



**Gede Enterprises Ltd v Ondieki alias Samwel Mose (Civil Appeal 41 of 2023) [2024] KEHC 5764 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5764 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 41 OF 2023**

**TA ODERA, J  
MAY 15, 2024**

**BETWEEN**

**GEDE ENTERPRISES LTD ..... APPELLANT**

**AND**

**INNOCENT MOSE ONDIEKI ALIAS SAMWEL MOSE ..... RESPONDENT**

*(Being an appeal from the Judgment delivered by Hon. C.A OGWENO (SRM) on 18th April 2023 in KISII CMCC NO 97 OF 2019)*

**JUDGMENT**

**Introduction**

1. This Appeal arises from the Judgment delivered on 18<sup>th</sup> April, 2023 in Kisii CMCC NO 97 of 2019 whereby the Appellant was found to have been 100% liable injuries sustained by the Respondent in whose favor an award was preferred as follows;
  - a. General damages at Kshs.400,000
  - b. Special damages at Kshs. 11,990
2. Aggrieved by the decision of the trial court filed this appeal based on the grounds that;
  - a. That the learned trial magistrate erred in law and misdirected herself when she failed to consider the appellant's submissions on both points of law and facts.
  - b. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.



- c. That the learned magistrate erred in law and misdirected himself when she failed to consider the provisions set out in the insurance (*Motor Vehicle Third Party Risks (Amendment) Act, 2013, CAP 405.*)
  - d. The learned magistrate erred in law and in fact in finding the Defendant/Appellant 100% liable in view of the evidence produced before the trial court and in particular that the Plaintiff/Respondent failed to prove his case on liability against the Defendant/Appellant.
  - e. The learned trial magistrate erred in law and in fact in awarding the Plaintiff/Respondent Kshs.411,9901= for damages hence arriving at a wrong finding as regards the nature of injuries sustained by the plaintiff.
  - f. The Learned trial magistrate erred in law and fact by awarding the plaintiff and high quantum as damages in the circumstances of this case.
  - g. The learned trial magistrate erred in law and fact in awarding the Plaintiff a highly excessive sum as to an amount that is so erroneous as to the estimate of injuries suffered by the Plaintiff.
  - h. The Learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on quantum and liability and legal authorities relied upon in support thereof.
    - i. The Learned trial magistrate erred in law and fact by overly relying on the Plaintiff/Respondent's submissions which were not relevant and without addressing her mind to the circumstances of the case.
  - j. The learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
3. Based on the grounds of Appeal the Appellants sought for the following orders;
- a. That this appeal be allowed with costs
  - b. The Judgment delivered by the trial court on 18<sup>th</sup> April 2023 by Honourable C.a Ogweno (srm) be set aside and a judgment of this court dismissing the suit against the Appellant with cost be entered in its place.
  - c. That without prejudice to prayer (b) above this Honourable court re-assesses apportionment of liability and general damages and reduce the same.
  - d. The costs of this Appeal and those of the trial court be awarded to the Appellant.
  - e. That such further orders that may be made by this honorable court may deem fit to grant.
4. The background of the matter is that the Respondent filed a suit against the Appellant vide a plaint dated 19<sup>th</sup> February, 2019 seeking general damages for the pain, suffering loss of amenities to be assessed by the court, special damages of Kshs. 9,670, costs of the suit and interests.
5. To support his claim the Respondent alleged that on or about 24<sup>th</sup> September, 2018, while travelling as a pillion passenger on a motor cycle registration number KMEE 805X, along Kisii-Nyamira road. When at Getare area, the Appellant's driver who was driving negligently a motor vehicle Registration number KCQ 417N registered in the name of the Appellant caused the said vehicle to veer off the road and knocked the said motorcycle from behind and as a consequence the Respondent sustained injuries which included bruises on the left elbow, laceration on the teeth, laceration on the back, deep cut wounds on the scalp, one loose (mobile) tooth on upper jaw and fracture two on upper jaw. She thus prayed the Appellant to be held vicariously liable for the negligence actions of her driver.



