



REPUBLIC OF KENYA



KENYA LAW
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**Kenagro Suppliers Limited v Munene (Civil Appeal E033 of 2023)
[2024] KEHC 8732 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E033 OF 2023**

LW GITARI, J

JULY 18, 2024

BETWEEN

KENAGRO SUPPLIERS LIMITED APPELLANT

AND

NICHOLAS MUNENE RESPONDENT

JUDGMENT

This appeal is against the Judgment of the learned trial magistrate in Chief Magistrate's Court Chuka Civil Case No.171/2022 which was as follows:-

1. General Damages - 800,000/-
2. Less 20% contribution - 160,000/-
3. Special Damages - 9,030/-
4. Costs and interests

Background

1. The respondent filed a suit vide a plaint dated 20th September, 2022 against the appellant seeking special damages of Kshs 51,390 as pleaded, general damages for pain suffering and loss of amenities, costs of the suit and any other or further relief the court may deem just and fit to grant.
2. The respondent pleaded that on or around 16th May 2022 near Huduma stores area along Chogoria-Kiangua road the Appellant's agent and/or authorized driver drove motor vehicle registration number KDG 884T so negligently, carelessly and negligently that the motor vehicle veered off its lawful lane and hit motor cycle registration No. KMDV 134 Q on which motor cycle the respondent was a pillion rider as a result of which the plaintiff suffered serious bodily injuries.



3. The respondent enumerated particulars of the Appellant's agent and/or authorized driver's negligence as driving motor vehicle registration No. KDG 884T so carelessly, negligently and recklessly in the circumstances, driving managing and controlling motor vehicle reg. No. KDG 884T without due regard to other road users and in particular the respondent herein, failing to keep a proper look out or maintain adequate control over the said motor vehicle, driving the same motor vehicle without due care and attention, failing to stop, swerve or act in any other diligent or reasonable way so as to avoid the said accident, causing the accident and that as a result of the road traffic accident of 16th May 2022 one Nicholas Munene was seriously injured.
4. The respondent enumerated particulars of his injuries as bruises on the face, right hypochondrium of the abdomen contusion, right foot lacerations and perforated bound under the diaphragm.
5. The respondent avers that after the occurrence of the accident on 16th May 2022 he suffered further loss and damages which he particularized as 550 purchase of copy of records of motor vehicle reg No. KCF 632F, Kshs 10,000 cost of demand notices 10,840 medical expenses, kshs.20,000 charges for medical examination and report and kshs.5,000 transport costs for second medical examination and kshs. 5,000 for expert evidence.
6. The respondent contends that the Appellant's agent and/or authorized driver is wholly to blame for the occurrence of the accident on 16th May 2022.
7. The Appellant filed his defence dated 7th November 2022 wherein he denied the respondent's claim to the extent that at all material times to the suit the Appellant was the registered, beneficial, insured proprietor of motor vehicle registration number KDG 884T and the respondent was put to strict proof thereof.
8. The Appellant states that he denied the occurrence of the accident on or about 16th May 2022 along Chogoria-Kiangua road in the manner and in the circumstances as alleged. That further the allegations of negligence attributed to the Appellant are denied.
9. The Appellant further states that in the alternative and without prejudice to the foregoing the Appellant avers that if any accident occurred on 16th May,2022 as alleged by the respondent which is denied then the same was wholly caused and or substantially contributed to by the respondent.
10. The Appellant enumerated particulars of negligence as riding motor cycle registration number KMDV 134 Q in the wrong lane, riding motor cycle registration number KMDV 134 Q in an excessive speed in the circumstance, riding on an unworthy motor cycle, blocking motor vehicle registration number KDG 884 T on its rightful path, riding motor cycle registration number KMDV 134Q without due care and attention, failing to take any steps to avoid the accident, failing to take regards for safety of other road users particularly the Appellant, failing to stop, slow down swerve or ride in any manner to avoid the accident, failing to obey traffic rules and causing the accident.
11. The Appellant denied the particulars of injuries as pleaded.
12. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the respondent against the Appellant as follows:
 - a. General damages Kshs. 800,000
Less 20% contribution Kshs 160,000
Net Total Kshs640,000
 - b. Special damages Kshs.9,030



