



**Ongeta v AO Baysuf & Sons Ltd (Civil Appeal E041 of 2022)
[2024] KEHC 2650 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E041 OF 2022
HI ONG'UDI, J
MARCH 12, 2024**

BETWEEN

JOSEPHINE KERUBO ONGETA APPELLANT

AND

AO BAYSUF & SONS LTD RESPONDENT

*(being an appeal from the Judgement by Hon P. K. Mutai (SRM) delivered on
6th June, 2022 in Kisii Chief Magistrate's Court Civil Case No. No. 462 of 2019)*

JUDGMENT

1. Josephine Kerubo Ongeta the appellant herein had in the lower court sued A. O. Bayusuf & Sons Ltd the respondent claiming general and special damages, costs and interest arising from injuries she suffered as a result of an accident involving her and the respondent's vehicle. In the course of the hearing, the two parties entered into a consent in respect of liability in the ratio of 65:35 in favour of the appellant. Thereafter the general damages were assessed at Ksh 400,000/= and special damages at Ksh 40,820/= Judgment was delivered on 6th June, 2022 plus costs and interest.
2. Being dissatisfied with the Judgment the appellant filed this appeal citing the following grounds: -
 - i. The learned trial Magistrate misdirected himself in fact and in law, when he failed to properly or at all evaluate and/or analyze the evidence on record cumulatively and/or exhaustively, thus the learned trial Magistrate reached an erroneous conclusion insupportable by the evidence on record.
 - ii. The amount of general damages that the learned trial Magistrate awarded of Ksh 400,000/= is inordinately low and not comparable to similar awards sustained by the appellant.



- iii. That the learned trial Magistrate did not consider the submissions of the appellant and authorities cited in awarding general damages thus occasioning serious injustice against the respondent.
 - iv. That the judgment and/or decisions of the learned trial Magistrate is contrary to the weight of the evidence on record.
3. The injuries suffered by the appellant arose from the road traffic accident involving the appellant and the defendant's motor vehicle KCG 242J MAN/ZD4989 Doll make Trailer. The appellant is alleged to have suffered the following injuries: Head injury Deep cut wound on the face Blunt trauma to the right lumbar region Degloving injury to the foot Left foot disarticulation
 4. The appellant was the only witness who testified and she produced the discharge summary (PEXB1); P3 form (PEXB2), police abstract (PEXB3), medical report plus receipt for 6,500/= (PEXB 4a & b) demand notice (PEXB 5), bundle of receipts (PEXB6).
 5. The Appeal was canvassed by written submissions.

The appellant's submissions

6. These were filed by T. O. Nyangosi & Company advocates and are dated 1st December, 2023. It is counsel's submissions that the higher courts will not be quick to interfere with general damages awards save for:
 - i. When the award is inordinately high or low
 - ii. When the trial court proceeded on wrong principles or misapprehended evidence in some material respect. On this he cited the case of Texcal House Served Station Limited and another Jappien & another (Nrb CA No. 134 of 1998).
7. Counsel submitted that damages must be within limits set out by previous comparable decided cases. He stressed on uniformity in awards involving similar injuries. Referring to the medical report by Dr. Ombati he submitted that the appellant's left foot was amputated due to gangrenous as a result of the degloving injury. The permanent disability was assessed at 30% and an artificial foot costing Shs 75,000/= was required. It is his contention that none of this evidence was challenged. Relying further on Nicholas Juma v James Wambua Muli [2020] eKLR; Nyamira Gladys Kwamboka T/A Kwelikweli Enterprises v HOK alias Master IAN (minor suing through next friend and mother BMK) Nyamira Civil Appeal No E063 of 2021 he urged the court to award the appellant his request of Ksh 2,500,000/= in the lower court.

The respondent's submissions

8. The submissions were filed by L. G. Menezes & Co advocates and are dated 18th December, 2023. Counsel set out the principles governing the hearing of first appeals as set out in a number of cases, namely:
 - i. Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No 172 of 2000)
 - ii. Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another (Civil Appeal No 345 of 2000)
 - iii. Virami t/a Kisumu beach resort Vs Phoenix East Africa Assurance Company Ltd (Kisumu HCCC No. 88 of 2002)



9. He has identified two issues for determination being whether the trial court did a proper evaluation of the evidence and whether the award of Ksh 400,000/= was proper in the circumstances of this case. Counsel gave a breakdown of the evidence adduced by the appellant and submitted that the trial court had analyzed it well and arrived at the right decision.
10. On quantum he submitted that an award for general damages is made in consideration of the injuries suffered. Reference was made to the case of *P. N Nashru Ltd v Omar Mwakoro Makengaa* [2018] eKLR and *Kigaraari v Aya* [1982 – 88] KAR 168
11. He submitted further that an appellate court may only interfere with an award of damages if it is shown that the court in making the award considered irrelevant factors or left out a relevant one. Reference was made to the case of *Gitobu Imanyara & 2 Others v A.G* [2016] e KLR. Counsel agreed that comparable injuries should attract comparable awards as held in the cases of *Odinga Jacktone Ouma v Maureen Achieng Odera* [2016] eKLR and *Blue Horizon Travel Co Ltd v Kenneth Njoroge* [2020] e KLR where an award of Ksh 650,000/= was reduced to Ksh 400,000/=