6. In its Defense, the Appellant denied allegations against it and pleaded that if an accident had occurred the same was contributed by the negligence or recklessness of the Respondent and the rider and/or the owner of the motor cycle registration number KMEE 805 X.
7. The learned trial Magistrate upon hearing all the parties delivered its judgement date on 18<sup>th</sup> April, 2023 wherein it held as follows;

“

“i. Liability

The NTSA copy of records show that Gede Enterprises Limited is the registered owner of motor vehicle registration number KCQ 417N.

The plaintiff's evidence is that he was aboard the motorcycle when he was hit from behind by the subject motor vehicle. The police indicated that the vehicle was trying to overtake while heading towards the same direction as the motorcycle when it hit the motorcycle.

This evidence remained uncontroverted by the defense who failed to call any evidence in support of its case.

The High Court in Trust Bank Limited versus Paramount Universal Bank Limited & 2 others [2009] eKLR held that where a party fails to call any evidence in support of his case, his pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

ii. Quantum

I have perused the medical records produced by the Plaintiff. The P3 form and medical report by Dr. Peter Morebu show that the plaintiff sustained bruises on the left elbow, laceration on the mouth, laceration on the back, deep cut wounds on the head, one loose tooth on the upper jaw and fractured two teeth on the upper jaw.

The defense argued that the variance in the treatment notes and medical report was a ground for the court to determine quantum based on the initial treatment notes as primary evidence of the actual injuries sustained by the Plaintiff.

I did however confirm that the P3 form was filled by a different medical officer 13 days after the accident. It also noted that the plaintiff had fractured his two teeth on the upper jaw. I found no reason to therefore doubt the authenticity of the P3 form as well as the Medical Report.

The defense did not controvert the said injuries by way of a 2nd medical report. The Court thus proceeds to determine quantum based on the report by Dr. Morebu.

In determining quantum, the Court is guided by the decision of the High Court in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR) where it was held that general damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.

The plaintiff has submitted the sum of Kshs 1,200,000/- in general damages would be fair in the circumstances. He cited the following decisions: -



1. Kariuki M'Ng'onde versus Philip Miriti & 2 others (2005) eKLR. Where the court awarded Kshs 1,500,000/- where the plaintiff sustained more or less similar injuries.

In this case the Plaintiff had sustained amputation of the left lower the knee fracture of the left scapular and clavicle and other soft tissue injuries these were more serious injuries which were not comparable to the matter at hand.

2. Vincent Cheruiyot Rono versus Mombasa Maize Millers Limited (2006) eKLR where the court awarded Kshs 400,000 for multiple soft tissue injuries.

The defendant on the other hand submits that an award of Kshs 90,000/- would be adequate in the general damages for the injuries suffered.

The defense relied on the following authorities: -

1. Ndungu Dennis versus Ann Wangari Ndirangu & another [20181 eKLR where the Court awarded the sum of Kshs 100,000/- for soft tissue injuries to the lower back and leg.
2. Charles Momanyi & another versus Godfrey Ogoti Seme [20191 eKLR where the Court awarded Kshs 90,000/- to a plaintiff who had sustained soft tissue injuries to the forearm, foreleg and right arm.

I have considered the authorities cited above. They were irrelevant and incomparable to the injuries suffered by the Plaintiff.

The High Court in Washington Mukunya Karanja & another v Margaret Wambui Maina [2020) eKLR upheld the lower Court's award of Kshs 300,000/- for swelling of upper part of mouth, alveolar fracture of both incisor teeth, soft tissue injuries on right leg and superficial wound.

I have taken appreciation of the various authorities and using its closest approximation of the compensable value of the injuries in the case before me, relative to those cited in authorities, and given the passage of time as well as inflation, I award general damages to the plaintiff in the sum of Kshs 400,000/= to be reasonable compensation in the circumstances.

#### E. Special damages

The Plaintiff has produced receipts adding up to Kshs 11,990 /- only in special damages. I allow the same as proven.

