the respondent sustained injuries of the left radius which was conservatively managed by a plaster cast. She also suffered a neck injury which was revealed by X-ray and MRI showing that she had a fracture of the 2<sup>nd</sup> neck vertebrae. The neck was immobilised with a neck collar. She was treated with painkillers and anti-inflammatory drugs. When she was examined by Dr Wokabi on March 8, 2012, the respondent complained of pain on the right leg, she was unable to walk without the aid of crutches. She stated that she experienced chest pains and backache. She stated that she was unable to do her normal work and domestic duties.
5. On examination, Dr Wokabi observed that the right leg was swollen from the knee downwards. The X-rays revealed that there were fractures of the right tibia and fibula on the upper on third. The doctor observed that the respondent suffered a lot of pain and that the fractures would be clinically united with conservative treatment. He noted that it is unlikely that the respondent would resume her old vitality and work and assessed permanent disability at 12%. The respondent would always suffer residual pain over the area of the fracture which would tend to be recurrent depending on the nature of activities.
6. In the submissions before the trial court, the respondent suggested an award of Kshs 1,000,000.00. She cited the following decisions including the following. *Veronica Mwangeli Kilonzo v Robert Karume MSA HCCC No 597 of 2001 [2003] eKLR* where the plaintiff suffered a compound fracture of the right tibia and fibula and was awarded Kshs 500,000.00 as general damages in 2003. *Tereza Nyambura Kimoru v Michael Kyalo Kiilu MSA HCCC No 718 of 1990 (UR)* where the court awarded Kshs 750,000.00 as general damages where the plaintiff sustained a compound fractures of the left tibia-fibula and right tibia fibula. *Michael Gichoni Mwangi v Peter Mwangi and Another NRB HCCC No 4550 of 1988 [1998] eKLR* where the court awarded Kshs 350,000.00 a compound fracture of the right tibia and fibula which required substantial treatment and resulted in 20% disability. *Mwaura Muiruri v Suera Flowers Limited and Another NKU HCCC No 189 of 2009 [2014] eKLR* where the plaintiff suffered multiple laceration of the face, soft tissue injuries on the chest cage, comminuted fractures of the right humerus, upper and lower third of the tibia and compound double fractures of the right leg upper and lower third of the fibula and was awarded Kshs 1,450,000.00 as general damages in 2014.
7. The appellants suggested Kshs 150,000.00 as general damages based on the case of *Abdalla Mwakasha v Kalimunda Gerald MSA HCCC No 893 of 1980 (UR)* where the plaintiff was awarded Kshs 75,000 as general damages.
8. I do not think there is any dispute concerning the nature and extent of injuries sustained by the respondent. The issue for consideration is whether the award of damages is commensurate with the injuries sustained. In assessing the award of damages particularly general damages, the court is guided by the awards made by the court in similar cases. In this respect the counsel before the court have a duty to cite relevant cases to assist the court in reach a reasonable award that would amount to just compensation.
9. I have set out the cases cited by the parties before the trial magistrate. The appellants cited a single case which was decided in 1980, 27 years before the judgment before the trial court. From the original file which is before this court, it is apparent that counsel for the appellants did not furnish the court with a copy of the unreported decision. It is good practice where an advocate cites an unreported decision to furnish the court with that decision in order for the court to assess the veracity of the judgment and



appreciate the reasons given in the decisions. In the absence of the cited decision, I cannot condemn the trial court for failing to consider the appellants' submissions which were based on an unreported decision which they failed to provide to the court.

10. On the other hand, the respondent's advocate cited several decisions and provided copies thereof although most of them are reported on the Kenya Law Reports website. The decisions cited by the respondent though relevant to an extent, were also somewhat dated having been delivered at least 15 to 20 years prior to the trial court's decision. It is the duty of advocates to assist the court by providing more recent and relevant cases particularly in this age of online reportage. In addition, our courts have also pointed out the need for consistency in awarding damages for similar injuries although it is agreed that not all injuries are the same (see *Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No 26 of 2013 [2014] eKLR*). In addition, in awarding damages, the current value of the shilling and the economy have to be taken into account, astronomical awards must be avoided and the court must see to it that awards make sense and result in fair compensation (see *Ugenya Bus Service v Gachoki NKU CA Civil Appeal No 66 of 1981 [1982] eKLR* and *Jabane v Olenja [1986] KLR 661*).
11. While this court is tempted to interfere with the award on the ground that it may be on the higher side, it is important to recall this court is exercising appellate jurisdiction and is required to consider what was before the trial magistrate. An appeal is not an opportunity for an appellant to make up the case it did not prosecute before the trial court. I therefore do not find any error in the approach used by the trial magistrate on the basis of the material before the court and the submissions made by counsel on the issue of general damages.
12. On the issue of special damages, there is no dispute that the court can only award special damages as pleaded and proved (see *Hahn v Singh [1985] KLR 716* and *Coast Bus Service Ltd v Murunga Danyi CA Civil Appeal No 192 of 1992 (UR)*). The respondent pleaded Kshs 16,740.00 as special damages on account of the medical report, motor vehicle search and medical charges and treatment. The court awarded Kshs 31,740.00 as special damages which included the doctor's court attendance fees of Kshs 15,000.00 to which the doctor testified. The appellants are correct that for an amount to be awarded as special damages, it ought to be pleaded. The amount of Kshs 15,000.00 was not pleaded hence it could not be awarded. The pleaded special damages were however pleaded and proved to the required standard.
13. I dismiss the appeal except that on account of special damages which should be reduced by Kshs 15,000.00. The appellants shall pay the respondent Kshs 50,000.00 only as costs of the appeal.

**SIGNED AT NAIROBI**

**D S MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2022.**

**M KASANGO**

**JUDGE**

Instructed by Jackson Owmenga and Company Advocates for the appellants

Instructed by Njoroge Kimani and Company Advocates for the respondent.

