



**Kimita v Travel Budget Express & another (Civil Appeal  
E042 of 2022) [2024] KEHC 6435 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6435 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E042 OF 2022  
GL NZIOKA, J  
JUNE 4, 2024**

**BETWEEN**

**MARIA WAITHIRA KIMITA ..... APPELLANT**

**AND**

**TRAVEL BUDGET EXPRESS ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH NJOGU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the decision of Honourable E.W. Mburu  
delivered on 23rd March 2021, vide CMCC No. 529 of 2016)*

**JUDGMENT**

1. The plaintiff (herein “the appellant”) commenced the suit in the trial court vide a plaint dated 18<sup>th</sup> April 2015 and amended on 11<sup>th</sup> September 2017, seeking for judgment against the defendants (herein “the respondents”) for: -
  - a. General damages;
  - b. Special damages of Kshs 20,230/= plus 16% VAT
  - c. Costs of the suit;
  - d. Interest on (a) and (b) above at court rates;
  - e. Any other relief that this Honourable court shall find fit and just to grant.
2. The claim arose out of a road traffic accident that occurred on or about the 7<sup>th</sup> day of February 2016, involving motor vehicle registration No. KAV 151N owned by the 1<sup>st</sup> respondent and driven by the 2<sup>nd</sup> respondent and on which the appellant was travelling as a lawful paying passenger.



3. That as a result, the appellant sustained the following injuries: -
  - a. Fracture distal end of the left tibia and fibula;
  - b. Severe soft tissue injury of the left leg;
  - c. Deep cut wound on the forehead leading to severe soft tissue injuries;
  - d. Cut wound on the zygomatic area leading to severe soft tissue injuries;
  - e. Deep cut wound on the left arm leading to soft tissue injuries;
  - f. Fracture of the right tibia;
  - g. Compound fracture of the left tibia;
  - h. Deep cut wound on the chin.
  
4. The respondents denied liability vide a statement of defence dated 16<sup>th</sup> September 2016, and attributed the cause of the accident to the negligence of the appellant.
  
5. However, subsequently the parties recorded a consent judgment on liability in the ration of 90:10% in favour of appellant and as against the respondents.
  
6. By a judgment dated 23<sup>rd</sup> March 2021 the trial court awarded damages as follows: -
  - a. Liability----- 10:90 (By consent)
  - b. General damages-----Kshs 800,000/=
  - c. Special damages-----Kshs 20,230/=

Total-----Kshs 820,230/=

Less 10%-----Kshs 82,023/=

Balance -----Kshs 738,207/=
  
7. However the appellant is aggrieved by the decision of the trial court on amount awarded a general damages and appeals against it on the following grounds: -
  - a. That the Learned Trial Magistrate erred in law and fact in awarding Kshs 800,000 in general damages which is inordinately too low as to represent an erroneous estimate of damages payable
  - b. That the Learned Trial Magistrate erred in applying wrong principles and failing to take into account material facts arriving at an erroneous award in general damages
  - c. That the Learned Trial Magistrate erred in law and in fact in disregarding the appellant's submissions and on all points of fact and law in as far as the award of damages is concerned.



8. As a result, the appellant prays for the following orders: -
  - a. That the finding of the Trial Magistrate on quantum be set aside, be reviewed and/or revised and/or be substituted with the judgment of this honourable court.
  - b. That this Honourable court do make such further orders as it may deem fit
  - c. That this appeal be allowed with costs to the appellant
9. The appeal was disposed of vide written submissions. The appellant in submissions dated 4<sup>th</sup> April, 2023 argued that general damages of Kshs 800,000 awarded by the trial court was inordinately too low. That, the injuries she suffered and treatment undergone are set out in the treatment notes, P3 form and medical reports by Dr Obed Omuyoma, Dr Jennipher Kahuthu and Dr Wellington Kiamba.
10. Further, the report by Dr Kiama indicate that she has an angulation deformity on the left tibia due to the fracture resulting into reduction of function of the left lower limb, which was confirmed by Dr Jenipher Kahuthu. That, Dr Kiama classified the injury as grievous harm and gave temporary incapacity of six (6) months and a permanent disability of 20%.
11. The appellant cited the case of; Odinga Jacktone Ouma vs Moureen Achieng Odera [2016] eKLR where the Court of Appeal stated that “comparable injuries should attract comparable awards”.
12. She further relied on the case(s) of; Ziporrah Nangila v Edoret Express Limited & 2 others [2016] eKLR and Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR where the victims suffered injuries similar as herein and the courts awarded general damages of Kshs. 2,400,000 and Kshs, 2,000,000 respectively.
13. The appellant further submitted that general damages are awarded in exercise of the trial court’s discretion based on the evidence and the impression on demeanour of the witnesses which advantage the appellate court lacks as held in the case of Simon Tavera vs Mercy Mutitu Njeru [2014] eKLR.
14. The appellant placed further reliance on the case(s) of Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR and Bashir Ahmend Butt vs Uwais ahmed Khan [1982-88] KAR 5 where the Court of Appeal considered the factors the Appellate Court should consider to consider before it can interfere with an award of damages by a trial court.
15. That the subject factors were identified as; where damages are inordinately high or low to represent an erroneous estimate, or the Judge misapprehends the evidence or acts on wrong principles and arrives at a figure that is inordinately high or low.
16. Further, had the trial Magistrate given sufficient weight to appellant’s evidence, submissions, medical documents, and authorities, the trial court would not have made the award of; Kshs. 800,000 that was inordinately too low.
17. The appellant urged the court to set the award aside and substitute it with an award of Kshs. 3,500,000 as proposed in submissions filed in the trial court.
18. However, the respondents opposed the appeal vide submissions dated, 7<sup>th</sup> July, 2023 and argued that special damages must be specifically pleaded and proved. That, the trial court awarded special damages of Kshs. 20,230 instead of Kshs. 14,230 pleaded by the appellant in the plaint and urged the court to award Kshs. 14,230 as pleaded in the plaint.



