



**Wainaina & another v Thairu & another (Civil Appeal
202 of 2022) [2024] KEHC 9506 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 202 OF 2022
MA OTIENO, J
JULY 19, 2024**

BETWEEN

SAMMY WAINAINA 1ST APPELLANT

JOSEPH OGOLA EZRA 2ND APPELLANT

AND

PETER KIBUI THAIRU 1ST RESPONDENT

HILLARY KEMEI 2ND RESPONDENT

*(Being an appeal from the Judgment/decree of Honourable P. Nyotah
(P.M) delivered 26th August 2022 in Kiambu CMCC No.E228 of 2021)*

JUDGMENT

1. This is an appeal from the Judgment delivered on 26th August 2021 in the Ruiru Chief Magistrate's court civil case No. E228 of 2021 where the learned magistrate awarded the Respondent damages of Ksh 700,000.00 as general damages, Ksh. 147,920.00 as special damages and a further Ksh. 60,000.00 as future medical expenses respectively.
2. The claim arose as a result of a road traffic accident on 22.09.2019, where the 1st Respondent was hit by motor vehicle registration No. KCD 705J, then being driven by Joseph Ogola Ezra, the 2nd Appellant. The motor vehicle was registered in the name of 1st Appellant.
3. At the conclusion of the matter, the trial court rendered its decision on 26th August 2021 and awarded the plaintiff a sum of Kshs. 700,000/- in general damages. A sum of Kshs. 147,920,000/- was also awarded in special damages. These awards in damages are the subject of this appeal.



4. The Appellants raised eight grounds in the memorandum of appeal. The main ground being that the learned trial magistrate erred and misdirected herself in awarding general damages in the sum of Kshs. 700,000/- and a further Kshs. 147,920 in special damages.
5. The appellants urged the court to allow this appeal with costs and set aside the judgment of the trial court and the consequent decree.

Submissions

6. The appeal was canvassed by way of written submissions. The Appellants submissions are dated 6th September 2023 while the Respondent's submissions are dated 15th December 2023.
7. The Appellant in his submission took the position that the sum Kshs. 700,000/- awarded in general damages was excessive. It was also the Appellant's argument that the sum of Kshs. 147,920 awarded in special damages was not specifically pleaded and proved and therefore ought not to have been awarded.
8. On his part, the 1st Respondent argued that the sum of Kshs. 700,000/- awarded by the trial court in general damages was correct and ought not to be disturbed. It was also their position that the sum of Kshs. 147,920 awarded in special damages is part of the Kshs. 690,715/- specifically pleaded in the plaint.

Analysis and determination

9. This appeal is limited only on the quantum of damages awarded by the trial court. Consequently, in deciding this appeal I am fully aware that assessment of damages is within the discretion of the trial court and that as an appellate court, I may 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 *Mbogo vs Shah* (1968) EA 93 and *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 of the fact that this being a first appeal, I am enjoined to reconsider evidence, reevaluate the same and draw my own conclusions, noting that this court is not bound by the findings of the trial court merely because it did not have the advantage of seeing and hearing the witness testify as was held in the case of *Selle & Another vs. 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 the two principles in mind, I shall now proceed and reevaluate the nature of the injuries suffered by the Respondent as contained in the pleadings and the two medical reports. I will thereafter draw my own conclusion, as an appellate court, as to whether the learned trial magistrate exercised his discretion judiciously in assessing the general damages, taking into account the circumstances of the case.
12. From the respective parties' submissions, it is apparent that the parties are in agreement on the nature of the injuries the 1st Respondent suffered. Their only point of departure is on the quantum of damages that would be reasonable to compensate the injuries.



13. According to the pleadings and evidence availed at trial, the Respondent suffered fracture of the left upper 1/3 tibia, soft tissue injury of the chest and soft tissue injury of the face. It was also pleaded in the plaint that there was some residual pain on the fracture site; weakness and numbness on the injured leg.
14. The Appellant argued that the amount awarded by the trial court was excessive taking into account the nature of the injuries. According to the Appellant, a sum of Kshs. 400,000/- was reasonable. The appellant placed reliance on *Civicon Limited vs Richard Njomo Omwancha & 2 Others* [2019] eKLR where general damages of Kshs. 450,000 was awarded for a deep cut wound on the left earlobe, a tender left lateral chest wall, swollen and left tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint.
15. Further, the Appellant cited the case of *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR where a sum of Kshs. 450,000 was awarded for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, blunt trauma to the chest, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur; and *Daniel Otieno Owino & Anor v Elizabeth Atieno Owuor* [2020] eKLR, where a sum of Kshs. 400,000/- was awarded for compound fracture of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, blunt chest injury and head injury with cut wound on the nose.
16. The Respondent in urging the court not to disturb the award of Kshs. 700,000/- awarded by the trial court for the injuries suffered, cited the case of *John Njenga Maina v Humphrey Kinyua Rukeria* [2016] eKLR where an award of Kshs. 750,000/- was made for compound fracture of the tibia and fibula, laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss. Further, the Respondent relied in the cases of; *Pauline Gesare Onani v Samuel Changamure & Anor* [2017] eKLR the court awarded Kshs. 600,000/- and *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR where a sum of Kshs. 800,000/- was awarded for injuries suffered therein.
17. The Respondent argued that taking into account the nature of the injuries suffered and the inflationary trends in the country, the appropriate sum in damages for injuries suffered in this case, ought to be in the region of Kshs. 700,000/- as was awarded by the learned trial magistrate.
18. This court is alive to the principle that in awarding general damages, the courts ought to consider the nature and gravity of the injuries, taking into account past awards for comparable injuries, but bearing in mind that not two cases are precisely alike. See the Court of Appeal decision in the case of *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR.
19. Having reevaluated the injuries sustained by the plaintiff as particularized in the plaint and proved in evidence. I have also considered the submissions and the authorities cited by the respective parties in support thereof. I find that the injuries in the case of *Pauline Gesare Onani v Samuel Changamure & Anor* [2017] cited by the 1st Respondent closely are more comparable to the injuries suffered in the present case.
20. Taking into account the nature of the injuries suffered in this case and taking into account the inflationary trends in the country, I do not find the sum of Kshs. 700,000/- awarded by the learned trial magistrate in this inordinately high and excessive in the circumstances of this case.
21. In reaching the above conclusion, I am guided by the principle enunciated in *Power Lighting Company Ltd & Another V Zakayo Saitoti Naingola & Another* [2008] eKLR cited by both parties to this appeal 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.
22. On the issue of special damages, I agree with the submissions by the Appellant that the same ought not only to be pleaded but must be proven as well. It was the Appellant's argument that the Respondents failed to prove the special damages to the extent of Kshs. 147,920 awarded by the trial court. The Respondents refutes this position.
23. I have perused the record of appeal and find that this ground of appeal is not supported by the evidence on record. I have established that the Kshs. 147,920 awarded by the trial magistrate was in fact pleaded and proven by way production of receipts by the Respondents.
24. In view of the above, I find the appeal unmerited and is hereby dismiss the same with costs to the 1st Respondent.
25. I assess costs at Kshs. 50,000.00 all inclusive.
26. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Kabita h/b for Najira for the Appellant.

Chebon for the 1st Respondent.

