



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngata v Mburu & 2 others (Civil Appeal E218 of 2022)
[2024] KEHC 9603 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 9603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E218 OF 2022
DO CHEPKWONY, J
MAY 17, 2024**

BETWEEN

DAVID GITAU NGATA APPELLANT

AND

CAROLINE WAMBUI MBURU 1ST RESPONDENT

MUNYUA NJOKI EVAJERINA 2ND RESPONDENT

NICHOLAS GITHU WAITHANGA 3RD RESPONDENT

RULING

1. The Appeal emanates from the Judgment of the trial court in Kiambu CMCC No. 276 of 2019 delivered on 31st August, 2022 by Hon. G. Omodho. The suit before the trial court arose from a road traffic accident that occurred on 24th March, 2018 along Kwa maiko -Kirigiti road at Mboi-Kamiti within Kiambu County where the 1st Respondent was a lawful passenger in Motor Vehicle Registration Number KBZ 884S which got involved in a self-involving accident. Therefore, in the Plaintiff dated 4th June, 2019, the 1st Respondent sought Judgment against the Appellant, the 2nd and 3rd Respondents for special damages and general damages.
2. The Appellant entered appearance and filed its Defence wherein the occurrence of the accident was denied. However, on 17th August, 2020, an interlocutory Judgment was entered against the 2nd and 3rd Respondents for failing to enter appearance and or file defence.
3. In the course of the case, the 1st Respondent and Appellant entered consent on liability of 90%:10% in favour of the 1st Respondent which was adopted by the court as an order on 29th June, 2022. In view of this, the only issue left for determination by the trial court was on quantum of damages.



4. Upon consideration of the case, the trial court awarded the 1st Respondent an all-inclusive award of Kshs 300,000/= for general damages and special damages less 10% as agreed on liability together with costs and interest of the suit.
5. Being aggrieved, the Appellant filed the Memorandum of Appeal dated 23rd September, 2022 citing seven(7) grounds which summarised are that the award of Kshs 300,000/= was excessive, undeserved, and based on humanitarian grounds and not the law. The Appellant has urged the court to allow the Appeal and dismiss the whole Judgment of the trial court.
6. The appeal was admitted for hearing on 21st November, 2023 and parties directed to canvass the same by way of written submissions whereby the Appellant's submission are dated 24th January, 2024 while the 1st Respondent's are dated 27th July, 2023.
7. In the Submissions dated 24th January, 2024 the Appellant argue that the decision of the trial court was based purely on humanitarian grounds and not on the law. He argues that the 1ST Respondent did not prove the injuries sustained either through initial treatment notes and or medical report. He also argues that since the 1st Respondent only suffered a single fracture an award of Kshs 150,000/= would have been fair and reasonable. The Appellant has cited several cases where the courts have awarded higher sums due to the seriousness of the injuries contrary to the 1st Respondent who did not suffer such injuries.
8. On her part, the 1st Respondent filed Submissions dated 27th July, 2023 wherein she has raised the following issues which are inter alia; whether it is fair and just that the consent Judgment in Kiambu CMCC No. 276 of 2015 be set aside, whether the consent Judgement in Kiambu CMCC No. 276 of 2015 is just and fair and whether the 1st Respondent ought to be awarded costs.

Determination

9. As a first appellant court, this Court is charged with the duty of revisiting, re-evaluating and analysing the evidence of the trial court, while reminding itself that it did not have the opportunity of seeing or hearing the witnesses as they testified before the court so as to arrive at its own independent decision. See the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 where it was held:-

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”
10. Having considered the grounds of the appeal cited in Memorandum of Appeal herein, this Court has read through the original record of proceedings and the submissions filed by either party and finds that the Appellant is not seeking for the consent Judgment on liability to be set aside but for the quantum



of damages awarded by the trial court to be set aside for having been founded on humanitarian grounds and being excessive and undeserving.

11. Delving into the issue of quantum of damages, it will be noted from the Plaintiff that was filed before the trial court that the 1st Respondent listed the following as the injuries be sustained:-
 - a. Blunt injuries on both legs.
 - b. Fracture of the right mid 1/3 tibia and upper tibia.
 - c. Multiple deep cuts on her legs.
12. According to the witness statement filed by the 1st Respondent, it was stated that, ‘Immediately after the accident I was taken to Ministry of Health Kiambu Level 5 Hospital where I received first aid and since then I have been moving from one hospital to another including Limuru Sub County Hospital in Tigoni for specialised treatment. Due to high medical costs at Limuru Sub County Hospital in Tigoni, I began another phase of treatment in various pharmacies.’ She also listed the following as other incidental injuries:-
 - a. Loss of blood and good health.
 - b. Physical and emotional pain and suffering.
 - c. Loss/missed job opportunities.
 - d. Emotional and mental suffering as a result of the scars sustained which has also limited her dress code.
 - e. Hardship as result with crutches.
 - f. Financial loss.
 - g. Financial loss by my family.
13. In its Judgment, the trial court made the following remarks and findings:-

“I have considered the nature of injuries sustained by the Plaintiff as contained in the Plaintiff. The medical report was incomplete hence did not give any information on the injuries.

