



**Anyinga v Khai & another (Civil Appeal 28 of 2023)
[2024] KEHC 1526 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 28 OF 2023
PJO OTIENO, J
FEBRUARY 16, 2024**

BETWEEN

SHADRACK ANYINGA APPELLANT

AND

RAPHAEL MUGENGE KHAI 1ST RESPONDENT

RADHA MOTORS LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. Caroline
Cheruiyot (RM) in Kakamega Civil Claim No. E136 of 2022)*

JUDGMENT

1. By way of a statement of claim dated 21st December, 2022, the appellant sued the respondents for general damages in the sum of Kshs. 300,000/-, compensation, costs of the claim and interest at court rates. The appellant's case was that on 22/1/2022 he was riding as a passenger on Motor Cycle Registration Number KMEX xxxD when Motor Vehicle Registration Number KDD xxxB registered in the name of the 2nd respondent was carelessly driven by the 1st respondent thus hitting the Motor Cycle as a result of which he sustained injuries.
2. In a response to the statement of claim filed in court on 8th February, 2023 out of time and without the leave of court, the respondent denied the appellant's claim and averred that if at all the accident did occur, it was occasioned by the sole or contributory negligence of the appellant and/or the motor cyclist.
3. In its judgment, delivered on 22nd February, 2023, the trial court found the respondents 100% liable for the accident then assessed and awarded the appellant general damages in the sum of Kshs. 50,000/- together with costs and interest from the date of the judgment.



4. Aggrieved with the decision of the trial court, the appellant's lodged a memorandum of appeal dated 23rd February, 2023 premised on the following grounds;
 - a. The learned trial magistrate erred in law and in fact by finding that the appellant was entitled to general damages of Kshs. 50,000/- which was too much on the lower side in view of the injuries suffered by the appellant that it presented a miscarriage of justice.
 - b. The learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
 - c. The learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded damages for pain and suffering which is very low.
 - d. The learned trial magistrate erred in law and in fact when making her award by failing to consider the passage of time and incidence of inflation.
5. For the four grounds of appeal which sum up to a challenging the sum awarded as too low, the appellant prays that the judgment of the trial court be set aside so that this court to reassess the general damages payable to the appellant. The appeal only challenges the assessment of damages and not the finding on liability.
6. Having been directed that parties file and exchange submissions, have filed submissions stressing that the appellant suffered a bruised left shoulder, a bruised left elbow, a bruised left and right knee joints and swollen tender area and that in the regard cites *Chivatsi Simba Mwangiri v Boniface Musyoka* (2011) eKLR where the plaintiff had suffered similar injuries and the court awarded a sum of Kshs. 250,000/- in damages. It is further submitted that comparable injuries should receive comparable awards hence the Court is faulted for having awarded too low a sum for damages.
7. For the respondent, it is submitted that damages must be within limits set out by decided cases and within limits the Kenyan economy can afford then cites the case of *Osman Mobamed & another v Saluro Bundit Mohammed* Civil Appeal No. 30 of 1997 for that proposition.
8. It is also submitted that the trial magistrate relied on the correct principles in assessing damages by relying on the authority of *Kipkere Limited v Peterson Ondieki Tai* (2016) eKLR wherein Nagillah J set aside an award of Kshs. 90,000/- and substituted it with Kshs. 30,000/- on appeal and in a case where plaintiff has suffered deep cut wound on the left leg, chest contusion and bruises on the left shoulder injuries that were more severe than those sustained by the appellant herein.

Issue, Analysis and Determination

9. The Court has duly considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the respondent and discerns the issue for determination to be whether the award of general damages in the sum of Kshs. 50,000/- by the trial court was inordinately low as to invite interference by this Court sitting as an appellate Court.



Analysis

10. The court of appeal in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR had this to say on an appellate court overturning the amount of damages awarded by a trial court;

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, JA that:

‘An appellate court will not disturb an award of 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.’

11. The appellant in this case suffered a bruised left shoulder, a bruised left elbow, a bruised left and right knee joints. For such injuries the trial court awarded general damages in the sum of Kshs. 50,000/-.
12. The appellant contends that the damages were inordinately low while the respondent submits that the same was reasonable. It being that there is no standard procedure for assessment and/or calculation of damages other than comparison with other awards as observed by the court of appeal in *Simon Taveta vs Mercy Mutitu Njeru* [2014] eKLR where it was observed 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.”

13. While this Court could have awarded a large sum had it sat as the trial Court, that alone is not sufficient for it to interfere and substitute its own direction from that of the trial Court. For it to interfere, the appellant must convince it that the trial Court acted upon wrong principle and shot of that, the sum awarded is so low, and a misery, to depict an outright erroneous estimate of the damages.
14. The appellant has not alleged any error in principle. To the contrary the trial Court in coming to its assessment, the trial Court was guided by two decisions which were relatively more recent than those cited by the appellant. That cannot be an error in principle, neither can it be viewed as failure to make an award comparable to those made by higher court for comparable injuries.
15. While noting that assessment of damages is at the direction of the trial Judge and the constraints set by the law upon an appellate Court not to freely and lightly interfere, the Court finds that it is not satisfied that a case for interference has been made out. Without such a case being made out, the appeal lacks merits and is therefore dismissed.
16. Considering that the award by the trial Court was very modest, the Court orders that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF FEBRUARY, 2024



PATRICK J. O. OTIENO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Odah for the Appellant

Menjo for the Respondents

Court Assistant: Polycap Mukabwa