#### F. Conclusion

Judgment is hereby entered in favor of the Plaintiff against the defendants jointly and severally as follows:

- a. Liability at 100% in favor of the plaintiff as against the defendant.
- b. General damages at Kshs 400,000/-
- c. Special damages of Kshs 11,990/-
- d. Costs of the suit.
- e. Interest on (b) and (c) at Court rates from the date of judgment till payment in full.”



8. It is against this decision that the Appellant filed this Appeal. This court with the consent of all the parties directed that the Appeal to be disposed of by way of written submissions. The Appellants filed the written submission through the learned counsel on 13<sup>th</sup> December, 2024, while the Respondent's submissions were filed on 7<sup>th</sup> December, 2023.

### **The Appellants Submissions**

9. The learned counsel for the Appellant submitted the Respondent did not produce any document to prove that actually he was the person who was involved in the accident in question. He contended that the respondent did not produce an identity card or swear an Affidavit to demonstrate that Innocent Mose Ondiek is the same person as Samuel Mose whom according to P3 was involved in the accident.
10. On liability the learned counsel submitted that, the plaintiff did not produce the motor vehicle inspection of the motor cycle to show that the motor vehicle was knocked from behind. He equally argued that the plaintiff had admitted that he was not wearing a helmet as legally required given that the same was a legal requirement. It was therefore his conclusion that the Plaintiff injuries were attributable to her own negligence.
11. On quantum the learned counsel the injuries sustained by the Plaintiff according to the testimony of Dr. Morebu at cross-examination were merely soft tissue injuries and thus on a higher. On a rather change of stand the learned counsel contended that the respondent ought to have been awarded Kshs. 50,000 as opposed to the Kshs. 90,000 he had suggested to the lower court and the Kshs. 400,000 awarded to by the lower court. The learned counsel relied on the case HB (Minor suing through mother and next friend DKM) vs Jasper Nchonga Magari and another (2021 eKLR where the court upheld an award of Kshs. 60,000 to the Plaintiff who suffered blunt object injuries to head, neck thorax abdomen and limbs.
12. He thus urged this court to allow the Appeal and set aside the Judgement to the trial court.

### **The Respondents Submissions**

13. The learned counsel for the Respondent with regard to quantum submitted that the assessment of general damages was based on the discretion of the trial court and that this court ought to only interfere with the same if it is satisfied that the trial court;
  - a. Took into account an irrelevant factor
  - b. Left out of account a relevant factor
  - c. The award is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.
14. The learned counsel in bid to support the above argument relied on the cases Paul Kipsang Koech and another vs Titus Osule Osore (2013) eKLR and Kiwanjani Hardware Ltd & another vs Mule Mutinda (2008) eKLR.
15. On whether the award of 411,900 for general and special damages was inordinately excessive, the learned counsel submitted that the Appellant in its appeal did not demonstrate that the trial court made assessment of damages based on wrong principles. He contended that generally assessment of damages for personal injuries is guided how courts have previously decided in order secure some uniformity. He underscored that it is desirable that so far as possible by comparable injuries should be compensated by comparable awards. He supported his argument by the case of (Civil Appeal No. 1996 Cecilia Mwangi & another vs Ruth W. Mwangi (unreported) as cited in Mumias Sugar Company Ltd vs Julius Abuko



Shibia (2015) eKLR and the case of Telkom orange kenya LTD vs ISO minor suing through his next friend and mother (2018) eKLR. Based on the above submission the learned counsel submitted that there was no error detected on the part of the trial court that would warrant interference. He argued the award was commensurate with the injuries sustained by the Respondent which were bruises on the left elbow, lacerations on the teeth, laceration on the back, deep cut wound on the scalp, one loose (mobile) on the upper jaw, fractured two teeth on the upper jaw as was proved by the evidence of Dr. Morebu. The learned counsel argued too that the trial court guided by the findings in the case of Washington Mukunya Karanja and another vs Margret Wambui Maina (2020) eKLR reasonable award in the sum of Kshs. 400,000.

