



REPUBLIC OF KENYA



**KENYA LAW**  
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**Keter v Kiprotich & another (Civil Appeal E023 of 2021)  
[2024] KEHC 6771 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6771 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL E023 OF 2021**

**JR KARANJA, J**

**JUNE 6, 2024**

**BETWEEN**

**PETER MOROGO KETER ..... APPELLANT**

**AND**

**JONAH KIPROTICH ..... 1<sup>ST</sup> RESPONDENT**

**BEATRICE MASISTA KAVOGO ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the Hon. B.W. Wachira,  
Resident Magistrate delivered on 10th December 2021)*

**JUDGMENT**

1. This appeal is turned on the Judgment delivered on 10<sup>th</sup> December 2021 by the Resident Magistrate at Kapsabet in CMCC No. 162A of 2019, in which the Respondent, Beatrice Masista Kavogo, was awarded general damages in the sum of Kshs. 220,000/- and special damages in the sum of Kshs. 13,100/- together with costs of the suit upon a 100% liability ratio determined against both Appellants, Peter Morogo Keter and Kiprotich Jonah on the basis of the injuries suffered by the Respondent/Plaintiff in a road accident which occurred on 16<sup>th</sup> August 2019, within Kapsabet township involving the Appellants' motor vehicle Registration No. KCL 087T and the Respondent as a pedestrian.
2. It was alleged that the Plaintiff/Respondent was at the material time walking within Kapsabet town when the Defendants/ Appellants vehicle was negligently and/or carelessly driven such that it went out of control, veered off the road and hit the Plaintiff thereby causing her bodily injuries.  
  
As a result, the Plaintiff suffered loss and damages and instituted this suit against the Defendants/ Appellant praying for damages against them, jointly and severally.  
  
The Plaintiff blamed the Appellants for the accident.



3. The Appellants/ Defendants denied the Plaintiff's claim and contended that if the accident occurred as alleged, then it was solely and/or substantially contributed to by the Plaintiff/ Respondent's negligence.

The Appellants therefore prayed for the dismissal of the Respondent's claim with costs.

4. The Plaintiff/ Respondent (PW3) testified at the hearing of the suit and called three witnesses including Dr. Joseph Sokobe (PW1) and a health worker, Tom Kipkosgei Kilele (PW2) as well as a police officer, PC Cheserek Kiptoo (PW4)

The First Defendant (DW1) testified for the Appellants and did not call any other witnesses.

On completion of the trial, the impugned judgment was delivered by the trial court on 10<sup>th</sup> December 2021. The Plaintiff/ Respondent was thus awarded the damages aforementioned, but the Appellants being aggrieved preferred the eight (8) grounds of appeal contained in the memorandum of appeal dated 15<sup>th</sup> December 2021.

5. The appeal was heard by way of written arguments or submissions which were filed on behalf of the Appellants by Kimondo Gachoka and Company Advocates and on behalf of the Respondent by Morgan Omusundi Law Firm.

The rival submissions were duly considered by this court as against the grounds of appeal and the court record. The Respondent opposed the appeal and prayed for its dismissal with costs.

6. In terms of the principle pronounced in the case of *Selle Vs. Associated Motor Boat Company* (1968) EA 123, this court reconsidered the evidence with a view to arriving at its own conclusions while bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In that regard, it was the opinion of this court that the occurrence of the accident and the Appellant's ownership of the ill-fated vehicle were factors which were not substantial dispute. Therefore, the issues for determination by the trial were two fold i.e. liability and quantum of damages.

7. On the question of liability, there was sufficient credible evidence from the Respondent (PW3) which indicated that she was on the side of the road in the process of boarding a motor cycle when she was hit and injured by the Appellant's motor vehicle. This by itself demonstrated that the driver of the vehicle was reckless, negligent and careless as to lose control of the vehicle, veer off the road and cause the vehicle to hit and injure the Respondent who was off the road.

8. There was no evidence from the appellants to disprove the foregoing fact. The evidence by the First Defendant (DW1) merely alluded to an agreement entered between the rider/owner of the alleged motor cycle, the Plaintiff/ Respondent and himself, as owner of the ill-fated Motor vehicle to the effect that the matter was to be settled out of court or had already been settled out of court. However, the said agreement (D. Exhibit 1) was not and could not be the Appellants' evidence of rebuttal of the Respondent's claim and more so, on the question of liability of the Appellants.