Analysis and Determination

12. This being a first appeal this court has a duty of re-evaluate and re-consider the evidence afresh and arrive at its own conclusion. It also has to bear in mind that it did not see or hear the witnesses and ought to give an allowance for that. See *Selle & another v Associated Moto Boat Co Ltd & another* [1968] E.A 123.
13. Having carefully considered the evidence on record, grounds of appeal, submissions and cited decisions by both parties, I find only one issue falling for determination. The issue is whether the award of Ksh 400,000/= was commensurate with the injuries suffered. The issue of liability was sorted out through a consent by the parties in the ratio of 65:35 in favour of the appellant. Furthermore, the appellant did not raise it as one of the grounds of appeal.
14. I start off from the point that an award is a discretionary exercise by the trial court. A superior court of Appeal will only interfere with that discretion if it finds that the trial court considered irrelevant factors and/or did not consider relevant factors as it made the award. This was the holding in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A. M. Lubia and Olive Lubia* [1985] I KAR 727 where the Court of Appeal stated:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, 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 inordinately high that it must be a wholly erroneous estimate of the damage”.

15. It’s clear from paragraph 5 of the plaint what the injuries complained of by the appellant were. The appellant claims that the trial court did not analyze the evidence correctly and ended up awarding her a very small figure of Ksh 400,000/= instead of the Ksh 2,500,000/= she had asked for.

This is what the trial court stated at Pg 2 of the Judgment:

“The plaintiff largely suffered soft tissue injuries. I find the case of *Blue Horizon Travel Co. Ltd v Kenneth Njoroge* [2020]eKLR more relevant. Considering injuries sustained comparable awards and inflation, I award the plaintiff Kshs 400,000/= as general damages”.



16. In assessing the injuries suffered the court has a duty to consider the evidence of the plaintiff and the medical evidence. In this case the plaintiff who is the appellant told the court through the witness statement which he adopted that: I was rushed to the Kisii Teaching and Referral Hospital by good Samaritans where I was treated for the injuries I suffered. I reported the accident at Kisii Traffic Base where I was issued with a P3 Form which was later filled in by a Medical officer at Kisii Level 6 Hospital, then returned a copy to the same traffic Base where I was issued with a police Abstract Form I later saw Dr. Ombati Timothy Mokuia who prepared a Medical Report for me which I paid for Ksh 6,500/= . I then gave instructions to the firm of M/s T. O. Nyangose & Co Advocates to pursue a claim for compensation on my behalf.
17. When she testified she stated that she had an injury on the leg, skin peeled off, soft tissue injuries and she suffered amputation on her toes which was seen by the court. In cross examination she said she had not healed but she had no evidence of recent medical treatment.
18. The P3 form (PEXB2) and the Medical Report PEXB 4(a) were produced by the appellant, who could not fully explain what the real injuries were. However, from the medical report, the appellant is said to have suffered a serious degloving injury that led to amputation of the left foot due to gangrene. She would therefore need an artificial foot to aid her movement. The permanent disability was assessed at 20% by the doctor.
19. Generally, there is no denial that the appellant suffered the injuries stated in P EXB 2 & 4a. The amputation on the left foot was well noted by the court when the appellant testified. The recommendation by the doctor for an artificial foot valued at Ksh 75,000/= in the year 2019 is not disputed.
20. Considering all the above would the trial court be faulted for the award of Shs 400,000/= as general damages? In the case of *Blue Horizon Travel Co. Ltd* (*supra*) which the respondent relied on in the lower court and this court, the victim suffered fractures which healed after a short while. He did not undergo any amputation.
21. In my view the trial court did not consider the seriousness of the injury on the appellant's left foot which was amputated and an artificial foot had to be purchased. If the respondent was in doubt it should have subjected the appellant to a second medical assessment. This was never done.
22. Besides the cases cited by the counsel for the parties herein, I have also considered the cases of:
 - i. *Crown Bus Services Ltd & 2 Others v B M (Minor suing through his mother and next friend SMA)* [2020] eKLR where an award of general damages of Ksh 2,500,000/= was made for an amputation that led to a disability.
 - ii. *Abdi Werdi Abdulahi v James Royo Mungatia & another* [2019] eKLR where an award of Ksh 3,500,000/= was made in similar circumstances as in No (i) above.
23. The scenario in this matter though serious cannot be compared to the *Crown Bus Services Ltd and Abdi Werdi Abdulahi cases* (*supra*).
24. After due consideration of the facts I am of the view that the award for general damages herein ought to be interfered with by this court which I hereby do.
25. I therefore enhance the award for general damages to Ksh 800,000/= (eight hundred thousand shillings) plus special damages of Ksh 40,820/= (forty thousand eight hundred and twenty shillings). The judgment of the lower court is thus set aside and substituted with the Judgment for 840,020/= (Eight hundred and forty thousand, eight hundred and twenty shillings) plus costs and interest



from the date of the Judgment in the lower court. The award on general damages is subject to 35% contribution.

26. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MARCH, 2024 AT NAKURU.

H. I. ONG'UDI

JUDGE