16. The learned counsel thus contended that the amount awarded by the trial court was not inordinately excessive so as to warrant this Honorable court to interfere with the same.
17. On liability the learned counsel submitted that the respondent's evidence was clear that he was a motor cycle registration number KMEE 805X along Kisii-Nyamira Road at Getare Area when the driver of motor vehicle number, KCQ 417N knocked the said motor cycle registration number, KMEE 805X from behind. The learned counsel underscored that the Appellant never called any witness especially the driver of the motor vehicle number, KCQ 417N to challenge the evidence of the Respondent and thus the testimony of the Respondent remained unchallenged. The learned counsel equally submitted that the appellant did not join the rider of the motor cycle to the suit so as to shift blame to him considering that the Respondent was a pillion passenger of the said motor cycle and thus not in control of the same.
18. The learned counsel equally submitted that the trial had the opportunity of seeing and taking evidence and also had a look at the submissions filed by both parties and thus it arrived at a reasoned decision that this court should uphold and dismiss the Appeal with costs to the Respondent.

### **Issues Of Determination**

19. Having analyzed the grounds of Appeal, reviewed the written submissions filed by the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the issues of determination are.
  - a. Whether the respondent was involved in the accident.
  - b. Whether the trial court erred in its finding that the Respondent was 100% liable for the offense.
  - c. Whether the court should set aside the decision of the lower court and reassess the general damages awarded to the Respondent.

### **Analysis And Determination**

Whether respondent was involved in the accident

The appellant submitted that respondent did not prove that he was involved in the accident as he provided different names in the police abstract, occurrence book and in court. I have seen the plaint filed in the lower court which indicates that the plaintiff is Innocent Mose Ondiek alias Samwel Mose. This is supported by his evidence in Chief. The police abstract indicates Innocent Mose Ondieki . On cross-examination he said he has no document to show both sets name names and that Samuel is a name he uses at home and on re-examination he said Samuel is also his name. PW2 PC Moses Kasera on cross examination said that the victims were Walter Otworu Samuel Mose and Felix Ondari. The issue of national identity card did not arise on cross examination and cannot thus be raised at this stage. It is not strange for one to have two sets on names. In any event the names



were disclosed in the pleadings. I am satisfied on a balance of probability that that innocent Mose Ondieki and Samuel Mose Ondieki are one and the same person that is the respondent herein. The learned trial magistrate thus did not err in finding that the respondent was involved in the accident.

Whether the trial court erred in its finding that the Appellant was 100% liable for the accident.

20. The appellant challenged the 100% finding liability on the ground the respondent admitted that he was not wearing a helmet at the material time as required by law and thus contributed to the accident.
21. The Respondent on the other hand reiterated the findings of the trial court that his evidence was never challenged by the Appellant who failed to present any witness during the defense hearing to challenge the evidence and testimony of the Respondent's witnesses. The Respondent equally argued that the Appellant did not bother to enjoin the rider of the motor cycle as party to the suit and thus there was no way the Respondent was going to take the blame on behalf of a party who was not in the suit bearing in mind that he was not the one in control of the motor cycle.
22. . I have considered the two positions held by the two parties as well as the findings of trial magistrate that I have summarized herein above and I have noted that the issue of the helmet was not raised either in evidence in chief or cross -examination at all. This issue cannot be raised at this stage appellate stage. The evidence on the causation of the accident was thus not controverted. The learned trial magistrate did not err when she apportioned 100% liability on the appellant
23. The testimonies of the Appellant witnesses it is true that in their evidence, appellant faulted the motor cycle rider for the accident saying that appeared suddenly from a feeder road without notice thus causing the collision. If this was the Appellant's position, then they ought to have joined the rider as a 3<sup>rd</sup> party under Order 1 Rule 15 of the Civil Procedure Rules 2010 so that the issue of who between the Appellant, the rider and the respondent was to blame for the accident could be determined by the trial court. The Appellant did not do so and no witness was called to controvert the evidence of respondent. The respondent pleaded that he sustained the following injuries
  - i. Bruises on left elbow
  - ii. Laceration on the teeth
  - iii. Laceration on the back
  - iv. Deep cut wound on the scalp
  - v. One loose (mobile tooth on upper jaw
  - vi. Fracture of two teeth on the upper jaw /
24. Dr. Morebu examined the respondent on 15.1.19 and found that he sustaiend the following injuries –
  - i. Scars on the left elbow
  - ii. Scars on the feet
  - iii. Scars on the back
  - iv. Scars on the scalp
  - v. Had fractured upper teeth
25. Equally as correctly submitted by the learned counsel for the Respondent as a pillion passenger, the respondent was not in control of the motor cycle and there was nothing he could have done either



