



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 38 OF 2015**

**REUBEN MONGARE KEBA.....APPELLANT**

**VERSUS**

**L P N (minor suing through**

**next friend E M A) .....  
RESPONDENT**

*(An appeal from the judgment and decree of Hon. J.M. NJOROGE (Chief Magistrate) dated and delivered on the 3<sup>rd</sup> day of March 2015 in the Original Kisii CMC No. 299 of 2013.)*

**JUDGMENT**

**Background**

1. In his plaint dated 31<sup>st</sup> July 2013, the respondent herein, who was the plaintiff before the lower court in Kisii CMCC 299 of 2013, sued the appellant for special, general damages and costs arising out of a road traffic accident that occurred on 4<sup>th</sup> April, 2013 along Kisii-Kilgoris Road. The respondent's case was that he was, on the material day, a lawful pedestrian walking along the said Kisii - Kilgoris Road when near Gekomu, the appellant's motor vehicle registration number KBP 707A, which was being driven negligently and recklessly violently knocked him down thereby occasioning him serious injuries.

2. Upon the commencement of the trial the respondent presented 4 witnesses in court in support of his case and after the close of the respondent's case, the parties entered into a consent judgment on liability in the ratio of 80%:20% in favour of the respondent. The appellant then closed his case without calling any evidence.

3. The trial court then entered judgment, on liability on the said agreed terms and proceeded to enter judgment, upon receiving the parties respective submissions on quantum as follows:

**a) Liability – 80:20**

**b) General damages – Kshs. 1,200,000/=**

**Less 20%-                      Kshs. 960,000/=**

**c) Special damages    Kshs. 153,942/=**

**d) Plus costs and interest.**

4. It is the above judgment that is the subject of this appeal, more specifically, in respect to the award for general damages. The appellant has listed the following grounds of appeal in his memorandum of Appeal.

**1. That the learned trial magistrate erred both in law and principle, by applying erroneous principle in computation of damages payable thus arriving at erroneous and grossly excessive estimates of general damages payable.**

**2. The learned Trial Magistrate erred in law and fact when the same awarded special damages which were never proved in accordance with the law.**

**3. The learned Trial Magistrate erred in law and fact when he failed to subject the costs payable to percentage of contribution borne by the Respondent.**

**4. That the learned trial magistrate acted in error when the same failed to properly evaluate evidence on record thus reaching erroneous decision.**

5. The appellant therefore sought the following prayers on appeal:

**a) The Judgment and/or Decree of the learned Trial Magistrate dated 3<sup>rd</sup> day of March 2015, be set aside and/or quashed.**

**b) This Court be pleased to re-visit the issue of assessment of the quantum of the general and special damages payable and assess/review/vary the same to reasonable amount, applying the right principles and law.**

**c) That the Court be pleased to order that the costs of the suit awarded in the subordinate court was subject to contribution of liability in the ration of 80:20% in favour of the Respondent.**

**d) Costs of the Appeal be borne by the Respondent.**

**e) Any such and/or further orders that the Honourable court shall deem just and expedient in the circumstances.**

6. When the appeal came up for hearing before me on 18<sup>th</sup> October 2016, parties agreed to canvass their arguments on appeal by way of written submissions.

### **Appellant's submissions**

7. Through his advocates M/s O. M. Otieno & Co. Advocates, the appellant submitted on the principles to be applied in deciding whether or not an appellate court should interfere with the trial court's discretion in assessing damages as were set out in the case of **Texcal House Service Station Ltd & Another vs Jappien and Another (Nairobi CA No. 134 of 1998)**.

8. The appellant submitted that damages must be within limits set out by previous comparable cases and also within the limits of the Kenyan economy. It was the appellant's case that the injuries sustained by the respondent were minor injuries which had fully healed as at the time of the hearing of the case and that the award of Kshs. 1,200,000/= general damages was inordinately high, unjustified and without basis.

9. The appellant added that the trend in previous cases of injuries that were similar in nature to the injuries suffered by the respondent had been in the range of Kshs. 300,000/= and 400,000/= and this is the range within which the trial court ought to have based his award while taking into account the aspect of inflation.

10. The appellant contended that the trial court proceeded on wrong principles by relying on authorities cited by the respondent which authorities were in respect to claimants who sustained more severe injuries

than those that were sustained by the respondent. In this regard, the appellant gave the example of the decision in **Kirinyaga Distributors Co-op Union and Another vs Eustace Wilson Embu HCCA No.23 of 2010**.