19. The respondents relied on the case of; Power Lighting Company Limited & another vs Zakayo Saitoti Naingola & another (2008) eKLR cited in the case of Jennifer Mathenge vs Patrick Muiruki Maina [2020] eKLR where the court considered the factors the Appellate Court should consider before it can interfere with an award of damages.
20. The respondents submitted that the damages should not be inordinately too high or low. That they meant to compensate a party for loss suffered but not to enrich a party and that damages should be commensurate to injuries suffered.
21. Further, past decisions should be considered as mere guides as each case depends on its own facts. Furthermore, inflation should be taken into account as well as the purchasing power of the Kenyan shilling at the time of judgment.
22. The respondents argued that the award of Kshs 800,000 as general damages is inordinately high taking into consideration the injuries sustained by the appellant and urged the court to substitute the award with the sum of Kshs. 500,000 that is reasonable and adequate compensation.
23. The respondents relied on the case of; Civicon Limited vs Richard Njomo Omwanicha & 2 others [2019] eKLR where the injured suffered a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow bruises on left elbow, cut wound on left foreleg, fracture of the left tibia and fibula, and dislocation of the left hip joint and the court awarded her Kshs. 450,000.
24. Further, reliance was placed on the case of; Daniel Otieno Owino & another vs Elizabeth Atieno Owour [2020] eKLR where the court reduced the award of general damages of Kshs. 600,000 to Kshs. 400,00 where victim sustained compound fractures of the tibia and fibula bones on the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, and blunt chest injury.
25. Furthermore, in the case of; Nahson Nyabaro Nyandega vs Peter Nyakweba Omboga [2021] eKLR the court reduced the award of Kshs 900,000 by the trial court to Kshs 650,000 where the injured suffered bruises on the face, compound fracture of the right tibia bone and cut wound on the right leg.
26. Finally, the injured submitted that costs follow the event and cited section 27 of the [Civil Procedure Act](#) (Cap 21) Laws of Kenya and urged the court not to allow the appeal as prayed and award the respondents costs of the appeal.
27. I have considered the appeal in the light of the material before the court and in considering same, I note the law is settled that, the 1<sup>st</sup> appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968)EA and Mkube -vs - Nyamuro 1983 KLR 403.
28. In the same vein, the Court of Appeal in the case of; Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR stated that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it



must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.

29. The Court of Appeal in the case of; *Coastal Kenya Enterprises Limited v Muchiri (Civil Appeal 84 of 2017)* [2023] KECA 897 (KLR) (24 July 2023) (Judgment) had this to say on determining general damages, that:

“In making these awards we identify ourselves with the words of Potter, JA in *Rahima Tayab & Others vs Anna Mary Kinanu* [1983] KLR 114; where it was held while relying on the oft-cited case of *H West and Son Ltd vs Shephard* [1964] AC 326 at 345 that:

“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. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”

30. To revert back to the matter herein, I note that the main issue raised concerns the amount awarded as general damages. The appellant in submissions filed in the trial court sought for a sum of Kshs. 3,500,000 based on authorities cited while the respondents proposed a sum of Kshs 250,000 as supported by authorities relied on.
31. The injuries the appellant sustained are tabulated in the amended plaint. However, assessing general damages, it is important to establish the specific injuries that the appellant suffered.
32. In that regard the discharge summary from Naivasha District Hospital dated 7<sup>th</sup> February 2016, revealed that the appellant sustained a fracture of the left tibia/fibula bones. A further report dated 20<sup>th</sup> February 2016, showed that the x-ray taken revealed a further fracture of right tibia. Furthermore, there was tenderness noted at the distal right leg, plus healing open wounds.
33. The appellant was also examined by three doctors. The medical report by Doctor Obed Omuyuma dated, 24<sup>th</sup> February 2016, indicates fractures of both right and left tibia, healing wounds on the forehead, zygomatic region of the head and left arm dorsal aspect. However, the doctor observed that the appellant was still on treatment and hence the issue of permanent disability could not be addressed. He classified degree of injury as grievous harm.
34. The report by Doctor Jennipher Kahuthu dated, 17<sup>th</sup> October 2016, makes reference to the fracture of left right tibia only and application of P.O.P on the right leg. However it acknowledges an x-ray was taken on 7<sup>th</sup> February 2016 which showed a fracture of left tibia/fibula and another on 9<sup>th</sup> February 2016 which revealed fracture of right tibia/fibula. She placed the angulation deformity at zero percent (0%).
35. Finally, the medical report by Doctor Wellington K. Kiamba dated 1<sup>st</sup> August 2017, notes fractures of both left and right tibia and other soft tissue injuries with resultant scars. The Doctor observed that, the fracture on the right tibia had united and movements of the left knee and ankle joints could be executed without restrictions.
36. The report further indicates that, although the fracture of left tibia has united, there was an angulation deformity and the leg was still swollen and tender resulting into reduction of function of the left lower