to cause or to avoid the accident. I have noted that the issue of the helmet was not raised either in evidence in chief or cross -examination at all. This issue cannot be raised at this stage appellate stage. No contributory liability was proved at all.

26. I have considered the two positions held by the two parties as well as the findings of trial magistrate that I have summarized herein above. The evidence on the causation of the accident was thus not controverted. The learned trial magistrate did not err when she apportioned 100% liability on the appellant

Whether the court should set aside the decision of the lower court and reassess the general damages awarded to the Respondent.

27. The respondent pleaded that he sustained the following injuries –

- i. Bruises on left elbow
- ii. Laceration on the teeth
- iii. Laceration on the back
- iv. Deep cut wound on the scalp
- v. One loose (mobile tooth on upper jaw
- vi. Fracture of two teeth on the upper jaw /

28. Dr. Morebu examined the respondent on 15.1.19 and found that he sustained the following injuries –

- i. Scars on the left elbow
- ii. Scars on the feet
- iii. Scars on the back
- iv. Scars on the scalp
- v. Had fractured upper teeth

29. It is trite law that an appellate court can only disturb an award of damages made by a trial court if it was satisfied that it was either inordinately high or low as to justify an inference that it represented an erroneous estimate of the damage suffered; or that the trial court took into account irrelevant factors or omitted to take into account relevant ones or acted on wrong legal principles in arriving at the award. See: *Mariga V Musila* (1984) KLR 251; *Kemfro Africa Ltd t/a Meru express Services 1976* and *Another V Libia & Another* (1987) KLR 30.

30. The treatment notes from Kisii county referral hospital reveal that the respondent sustained a cut on the occipital region of the scalp. several lacerations on the face, hand and legs. This is supported by the medical report dated 7.6.21 by Dr. Kahuthu who conducted the 2<sup>nd</sup> medical examination found that the injuries were soft tissue and that the initial medical report did not reveal the fracture upper teeth as stated by Dr. Morebu. Initial treatment notes are usually the true reflection of injuries sustained and treatment received. A medical report cannot have injuries which were not in the initial treatment notes. This is because treatment notes are the referral notes for the doctor examining a patient for a medical report. There is no justification for the fracture of the teeth injuries indicated by Dr. Morebu. It is clear that report by Dr. Morebu exaggerated the injuries sustained by the respondent. I find that the respondent sustained a cut on the occipital region of the scalp, several lacerations on the face, hand and legs.



I have seen the case of Lilian Anyango Otieno v Philip Mugoya Ogila [2022] eKLR

where the respondent sustained an injury on the right hand lacerations on the chest and elbow joint and minor lacerations on other parts of the body. General damages were awarded at Kshs 150,000/= . I have taken into account the inflation factor, the nature of the injuries sustained by the respondent herein, the cited cases, the comparable cases and all the relevant factors.

I find that the award of general damages in the sum of Kshs. 400,000/= by the trial court was excessive considering the soft tissue nature of the injuries sustained by respondent and thus I proceed to substitute it with an award of Kshs 100,000/= which I find to be adequate.

### **Conclusion**

The appeal has thus failed on liability but succeeded on quantum. I enter judgment for respondent against the appellant as follows:

Liability 100%

General damages for pain loss and suffering – Kshs. 100,000/=.

Costs to the appellant.

It is so ordered.

**T.A ODERA**

**JUDGE**

**15.5.24**

Delivered virtually Via team's platform in the presence of:

Court Assistant: Oigo

Cheruiyot advocate for the respondent.

N/A for Appellant