11. The appellant faulted the trial court for adopting the respondent's submissions on quantum when there was no similarity between the injuries sustained by the respondent and the injuries sustained by claimants in the authorities relied upon by the respondent.

12. On special damages, the appellant submitted that the respondent only specifically proved that he incurred special damages of Kshs.103,890 and not Kshs.153,942 that was awarded by the court.

13. Lastly, the appellant stated that upon the liability being apportioned at the ratio 80:20, it followed the same ratio ought to have been applicable to the costs awarded to the respondent.

### **Respondent's submissions**

14. M/s Khan & Associates advocates for the respondent submitted that the trial court properly applied its mind in coming up with the award on general damages that was guided by the injuries the respondent suffered in the accident and the relevant authorities that the parties put at the court's disposal.

15. The respondent referred the court to several authorities in which similar awards were made in respect to general damages or injuries similar to those sustained by the respondent.

16. According to the respondent, the appellant was not being truthful when he submitted that the respondent suffered only soft tissue injuries when the respondent's report and treatment notes indicated that he suffered serious injuries that left him with a permanent disability.

17. On special damages, the respondent submitted that he pleaded a total of Kshs. 160,200/= special damages and the court awarded him Kshs. 153,942/= under this heading part of which was to be expended in offsetting an outstanding hospital bill of Kshs. 39,529/= which the respondent stated that he was justified to claim. The respondent relied on the **Court of Appeal's decision in Cosmo Plastics Ltd vs Stephen Kiamba Nzura CA 117 of 2003** in which it was held:

***“Once treatment has been meted and charges become due, they ought to be paid for, if not by the injured person, by the person causing the injury directly, if need be, to the person offering the treatment service.”***

18. In regard to the outstanding/pending hospital bill, the respondent suggested that, going by the dictum in the **Cosmo Plastics Ltd case (supra)**, the appellant should be ordered to pay the said amount directly to the hospital.

19. On costs, the respondent submitted that only the instructions fees could be subjected to the 20% contribution and not all the items contained in the party and party bill of costs.

### **Analysis and determination**

20. As I have already stated in this judgment, parties had by consent agreed to share liability at 80% to 20% in favour of the respondent. The only issue that requires the determination in this is appeal, as can be discerned from the grounds of appeal, is whether the trial court applied the wrong principles in assessing and arriving at both general and special damages.

21. This being a first appeal, this court is obligated to evaluate the evidence tendered before the trial court in order to arrive at its own conclusions on whether the trial court made the right decision.

22. The respondent's injuries were enumerated in the plaint as follows:

a) Fracture of the tibia-fibula bones of right leg.

b) Dislocation of the right hip joint.

c) Bruises on the chin.

d) Fracture of the right femur.

e) Degloving injury of the right leg.

23. PW2, Dr. Ogando Zoga who examined the respondent and prepared a medical report that was produced at the trial as Pexhibit 7A confirmed the injuries outlined in the plaint and testified as follows regarding the said injuries:

**“Treatment included skin grafting. He had external fixation of the right leg. The right leg was shorter than the left leg. Scar on the cheek at the time of examination. The patient sustained serious injuries which include fractures and would develop malunion and shortening of the right limb and this would expose him to osteoarthritis fracture. I recommend physiotherapy and analgesic. Soft tissue injuries would heal with permanent scars. Physical disability was assessed at 20%.”**

24. The evidence on the nature and extent of claimant’s injuries normally forms the basis upon which an award of damages is founded. I note that the appellant did not subject the respondent to a 2<sup>nd</sup> medical examination by a doctor of his choice and therefore PW2 presented the only medical opinion that the court could rely on.

25. I have also perused the treatment notes that were produced as Pexhibit 2 together with the P3 form produced as Pexhibit 5. I note that the said exhibits confirm the contents of the doctor’s medical report. The P3 form classified/assessed the respondent’s degree of injury as **“maim.”**

26. The advocate for the appellant submitted before the trial court that an award of Kshs. 300,000/= general damages would be adequate compensation for the respondent, the respondent proposed an award of Kshs. 1,400,000/=. The pertinent question which arises is whether the trial court applied the wrong principles in assessing the damages. In the case of **Kemfro Africa Limited t/a Meru Express Service & Gathogo Kanini – v- A.M. Lubia & Another, (1982-88) 1 KAR 777**, it was stated:

***“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 damage. (See Kanga – v- Manyoka(1961) EA 705,709-713)”***

27. In **Denshire Muteti Wambua – v- Kenya Power & Lighting Co,Ltd. Civil Appeal No. 60 of 2004**, the Court of Appeal reiterated the principles under which this Court would interfere with the award of damages as stated and applied in the **Kemfro Africa Limited t/a Meru Express Service & Gathogo Kanini – v- A.M. Lubia & Another (supra)**. In the case of **Arrow Car Limited – v- Bimomo & 2 others, (2004) 2 KLR 101**, it was stated that comparable injuries should as far as possible be compensated by comparable awards. In **Denshire Muteti Wambua – v- Kenya Power & Lighting Co. Ltd (supra)**, it was stated that awards have to make sense and have to have regard to the context in which they are made; they have to strike a chord of fairness. As was stated by Lord Denning in **Kim Pho Choo – v – Camden & Islington Area Health Authority, (1979) 1 All ER 332**, in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation for both the plaintiff and the defendant.

28. The context in which the compensation for the respondent is made must be evaluated and is

determined by the nature and extent of injuries and comparable awards made in the past. In this case, the nature and extent of injuries suffered by the respondent are stated in the medical report and treatment notes as fractures of the right femur and tibia fibula bones, dislocation of the right hip joint, bruises of the chin and degloving of the right leg. The medical report assessed physical disability at 20%. The trial magistrate made an award of Kshs 1,200,000/= general damages for injuries which were classified in the P3 form as "maim". In my own assessment, the classification of the injuries as maim shows that they were in between the classification of "minor" and "grievous" and this is a factor which should have been taken into account in the assessment of damages. To my mind the respondents injuries were neither so grave nor so minor.

29. I note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries. The appellant in this case cited the cases of **Jane Wangui Kamau & 2 others vs Alice Atandi Mungamanyi & Another Nakuru HCCC No. 136 of 2003** wherein an award of Ksh. 350,000/= was made on 19th October 2004 and the case of **Yunis Malik vs Eliud Murithi & Another (Nakuru HCCC354 of 2000)** where the plaintiff was awarded Ksh. 400,000/= on 13<sup>th</sup> May, 2005. On his part, the respondent relied on the cases of **Abdi Salim Nuron vs KTDA HCCC 26 of 1999** and **Kirinyaga District Coop Union and Another vs Eustace Wilson (supra)** in which awards of Kshs.800,000/= and Kshs.1,400,000/= were made respectively.

30. I have considered the authorities quoted by the Respondent and especially the first case of **Abdi Salim Nuron (supra)** in which an award of Kshs.800,000/= general damages was made to the plaintiff. I note that in the said case, disability was also assessed at 20% meaning that the extent and nature of the claimant's injuries were similar to the those in the instant case. I find that in making an award of Kshs.1,200,000/= general damages for similar injuries, there was error of principle on which the discretion of the trial court can be interfered with as the award was much higher than awards made in comparable cases.

31. In the circumstances of this appeal and considering all the factors I have enumerated in this judgment I am entitled to interfere with the judgment in respect of the award of general damages. I set aside the award of Kshs. 1,200,000/= general damages and substitute thereof a sum of Kshs. 800,000/= general damages. The amount of damages awarded is subject to the liability as recorded by the trial court.

32. On special damages the appellant submitted that only Kshs.103, 890 was proved yet the court awarded the respondent Kshs.153, 942. I have perused the receipts produced by the respondent before the trial court as P exhibit 3A-3O and P exhibit 7b and I note that they all add up to the total sum of Kshs.115,790. Clearly therefore the amount proved under the heading of special damages which I hereby award is Kshs.115,790/= which sum will also be subject to the liability as recorded by consent.

33. The award of Ksh. 800,000/= general damages shall attract interest at court rates from 3rd March 2013 being the date of judgment of the trial court. The parties having agreed on liability at 20% to 80% in favour of the respondent, I find that it is automatic that 20% shall be deducted from the award of Ksh.800,000/= general damages, 115,790/= special damages and costs being the respondent's portion of liability. Taking into account the injuries sustained by the respondent and considering that this appeal has partially succeeded in reducing the award of the lower court, I hereby order that the appellant shall bear the costs of proceedings in the lower court and each party shall bear the costs of this appeal.

In sum, the appeal is allowed partly and I award the respondent the total sum of Kshs.732,632/= made up as follows:

a) General damages –	Kshs. 800,000/=
b) Special damages	Kshs. <u>115,790/=</u>
c) Total	Kshs. 915,790/=