- c. Interest on the general damages from date of the judgement herein.
 - d. Interest on special damages from the date of filing of the suit.
 - e. Costs of the suit to the respondent with interest from the date of judgement herein.
13. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;
 1. The learned Trial Magistrate erred in Law and fact by awarding inordinately high general damages to the respondent.
 2. The learned trial magistrate erred in fact and in law by failing to consider the appellant's submissions and authorities on quantum hence arriving at an erroneous decision.
 3. The learned trial magistrate erred in fact and in law by awarding damages that were inordinately high to constitute a miscarriage of justice in the circumstances of the case.
 4. The learned trial magistrate erred in fact and in law by failing to consider the nature of injuries suffered by the respondent were soft tissue injuries.
 5. The learned trial magistrates misdirected himself in law and in fact by failing to rely on comparative awards and authorities and case law for soft tissue injuries.
 14. The appellant prays that the appeal be allowed, the court proceeds and set aside the award on general damages and assess the same afresh in line with case law and contemporary awards and the costs of the subordinate court and the appeal be awarded to the Appellant herein.
 15. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 27th April, 2024 through the firm of Kiruki & Kayika Advocates while the respondent filed his dated 25th March 2024 through the firm of Muthomi Gitari Advocates LLP.

Appellant's Submissions

16. The Appellant submitted on brief facts of the case and relied in the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013]eKLR to outline the primary role as a first appellate court.
17. The Appellant identified three issues for determination the first being whether the trial magistrate's award of compensation was based on wrong principles, whether the learned trial magistrate's judgement should be set aside and whether the court should proceed and determine the issue of quantum and how it should be apportioned.
18. The Appellant submitted on the first issue that court is clothed with discretionary jurisdiction to interfere with the judgment of the trial court in instances where the judgment of the trial court is not supported in law and or it amounts to miscarriage of justice. The Appellant relied in the case of *Stephen Mwallyo Mbondo v County Government of Kilifi* [2021]eKLR.
19. The Appellant submitted that it is trite law that an award of general damages is a matter of the court's discretion. That discretion should however not be abused to award a party damages that amount to be punitive to the other or to unjustly enrich a party in a suit in the pursuit of justice.
20. The Appellant further submitted that they will demonstrate hereunder, the impugned judgment of the Honourable trial court is fraught of errors in principles of law, rules of evidence and irrelevant considerations in reaching its judgment and ultimately abusing its discretion for awarding an excessive sum of general damages which amounts to punishment of the Appellants herein as well as their insurer.



