**Adembesa & another v Gweno (Civil Appeal E192 of 2023)**
**[2024] KEHC 5379 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5379 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL E192 OF 2023**

**RE ABURILI, J**

**MAY 17, 2024**

**BETWEEN**

**HUMA OSCAR ADEMBESA ..... 1ST APPELLANT**

**ANTHONY WESONGA OPWORA ..... 2ND APPELLANT**

**AND**

**JOHN ODIWOUR GWENO ..... RESPONDENT**

***(An appeal arising out of the judgment and decree of the Honourable K. Cheruiyot in the Chief Magistrate's Court at Kisumu delivered on the 18{{^th}} October 2023 in Kisumu CMCC No. 48 of 2018)***

**JUDGMENT**

## Introduction

1. The Respondent's suit against the appellants in the lower Court was that on the 24th March 2017, whilst being a lawful fare paying passenger in motor vehicle registration no. KBL 724M along the Kisumu – Busia road, the 2nd appellant being the 1st appellant's driver drove motor vehicle registration No. KBT 824C ZD negligently so as to cause it to collide with the Motor vehicle registration Number KBL 724M, leading the respondent to sustain the injuries pleaded.

2. The appellants filed a joint statement of defence dated 4th May 2018 denying the averments of the respondent and contended that the accident was caused by the contributory negligence of the driver of motor vehicle registration no. KBL 724M.

3. The respondent John Odiwour Ogweno testified as PW1 that the appellant's trailer swerved to their side and hit the bus in which he was travelling thereby causing it to roll off the road. At the time of testifying, the respondent averred that he normally felt chest pains and that he normally took drugs

from the chemist. In cross-examination, the respondent stated that he usually gets medicine from the chemist whenever he felt unwell.

4. PW2, George Mwita testified that he examined the respondent on the 4.4.2017 following the accident that had occurred on the 24.3.2017. It was his testimony that the respondent was initially treated at Port Florence Hospital for soft tissue injuries on the head, back, chest, head, shoulders, elbow joints and knees. In cross-examination, PW2 testified that he examined the respondent 2 weeks after the accident and that the respondent sustained soft tissue injuries. PW3 No. 83516 P.C. Mwakwelekeve Njoya testified on the report of the accident and his issuing of the abstract to the respondent on the 24.8.2017.

5. PW4, Jared, a clinical officer at JOOTRH. He reiterated the injuries sustained by the respondent as detailed in the P3 form filed on the 4.4.2017 as well as treatment notes dated 24.3.2024.

6. The appellants did not call any evidence to controvert the testimonies of the respondent and his witnesses.

7. The trial court in its judgement found the appellants liable at 100% for the occurrence of the material accident and proceeded to award general damages of Kshs. 1,200,000, and Kshs. 200,000 for surgical correction to remedy the deformity occasioned by the fracture.

8. The appellants being dissatisfied with the judgment and decree of the Trial Court on quantum awarded, filed a Memorandum of Appeal dated 12th September 2023 raising the following grounds of appeal:

   SUBPARA 1.

   The learned trial magistrate erred in law and fact in making an award on general damages of Kshs. 1,200,000 that was inordinately too high as to amount to an erroneous estimate of the loss or damage suffered by the respondent.

   SUBPARA 2.

   The learned trial magistrate erred in law and fact in failing to appreciate that the injuries suffered by the respondent which were soft tissue injuries could not attract the inordinately high general damages.

   SUBPARA 3.

   The learned trial magistrate misdirected himself in arriving at a wrong estimate in awarding damages which was against the weight of evidence adduced as regards the injuries suffered by the respondent.

   SUBPARA 4.

   The learned trial magistrate erred in assessing general damages by failing to apply the principles applicable in award of damages and comparable award for analogous injuries.

   SUBPARA 5.

   The learned trial magistrate erred in awarding a sum of Kshs. 200,000 for future medical expenses which were neither pleaded nor proven by the respondent.

9. The appellant's prayer is for this Court to set aside the trial magistrate's judgment and substitute it with its own assessment.

