



**Odwori v Stewan General Merchants Limited & 2 others (Civil Appeal
E001 of 2023) [2024] KEHC 8427 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E001 OF 2023
MA ODERO, J
JULY 12, 2024**

BETWEEN

FLAVIAN WANDERA ODWORI APPELLANT

AND

STEWAN GENERAL MERCHANTS LIMITED 1ST RESPONDENT

STEPHEN WAMBUGU 2ND RESPONDENT

PAUL MAINA MWAI 3RD RESPONDENT

JUDGMENT

1. Before this court is the Memorandum of Appeal dated 6th January, 2023 by which the Appellant Flavian Wandera Odwori seeks the following orders:-

- “ 1. The Appeal be allowed.
2. The judgment of the Chief Magistrate’s Court (Nyeri) in CMCC No. 402 of 2019 be set aside and substituted with an enhanced award of quantum of damages with respect to the injuries sustained by the Appellant.
3. The costs of this Appeal be awarded to the Appellant”

2. The Respondents opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 29th January, 2024 whilst the Respondents relied upon their written submissions dated 8th April, 2024.

Background

3. This matter arose out of an accident which occurred on 26th May 2017. The Appellant told the lower court that on that day she was lawfully travelling as a passenger aboard a motor vehicle Registration No.



KAV 288E along the Nyeri - Mukurweini Road About 300 metres from a Kagumo Teachers College they encountered a lorry Registration No. KBD XXXX which was registered in the name of First Respondent but was being driven by the 3rd Respondent.

4. That the lorry which was coming from the opposite direction was at a High Speed causing material being carried of the back of the said lorry to fall into their path. As a result the driver of the KAV 288E lost control. An accident occurred in which the Appellant was injured.
5. The Appellants then filed a Civil Claim in the Magistrates Court seeking
 - (i) General Damages for pain and Suffering and loss of amenities.
 - (ii) Special damages of Kshs. 80,230/= as well as costs for future medical treatment.
 - (iii) Costs of the suit and interest.
6. The Defendants filed a joint defence in which they denied that the accident was caused by the negligence of the 3rd Respondent.
7. The suit was duly heard and vide a judgment delivered on 19thDecember, 2022, Hon. LUBIA Senior Resident Magistrate found the Respondents jointly and severally liable for the accident at 100% and made the following awards to the Appellant:-
 - (a) General Damages of Kshs. 1,000,000
 - (b) Costs of Prosthesis at Kshs. 300,000
 - (c) Special Damages of Kshs. 80,230
 - (d) Total Award - Kshs. 1,380,230
 - (e) Costs of the suit and interest at Court rates from the date of judgment until payment in full
8. Being aggrieved by this decision the Appellant filed this Memorandum of Appeal dated 6th January 2023, which appeal was premised upon the following grounds.
 - “(a) That the learned trial magistrate erred in law and in fact by not properly analyzing and/or considering the materials and evidence on record, while arriving at their decision of quantum of damages awarded to the Appellant.
 - (b) That the learned trial magistrate erred in law and in fact by making an award on general damages which was manifestly low in view of the injuries sustained by the Appellant. The evidence on record. The applicable law and principles for award of damages.
 - (c) That the learned trial magistrate erred in law and in fact by reaching a decision on quantum of general damages which is not supported by neither the pleadings, the submissions, evidence nor the submissions on record”.
9. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 29th January, 2024, whilst the Respondents relied upon their written submissions dated 8th April, 2024.



Analysis and Determination

10. I have carefully considered the record of Appeal herein as well as the written submissions filed by both parties.
11. This is a first appeal thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and draw its own conclusions.
12. In *Selle & Another -v- Associated Motor Boat Company Limited Others* [1968] E.A 123, the court of Appeal held that;-

“An appeal to this court from trial by the High 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 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. In particular this court is not bound necessarily to follow the trial judge’s findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”
13. Similarly the same court in the case of *Kiruga -v- Kiruga & Another* [1958] KLR eKLR the court observed that

