



REPUBLIC OF KENYA



KENYA LAW
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**Thiiru aka Thithu v Adam (Civil Appeal E065 of 2022)
[2024] KEHC 1334 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E065 OF 2022
LM NJUGUNA, J
FEBRUARY 14, 2024**

BETWEEN

MARTIN THIIRU AKA THITHU APPELLANT

AND

HALIMA ISSA ADAM RESPONDENT

(Appeal arising from the decision of Hon. H. Nyakweba SPM in Chief Magistrate's Court at Embu Civil Suit No.48 of 2020 delivered on 14th September 2022)

JUDGMENT

1. The appellant has filed memorandum of appeal dated 21st December 2022 challenging the above cited decision and seeking orders that the impugned judgment be set aside or varied, this court reassesses the award for general damages and the ratio of costs to be borne by each party, the appeal be allowed with costs and such other orders as the court shall deem just. The appeal was premised on the grounds that the learned magistrate erred in law and fact:
 - a. By failing to properly scrutinize and evaluate the pleadings and submissions tendered by the appellant and correctly relate the same to case law cited therein thereby failing to arrive at a fair and reasonable assessment of the compensation;
 - b. In awarding Kshs. 1,200,000/= as general damages which is manifestly excessive and inordinately high;
 - c. In failing to find that the costs of the suits of the suit should be subjected to the same liability ratio of 80:20;
 - d. In failing to take into account the proper legal principles and previous awards in similar cases on quantum;



- e. In failing to take into account the written submissions and authorities of the appellant while making the award; and
 - f. By making an award on general damages that was inordinately high in favour of the respondent amounting to a miscarriage of justice.
2. Through a plaint dated 26th May 2020, the respondent sought judgment against the appellant for special and general damages together with interests and costs of the suit. It was the respondent's case that on or about 27th October 2019, the plaintiff was a pillion passenger on motor cycle registration number KMET 572E ridden by one Josphat Kariruki Nduma travelling along Embu-Kiritiri road when near Don Bosco Area, the appellant's driver, servant, employee, assignee so negligently drove, managed and/or controlled the appellant's motor vehicle that he caused or permitted the same to lose control and knock the motor cycle the respondent was on, causing him to be injured. The respondent alluded vicarious liability to the appellant.
 3. In his statement of defense, the appellant denied the allegations made in the plaint and stated that the respondent is to blame for the accident. The respondent filed a reply to defense wherein she affirmed averments made in the plaint.
 4. During the hearing, PW1 was the respondent herein who stated that she was a pillion passenger on the named motor cycle which had signaled intending to turn right at Wellus junction when the appellant's motor vehicle hit the motor cycle from behind. That she sustained head injuries, 2 broken ribs, left hip and left shoulder. That she was taken to Tenri Hospital before being transferred to Coptic Hospital. That she underwent follow-up treatment at Coptic Hospital and Kenyatta National Hospital. She stated that the accident was reported at Embu Police Station and she obtained a P3 form that was filled by Dr. Njiru. She produced copies of her treatment records from the hospitals where she was treated and the medical bills totaling Kshs. 1,514,570/=. She stated that at the time of the accident she was not wearing a helmet.
 5. PW2 was PC Noor Adam of Embu Traffic Base who stated that the accident was reported at Embu traffic base. That the motor cycle rider was turning to enter a feeder road when motor vehicle KCT 336Z knocked it down. He produced the police abstract as evidence. He blamed the driver of the motor vehicle for the accident.
 6. PW3 was Josephat Kariuki Ndungu who stated that on the day of the accident, he was carrying the respondent on his motor cycle as a pillion passenger and at Don Bosco, he slowed down and signaled to join a feeder road, when a motor vehicle hit his motor cycle from behind. That before making the turn, he had checked to ascertain that it was safe to proceed but the motor vehicle hit him suddenly. That his passenger was wearing a helmet and that nobody was charged with a traffic offence.
 7. PW4, Dr. Geoffrey Njuki Njiru stated that she examined the respondent and recorded the injuries that were sustained in his medical examination report. He produced the medical examination reports and the corresponding payment receipts.
 8. DW1, the appellant stated that as he was driving his motor vehicle registration number KCT 336Z from Nairobi to Kiritiri, he had indicated intending to overtake the motor vehicle ahead of him which had indicated to get off the road. That as soon as he had finished overtaking, a motor cycle suddenly emerged from the right-hand side and a collision occurred. That the pillion passenger was injured and rushed to hospital and he remained at the scene to wait for the police. That upon inspection, his motor vehicle was not found with any pre-accident defects and he produced the inspection report as evidence. He stated that the rider of the motor cycle would not have known that he had indicated with the intention to overtake another motor vehicle.



