



**Ukavi v Erasmus (Civil Appeal E018 of 2023)
[2024] KEHC 1384 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E018 OF 2023
LM NJUGUNA, J
FEBRUARY 14, 2024**

BETWEEN

SAMMY NYAGA UKAVI APPELLANT

AND

JIM KINYUA ERASMUS RESPONDENT

*(Appeal arising from the decision of Hon. Gichimu W. J. Senior Principal
Magistrate in Runyenjes PMCC No. 10 of 2022 delivered on 27th April 2023)*

JUDGMENT

1. The appellant filed memorandum of appeal dated 23rd May 2023 challenging the above cited decision and seeking orders that the appeal be allowed, the judgment of the trial court be set aside and costs of the appeal be awarded to the appellant. The appeal was premised on the grounds that:
 - a. The learned magistrate erred in law in awarding general damages at Kshs.350,000/= which amount is manifestly excessive and high considering the injuries sustained by the respondent;
 - b. The learned magistrate erred in law and fact in failing to consider the written submissions of the appellant on record and the authorities annexed therein in support of the appellant's case while arriving at the award of damages; and
 - c. The judgment of the learned magistrate is against the law and weight of evidence on record and against the doctrine of stare decisis.
2. The trial court suit was instituted by a plaint wherein the plaintiff pleaded that on or about 14th March 2021 the respondent was a lawful passenger in the motor vehicle registration number KBD 822G along Kathageri-Kigumo road when the appellant and/or his driver and/or agent carelessly and negligently drove, managed and/or controlled the said motor vehicle causing it to hit motor cycle registration number KMCY 459T and in the circumstances it lost control, veered off the road and hit a tree, causing



- the respondent personal injuries. The respondent detailed the injuries in the plaint and prayed for judgment against the appellant for special damages of Kshs. 3,650/=, general damages, costs of the suit and interest.
3. The appellant filed a statement of defense in which he denied the allegations made in the plaint and stated that the respondent is to blame for the accident. The matter proceeded to full hearing. At the hearing, PW1 was PC Winnie Sembeyo of Runyenjes Police Station who stated that the accident involved the named motor vehicle and motor cycle. That at the scene, the motor vehicle was on the wrong lane and the motor cycle was approaching from the opposite direction before the collision. That pillion passenger on the motor cycle died on the spot while the passengers in the motor vehicle were injured. She blamed the driver of the motor vehicle for the accident.
 4. PW2 was the respondent who stated that she was sitting next to the driver who was speeding and she asked him to slow down but he did not listen. That after the accident, she has not been able to continue with her work as a mason and she now works in the market. The appellant did not testify at the hearing. The trial magistrate rendered his judgment in which he found the appellant 100% liable for the accident and awarded general damages of Kshs. 350,000/=, special damages of Kshs. 3,650/= and costs of the suit to the respondent.
 5. In the instant appeal, the court directed the parties to proceed by way of written submissions and both parties complied.
 6. The appellant, in his submissions cited the case of *Selle & another v. Associated Motor Boat Co.Ltd and Others* (1968) EA 123 as cited in the case of *Joseph Mosonik & Another v. Kipkemoi Mosonik* (2020) eKLR and reminded this court to reevaluate all the evidence before making its finding. He stated that the appellate court may disturb an award of the trial court where the same is inordinately high or low and he referred to the case of *Butt v. Khan* (1982-88) KAR 5 as was applied in the case of *Joseph Kyalo Maundu v. Moses Musau Mulela & Another* (2019) eKLR. That the award of damages is discretionary but must follow precedence and must be proportionate to the nature of injuries.
 7. For this argument he relied on the cases of *Simon Taveta v. Mercy Mutitu Njeru* (2014) eKLR, *Sosphinaf Company Limited v. James Gatiku Ndolo* (2006) eKLR and *Ugenya Bus Service v. Gachoki* (1982) eKLR where the general sentiment of the courts was that astronomical awards must be avoided. He submitted that an award of Kshs. 100,000/= would suffice given the nature of the injuries. He placed reliance on the case of *Daniel Gatana Ndungu & Another v. Harrison Angore Katana* (2020) eKLR where an award of Kshs. 350,000/= was reduced on appeal to Kshs. 140,000/=. He was also guided by the cases of *Ephraim Wagura Muthui & 2 Others v. Toyota Kenya Limited & 2 others* (2019) eKLR and *Kigaraari v. Aya* (1982-88) KAR 768 as cited in the case of *Godfrey Wamalwa Wamba & Another v. Kyalo Wambua* (2018) eKLR. He urged the court to set aside the findings of the trial court and award Kshs. 100,000/= as general damages.
 8. On his part, the respondent submitted that the trial court was correct in awarding general damages of Kshs. 350,000/= as the amount is proportionate to the injuries sustained. That at the trial, the appellant did not tender any evidence that should be considered by this court and that the weight of whatever evidence was adduced simply favoured the award. He relied on the case of *Cecilia Mwangi & Another v. Ruth Mwangi* CA 251 of 1996 and *Nancy Oseko v. Board of Governors Masaai Girls High School* (2011) eKLR and argued that no amount of damages is enough to restore the injured person completely.
 9. I have considered the trial court's record, the pleadings and submissions by the parties at trial and the pleadings and submissions in this appeal. In my view, the issue for determination is whether the general damages awarded by the trial court are excessive.