21. It is the Appellant's submission that it is trite law that an appellate court has the power to interfere with an award of damages if it is found to be inordinately high or low or awarded without due adherence to legal principles.
22. The Appellant submitted that the trial magistrate awarded:
General damages Kshs. 800,000/=
Less 20% contribution Kshs 160,000/=
Net Total Kshs 640,000/=
Special damages Kshs.9,030
Gross total kshs 649,030/=
23. It is the Appellant's submission that the trial magistrate's award of compensation/quantum was erroneous and excessive.
24. The Appellant submitted that on the issue of Special damages, it is trite law that special damages must be specifically claimed and specifically proved. The Appellant relied in the case of *David Bagine v Martin Bundi* [1997] eKLR.
25. The Appellant further submitted that the respondent pleaded special damages of KShs.51,390/= comprised of: motor vehicle copy of records Kshs. 550/=; Kshs. 10,000/= for demand letter; Kshs 5,000 fees for expert evidence; Kshs 5,000/= for transport costs for second medical examination; Kshs. 20,000/= for second medical examination and report; and Kshs. 10,480/= for medical expenses.
26. It is the Appellant's submission that the receipts the trial Magistrate relied on in awarding KShs.9,030/= did not match the amount claimed in each expense; as well the receipts did not indicate the Plaintiff was the payers of the money indicated some Receipts produced are faded and invisible, the tendered receipts also lacked the requisite revenue stamp and some expenses were not supported by any receipts thus unreliable and an award on the said receipts amounted to a miscarriage of Justice.
27. The Appellant submitted that the receipts tendered are in violation of the VAT Act (2013) and the VAT (ETI) Regulations [2020] which require those receipts to be in an electronic tax invoice hence awarding the expense will be supporting an illegality and (4) the receipts produced lack the requisite revenue stamp to have probative value as demanded by the case of *Leonard Nyongesa v Derrick Ngula Rigba* [2013]eKLR.
28. The Appellant submitted that the trial court relied on invoice in awarding the special damages whereas it is trite law that invoices are not a proof of payment.
29. It is the Appellant's submission that special damages can only be proved by producing actual receipts. The Appellant relied in the case of *Swalleh C. Kariuki & another v Violet Owiso Okuyu* [2021]eKLR
30. The Appellant submitted that special damages were not properly pleaded and strictly proven. That the risk of extorting the appellant and/or their insurer by making fictitious claims in the name of compensating the Respondent is too high to ignore. The Appellant urged the court to set aside the award of Kshs.9,030/= in special damages and award nil.
31. The Appellant submitted that awards under general damages are universally understood to be assessed on the Court's discretion subject however to the nature of the injuries and the general trend of compensation in similar cases.



32. It is the Appellant's submission that regarding the nature of the Respondent's injuries, the Respondent's medical report prepared by Dr. Nicholas Nkoge dated 27/06/2022, sets out his injuries as follows:
- (i) Bruises on the face;
 - (ii) Right hypochondrium of the abdomen contusion;
 - (iii) Right foot lacerations; and
 - (iv) Perforated bowel under the diaphragm.
33. The Appellant submitted that Respondent's doctor Dr. Nkonge never gave a specific figure for permanent incapacity and there was no evidence of physiotherapy undertaken by the Respondent to support a claim for ongoing recovery or disability. That the respondent's injuries have resolved and there is no residual injury to the Respondent.
34. The Appellant further submitted that the respondent medical report lacked the degree of injury he had sustained. That they urged the court to find in assessment the nature of injuries sustained by the Respondent to be soft tissue injuries.
35. The Appellant submitted that the medical report, discharge summary from Chuka county referral Hospital and the P3 form shows that the respondent underwent operation of exploratory laparotomy and as such the only disability was that of pain from surgical scars and abdominal discomfort.
36. The Appellant submitted that in the lower court the respondent supported the his proposal for Ksh 1,200,000/= with one authority being James Njenga vs Coast Bus (Mombasa) Limited 2016eKLR where the Court awarded Ksh. 900,000/= where injuries involved were blunt abdominal trauma with small intestine perforation.
37. It is the Appellant's submission that the authorities quoted by the respondent the injuries are more severe and not comparable with those suffered by the respondent. That the trial court failed to consider comparable injuries quoted by the Appellant wherein the court awarded amounts suggested by the Appellant herein. The Appellant relied in the cases of *Simon Mwinzi v Mwithi Musee*, HCCC 3160/(NRB) 1988 Inamdar's Digest(Supplement) p109, *Lydia Chao v Dhanjal Brothers ltd & 3 others* [1990]eKLR, *HB (Minor suing through mother & next friend DKM v Jasper Nchonga Magari & another* [2021]eKLR.
38. The Appellant submitted that the above quoted authorities the parties therein suffered more severe injuries than the respondent herein. That an award of kshs 100,000/= would be sufficient compensation for pain and suffering comparing with the injuries sustained by the respondent herein as well the passage of time and inflation rates.
39. It is the Appellant's submission that the court proceed to set aside the award by the trial court of kshs 800,000/= and substituted it with an award of kshs 100,000/= which is reasonable bearing in mind the nature of injury and enough compensation.
40. The Appellant submitted on the issue of cost and relied on section 27 of the *Civil procedure Act* which stipulates costs generally follow the event.
41. The Appellant further submitted that the appeal is merited and suggested the respondent be awarded special damages nil, general damages for pain and suffering 100,000 less contributory negligence of kshs 20,000/= and the total being kshs 80,000.



