



REPUBLIC OF KENYA



**Gitau v Njuguna (Civil Appeal E392 of 2023)  
[2024] KEHC 9518 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9518 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E392 OF 2023**

**MA OTIENO, J  
JULY 19, 2024**

**BETWEEN**

**BERNARD NJOROGE GITAU ..... APPELLANT**

**AND**

**ERIC WAINAINA NJUGUNA ..... RESPONDENT**

*(Being an appeal from the Judgment/decree of Honourable M.A. Opondo,  
S. P.M) delivered 23rd August 2023 in Kiambu CMCC No. E042 of 2020)*

**JUDGMENT**

1. This appeal arises from the Judgment delivered on 23<sup>rd</sup> August 2020 in the Kiambu Chief Magistrate's court civil case No. E042 of 2020 where the learned magistrate awarded the plaintiff damages of Ksh 1,000,000/- as general damages, Ksh 44,778/- as special damages and Ksh 130,000.00 as cost of future medical expenses.
2. The claim arose as a result of a road traffic accident that occurred on 24.11.2018, where the Plaintiff was hit by motor vehicle registration No. KWS 020, then being the Appellant herein.
3. Dissatisfied with the decision of the learned trial magistrate, the Defendant, who is the Appellant herein appealed to this court, citing the following grounds in his memorandum of appeal; -
  - i. That the learned trial magistrate erred in law and fact in finding that the Claimant was entitled to general damages of Kshs 1, 000, 000/= and special damages of Kshs 44, 778/= and Kshs 130, 000/= for future medical expenses which was too much on the higher side in view of the injuries suffered by the Claimant that it presented a miscarriage of justice.
  - ii. That the trial magistrate erred in law and in fact and misdirected herself when she failed to consider the Appellants submissions on both points of law and facts.



- iii. That the learned magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent.
  - iv. That the learned trial magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on quantum thereby arriving at a decision unsustainable in law.
  - v. That 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.
  - vi. That the learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
4. The appellant urged this court to allow this appeal with costs and set aside the judgment of the trial court and the consequent decree.

### Submissions

5. The appeal was canvassed by way of written submissions. The Respondent filed his submissions on 14<sup>th</sup> May 2024. The Appellant failed to file his submissions despite this court's directions of 04.06.2024 allowing the Appellant time to file his submissions on or before 7<sup>th</sup> June 2024. I will therefore proceed with the matter only on the basis of the record of appeal and the Respondent's submissions.
6. A perusal of the memorandum of appeal reveals that the substratum of the appeal is the award by the trial court of sum of Kshs 1,000,000/- in general damages; Kshs 44,778/- in special damages and a further Kshs 130,000.00 as cost of future medical expenses.
7. The Appellant stated in his memorandum of appeal that the amounts awarded by the trial court was excessive. According to the appellant, the Hon. magistrate proceeded on wrong principles in assessing damages by failing to take into account the nature of the injuries and awards in comparable injuries.
8. On his part, the Respondent took the position that the sum of Kshs 1,000,000/- awarded by the trial court in general damages is correct and ought not to be disturbed. That equally sound in law is the award of Kshs 44,778/- in special damages and a further Kshs 130,000.00 as cost of future medical expenses.

### Analysis and determination

9. This appeal is limited only on the quantum of damages awarded by the trial court. Consequently, I take note that the assessment of damages is within the discretion of the trial court and that this court should only interfere in instances where trial court, in assessing damages, erred in principle and either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence. See *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727).
10. At the same time, I am cognizant that this being a first appeal, the hearing is by way of a retrial and I am enjoined to reconsider evidence adduced at trial and draw my own conclusions, bearing in mind that unlike the trial court, I did not see or hear the witnesses testify. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