9. It therefore followed that the Plaintiff did establish and prove without any dispute that the Appellants were fully liable at 100% for the accident and its consequences. The agreement aforementioned was irrelevant for the purposes of this case and was in any event devoid of any probative value.

If the Plaintiff reneged on the agreement, the remedy for the Appellants lay elsewhere and not the trial court and this personal injury claim.

10. In rejecting the agreement and holding the Appellants fully liable for the accident and to the Respondent in damages, the trial court found that the Respondent was blameless in causation of the



accident and relied on the decision in *Kimeu Vs. Kasese* (1990) eKLR in which the court considered a similar agreement and held that: -

“in short, I conclude that the agreement has no legal validity. Even if I were to find that it is valid, I would hesitate to enforce it as perhaps it would be against public policy in the sense that most illiterate accident victims would be denied fair compensation by unscrupulous actions of vehicle owners.....”

11. This court fully agrees with the conclusion reached by the trial court in that regard with the resultant effect that grounds one (1), two (2) and three(3) of the appeal are hereby overruled and dismissed. As regards the rest of the grounds i.e. grounds 4, 5, 6, 7 and 8, they all relate to the issue of quantum of damages.

The Appellants contend that the award of general damages made by the trial court was excessive and erroneous and that the claimed special damages were not proved.

12. On this question of quantum of damages at this stage, the guiding principles are found in the pronouncements of the superior courts in numerous cases including those cited by the Respondent in this appeal.

The general principle as enunciated in the case of *Butt Vs. Khan*(1981)KLR 349 is that: -

“an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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.”

This principle was buttressed and affirmed by the decision of the court in the case of *Kemfro Africa Limited t/a Meru Express Service and Another Vs. A. M. Lubia and Another* (1982-88) 1 KAR 727.

13. In the present case, the injuries suffered by the Plaintiff/ Respondent were classified as soft tissue injuries consisting of blunt injuries to the head, neck, chest and back and bruises to both legs as per the medical report dated 31<sup>st</sup> August 2019 produced herein (P. Exhibit 1(a) by Dr. Sokobe (PW 2), which indicated that the Plaintiff recovered fully from the injuries.
14. The Respondent/Plaintiff in her final submissions before the trial court proposed general damages in the sum of Kshs. 700,000/- while the Appellants/ Defendants proposed a sum of Kshs. 50,000/-.

Both parties cited authorities which were favourable to their respective proposals.

The following excerpt from the English Case of *Wes and Sons Limited Vs. Shepherd* (1964) A/C 326, provides useful guideline on quantum of damages to wit: -

“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 that is said, it still must be that the amounts which are awarded are to a considerable extent conventional.”

15. The trial court was very much alive to the guidelines stated hereinabove and indeed the general legal principles applicable in the assessment of general damages and having considered the nature of the



injuries suffered by the Plaintiff/Respondent and the authorities cited by both sides correctly, in this court's view, made an award of Kshs. 220,000/- being general damages for pain and suffering. The award was in the circumstances fair, reasonable and adequate compensation for the pain and suffering endured by the Plaintiff/ Respondent as a result of the material accident.

16. The Appellants did not in any manner demonstrate herein that the trial court proceeded on wrong legal principles in making the award for general damages, neither did they demonstrate that the award was inordinately high in the circumstances. This court must therefore uphold the award.
17. With regard to special damages, the Plaintiff/ Respondent made a claim of Kshs. 12,550/- but the relevant documentary evidence in the form of the medical treatment and medical report established a sum of Kshs. 6,050/- as clearly appreciated by the trial court. However, the trial court ended up awarding an enhanced sum of Kshs. 13,100/- for special damages without any justification or proof thereof.

The rule of the thumb in such awards is that special damages must not only be specially pleaded but also specifically proved.

Consequently, the special damages of Kshs. 13,100/- awarded by the trial court is hereby reduced to Kshs. 6,050/- as proved by necessary documentary evidence.

18. All in all, other than the reduction of the special damages the present appeal is substantially unmerited and is hereby dismissed with costs to the Respondent.

Ordered accordingly.

**DELIVERED AND DATED THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

**J. R. KARANJAH,**

**JUDGE**