Respondent's Submission

42. The respondent submitted on the background of the matter and identified one issue for determination whether the learned magistrate award of quantum was lawful and just as per the evidence before the court and the applicable law.
43. It is the respondent's submission that when he was hit by the Appellant he suffered grievous injuries and thereafter he was taken to P.C.E.A Chogoria Hospital and later on referred to Chuka Referral Hospital whereby he was admitted for surgery for a period of twenty one (21) days and the same is evidenced in the discharge summary from Chuka Referral Hospital that was also produced in court.
44. The respondent submitted that he sustained soft tissue injury on the face, right foot laceration, abdominal injuries and a perforated bowel. That the respondent suffered serious bodily injuries that required emergency surgery and receipts from Chuka Referral Hospital were produced in court for the same.
45. It is the respondent's submission that the above mentioned was supported by the Medical Report authored by Dr. Nicholas Nkonge dated 15th December 2022 whereby injuries sustained by the respondent as a result of the accident were corroborated by the statements contained in the P3 form and the discharge summary of Chuka General Hospital.
46. The respondent submitted that Dr. Nicholas Nkonge's opinion was the respondent was at risk of developing abdominal complications like abdominal adhesion which qualifies to be a permanent disability.
47. It is the respondent submission that the trial court did not error in its award of damages at kshs .800,000 and further stated that there is no need to interfere with the award. The respondent relied in the case of *James Njega v Coast Bus (Mombasa) Limited* eKLR.
48. The respondent relied on section 27 of the *Civil Procedure Act* in regards to the issue of cost and further relied in the case of *Thomas Nyaga Njuki v Alexander Ireri Karimi* [2020]eKLR.

Analysis & Determination

49. The principles upon which an appellate court may interfere with an award made by a lower court are settled. These are as was stated by the Court of Appeal in case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and olive Lubia* [1985] 1 KAR 727, where the it observed:“....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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”
50. In awarding damages, the court has to bear in mind the principle that comparable injuries should as far as possible be compensated by comparable awards. It also has to ensure that it awards what it regards to be reasonable. These principles were espoused in *West (HI) and Sons Ltd v Shepherd* [1964] AC 326 which was adopted in the case of *Cecilia Mwangi & Another v Ruth Mwangi* CA 251 /1996, and in the *Nancy Oseko* case where the Judge adopted what Lord Morris said that: “But money cannot renew a physical frame that has been battered and shuttered. 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 this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

51. The material accident in the instant case took place on 16th May 2022. The respondent was examined by Dr. Nicholas Nkonge when the doctor prepared his medical report. According to the report the respondent had sustained –bruises on the face, right hypochondrium of the abdomen contusion, right foot lacerations and a perforated bowel under the diaphragm.
52. The patient was referred to Chuka Hospital where he was treated and thereafter discharged.
53. I have considered the grounds of appeal, the grounds in opposition thereto and the submissions by the respective advocates for the parties. I have perused the authorities cited by the advocates for the appellant. I find the injuries sustained to be soft tissue injuries.
54. In determining the quantum of damages payable to the plaintiffs, the court has to consider the aim of the law of damages. As rightly submitted by the counsel for the appellant, the following are the cardinal principles in assessment of damages:-
 - a) Damages should not be inordinately too high or too low.
 - b) Should be commensurate to the injury suffered.
 - c) Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.
 - d) Awards in past decisions are mere guidelines and each case depends on its own facts.
55. The philosophy and reasons for award of damages for pain and suffering is explained in paragraph 883 of *Halsbury's Laws Of England*, 4th Edition.

