



**Patel & another v Salvatore (Civil Appeal 104 of 2021)  
[2024] KEHC 6986 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6986 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 104 OF 2021  
SM GITHINJI, J  
JUNE 12, 2024**

**BETWEEN**

**MANOJ NARSHI PATEL ..... 1<sup>ST</sup> APPELLANT**

**PAUL PATRICK AHONGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GULISANO SALVATORE ..... RESPONDENT**

*(Being an Appeal from the Judgement of Honourable Dr. Julie Oseko (CM)  
delivered on the 24th November, 2021 in CMcc No.323 of 2014 at Malindi)*

**JUDGMENT**

1. This Appeal arises from the judgment and decree of Hon. Dr. Julie Oseko delivered in Civil Suit No 323 of 2014 in the Chief Magistrate’s Court, Malindi on 24<sup>th</sup> November 2021 where judgment was entered in favour of the Plaintiff in the following terms;
  1. General damages Kshs 5,000,000/=.
  2. Special damages Kshs 464,744/=.
  3. Interest Kshs 4,590,384/=.
2. Dissatisfied with the judgment, the Appellants instituted the instant appeal on the following grounds;
  1. That the learned chief magistrate erred in awarding the plaintiff Kshs 5,000,000/= for general damages in that the said sum is so excessive as to amount to an erroneous estimate of the damages payable to the plaintiff.
  2. That the learned chief magistrate erred in failing to consider conventional awards in cases of similar nature thereby awarding an exorbitant and inordinately high figure as general damages



without due regard to the laid down principles and without giving any proper or plausible reason or reasons for doing the same.

3. That the said award of Kshs 5,000,000/= as general damages are altogether disproportionate to the injuries sustained by the plaintiff and is not in keeping with other comparable awards made in respect of similar injuries.
4. The learned magistrate failed to give any or adequate or credible reasons of how she arrived at the figure of Kshs 5,000,000/= general damages which she awarded to the plaintiff on the basis of 100% liability.
5. The learned chief magistrate failed to give any or adequate reasons of how she arrived at the figure of Kshs 60,000/= additional driving recuperation which she awarded to the plaintiff on the basis of 100% liability.
6. That the learned chief magistrate erred in awarding special damages as under to the plaintiff when there was no credible and documentary evidence adduced before her in support thereof.
  - i. Medical report Kshs 1,500/=.
  - ii. Accommodation at Alnertos  
For two months for post  
Operative care Euro 1,500/=.
  - iii. Additional labour during  
Recuperation Kshs 60,000/=.
  - iv. Treatment in Italy Euro 244/=.
  - v. Treatment at Tawfiq Hospital  
In Malindi by an orthopedic  
& Trauma Centre Mombasa Kshs 185,000/=
7. That the learned chief magistrate erred in law in awarding to the plaintiff a sum of Kshs 5,000,000/= as general damages by failing to take into account that the general damages awarded to the plaintiff would be invested to earn interest. If the learned chief magistrate had borne that factor in mind it is reasonably possible that she would have awarded a lesser amount to the plaintiff as general damages.
8. That the learned chief magistrate erred in awarding to the plaintiff the interest on the general damages of Kshs 5,000,000/= from the date of filing suit (i.e. from 12<sup>th</sup> November 2014) until payment in full when the same ought to have been awarded from the date of the judgment until payment in full since the plaintiff's claim was for general damages and not for liquidated amount.
9. That the learned chief magistrate erred in ordering that the conversion rate of the Euro to the Kenya shilling shall be calculated at the rate applicable on the date of judgment herein i.e. 24<sup>th</sup> November 2021 and not when the same was paid for by the plaintiff.
10. That the learned chief magistrate erred in failing: -
  - a. To appreciate the significance of the various facts that emerged in the evidence of the plaintiff's and the defendant's witnesses.



- b. To consider or properly consider all the evidence before her and/or.
  - c. To make any proper findings on the evidence before her.
11. That the learned chief magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the defendants/appellants.