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.”
14. On the issue of liability there appears to be no contest. Neither the Appellant nor the Respondents have taken issue with the decision of the learned trial magistrate to award liability at 100% in favour of the Appellant.
15. Likewise there is no contention on the issue of Special damages which were awarded at Kshs. 80,230/= . The same was proved by way of receipts.
16. The bone of contention in this appeal is the issue of quantum awarded as General damages. The court took into account the injuries which had been sustained by the Appellant which included an amputation to the left leg at the knee, Disability was assessed at 50%.The medical report indicated that the Appellant would require a prosthesis costing Kshs. 300,000 which prosthesis would need to be changed every eight (8) years.
17. Taking all the above into account the lower court awarded general damages at Kshs. 1,000,000/= . The Appellant contended that this amount awarded by the trial court was inordinately low given the serious and life-changing injuries which he had suffered.That the trial court failed to take into account awards made by courts in similar circumstances. The Appellant proposed an award of Kshs. 2, 500,000.
18. On their part the Respondents submitted that the assessment of general damages is at the discretion of the trial court. That the Appellate court can only interfere with the quantum of damages awarded by a trial court only in cases where it is satisfied that the trial court applied wrong principles of law.



19. The Respondents further submitted that the purpose of an award of general damages is to compensate the victim and not to enrich him. The Respondents proposed an award of between Kshs. 1,000,000 to Kshs. 1,600,000. They urged this court not to interfere with the award made by the trial court.
20. I have considered the injuries suffered by the Appellant and made a comparison with awards made in cases where similar injuries were suffered. The need for a court to rely on similar cases was emphasized by Hon. Lady Justice Meoli in the case of CM (a minor suing through mother and next friend MN) -v- Joseph Mwangangi Maina [2018] Eklr.
21. Similarly in Crown Bus Services Ltd & 2 Others -v- BM (Minor suing through his mother and next friend SMA) [2020] eKLR. The court outlined the principles to be relied upon in computing general (compensatory damages) as follows:-

..... “But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the 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 and done, it is still must be that amounts which are awarded are to a reasonable extent conventional.”

1. Comparative awards for comparative injury - see Kigaragari v. Aya (1985) KLR 273 where the Court of Appeal (Hancox, Nyarangi, JJA and Platt, Ag. JA) it was held that-

“In awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.”

2. Compensation figures should not be so high as to threaten the economy – See Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR where Kneller JA considered the issue of interference with trial court’s award as follows:-

“This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:

- a. Proceeded on a wrong principle; or
- b. Misapprehended the evidence in some material Respect And the judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country. Lord Denning MR in Lim Poh Choo v Chamden and Islington Area Authority [1979]



2 All ER 910 (ca); Hancox JA Mariga v Musila
(ibid).” [own emphasis]

22. I have considered the nature of injuries suffered by the Appellant which included amputation of the left leg at the knee and permanent disability of 50%. The Appellant would also require to be fitted with a prosthesis which would need to be replaced every eight (8) years.
23. In a similar case Koru Holy Family Mission Hospital -v- Koech [2021] eKLR - being case where the plaintiff suffered Amputation of the right leg at the knee and disability was assessed at 70% the court awarded general damages in the amount of Kshs.2,200,000.
24. I do in the circumstances agree that the award made by the trial court in this matter was on the lower side. Taking into account inflationar trends my view is that an award of Kshs. 2,400,000 would have been more appropriate.
25. I also note that the learned trial magistrate only awarded Kshs.300,000 as cost for Prosthesis yet the medical report clearly indicated that the Prosthesis would need to be replaced every eight (8) years.
In the circumstances the court ought to have made accommodation for the replacement of the prosthesis after a period of eight (8) years thus awarding Kshs. 600,000 under this heading.
26. Finally I find merit in this appeal and allow the same. The award made by the trial court is hereby set aside and in its place I make the following awards;-
 - (a) Liability remains at 100% against the Respondents
 - (b) General Damages – Kshs. 2,400,000/=
 - (c) Special Damages – Kshs. 80,230/=
 - (d) Costs for Prosthesis – Kshs, 600,000/=Total Award - Kshs. 3,080,230/=
 - (e) Costs of the suit and this Appeal are awarded to the Appellant plus interest at court rates from the date of judgment until payment in full.

DATED IN NYERI THIS 12TH DAY OF JULY 2024.

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MAUREEN A. ODERO

JUDGE

