



REPUBLIC OF KENYA



KENYA LAW
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**About v Wanjala (Civil Appeal E003 of 2021)
[2022] KEHC 16477 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E003 OF 2021**

DK KEMEL, J

NOVEMBER 28, 2022

BETWEEN

HUSSEIN ABOUD APPELLANT

AND

STEPHEN LUNGOKO WANJALA RESPONDENT

*(Being an Appeal against the judgement and decree of the Senior
Principal Magistrate in Bungoma by the Honourable Mutai delivered
on 27th November, 2020 in Bungoma CMCC No. 75 of 2018)*

JUDGMENT

Background

1. This appeal is against the award of quantum by the trial court in respect of an accident which occurred on December 24, 2017 along the Bungoma -Kanduyi road at Pamus area. It was pleaded that the respondent was lawfully repairing his motor bike at a garage along the Bungoma-Kanduyi road when the appellant's motor vehicle being driven by himself, his authorized driver, employee or any other person with the appellant negligently permitted, caused and allowed motor vehicle registration number KAA 028 N make peugeot 504 saloon to lose control, veered off the road and knocked down the respondent thereby occasioning injuries to the respondent. The respondent prayed for orders against both the appellants for: general and special damages; interest and costs of the suit.
2. Upon service the appellant entered appearance and filed a defence seeking the dismissal of the respondent's suit with costs and denied the occurrence of the alleged accident or the alleged injuries sustained.
3. On September 14, 2020 a consent order on liability was entered in the ratio of 80% to 20% as against the appellant.



4. The matter proceeded to full hearing on the assessment of quantum of damages. According to PW1, Steven Lungoko Wanjala, he stated that on December 24, 2017 took his motor cycle to the garage at Pamus area. As the mechanics were working on his bike, a motor vehicle lost control and veered off the road towards him hitting him in the process. He was quickly rushed to Bungoma Referral Hospital where he was admitted for a period of five days. He produced a receipt of payment of Kshs 5440/= as p exhibit ii and notice to the appellant as p exhibit vi. He told the court that he sustained injuries on his right leg where he had a dislocation on the joint, head injuries and the left leg. He blamed the driver of the motor vehicle for the accident.
5. On cross-examination, he told the court that it was a garage without a name and that the same was five meters from the main road. He lost consciousness after being hit and was not able to see the vehicle. He stated that he had not fully healed and was still under medication. He told the court that he lacked medical chits and that he was employed as a rider. On re-examination, he told the court that he had not fully healed.
6. PW2, Elias Adoka, told the trial court that he is a clinician attached to Bungoma Referral Hospital and that he filled and signed the P3 form for the respondent on January 16, 2018. On examination of the respondent, he observed that he had head ache, pain on the left shoulder joint with restricted movement of the joint and that he had pain on the right shoulder joint. The x-ray examination showed a dislocation and that he approximated the age of the injury to be three days. The probable cause of injury was a road traffic accident. The respondent was put on a plaster of paris on the right ankle joint, was given some antibiotics and analgesics to relieve pain and that he classified the injuries as grievous harm. He produced the discharge summary as p exhibit i and the P3 form as p exhibit iii. On cross-examination, he told the court that he examined the patient on January 16, 2018.
7. The police abstract initially marked as pmfi iv was produced as p exhibit iv and the medical report by Dr Mulianga Ekesa marked as pmfi v (a) was produced as p exhibit v(a) and the receipt to Kshs 1,000/= initially marked as pmfi v (b) produced as p exhibit v (b). the 2nd medical examination report by Dr Adege William was produced as defence exhibit I.
8. At the close of the appellants case, parties filed and exchanged their submissions. The trial court issued a judgment in favour of the respondent as follows: pain and suffering and loss of amenities- Kshs 480,000/=; special damages- Kshs 8, 490/=; less 20%-Kshs 97, 698/=. The trial court also awarded the respondent costs of the suit and interest at court rates.
9. Aggrieved by the judgment of the trial court, the appellant filed his memorandum of appeal dated January 16, 2021. The grounds are as follows:
 - i. That the learned trial magistrate erred in law and fact by failing to appreciate the nature of the injuries sustained by the respondent and absence of residual incapacity arising therefrom thereby awarding general damages that were inordinately high in the circumstances.
 - ii. That the learned trial magistrate misapprehended the evidence and misapplied, misunderstood and/or overlooked the correct principles and judicial precedents and the submissions of the appellant with the result that he made an award for pain, suffering and loss of amenities that was inordinately high.
 - iii. That the learned trial magistrate erred in law and in fact in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of stare decisis and take into account public interest. He thus made an award for pain suffering and loss of amenities that were arbitrary and erroneous.