I will further go by the oral evidence given on oath by the Plaintiff as to her injuries. The Plaintiff stated that she incurred injuries to her legs including a fracture of the right mid tibia and upper tibia which have since affected her. No X-ray reports were availed to show any fracture incurred. As it were no medical proof is availed to demonstrate that there were injuries sustained. The police abstract alludes that the passenger sustained harm injuries but as I already observed this is not a medical assessment of the injuries. Based on the above reasons and considering that liability was consented to, and further that it is confirmed that indeed the Plaintiff was involved in the road accident, doing my best I will award Kshs.300,000/= as all-inclusive award for both general and special damages. The award is purely on humanitarian grounds based on the fact that liability was consented to and proof that the Plaintiff has been undergoing treatment to bring her health back to normalcy.”



14. It is trite law that this court has powers to interfere with an award made by the trial court if the same is based on wrong principles of law. This principle was adopted with approval by this Court in the case of Butt –vs- Khan [1981] KLR 349 where it was held per Law, JA:

“ ... 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...”

15. It is also trite that a court should award damages that are commensurate to the injuries that a claimant has sustained. In this case, a reading of the original record of proceedings reveals that the 1st Respondent did not provide medical documents, x-ray films, or even initial treatment notes to prove the injuries she claims to have sustained. She availed a P3 form and at Part 11 section ‘A’ thereof, there was no description of any injuries that were observed on the Appellant.

16. It was worth-noting that this Court is a court of law and thus expected to base its decisions on facts and the law, and not on humanitarian grounds as was stated by the trial Magistrate in its ruling and or Judgment. More importantly, a court is required to place reliance on evidence adduced by the

parties and not assumption.

17. By basing the awards for the Respondent on humanitarian grounds, the same is found to have been done without any basis but on wrong principles of law. Furthermore, the court erred in awarding an all inclusive sum of Kshs.300,000.00 as general and special damages since the two types of damages are different and their qualification based on different principles.

18. General damages are non-economical damages that are primarily applicable in personal injuries cases and are meant to compensate an injured individual for non-monetary damages that are incurred in a personal injury claim. The most common examples of personal injury law suits in Kenya arise or of road traffic accident, medical malpractices and negligence, dip-fall accidents and product liability or wrongful death or from dangerous animals. In either instance, what is to be considered by the court is the pain and suffering and or emotional and mental distress, loss of enjoyment of life and or companionship and decrease in quality of life that one suffers from a particular injury.

19. In this sense, general damages are more subjective hence the need for expert witness and calculations thereof are based on the level and seriousness of pain and suffering one has experienced as a result of the personal injury or illness. In cases such as the instant one, medical evidence is always used and or relied on to support the element of claim and it is expected that the money awarded can provide the Plaintiff with such consolation for the injuries suffered.

20. On the other hand, special damages are defined as economic damages which are meant to compensate a party’s out of pocket expenses, which are resultant of the Defendant’s negligence or recklessness. The monetary value of special damages being expenses that may have been incurred by an individual as a result of an accident, are easier to quantify since all one is required to avail are receipts and or other documents to prove the same. They include medical expenses, travel expenses, loss of earnings, etcetra, and are proved by way of producing medical invoices and receipts, payslips or evidence from an employer or representative thereof to give an estimate of loss of income and future loss and or records of accounts to prove earnings if one is self employed. For a claim of special damages, a party is required to specifically plead and provide proof of a specific claim.



21. Based on the foregoing discussion on the differences between general and special damages, this Court finds that the trial court erred in generalizing the award and basing the same on humanitarian grounds without proof of medical evidence to confirm that the 1st Respondent sustained the injuries pleaded in her Complaint.
22. Further, although the 1st Respondent availed receipts/invoices to confirm expenses incurred in seeking medical treatment for the injuries sustained and travel expenses to various hospitals for treatment of the said injuries, in the absence of proof of injuries sustained by the 1st Respondent, the claim for special damages cannot stand because it cannot be confirmed that these expenses are resultant of the Defendant's negligence or recklessness where there is no evidence of the injuries sustained as a result thereof.
23. In view of the above findings, the Court finds that the appeal has merit and the same is hereby allowed. Consequently, the all inclusive award of Kshs.300,000.00 is hereby set aside for want of justification, with costs of the Appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH _DAY OF MAY, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by Appellant

Mr. Festus Onyango holding brief for Mr. Mwai counsel for 1st Respondent

Court Assistant - Martin