### **Evidence at Trial**

3. PW1 Gulisano Salvatore the plaintiff adopted his witness statement dated 12/11/2014. He produced as PEX 1-18 documents as per the list of documents. He added that he uses electronic gadgets to stimulate his nerves and that he cannot lift anything heavy. He blamed the defendant for the accident. On cross examination he stated that the lorry had stopped but it entered the road without stopping and the cabin was turning so he did not have time to brake.
4. PW2 Dr. Morris Buni testified that the plaintiff had gone to his clinic where he examined him and prepared a medical report. He added that the plaintiff was using an electronic gadget to control the pain and might deteriorate if he does not continue with physiotherapy.
5. PW3 No 231406 CIP George Naibei the Base Commander Malindi at the time of testifying told the court that there was an accident on 22<sup>nd</sup> May 2012 involving motor vehicle registration No KAP 502Q fiat lorry and motor cycle registration No KMCM 410B. That both were headed towards Lamu with the vehicle in front of the motor cycle. He testified that at Kibao cha ng'ombe, the driver indicated to enter Timboni and after turning, the motor cycle rammed into the right front mud guard and the rider sustained serious injuries.
6. DW1 Patrick Ahonga adopted his witness statement dated 28.9.2012 as his evidence and produced as DEX 1-4 documents as per the list of documents dated 30.10.2016. He stated that he was turning when the motor cycle emerged from the road and hit the vehicle in front. He blamed the rider of the motor cycle for the accident because he had been indicating while at 0.5 of a km away and the plaintiff was not supposed to overtake.

### **Analysis and Determination**

7. The appeal was canvassed by way of written submissions. I have taken into account the submissions by the parties as well as the authorities relied upon. From the memorandum of appeal, I deduce the following issues for determination;
  1. Whether the amount of Kshs 5,000,000/= in general damages is excessive?
  2. Whether special damages were rightly awarded?
  3. Whether interest on the sum awarded from the date of filing the suit is appropriate?
  4. Whether the conversion rate for Euro to Kenya shillings should be at the rate of obtaining when it was paid or at the time of Judgment.
8. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and another v Associated Motor Boat Co. Limited and others* (1968) EA 123, *Williams Diamonds Limited v Brown* (1970) EA 1. The Court



of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) IKAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”

9. The point of contention in this appeal is the quantum of damages awarded by the subordinate court, viewed by the Appellants as inordinately high or unjustified. In considering the appeal, I will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages.”

See also *Butt v Khan* (1981) KLR 349 and *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No 284 of 2001; (2004) eKLR.

10. It is not contested that following the accident, the Respondent sustained the following injuries; comminuted fractures of the neck of the right humerus, fracture of the right elbow, fracture of the middle third of the distal radius and ulna on the right, fracture of the proximal third of the radius to the left and multiple and soft tissue injuries with radial nerve injury. These injuries are documented in the Respondent’s medical report prepared by Dr. M.K Buni, dated 11<sup>th</sup> September 2014 and the medical report by Dr. Arenzi Fabrizio dated 2<sup>nd</sup> June 2014. The Respondent was also examined by the Appellants’ doctor, Dr. Udayan Sheth. From the medical reports produced by the parties, the point of contention is the assessment of permanent incapacity. While Dr. Buni opines that permanent incapacity is 40 %, Dr. Sheth is of the view that the respondent has a permanent incapacity of 15%. In instances where there are two conflicting medical reports and both are admitted as evidence, it is important to consider the duration in which the reports were made. I do note that both reports are two years apart and it would be safe to infer that the latest report would be more accurate considering the Respondent would have made progress or otherwise at healing. Further, I note that Dr. Buni is a consultant surgeon while Dr. Udayan Sheth is an orthopedic surgeon thus the expert in this field. The criteria and threshold on expert evidence is as expressly stated in the case of *Stephen Wangondu v the Ark Ltd* 2014 eKLR. Having ascertained thus, I will now enter into the issue of quantum for general damages.
11. As earlier, noted, comparable injuries attract comparable awards and the said amounts should be reasonable to the extent of conventional. Further, no two cases are alike. Additionally, the appellate court should refrain from interfering with the award of the subordinate court unless it is convinced that the trial court applied the wrong principles. As pointed out, the Respondent herein sustained the following injuries; comminuted fractures of the neck of the right humerus, fracture of the right elbow, fracture of the middle third of the distal radius and ulna on the right, fracture of the proximal third of the radius to the left and multiple and soft tissue injuries with radial nerve injury. The trial court awarded Kshs 5,000,000/= as general damages for pain and suffering. I find the same to be inordinately high and substitute with an award for Kshs 3,000,000/=. In so finding, I am persuaded by the holding



in the case of *Hussein Dairy Ltd v Samuel Mokaya* HCCA No 137 of 2012, the Plaintiff had suffered the following injuries;