10. The appeal herein was canvassed by way of written submissions.

**The Appellants' Submissions**

11. The appellants' counsel submitted that the trial court relied on alien evidence that was never adduced in court. It was submitted that the award of Kshs. 1,200,000 as general damages was an error in law and fact as it is inordinately too high as to amount to an erroneous estimate of the loss suffered by the Respondent who suffered soft tissue injuries which have often fetched an award ranging between Kshs. 50,000 to about Kshs. 250,000 depending on the severity of the injuries.

12. It was submitted that the trial court took into account irrelevant factors by importing evidence of injuries not pleaded or brought before the court by relying upon alien evidence of Dr. Obina from Kendu Adventist and Dr. Olima both of whom are strange to the proceedings as they neither testified nor produced any evidence pertaining to the suit.

13. The appellant submitted that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases as was held in the case of Tom Obita Ndago & Another v Alfonse Omondi Otieno [2015] eKLR .

14. It was submitted that an award of Kshs. 70,000 would be sufficient for general damages. Reliance was placed on the following cases:

    i. George Mugo & another V AKM (minor suing through next friend and mother of A.N.K [2018] where Kemei J substituted an award of Kshs. 300,000 with an award of Kshs. 90,000 for soft tissue injuries to the left shoulder, blunt chest injury, bruises to the left wrist and blunt injury to the left arm.

    ii. HB (MINOR SUING THROUGH MOTHER & NEXT FRIEND DKM) v Jasper Nchinga Magari &Another [2021] eKLR wherein Nyakundi, J upheld the award of the trial court of Kshs. 60,000 for blunt injury to the head, neck, thorax, abdomen and limbs.

15. The appellant submitted that the trial court erred in awarding a sum of Kshs. 200,000 for future medical expenses which were neither pleaded nor proven by the Respondent as the respondent did not suffer any fracture neither pleaded nor adduced any evidence in proof of future medical expenses at all. Reliance was placed on the case of *Pride Kings Security v Ekaalet (Civil Appeal E009 of 2022)* [2023] KEHC 20284 (KLR) (17 July 2023) (Judgment) where it was held interalia that "On future medical expenses, I note, from the plaint, that the same were not pleaded. Such expenses are in the nature of special damage, and it its trite that for special damages to be awarded, special damage must not only be specifically pleaded, it must equally be specifically proved."

**The Respondent's Submissions**

16. On behalf of the respondent, it was submitted that the injuries he sustained were classified as maim and that an award of Kshs. 200,000 would compromise adequate compensation for pain and suffering for the bone and soft tissue injuries. Reliance was placed on the cases of:

    i. *Wahinya v Lucheveleli (Civil Appeal E046 OF 2021)* [2022] KEHC 13762 where the respondent sustained injury to the left lateral chest wall, blunt injury to the right upper limb, blunt injury to the right upper limb, blunt injury to the right thigh and left leg and the court upheld the trial court's award of Kshs. 200,000.

    ii. Pitalis Opiyo Ager v Daniel Otieno Owino & Another [2020] eKLR where the trial court upheld the trial court's award of Kshs. 200,000 in respect of soft tissue injuries.

**Analysis and Determination**

17. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact.

18. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the Court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. The issue for determination faced by this court is whether the trial court erred in fact and law in its assessment of the damages to the respondent.

20. Courts have reiterated innumerable times that an appellate Court can only interfere with the sum awarded where an appellant demonstrates that the award is too high or so low as to amount to an outright error in assessment of damages, or that in coming to that assessment the Court took into account an irrelevant matter or that it failed to take into account a relevant matter. The Court of Appeal in Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates [2013] eKLR held as follows-

> " We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled... This principle was adopted with approval by this Court in Butt v Khan [1981] KLR 349 where it was held per Law, JA:
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> "... 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..."

21. The award of the amount of Kshs. 1,200,000 in general damages was challenged for being such inordinately high and excessive in light of the injuries sustained by the respondent. It was contended that the Trial Court did not take into account the authorities submitted by the appellants and in addition, that the Trial Court in its award and that the trial court in awarding damages for future medical treatment, it did so on no concrete basis as the same was not pleaded nor specifically proven.