9. In the instant appeal, the court directed the parties to proceed by way of written submissions and both parties complied.
10. The appellant submitted that the trial magistrate erred in awarding the general damages at Kshs. 1,200,000/= and did not consider similar decided cases. He urged the court to consider the case of Harun Muyoma Boge v. Daniel Otieno Agulo (2015) eKLR where the court held that the award of general damages must be done in comparison to other similar cases where the injuries were similar. He stated that for similar injuries, other courts awarded general damages of between Kshs. 600,000/= to Kshs. 800,000/=.
11. Reliance was placed on the cases of Joseph Kimathi Nzau v. Johnson Macharia (2019) eKLR, Panniack Investments Limited v. Davidson Mwanzia Kamuta (2018) eKLR, George Kiptoo Williams v. William Sang & Another (2004) eKLR, Gatete Muthee David v. Joseph Charo Ndaa (2021) eKLR and Joseph Kimanathi Nzau v. Johnson Macharia (2019) eKLR. He urged the court to award Kshs. 800,000/= as general damages and subject it to the liability ratio of 80:20.
12. The respondent submitted that in as much as the appellate court had power to reevaluate the evidence adduced at trial, it must remind itself that it lacks the advantage of having seen the witnesses testifying at the trial. That the record of appeal served upon the respondent is not complete as some of the exhibits presented at the trial court, are missing. She placed reliance on the case of Gitobu Imanyara & 2 Others v. AG (2016) eKLR and urged the court not to disturb the findings of the trial court on quantum. It was her submission that the award of damages is not too high or too low nether is it erroneous. Reliance was placed on the judgment of the trial court and the reasoning of the learned magistrate when determining on quantum.
13. Further reliance was placed on the cases of George Kiptoo Williams v Sang & Another [2004] eKLR, Joseph Kimanathi Nzau v Johnson Macharia [2019] eKLR and Francis Murangiri Josiah & Another v. Stanley Kiuriam Mutunga [2017] eKLR for the argument that the award of the trial court factored in the cost of inflation. She pointed out that the injuries in the case of Panniack Investments Limited v Davidson Mwanzia Kamuta [2018] eKLR are different from the ones suffered by the respondent herein and that the case is not a proper reference for the court.
14. I have considered the trial court's record, the pleadings and submissions by the parties at trial and the submissions in this appeal. In my view, the issues for determination are:
 - a. Whether the award of general damages is excessive, considering the nature of the injuries and similar decided cases;
 - b. Whether the costs of the suit should be subjected to the 80:20 liability ratio.
15. In making the decision in this matter, this first appellate court should re-evaluate the evidence of the trial court and make a finding of its own. This was the position held in the case of Okeno v Republic [1972] EA 32 where the court held:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so,



it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

16. The trial magistrate, in his decision, was guided by the cases of Philip Kimani Gikonyo v Gateway Insurance Co. Ltd [2007] eKLR and George Kiptoo Williams v Sang & Another [2004] eKLR leading him to award Kshs. 1,500,000/=. He noted that the referenced cases were determined many years ago and so he stated that the amount was subject to the inflationary trend and that the Kshs. 560,000/= awarded in the latter case was to be enhanced. Liability was determined at the ratio of 80%:20% in favour of the respondent.
17. The scope of an award of general damages is limited to certain parameters, noting that no amount of money is enough to compensate for bodily injuries. This was echoed in the case of H. West & Son Ltd v Shepherd [1964] AC. 326 in which Lord Morris of Borth-y-Gest stated as follows;

“ ... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”
18. Further, in the case of John Kipkemboi & Another v Morris Kedolo [2019] eKLR the court stated:

“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 a 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; and
 - 5) The awards should not be inordinately low or high (See Boniface Waiti & another v Michael Kariuki Kamau [2007] eKLR.”
19. According to the medical report by Dr. Njiru, the respondent suffered the following injuries:
 - a. Brain contusion resulting in residual brain oedema in the right frontal and temporal region;
 - b. Sinusitis and acute subdural hematoma and oedema;
 - c. Fractures in medial end of right clavicle with subluxation of the acromio-clavicular joint;
 - d. Thin hairline fissure fracture of proximal part of left 1st rib;
 - e. Fracture to right scapular blade inferior aspect;
 - f. Fractures to the right 3rd, 4th and 5th rib in the anterior axillary lines and right 6th rib in proximal as well as anterior axillary line;