- (i) Fracture of the right radius bone;
- (ii) Fracture of the ulna bone;
- (iii) Chest contusion;
- (iv) Deep cut wound on the right leg;
- (v) Fracture of the left pelvic bone;
- (vi) Bruises on the back; and
- (vii) Cerebral concussion.

12. The learned Judge maintained the sum of Kshs 800,000/= which the trial Court had awarded as General Damages.
13. I find that the injuries sustained by the Plaintiff herein are to a greater extent almost similar in severity with the injuries in the above cited authority. In arriving at the award herein, I have taken into account the age of the authority and the time the instant plaintiff sustained the injuries and thus the adverse effects of inflation are addressed in the awarded sum/amount.
14. On the issue of special damages, it is trite that special damages must be specifically pleaded and proved. In the amended plaint dated 1<sup>st</sup> September 2016, the plaintiff sought special damages itemized as below;
  - i. Medical report Kshs 15,000,
  - ii. Accommodation at Abertos for  
Two months' post-operative care Euro 1,500/=.
  - iii. Additional labour during recuperation Kshs 60,000/=.
  - iv. Treatment in Italy Euro 244/=.
  - v. Treatment at Tawfiq hospital in Malindi  
By an orthopedic surgeon from St. Gallen  
Orthopedic & trauma Centre Mombasa Kshs 185,000/=.
15. I have perused the trial court record and all documents that were produced as Exhibits. I have noted two documents bearing the name certificate of payment for Euro 1500/= and Kshs 60,000/= respectively. The said documents do not bear any official letter head and are not authentic proof of payment for the sums allegedly paid. As such, I find that the same were not proved on a balance of probabilities and did not deserve to be awarded. I have also noted that the Plaintiff did not supply as evidence receipt(s) for payment for the sum of Kshs 185,000/= and Euro 244/= which are stated to have been paid to Tawfiq Hospital and for treatment in Italy respectively. In the circumstances, I also decline to award the same. I however, note that there is a receipt for Kshs 15,000/= issued by Dr. Buni for professional fee and medical exam. I find this well proved and uphold award of the same. Having found that the sums of Euro 1500/= and Euro 244/= were not justified, this dispenses the question of the conversion rate from Kshs to Euro that would be applicable.



16. As regards the issue of interest, the Appellants are of the view that the same ought to have been from the date of judgment and not the date of filing of the suit. Section 26 of the Civil Procedure Act provides as follows:
- i. Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
  - ii. Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.
17. Our Superior Courts have, over time, come up with several principles derived from this general rule in Section 26 of the Civil Procedure Act which have, over time acquired stable meanings. The most relevant principle in the present appeal is that at all times a Trial Court has wide discretion to award and fix the rate of interests provided that the discretion is exercised judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial Court with utmost respect and should refrain from interfering with the same unless it is satisfied that the Lower Court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.
18. Further, under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:
- a. The period from the date the suit is filed to the date when the Court gives its judgment; and
  - b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix.
19. The trial court stated that interest was to run from the date of filing the suit. In so finding the trial court exercised its discretion. The Appellants have not demonstrated that the discretion was misguided and therefore I have no justification to interfere with the same.
20. In a nutshell, the appeal partially succeeds in the following terms;
1. General damages for pain and suffering Kshs 3,000,000/=.
  2. Special damages Kshs 15,000/=.
  3. Interest from the date of filing the suit.
  4. No orders as to costs as regards the appeal

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 12<sup>TH</sup> DAY OF JUNE, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the presence of; -



1. Mr Adede holding brief for Mr Gor for the Appellant
2. Muli and Ole Kina are for the Respondent, Ms Mwalanda is holding their brief.

