



REPUBLIC OF KENYA



**Bonareri v Ongeru (Civil Appeal E101 of 2021)
[2024] KEHC 1401 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E101 OF 2021
PN GICHOHI, J
FEBRUARY 15, 2024**

BETWEEN

RUTH BONARERI APPELLANT

AND

VICTOR MOKAYA ONGERI RESPONDENT

*(Being an appeal from the judgment and decree in Kisii CMCC
602 of 2018 by Hon. N. S. Lutta (CM) on 28th July, 2021)*

JUDGMENT

1. Through the firm of T.O. Onyango & Co. Advocates, Victor Mokaya Ongeru (Respondent) filed his claim before the trial court where he alleged that on 9th September 2018, he was riding M/Cycle KMDA 726 R along Kisii-Nyamira Road when he was knocked down by motor vehicle KCM 147E Toyota Axio (accident motor vehicle) that was negligently driven by Ruth Bonareri (Appellant) as a result of which Respondent suffered bodily injuries. He therefore sought both general and special damages.
2. The Appellant filed his defence through the firm of Ogenjo, Omboto & Kijala Advocates and denied this claim.
3. At the conclusion of the trial, the learned trial magistrate found the Appellant liable at 100% and proceeded to award damages as follows: -General damages Kshs.400,000/=Special damages Kshs. 27,770/=
4. Dissatisfied with the whole judgment, the Appellant has preferred this appeal setting out 9 grounds of appeal which can be summarised as follows: -
 1. That the learned trial magistrate erred in law and in fact in failing to appreciate and consider the pleadings and evidence adduced in support thereof.



2. That the learned trial magistrate erred in law and in fact in admitting the evidence of PW1, PW2 and PW3 which was not supported by any factual basis.
 3. That the learned trial magistrate erred in law and in fact by failing to attach due weight to the Appellant's evidence and submissions.
 4. That the learned trial magistrate erred in law and in fact in awarding general and special damages basing his findings on irrelevant issues not supported by evidence adduced or applicable law.
 5. That the learned trial magistrate erred in law and in fact in failing to attach due weight to the Appellant's evidence, submissions and authorities attached thereto.
 6. That the learned trial magistrate erred in law and in fact in assessing and awarding general and special damages yet the Respondent had not proved her case.
 7. That the learned trial magistrate erred in fact and in law by giving the Respondent so inordinately very high award that it amounted to wholly erroneous estimate of damages suffered by the Respondent.
5. He therefore prayed that the Appeal be allowed with costs and that the judgment of the trial magistrate be set aside with costs.

Submissions

6. Though parties agreed to file submissions, only the Appellant complied by filing hers on 23rd January 2023. The Appellant submitted that from the memorandum of Appeal, the Appellant was appealing only on quantum. He submitted that the doctor who first treated the Respondent had noted that the Respondent had only suffered a dislocation of and was discharged a day after admission. That the Plaintiffs Report produced by Dr. Morebu Momanyi indicated that most of the injuries suffered by the Plaintiff were soft tissue in nature and with fractures being those that can heal with no permanent disability projected.
7. The Appellant therefore submitted that the trial court ought not have given any consideration to the report by Dr. Peter Morebu as it was a complete fabrication and /or exaggeration of injuries sustained by the Respondent. He termed the said report fraudulent and intended to mislead the court.
8. The Appellant therefore proposed than award of Kshs. 60,000/= would suffice as general damages. In support of that award, the Appellant relied several cases among them the case of Mokaya Mochama v Julius Momanyi Nyakwoyo [2020] eKLR where the Plaintiff /Respondent had sustained cerebral concussion i.e., Lost consciousness for a short duration, deep cut wound on the back of his head, bruises on the right foreleg and was awarded Kshs. 70,000/= as general damages.
9. The Appellant further submitted that the trail court erred in awarding Kshs. 75,000/= as future medical expenses without the Respondent adducing any evidence whatsoever to persuade the court. She therefore urged the court to set it aside for being unjustified. Lastly, he urged the court to award the costs.

Analysis And Determination

10. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions bearing in mind that it did not have an opportunity to see or hear the witnesses testify - see *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123.



