



REPUBLIC OF KENYA



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**Sanlam General Insurance Limited v Guto & another (Civil Appeal
E013 of 2023) [2024] KEHC 7397 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E013 OF 2023
WA OKWANY, J
JUNE 13, 2024**

BETWEEN

SANLAM GENERAL INSURANCE LIMITED APPELLANT

AND

EVANS NYAGAKA GUTO 1ST RESPONDENT

JOHN GUTO ATANCHA 2ND RESPONDENT

*(Being an Appeal from the Judgment in the Chief Magistrate's Court at Nyamira, Civil Suit
No. E108 of 2021 delivered by Hon. B. Okong'o, Resident Magistrate on 6th April 2023)*

JUDGMENT

1. The 1st Respondent herein was the Plaintiff before the trial court where he sued the Appellant and 2nd Respondent for damages arising out of an accident that occurred on 4th July 2020. The Plaintiff's case was that she was on the material day traveling as a pillion passenger on the Appellant's Motorcycle Registration Number KMFC 357W TVS STAR along Kebirigo-Mosobeti Road when at Kenya area or thereabout, the Appellant's rider, servant or agent so negligently rode, managed and/or controlled the said Motor Cycle thereby allowing it to lose control and land into a ditch and cause an accident. The 1st Respondent stated that he sustained serious injuries and has suffered loss and damage following the said accident.
2. The Appellant and the 2nd Respondent filed their respective Statements of Defence in which they denied all the averments made in the Plaint.
3. The matter was thereafter set down for hearing. The 1st Respondent (Plaintiff) relied on his Witness Statement dated 24th May 2021 alongside documentary evidence which he produced as exhibits. While the Appellant and 2nd Respondent did not call any witnesses but produced a second medical report from Dr. Zeph Gaya.



4. In a judgment rendered on 6th April 2023, the trial court held the Defendants 100% liable for the said accident and awarded the 1st Respondent damages as follows: -

General Damages – Kshs. 800,000/=

Special Damages – Kshs. 173,970/-

Total Award – Kshs. 973,970/=

Interests and costs of the suit.

5. Aggrieved by the trial court's decision, the Appellant filed the instant appeal seeking orders to set aside the judgment of the trial court, on quantum. The Appellant listed the following grounds of appeal in the Memorandum of Appeal: -

1. The Learned Trial Magistrate erred in fact and law in awarding the Respondent 100% liability against the Appellant at Kshs. 800,000/= General Damages and Kshs. 173,970/= for Special Damages which amount was exorbitantly high in the circumstances considering the injuries suffered by the 1st Respondent.
2. The Learned Trial Magistrate erred in fact and law in holding that the 1st Respondent had proved his case on a balance of probabilities which finding was against the weight of the evidence on record.
3. The Learned Trial Magistrate erred in fact and law in holding that the 1st Respondent had proved his case on awarding the 1st Respondent Kshs. 973,970/= as quantum which finding was against the weight of evidence on record.
4. The Learned magistrate erred in law and in fact when she failed to consider the Appellant's evidence on points of law and facts with regard to quantum based on the injuries sustained and the age of the 1st Respondent.
5. 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.
6. The Learned Trial Magistrate erred in law and in fact in failing to pay regard to submissions and decisions filed alongside the Appellant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
7. The Learned Trial Magistrate erred in fact and law in finding that the 1st Respondent was entitled to Kshs. 973,970/= quantum as against the Appellant.

6. The Appeal was canvassed by written submissions which I have considered alongside the record of appeal. I find that the main issue for determination is whether the trial court arrived at the correct verdict on quantum of damages.

7. The duty of a first appellate court was discussed in the case of *Peters vs. Sunday Post* [1958] E.A 424 at 429 where the court stated that:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a



jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself come to Different.”

8. It is trite that assessment of damages rests at the discretion of the trial court. This means that an appellate will not ordinarily interfere with or alter the trial court’s award on damages unless it is so inordinately high or low as to present an erroneous estimate. This is the position that was taken in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) v Kiarie Shore Stores Limited* [2015] eKLR where it was held thus:-

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages.”

9. The 1st Respondent listed the following particulars of injuries in the Plaintiff: -

- i. Bruises on the abdomen
- ii. Multiple bruises and cut wounds on the forehead, left temporal and occipital region of the head.
- iii. Chest contusion
- iv. Multiple bruises and cut wounds on the upper and lower limbs bilaterally
- v. Fracture of the right femur.

10. I have perused the P3 Form (P.Exh3) and the Medical Report from Dr. Ombati (P.Exh5) and noted that that they contain the injuries stated in the Plaintiff. The 2nd Medical Report by Dr. Zeph Gaya that the Appellant produced as an exhibit indicates that the 1st Respondent sustained soft and skeletal tissue injuries which had recovered as at the time of the second medical examination which did not result in permanent disability. I note that the 2nd medical examination was conducted at least one year after the first examination.

11. Courts have also taken the position that comparable injuries will attract comparable awards as the awards made in the past decisions. In *Simon Taveta vs. Mercy Mutitu Njeru*, Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal held thus: -

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

12. I have considered the 1st Respondent’s injuries and compared the same with past authorities in which the claimants suffered almost similar injuries as follows: -

- i. In *Joseph Mwangi Thuita vs. Joyce Mwole* [2018] eKLR, the plaintiff was awarded Kshs. 700,000 as general damages for fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support.



- ii. In *Jackson Mbaluka Mwangangi vs. Onesmus Nzioka & another* [2021] eKLR Odunga J. (as he then was) awarded Kshs 600,000/- for general damages where the Appellant sustained blunt injury to the right shoulder and fracture of the left femur.
 - iii. In *David Mutembei vs. Maurice Ochieng Odoyo* [2019] eKLR, the court reduced an award of Kshs. 1,600,000/= to Kshs. 800,000/= on appeal, where the Respondent sustained a fracture of the right femur and a proximal fracture of the left tibia.
13. In the instant case, the Appellant argued that the trial court's award was excessive. The Appellant cited the case of *Erick Ratemo vs. Joash Nyakweba Ratemo* (2018) eKLR where the court awarded Kshs. 350,000/= for similar injuries as those sustained by the claimant. The Appellant proposed an award of Kshs. 250,000/= General Damages.
 14. The 1st Respondent, on the other hand, maintained that the trial court's award on damages was reasonable and commensurate with his injuries. He urged this court to uphold the trial court's award. He relied on the decisions in *Irene Chebotuya vs. Shadrack Kiplang'at Ng'eno*, High Court Civil Appeal No. 25 of 2019 and *David Kimathi Kaburu vs. Dionisius Mburugu Itirai* (2017) eKLR.
 15. I note that the injuries sustained by the claimants in the cases that I have cited herein above were more severe than the injuries that the 1st Respondent sustained in the accident in question. I am of the view that the award of Kshs. 800,000 made by the trial court was on the higher side when compared to the similar award and the 1st Respondent's injuries. My finding is that an award of Kshs. 600,000 will be adequate compensation for the 1st Respondent's injuries.
 16. I therefore find that the instant appeal is merited and I therefore allow it and set aside the award of Kshs. 800,000 and substitute it with an award of Kshs. 600,000 general damages. The trial court's finding on special damages was not contested and I will therefore uphold it. I also award the 1st Respondent interest on both general and special damages at court rates till payment in full. I make no orders as to costs.
 17. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 13TH JUNE 2024.**

W. A. OKWANY

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JUDGE

I certify that this is a true copy of the originally

Signed

DEPUTY REGISTRAR