11. Having in mind the two principles, I shall now proceed and reevaluate the pleadings and the evidence on the nature of the injuries suffered by the Respondent. According to the Plaintiff, the Respondent suffered the following injuries; -
  - i. Soft tissue injuries to the head
  - ii. Fracture of the left ulna with dislocation of proximal radial ulna joint
  - iii. Fracture of the left femur
12. It was also pleaded that as a result of the injuries, the Respondent suffered further injuries as he underwent surgeries to fix the two fractures.
13. The Respondent was examined by two doctors, Dr. W.M Wokabi and Dr. Ruth Ichamwenge. The two medical reports largely agree on the injuries suffered by the Respondent as a result of the accident. The only point of departure between the two is that while Dr. Wokabi's report states that there was a dislocation of the proximal radio-ulna joint, Dr. Ruth states that no such dislocation was established and that the same was even not captured in the initial treatment notes from both Kiambu referral hospital and Ladnan hospital where the Respondent was initially treated.
14. I have reviewed the two medical reports, including the initial treatment notes and agree with the position taken by Dr. Ruth that there was no dislocation of the proximal radio-ulna joint as reported by Dr. Wokabi in his report.
15. According to the two medical reports, it was indicated that the Respondent will have some form of permanent liability. Dr. Wokabi who did the first examination on the Respondent places the disability at 25% while Dr. Ruth who conducted the examination later places the same at 15%.
16. The Respondent urged this court to maintain the award of Kshs 1,000,000/- by the trial court. In support of his position, he cited four cases. One such case is *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Anor* [2015] eKLR where the Plaintiff suffered compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and pathological/re-fracture of the right leg the court issued an award of Kshs 1, 500, 000/=.
17. The other case cited by the Respondent is that of *Martin Ileri Namu & another v Alicalinda Igoki Kiringa* [2019] eKLR where a sum of Kshs 800,000/- was awarded for left shoulder dislocation and fractures on the right tibia fibula and left radius ulna.
18. This court is alive to the principle that in awarding general damages, the courts ought to give an award that reflects the nature and gravity of the injuries. That comparable injuries should as far as possible, be compensated by comparable awards, always bearing in mind that not two cases are precisely alike. This is the guidance given by the Court of Appeal in the case of *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR.
19. Taking into account injuries suffered by the Respondent as particularized in the plaintiff and considering the Respondent's submissions and cases cited. I find that the injuries in the case of *Martin Ileri Namu & another v Alicalinda Igoki Kiringa* [2019] eKLR where an award of Kshs 800,000/- was given in 2019 for injuries substantially similar to the present case, save for the left shoulder dislocation which is missing in the instant case.



20. However, bearing in mind the time difference between the instant case and 2019 when the award of KShs. 800,000/- was made in the case of *Martin Ileri Namu & another* (supra), I will award a sum of KShs 800,000/- in general damages for the injuries suffered by the Respondent in the instant case.
21. In the premises, I find the award of Kshs 1,000,000 made by the learned trial magistrate to be inordinately high and that the same failed to take into account the nature of injuries suffered and comparable awards made in the past. See *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR.
22. This court in arriving at the above position has also been guided by the decision in *Power Lighting Company Ltd & Another V Zakayo Saitoti Naingola & Another* [2008] eKLR where the court stated that;
- i. Damages should not be inordinately too high or too low.
  - ii. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
  - iii. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
  - iv. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.
23. On special damages, the guiding principle is that the same ought not only to be pleaded but must be proven as well. The Appellant stated as ground of appeal that the learned trial magistrate erred in fact and in law in awarding a sum of Kshs 44,778/-. However, as indicated earlier in this judgment, no submissions were made in support of this allegation.
24. The above notwithstanding, I perused the plaint and the record of appeal and established that the sum of Kshs Kshs 44,778/- was specifically pleaded and proved. Consequently, I find no reason to interfere with the trial court's finding of awarding Kshs 44,778 in special damages.
25. On future medical expenses, both Dr. Ruth Ichamwenge, the Appellant's doctor and Dr. Wokabi for the Respondent in their respective reports agreed that the Respondent would require between Kshs 120,000/- to Kshs 130,000/- for future medical expenses. Taking this into account, I agree with the finding of the trial court and therefore uphold the award of Kshs 130,000/- as cost of future medical expenses.
26. In view of the above, I find the appeal partially merited and therefore award the following; -
- a. General damages for pain and suffering – Kshs 800,000/-
  - b. Special damages – Kshs 44,778/-
  - c. Cost of future medical expenses – Kshs 130,000/-
27. Each party to bear their own costs.
28. It so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19<sup>TH</sup> DAY OF JULY 2024**

**ADO MOSES**

**JUDGE**



Moses – Court Assistant

Mr. Onacha h/b for Ongwenyi for the Appellant.

Ms. Mwarakwa h/b for Kibathi for the Respondent.