Damages for pain and suffering are awarded for physical and mental distress caused to the plaintiff both pre trial and in the future as a result of the injury. This includes the pain caused by the injury itself and the treatment intended to alleviate it, the awareness of an embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.”

56. I find the authorities cited by the Appellant to have been far more relevant. In addition to the authorities cited by the respondent, I have considered the awards in the following cases.
57. In *Simon Mwinzi v Mwithi Musee*, HCCC 3160/ (NRB) 1988 Inamdar's Digest (supplement) p109, plaintiff sustained 3 perforations of mid small gut as a result of a chest stab wound – 4 cm. He underwent operation of laparotomy. The only disability was pain from surgical scars and abdominal discomfort after eating. Court awarded Kshs.55,000/= in May 1987.
58. In *Eldoret Still Mills Ltd v Charles Owino* [2013] eKLR and *Robert Ngari Gateri v Mango Transporters* [2015] eKLR. The court was faced with appellants who had suffered soft tissue injuries with no permanent disability. On consideration of the facts and evidence the court awarded Ksh.60,000/= for pain and suffering and loss of amenities.
59. Similarly in *Blue Horizon Travel Co Ltd v Kenneth Njoroge* [2020] eKLR the plaintiff having sustained soft tissue injuries and fracture of the 3rd and 9th ribs was awarded Kshs 400,000/- as general damages.
60. I come to the inescapable conclusion that Kshs. 800,000 awarded was excessive in the circumstances and this court has to interfere with the trial court's discretion in assessing the damages for pain and suffering. An award of Kshs.400,000/- would be adequate for pain and suffering.



61. I now turn to the special damages. In the plaint, a total sum of Kshs.51,390, has been claimed under various items as itemized. It is the Appellant's argument that in awarding 9,030 did not match the amount claimed in each expense as well as the receipts did not indicate that the respondent was the payer of the money indicated and prayed that the respondent is awarded nil. Various documents were produced in support of damages under this head.
62. In *Osborn's Concise Law Dictionary*, special damages are defined as damage of a kind which is not presumed by law, but must be expressly pleaded and proved." That principle is well settled in the Kenyan law in the Court of Appeal's decision in *Coast Bus Service Ltd v Sisco Murunga Ndanyi & others*, Civil appeal No. 192 of 1992 where the court stated thus:-
- 63.
- " It is now trite law that special damages must first be pleaded and then strictly proved."
64. The court has carefully perused the receipts which were produced in support of special damages. I have perused the record and I do note that the respondent produced all documents filed by him and which included a copy of receipt issued by Dr. Nicholas N. Mbui evidencing payment of kshs.20,000 for medical examination and a report of a copy of receipt evidencing payment of kshs 10,000 as costs for the demand notice issued by Ms. Muthomi Gitari & Co. advocates, receipts from Chuka Referral Hospital evidencing payment but which was illegible and a receipt for kshs 8,480 and also an invoice of kshs 550. The learned magistrate held that the receipts were produced by consent of the parties and had no reason to reject them.
65. I agree with the trial court award on special damages and there is no basis to interfere with it.
66. In the end the Appellant's appeal succeeds and the trial court judgement is set aside. I enter Judgment as follows:-
1. General Damages - Ksh.400,000/-
 2. Less 20% Contributions - Ksh.80,000/-
 3. Special Damages - Ksh.9,030/-
Total - Ksh.329,030/-
 4. Interests
 5. The appellant to get half the costs in the lower court and ½ costs of the appeal.

DELIVERED DATED AND SIGNED AT CHUKA THIS 18TH DAY OF JULY, 2024

L. W. GITARI

JUDGE

