



**Okoth v Foe Boe Ltd & another (Civil Appeal 22 of 2020)
[2024] KEHC 126 (KLR) (16 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 22 OF 2020
SM MOHOCHI, J
JANUARY 16, 2024**

BETWEEN

TERESIA ACHIENG OKOTH APPELLANT

AND

FOE BOE LTD 1ST RESPONDENT

JOHN KARANU WACHIRA 2ND RESPONDENT

(Being an Appeal from the Judgment of the Honourable E. Keli (Chief Magistrate) delivered on 17th January, 2020 in Nakuru CMCC No. 772 of 2018)

JUDGMENT

Introduction

1. This Appeal contests the entire judgment by the trial court Vide a plaint dated 22nd May, 2018, the Appellant herein sued the Respondents in Nakuru Chief Magistrate's Court Civil Case No. 772A of 2018 – *Teresia Achieng Okoth v Foe Boe Ltd & 1 Other* (the suit), seeking damages on account of injuries allegedly sustained in an alleged road traffic accident involving motor vehicle registration number KBR 980C (suit vehicle) and motor vehicle registration number KAQ 033D of which she was a lawful fare paying passenger.
2. After hearing trial; magistrate entered judgment in favour of the Appellant for General damages assessed at kshs 250,000/- that forms the substratum of the Appeal.
3. The Court directed the Appeal to be heard by way of written submissions which directions were never complied with by either the Appellant or the Respondents.
4. The Respondents elected not to defend the Appeal despite service.



5. The Appellant being dissatisfied with the said judgment preferred this Appeal, challenging the same and relies on the following grounds:
 - i. That the Learned Trial Magistrate erred in applying wrong principles and failing to take into account material facts thus arriving at an erroneous award.
 - ii. That the Learned Trial Magistrate erred in law and in fact in disregarding the Appellants submissions and on all points of facts and law in as far as the award of damages is concerned.
 - iii. That the Learned Trial Magistrate erred in law and fact in awarding Kshs. 250,000/= as general damages which is inordinately low in the circumstances in view of the severe injuries sustained by the appellant.
6. The Appellant prays for judgment and finding of the Trial Magistrate on quantum be set aside, be reviewed and/or revised and/or be substituted with the judgment of this Honourable Court.
7. The Appellant prays for Costs.

Appellants Case

8. Appellant failed to file written submission thus leaving the court to re-evaluate the record of Appeal as the basis of the judgment.

Respondent's Case

9. The Respondents failed and or refused to enter appearance and or defend the Appeal despite service being effected upon their counsel on record in the Trial court.

Analysis and Determination

10. That this being the first appeal and on quantum only, is by way of a re-trial and the Appellate court is duty bound to re-evaluate and scrutinize the totality of evidence on record in order to draw its own conclusions as was held in the much-celebrated case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123:-

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 demeanor of a witness is inconsistent with the evidence in the case generally.

11. As a first appeal court according to *Peters v. Sunday post Ltd* (1958) EA 424, I am only allowed to interfere with a finding of fact, if, it is not supported by evidence or it is contrary to the totality of the evidence produced at trial.
12. After re-assessing the entire evidence, I find as a fact that the trial court was in error to disregard the Appellant's submission on damages and proceeded to assess the general damages on the strength of an erroneous precedent as orally submitted by the Defendant and not in totality of the evidence on record.



13. The erroneous finding by the learned trial magistrate suggests/indicates that in all likelihood, he did not consider, evaluate and or apprehend the documentary evidence, parties submissions and other materials on record properly, dutifully, diligently and or as expected/required of him which was an error of principle and which entitles this honourable court to interfere with his decision on the award for general damages as was held by The Court of Appeal in the case of *Nzuki Isaac Muveke v Francis Njogu Niebia* [2021] eKLR:-

The Court of Appeal is entitled to interfere (with a finding) if one or more of the following matters are established:

first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong."

14. This court has considered the appeal herein, the evidence before the trial court, the grounds of appeal by the appellant counsel before the trial magistrate. In my humble view, the only issue for consideration is whether the quantum of general damages was inordinately low?
15. I am of the Considered View that the Appellant had Submitted that General Damages of the sum of Kshs 1,000,000/- shall suffice for the injuries sustained while the trial magistrate in reliance of case *Alphonze Muli Nzunki v Brian Charles Ochuodho* (2014) eKLR a decision based on injuries that are far much more serious than the instant case, commuted fracture of the tibia and fibula and degloving injury are incomparable to a fracture of the midshaft left tibia and the severe soft tissue injury and two other soft tissue injuries.
16. This Appeal is thus allowed. The Quantum of General damages of Kshs 250,000/-, is hereby set aside, and substituted with enhanced General damages assessed at kshs 600,000/-.
17. Special Damages of Kshs 6,550/- awarded by the trial magistrate remain unaffected.
18. The award of General damages as awarded will have interest at court rates, from the date of judgment in the lower court until payment in full.
19. The Respondent to bear the costs of this Appeal.

It is so ordered.

DATED AND DELIVERED AT NAKURU ON THIS 16TH DAY OF JANUARY, 2024.

S. MOHOCHI

(JUDGE)

In the presence of;

Appellant: Wafula for E.M Juma & Ombui & Co. Advocates

Respondents: Kerubo Advocate- Kimondo Gachoka

Ms. Schola C.A