22. In this case, the respondent pleaded that he sustained the following injuries in the material accident:

Injury to the head

Chest injury

Neck injury

Bruises on shoulders

Bruises both knees

Bruises both legs

23. The aforementioned injuries were reiterated by PW2, George Mwita who testified that he examined the respondent on the 4.4.2017 and that the nature of injuries were soft tissue.

24. The appellants did not call any witness in support of its case nor did they produce any documents of the same.

25. It is trite that where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

26. The fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR the court stated:

> " I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.
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> (See Kirugi and Another v Kabiya and Others [1983] e KLR).

27. The respondent despite the absence of evidence from the appellants was obligated to prove its case on a balance of probabilities and looking at the evidence adduced before the trial court I find that the respondent proved the injuries she had sustained.

28. The documents proving the respondent's injuries were admitted into evidence without any challenge from the appellants and the appellant cannot now turn and allege to impugn the same when they failed to do the same at the trial court

29. Therefore, taking into account the evidence adduced before the trial court it is clear that the respondent sustained soft tissue injuries to the head, back, chest, head, shoulders, elbow joints and knees.

30. In the instant case, the trial magistrate awarded Kshs 1,200,000 for general damages, which amount the appellants regard as inordinately high. The respondent submitted that an award of Kshs. 200,000 would suffice.

31. The Court of Appeal observed in Simon Taveta v Mercy Mutitu Njeru [2014] eKLR 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."

32. I have considered the authorities relied on by both parties in this appeal as well as before the trial court.

33. In the case of Ephraim Wagura Muthui & 2 others V Toyota Kenya Limited & 2 others [2019] eKLR where the court assessed damages at Kshs. 100,000 for soft tissue injuries.

34. In Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others [2019] eKLR Majanja J set aside the lower court award of Kshs. 55,000 for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000.

35. The award in the case of Ephraim Wagura (supra) was made five years ago and as this court must take passage of time and inflation into account, although the suit was initiated in court in 2018, it was not until 2023 October 18th, five years later that judgment was rendered.

36. I hasten to add that the trial magistrate could have, at the material time of writing the judgment been handling another similar matter hence the mention of medical reports and injuries that were not part of this case by the respondent including fracture of the tibia and fibula and kshs 200,00 for correction of the fracture deformity. That being the case, what the appellants could have done, would be to apply for review of the judgment since it was apparent that there was an error on the face of the record. The trial magistrate could easily have seen those errors and corrected them under section 99 of the *Civil Procedure Act* which stipulates that:

> "
>
> "99. Amendment of judgments, decrees or orders
> Clerical or arithmetical mistakes in judgments, decrees or orders, or errors
>
> arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

37. This is so because the claim for future medical treatment was never pleaded and neither were there medical reports produced which he relied on in making the award or identifying the fracture to tibia and tibula. Therefore, there was no basis for the award of the same and in my view, the trial court made an inadvertent and not deliberate error in making the awards which are hereby set aside.

38. In the end, I find that the award of damages by the trial magistrate was grossly and manifestly excessive, exorbitant and based on no material placed before it whether by way of pleadings on the injuries sustained or medical documents produced.

39. In the premises, this court is inclined to interfere with the discretion of the learned trial magistrate and does so by setting aside the award of Kshs. 1,200,000 as general damages and as well as the kshs 200,000 award for cost of correction of deformity in the fracture site which was plucked from nowhere and substitutes the award of general damages with an award of kshs 120,000 general damages for pains and suffering and loss of amenities.

40. In the circumstances I thus set aside the judgment and decree of the lower court and enter judgement for the respondent as follows, taking into account the award on general damages was in my view grossly and inordinately high, inflation, the soft tissue injuries sustained by the respondent assessed to be harm and time lapse since the cited awards were made: General damages for pain & suffering – Kshs. 120,000

41. Accordingly, this appeal succeeds on reduction of general damages for pain and suffering of Kshs 1,200,000 and Kshs 200,000 for surgical correction which injury was non-existent.

42. As the damages are substantially reduced, each party shall bear their own costs of the appeal.

43. The trial court file to be returned to the lower court together with a copy of this judgment forthwith.

44. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MAY, 2024**

**R.E. ABURILI**

**.....**

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**