- iv. That the learned trial magistrate erred in fact and law by failing to adequately evaluate the evidence and exhibits and thereby arrived at an award that is unsustainable in law.
 - v. That the learned trial magistrate erred in fact and law while assessing general damages awardable herein despite acknowledging that the respondent suffered soft tissue injuries with no incapacitation but nevertheless awarded general damages that were inordinately high.
 - vi. That the learned trial magistrate erred in fact and law by awarding special damages in the sum of Kshs 8, 490/= in absence of proof of the same as by law required.
10. By the directions of this court, the appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
 11. Vide submissions dated July 22, 2022 the appellant on quantum submitted that the appellate court has the discretion to interfere with an award of damages if the same is inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or a misapprehension of evidence. Counsel submitted that the trial court's assessment of damages be interfered with. Counsel relied on the case in civil appeal No 88 of 2017 *John Kipkemboi & another v Morris Kedolo* (2019) eKLR.
 12. It was submitted that the two respective medical reports were convergent in finding that the respondent only sustained mere soft tissue injuries with no permanent incapacitation save for the on and off headache that could be managed by analgesics. Counsel relied on the cases of *Ndungu Dennis v Ann Wangari Ndirangu & another* (2018) eKLR and the case of *Phylis Kawinzi Kitboka v Grace Wayua Mwanza* (2017) eKLR.
 13. Counsel urged this court to review the award of the trial court downwards to a tune of Kshs 120,000/= as general damages for pain and suffering.
 14. On the aspect of special damages, counsel submitted that the respondent pleaded a sum of Kshs 8, 490/= but only proved Kshs 5, 440/= in support of his claim. Counsel relied on the case of *Gidraf Maina Chege v Joseph Njoroge Njenga* (2017) eKLR. Counsel urged the court to allow the appeal.
 15. The respondent *vide* submissions dated April 20, 2022 submitted that the award of damages are wholly at the discretion of the court and that the award of the trial court was not solely based on the injuries stated by the respondent but those captured by the doctor during the examination. It was also submitted that it is unfair for the appellant to seek to wish away injuries that were actually sustained by the respondent and which the trial court considered. Learned counsel urged the court to dismiss the appeal with costs.
 16. I have considered the grounds of appeal, the submissions and the evidence adduced before the trial magistrate. This is a first appeal and as such the role of the court is to re-evaluate, re-assess and re-analyze the evidence which was tendered before the trial court and arrive at its own independent conclusions. This has been stated in various authorities and in *Abok James Odera Trading as Odera & Associates v John Patrick Muchira & Company Advocates* (2013) eKLR, the Court of Appeal re-stated the duty of the first appellate court which is that court has to re-evaluate the evidence and come up with its own finding and also determine whether the conclusions reached by the trial court are to stand or not, and give reasons either way.
 17. The issues cropping up in this appeal is basically one namely: -



i. Whether the trial court applied wrong principles in the award of damages.

18. On the issue of quantum, this court is guided by the well-known principle articulated by the Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & another v A.M Lubia & another (No 2)* [1987] KLR 30 that:

“[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.”

19. In *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457 it was held that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

20. Similarly, in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

21. In *Charles Oriwo Odeyo v Apollo Justus Andabwa & another* [2017] eKLR the court said that –

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and, in the result, arrived at wrong decision. (See *Butler v Butler* (1984) KLR 225.”

22. From the evidence adduced by the respondent in the trial court, the respondent suffered: concussion, cut wound on the hind leg, chest congestion, painful left shoulder joint, laceration on the anterior aspect of the right leg, painful swollen and deformed right ankle. The opinion of both reports were that the respondent suffered soft tissue injuries with no permanent incapacitation. This was based on a latest examination conducted the doctors of the appellant and the respondent.



23. 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 (See *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR.”

24. With regards to quantum, the trial court held that:

“I have taken into account the principle enunciated in the wise decisions cited and now proceed to assess the damages in respect of the plaintiff for pain and suffering and loss of amenities

I assess Kshs 480,000/=

plus special damages Kshs 8, 490/=

Total Kshs 488,490/=

less 20% Kshs 97, 698/=

balance Kshs 390, 792/=

costs of the suit and interest”

25. Still, I am required to come up with my own independent assessment whether the damages awarded were excessive. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike. This is what the Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* Civil Appeal 26 of 2013 [2014] eKLR that:

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

26. I do note the trial court did not rely on any precedent when making its award but did consider the precedents fronted by the respective parties in their submissions. Counsel for the appellant relied on the case of *Ndungu Dennis v Ann Wangari Ndirangu & another* (2018) eKLR where Justice Ngugi, J reviewed the trial court’s award for general damages of Kshs 300,000/= to Kshs 100,000/= where the respondent therein suffered soft tissue injuries and dislocation of both ankles. Also, the case of *Phylis Kawinzi Kitboka v Grace Wayua Mwanza* (2017) eKLR where the appellate court upheld an award of Kshs 90,000/= awarded by the trial court as general damages for pain and suffering for soft tissue injuries comparable to those sustained by the respondent herein.

27. I do note that the injuries sustained by the respondent in this case were a concussion, soft tissue injuries subluxation of the right ankle joint. The respondent’s injuries being soft tissue injuries which merely



amounted to harm are similar to those of the respondent in the case of *Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others* [2019] eKLR. where the court assessed damages at Kshs 100,000/=.

28. The award of Kshs 480,000/= is therefore excessive. The award of Kshs 120,000/= proposed by counsel for the appellant is on the other hand much on the lower side and would in my view amount to an erroneous estimate of the damage. The award in the case of *Ephraim Wagura* (supra) was made three years ago and as this court must take passage of time and inflation into account I find that an award of Kshs 200,000/= would suffice. In the premises the award of Kshs 480,000/= is set aside and substituted with one for Kshs 200,000/=.
29. Turning to the award of special damages, I note that out of the pleaded Kshs 8, 490/= only Kshs 6, 940/= (for the medical report-Kshs 2, 500/=, copy of records Kshs 550/= and the medical expenses-Kshs 5,440/=) were strictly proved in evidence. In this premises the award of Kshs 8, 490/= is set aside and substituted with one for Kshs 6, 940/=
30. Consequently, for the reasons stated above, the appeal has merit. The same is allowed. The trial court's award of general damages of Kshs 480, 000/ is hereby set aside and substituted with an award of Kshs 200,000/ while the award for special damages of Kshs 8, 490/ is also set aside and substituted with the sum of Kshs 6, 940. The aforesaid sums will attract the agreed 20% contribution. The appellant is awarded half costs in this appeal while the respondent will have full costs in the lower court.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER, 2022

D.Kemei

Judge

In the presence of:

No appearance for Ouma Njoga for Appellant

Wangila for Paul Ojuma for Respondent

Kizito Court Assistant