11. From the Appeal and submissions by the Appellant, the only issue here is on quantum. During trial, the Respondent (Victor Mokaya Onyango) relied on his recorded statement filed with the plaint and the documents in his list of documents. He stated that in the accident, he suffered multiple bodily injuries and was admitted at Kisii Teaching and Referral Hospital and later discharged.
12. According to the P3 form the Respondent sustained facial bruises and tender neck. That the Xray revealed the Respondent sustained dislocation of the left shoulder joint, fracture of the left ulna and radius, fracture of the left 2nd finger and left little finger, was swollen, bruised and tender.
13. The Medical report prepared by Dr. Morebu Peter Momanyi dated 17/09/218 and produced on his behalf by Dr. Timothy Mokua (PW4) showed that from the history of the patient, the Respondent sustained: -Facial bruises.Dislocation of the left shoulder joint.Fracture of the left ulna and radius.Fracture of the left 2nd finger and little finger.Bruiases on the left arm.
14. Other than the history, Dr. Morebu examined the Respondent and opined that Respondent had “sustained grievous harm i.e. left shoulder joint dislocation, left radio- ulna fracture, with multiple severe soft tissue injuries that were in the process of healing. The Dislocation may complicate with post traumatic arthritis later.”
15. The evidence by the Respondent’s witness Jackson Murauni, a Clinical Officer who produced the patient’s clinic card, treatment notes and the P3 form also confirmed the said injuries.
16. There was no other medical report availed in respect of the Respondent’s injuries. There is no evidence of a second medical by the Appellant’s doctor and no such doctor was called by the Appellant.
17. In the circumstances, the Appellant’s submissions that Dr. Morebu’s medical report was a complete fabrication and /or exaggeration of injuries sustained by the Respondent and that the said report is fraudulent and intended to mislead the court” is without any basis and therefore disregarded.
18. At the hearing, Respondent had asked for Kshs. 1,000,000/= and cited the case of Peter Namu Njeru v Philemone Mwangoti [2016] eKLR where the Court held that Kshs. 700,000/= was sufficient as general damages for fracture of the humerus and soft tissue injuries.
19. The Appellant on the other hand offered Kshs. 100,000/= and cited the case of Paul Karimi Kithinji vs Joseph Mutai Kireria [2020] eKLR where the Court awarded Kshs. 150,000/= for segmental fracture of the right ulna and minor lacerations of the face.
20. Further, the Appellant relied on the case of Patrisia Adhiambo Omolo v Emily Mandala [2020] eKLR where the Respondent sustained fracture left radius and ulna bones; multiple bleeding bruises on the forehead; deep cut - palm of left hand about 10 cm long, 1 cm deep bleeding profusely and a deformed swollen tender left forearm. He was left with deformed painful weak left arm, weakness left hand and contractures of the 1st, 2nd and 3rd fingers on the left hand. High Court upheld an award of Kshs. 180,000/=.
21. The general approach is that comparable damages should, as far as possible, be compensated by comparable awards and quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See Mbogo v Shah [1968] EA 93 and Kemfro Africa Limited t/a Meru Express Services [1976] & Anor. v Lubia & Anor, No. 2 [1987] eKLR 30).



22. The authority cited by Respondent of no assistance to the trial court as it concerned incomparable injuries to those suffered by Respondent herein. The injuries suffered in the authorities cited by the Appellant relate to fracture of ulna and radius and other injuries but Respondent in this case suffered not only the fracture of ulna and radius but also fracture left 2nd and little fingers and bruises on left arm.
23. An appellate court will not disturb the quantum of damages awarded by a trial court were unless it is satisfied that either that, in assessing the damages, the court 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.
24. Having analysed the evidence, the authorities cited by the parties, the trial court finally concluded: -

“In my considered view and with the guidance of *Lucy Mucaki v Frida Nyanguthi* [2015] eKLR, an award of Kshs. 400,000.00 be adequate commemoration.”
25. In *Lucy Mucaki* case (supra), the two medical reports by the Doctors who had examined the Respondent therein showed that Respondent sustained bruises at the base of the left big toe medially; spiral fracture of the tibia at left ankle joint; dislocation of the left ankle joint and soft tissue injury on the left first toe and developed post traumatic arthritis of the left ankle joint. On appeal, High Court set aside the award of Kshs. 650,000/= and substituted it with an award of Kshs. 450,000/=.
26. In *Third Engineering Bureau China Construction Group Limited v Edwin Kinanga Atuya* [2021] eKLR, the Respondent sustained bruises on the scalp, hands and right leg, compound left tibia fracture and compound left fibula fracture. High Court set aside the lower court’s award of Kshs. 800,000/= and substituted it with an award of Kshs. 500,000/=. These were more serious injuries than in the present Appeal.
27. This Court is satisfied that the trial court was properly guided by the evidence and the law. The award herein is sound. There is no reason to disturb it.
28. The other issue raised in this Appeal is on special damages and future medical expenses. In the Plaintiff, the Respondent had pleaded: -
 - a. Police Abstract Report Kshs. 200.00
 - b. Medical Report.....Kshs. 6,500.00
 - c. Search for owner of M/V. Kshs. 1,000.00
 - d. Treatment Expenses Kshs. 20,070.00
 - e. Future medical expenses (to be adduced during hearing hereto)

Total Kshs. 27,770.00
29. It is trite law that special damages must be specifically pleaded and strictly proved. Among the documents produced by the Respondent at the trial were a bundle of receipts. Having gone through them, this Court finds that those legible as of today are for Kshs. 26,870. In the judgment, the trial court held: - “The special damages of proved are Kshs. 27,770/=”.
30. The Court takes judicial notice of the rate at which ETR receipts fade especially if not properly kept. There is no reason to doubt that as the time the trial court arrived at the decision, those receipts that



are now illegible were actually legible. In the circumstances, this court will not interfere with the award by the trial court.

31. On future medical expenses, there was no evidence led on the same and the issue did not feature in the judgment. There was no finding to call for consideration in this Appeal.

32. In conclusion, this Appeal is unmerited and therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 15TH DAY FEBRUARY, 2024

PATRICIA GICHOHI

JUDGE

In the presence of;

N/A for Appellant

N/A for Respondent

Lauren Njiru / Aphline, Court Assistant

