



**Gicovi v Kinyua (Civil Appeal E039 of 2023)  
[2024] KEHC 5716 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5716 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E039 OF 2023  
LM NJUGUNA, J  
MAY 22, 2024**

**BETWEEN**

**DAVID NJUKI GICOVI ..... APPELLANT**

**AND**

**LINUS MWANIKI KINYUA ..... RESPONDENT**

*(Appeal arising from the decision of Hon. J.W. Gichimu in the Magistrate's Court at Runyenjes Civil Suit No.83 of 2022 delivered on 24th April 2023)*

**JUDGMENT**

1. The appellant filed a memorandum of appeal dated 26<sup>th</sup> July 2023 challenging the above cited decision of the trial court and seeking the following orders:
  - a. That the appeal be allowed and trial court's judgment be set aside;
  - b. That the court be at liberty to make such further or alternative orders as it deems proper in the circumstances; and
  - c. The appellant be granted the costs of appeal.
2. The appeal is premised on the grounds that:
  - a. The learned trial magistrate erred in law and fact in failing to consider adequately or at all, the submissions by the appellant and the authorities submitted;
  - b. The learned magistrate erred in law and fact in failing to appreciate the fact that the respondent failed to prove his case on a balance of probabilities;
  - c. The learned trial magistrate erred in law in awarding damages which were inordinately high considering the nature of the injuries; and



- d. The learned magistrate disregarded the findings by judges of a superior court when awarding damages.
3. Through a plaint dated 23<sup>rd</sup> September 2022, the respondent sought judgment against the appellant for general damages for pain and suffering, loss of amenities and future medical expenses, special damages of Kshs.39,290/= and costs. The particulars of the tortious claim were that on or about 02<sup>nd</sup> April 2022, the plaintiff was lawfully riding his motor cycle registration number KMCU 837W along Embu-Meru road within Kawanjara area when the driven, servant and/or employee of the motor vehicle registration number KBY 135Y drove, managed and/or controlled the same so negligently, carelessly and/or recklessly that he caused or permitted the same to violently hit the aforementioned motorcycle, causing the respondent serious bodily injuries.
4. The injuries suffered were lower limb lacerations and fractured tibia and fibula. The respondent held the appellant vicariously liable for the accident and detailed that he would need treatment spanning into the future. The appellant filed a statement of defense in which he denied the averments made in the plaint.
5. At the hearing, PW1 was the respondent who stated that the respondent's motor vehicle hit his motor cycle from behind in the circumstances stated in the plaint. That as a result of the accident, his leg was injured and he was admitted and treated at Tenri Hospital, Embu Level 5 Hospital and Afya Bora Mwea Hospital. That a metal plate was inserted in his leg and it would have to be removed in the future at a cost of Kshs.300,000/=. He stated that since the accident, he limps and he needs physiotherapy at Kshs.1,000/= every month. He produced receipts of the payments made for treatment at the various hospitals. On cross-examination, he stated that at the time of the accident, he was wearing a reflector jacket and a helmet. That he went to driving school and he understands traffic rules. That he procured a driving licence in 2018. He stated that he still limps as a result of the injuries sustained.
6. The appellant did not testify at the trial. The trial court, in its judgment relied on the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR and observed that the appellant did not adduce evidence challenging the respondent's claim. He also noted that the appellant did not file submissions and he considered the submissions of the respondent who proposed an award of general damages of Kshs.1,200,000/=. The trial magistrate relied on the cases of *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR and *G4S Security Services (K) Ltd v Jackline Nagome Barare* [2017] eKLR where the courts urged that damages should be awarded at the court's discretion and considering similar decided cases. He held the appellant 100% liable for the accident and awarded special damages as prayed and general damages of Kshs.950,000/=.
7. The court directed the parties in this appeal to file their written submissions but only the respondent complied.
8. The respondent submitted that he proved his case to the required standard and he relied on the cases of *Ngugi v Karanja* (Civil Appeal no 161 of 2018) KEHC 236 (KLR) where the court cited the case of *William Kabogo Gitau v George Thuo & 2 others* [2010] 1KLE 52 and *Kenya Akiba Micro Financing Limited v Ezekiel Chebi & 14 others* [2012] eKLR. It was his submission that the trial court was guided by the cases of *Wurano Tosha & Another v DMK* [2021] eKLR and *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another* [2015] eKLR in awarding damages as was submitted in the trial court. Further reliance was placed on the case of *Catholic Diocese of Kisumu v Tete*[2004] eKLR. He urged the court to dismiss the appeal.
9. The issue for determination is whether the trial court's award of general damages is fair in the circumstances.



10. It is worth reiterating that the appellate court makes its decision purely based on the record and evidence adduced before the trial court as was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

11. I do note that the appellant did not testify at trial, neither did he file any submissions and the trial magistrate noted as much. In his grounds of appeal, the appellant stated that the trial magistrate erred in failing to consider his submissions. This is inaccurate since there were no submissions by the appellant to be considered.

12. Assessment of damages should be in such a manner that is just and fair while the court compares awards of similar decided cases. This was held 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 v Michael Kariuki Kamau* [2007] eKLR.”

13. The trial magistrate considered the cases of *Vincent Mbogholi v. Harrison Tunje Chilyalya* [2017] eKLR and *G4S Security Services (K) Ltd v Jackline Nagome Barare* [2017] eKLR in determining general damages. In the case of *G4S Security Services (K) Ltd v Jackline Nagome Barare* [2017] eKLR the injuries were more severe than the ones suffered by the 3 respondents and the court upheld awards of between Kshs.150,000/= to 180,000/=. In the case of *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR the respondent suffered a fracture of the left tibia leg bone (medial malleolus), blunt object injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe. The court upheld an award of Kshs.500,000/=.

14. I have looked at the case of *Sammy Mugo Kinyanjui & another vs. Kairo Thuo* [2017] eKLR where the Respondent suffered slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs, fracture of the right and left tibia and left fibula, he was awarded Kshs.600,000/=. In the case of *Tirus Mburu Chege & another v JKN & another* [2018] eKLR, the Respondent suffered fractures of the tibia and fibula, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness. He was awarded Kshs.500,000/=.



15. From the foregoing cases, even those considered by the trial court, it is evident that the award of general damages is inordinately high given the nature of injuries suffered by the respondent. The same should be reviewed downwards. As for special damages, the sum of the amounts indicated on the receipts produced is Kshs.35,340/=. In the case of *H. West & Son Ltd v Shepherd* [1964] AC. 326 the court 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.”

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

- a. Liability is held at 100% by the appellant;
- b. Special damages Kshs.35,340/= with interest from the date of filing the plaint;
- c. The trial court’s finding on General damages for pain and suffering of Kshs.950,000/= is hereby set aside and substituted with Kshs.600,000/= with interest from the date of this judgment until payment in full;
- d. Each party to bear its own costs of the appeal.
- e. Interest shall be at court rates on all monetary awards herein.

17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