- limb. The degree of injury was classified as grievous harm with permanent disability of twenty percent (20%).
37. Pursuant to the aforesaid, these medical reports confirm the appellant suffered fractures of right and left tibia and soft tissue injuries to the left leg, forehead, left arm, chin and zygomatic area which have healed leaving scars.
38. The trial court in considering quantum relied on the injuries as pleaded in the amended plaint and the amount proposed by either party and authorities in support thereof.
39. I have considered the submissions by the respective parties in the trial court and herein. The law is settled similar injuries should attract comparable damages.
40. The decision appellant relied on the decision in the case of; Zipporah Nangila Vs Eldoret Express Limited & 2 Others [2016] eKLR the injuries the victim therein sustained were as follows: -
- a. Bilateral leg injuries
  - b. right wrist injury
  - c. Fracture dislocation of the right ankle
  - d. comminuted compound fracture of the distal and fibular
  - e. Fracture of the left distal and tibia and fibular
  - f. Extensive skin loss with bones exposed in the right tibia.
  - g. incapacitation assessed at 70%
  - h. The left leg was not functional
41. In that case the victim was awarded Kshs. 2,400,000 as general damages.
42. Similarly, the appellant relied on the case of; Geoffrey Mwaniki Mwinzi vs Ibero Ltd & Another [2014] eKLR where the victim sustained the following injuries: -
- a. Extensive compound fractures of the left tibia and fibula and extensive damage to the soft tissues of the left leg.
  - b. Fractured left collarbone.
  - c. The left leg was amputated
  - d. permanent disability which was assessed by the two doctors at about 55-60%.
43. In that case the victim was awarded Kshs 2,000,000 as general damages.
44. A consideration of the injuries sustained in the subject authorities' reveal the victims therein suffered much more severe injuries that the appellant herein, as such the cases are not comparable.
45. The respondents relied on the case of; Simon Mutisya Kavii vs Simon Kigutu Mwangi (2013) eKLR where the victim sustained the following injuries:-
- a. Comminuted fracture of the left tibia fibula
  - b. severe friction burn left thigh and leg



46. In that case the victim was awarded Kshs 200,000 as general damages.
47. The respondent also relied on the case of; Harun Muyoma boge vs Daniel Otieno Agude (2015) eKLR the injuries the victim therein sustained were as follows: -
- a. blunt chest injuries,
  - b. cut wound right wrist,
  - c. deep cut wound on the right foot,
  - d. fracture right tibia and fibula and soft tissue injuries
  - e. Disability estimated at between 5% - 25%
48. In that case the victim was awarded Kshs 300,000 as general damages.
49. The authorities by the respondents though reasonably comparable but relate to relatively less injuries and quite old in age.
50. The trial court having distinguished authorities cited by the parties relied on the case of; Geoffrey Wamalwa Wamba & Another vs Kyalo Wambua (2018) eKLR. In that case the victim sustained the following injuries:
- a. Compound fracture of the right distal tibia/fibula
  - b. Cut wound on the scalp
  - c. Cut wound on the chest
  - d. Cut on the lower lip.
51. According to the facts therein, he was admitted in hospital for three (3) weeks where he underwent surgery and plus K wire inserted to repair the fibula. A back slab application to align the fracture was also done. He was put on a cast for three (3) weeks. The K wire and the cast were removed on 26<sup>th</sup> July 2013, more than seven (7) months later.
52. Further, Dr Mohamed Hanif adduced in evidence vide a Medical Report dated 19<sup>th</sup> October 2015 that showed that there was obvious deformity of the lower third of the Respondent's limb which was wasted and shortened by about two (2) centimeters. He recommended corrective orthopedic surgery to correct the non-union of the tibia which he estimated would cost Kshs. 500,000.
53. It suffices to note that the victim in the afore matter underwent extensive treatment than the appellant herein. As such the amount awarded as general damages by the trial court in my considered opinion is reasonable.
54. The respondents urged the court to interfere with it but there is no cross appeal. I disregard the same.
55. The upshot is that; the appeal is dismissed in its entirety with costs to the respondents.

Dated, delivered and signed on this 4<sup>th</sup> day of June, 2024.

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:



Ms. Obura for the appellant

N/A for the respondent

Ms Ogutu: Court assistant

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