- g. Moderate right sided pleural effusion causing consolidation collapse of right lower lobe apical and posterior segments;
 - h. Left basal minimal pleuropneumonia reaction;
 - i. Mild hepatomegaly;
 - j. Calculary gall bladder; and
 - k. Colonic diverticulosis.
20. In the case of Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR (supra), the court awarded the sum of Kshs. 800,000/= as general damages for pain and suffering and loss of amenities for the following injuries: haematoma formation on the scalp, severe pain and tenderness on the scalp, fracture of the skull, fracture of 2nd molar lower both sides, severe pain and tenderness on the right side of chest anteriorly, haematoma formation on the chest right side, fracture of 1st right rib, fracture of 2nd left rib, fracture of the right clavicle bone and severe pain and tenderness on the right hip.
21. In making its decision, the court in the case of Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR (supra), was guided by the decision in the case of George Kiptoo Williams v. Sang & Another (2004) eKLR (supra) where the injuries were as follows: cut wound on the occipital region with lacerations on the left temporal region of the head, fracture of the skull on the occipital region, subluxation of the cervical vertebrae C1, C3 and C4, fracture of 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ribs of the left side of the chest, fracture of the left scapula and cut wound on the left hand and left arm. While at it, the court in the former case noted that the judgment in the guiding case was delivered on 11th November 2015 and then noted the inflationary exigencies. The trial court was guided by the same decision and he also noted the issue of inflation before awarding Kshs. 1,500,000/=.
22. In his judgment, the trial magistrate did consider the submissions of both parties. The appellant, in his submissions on the issue of general damages at the trial court, relied on the same arguments as the ones stated in his submission in this appeal. The respondent in her submissions at trial, simply urged the trial magistrate to award general damages of Kshs. 1,500,000/= and relied on the cases of Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR and Francis Murangiri Josiah & Another v Stanley Kiuriam Mutunga [2017] eKLR. In my view, the authorities relied on by the trial magistrate are good jurisprudence and they sufficiently inform the subject herein.
23. However, although the trial magistrate was guided by good precedence, I think that his award of general damages is excessive. Considering the other similar decided cases, I take the view that the award of general damages ought to be reviewed downwards, even in the face of inflation, whose exigencies will be factored-in. An award of Kshs. 1,000,000/= will suffice.
24. On the issue of whether the costs awarded ought to be subject to the liability ratio as well, the trial magistrate awarded the respondent costs of the suit together with interest thereon. Costs are awarded by the courts on discretion. Section 27 of the *Civil Procedure Act* provides on costs as follows:

“

- “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for



the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

25. This provision leaves award of costs to the discretion of the court. The general rule is for costs to be awarded to the successful party and the same may not be denied unless for a good reason. This means that costs can only be contested where the same are denied for good reason according to the discretion of the court. In the case of *Universal Engineering Works v Mohamedali Suleiman Essaji* [1951] 2 LRK 99 it was held:-

“A successful party is entitled to costs unless there are good reasons for depriving him of the costs.”

That is to say that the court may also choose to apportion costs purely on its discretion and not as of right. Parties are not to move the court to apportion costs based on the liability ratio. Therefore, it is upon this court to unsettle the findings of the trial court on this as the appellant has not demonstrated that he was denied costs unjustly.

26. In conclusion, I have considered all the pleadings and submissions of the trial court, the submissions of the parties in this appeal and the relevant law. I find that the appeal partially succeeds. I hereby make the following orders:

- a. Liability is held at 80%:20% against the appellant;
- b. General damages of Kshs. 1,500,000/= as awarded by the trial court is hereby set aside and substituted with Kshs. 1,000,000/=, the same to be subjected to the liability ratio. That is to say, the appellant to pay the respondent Kshs. 800,000/=;
- c. Special damages (medical expenses) maintained at Kshs. 1,514,655/= with interest from the date of filing the suit being 03rd June 2020 until payment in full;
- d. Each party to bear its own costs of the appeal; and
- e. Interest on general damages as awarded in this appeal shall be at court rates from the date of the judgment of the trial court.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