10. It is worth reiterating that the appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of *Okeno vs. Republic* (1972) EA 32 wherein 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.”

11. Before awarding the general damages of Kshs. 350,000/=, the trial court relied on the cases of *Vincent Mbogholi v. Harrison Tunje Chilyalya* (2017) eKLR and *G4S Security Service (K) Ltd v. Jackline Nagome Barare* (2017) eKLR as quoted in the case of *Sofia Yusuf Kanyare v. Ali Abdi Sabrte & Another* Nairobi HCCC No. 478 of 2007. The trial magistrate noted that at the trial, the respondent was still using crutches to walk and had an evident limp in his step.

12. 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. In the case of *John Kipkemboi & Another v. Morris Kedolo* (2019) eKLR where 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 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 Vs Michael Kariuki Kamau* (2007) eKLR.”

13. Further, I also note that there is no amount of money that can compensate the respondent herein for the pain and incapacity she suffered physically, emotionally and in all other spheres of her life. This was echoed in the case of *H. West & Son Ltd -vs-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.”



14. The respondent produced a medical report by Dr. Roger Hannington Kayo which stated that the respondent suffered a mild head injury, blunt injury on the chest and both upper and lower limbs, cut wound on the head and both hands, avulsion on the right lower limb, bruises on both hands, blood loss, soft tissue injury and physical and psychological pain. The doctor stated that the respondent suffered grievous harm and recovery will be gradual, leaving behind scars of cosmetic significance.
15. In comparing the awards by other courts on similar injuries, I am guided by the case of Peter Njuguna Vs Francis Njuguna Njoroge (2015) eKLR, the court awarded Kshs. 230,000/= for bruises on the occipital region of the scalp, deep cut on the forehead, bruises on the chest and lower back, bruises on the right elbow, bruises on both hands, tender left knee joint and a broken tooth. In the case of Francis Omari Ogaro v JAO (minor suing through next friend and father GOD) (2021) eKLR, the court reduced an award of Kshs. 250,000/= to Kshs. 180,000/= on appeal for similar injuries. In the case of Daniel Gatana Ndungu & another v Harrison Angore Katana (2020) eKLR, the appellate court reduced an award of Kshs. 350,000/= to Kshs. 140,000/= for injuries in the nature of a cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. In the case of Fred Barasa Matayo v Channan Agricultural Contractors (2013) eKLR the court reviewed downwards an award of Kshs.250,000/= to Kshs.150,000/= to moderate soft tissue injuries that were expected to heal in eight months' time.
16. In the present appeal, it is necessary to disturb the award of the trial court given that the same seems inordinately high, even considering the effects of economic inflation. In the cases of Butt v Khan (1981) KLR 470 and Kitavi v Coastal Bottlers Ltd (1985) KLR 470 the court held thus:

“Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on these areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low.”
17. In conclusion, I have considered all the pleadings and submissions of the trial court, the submissions of the parties to this appeal and the relevant law. The appellant did not challenge the trial court's findings on liability and special damages and therefore, the same shall remain unsettled.
18. I do find that the appeal is meritorious and is hereby allowed. I hereby make the following orders:
 - a. Liability is sustained at 100% by the appellant;
 - b. Special damages (medical expenses) Kshs. 3,650/= with interest from the date of filing the plaint, that is 16th February 2022 until payment in full;
 - c. General damages for pain and suffering of Kshs. 350,000/= as awarded by the trial court is hereby set aside and substituted with Kshs. 180,000/=, payable with interest from the date of this judgment until settlement in full; and
 - d. Costs of this appeal to be borne by the respondent, with interest at court rate.
19. 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

