



REPUBLIC OF KENYA



KENYA LAW
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Karia v NW (Minor suing through her next friend PWM) (Civil Appeal E014 of 2024) [2024] KEHC 10619 (KLR) (7 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E014 OF 2024
CJ KENDAGOR, J
AUGUST 7, 2024**

BETWEEN

EZEKIEL KEN OTIENO KARIA APPELLANT

AND

NW (MINOR SUING THROUGH HER NEXT FRIEND PWM) . RESPONDENT

(Being an Appeal from the Judgment of Honourable P.O. Ooko delivered on the 17th day of January, 2024 in Kiambu CMCC E301 of 2021)

JUDGMENT

1. This judgment relates to the memorandum of appeal dated 12th February, 2024. It is an appeal from the Judgment of Hon. P.O. Ooko, Senior Principal Magistrate, delivered on 17th January, 2024 in Kiambu Chief Magistrate’s Court Civil Suit No. E301 of 2021.
2. The Respondent filed the CMCC case against the Appellant, seeking general and special damages for injuries sustained in a road traffic accident that occurred on November 16, 2020, along Northern Bypass Road. The accident involved motor vehicle registration number KCG 159N and motor vehicle KCN 218A, in which the plaintiff was traveling as a fare-paying passenger.
3. The trial court adopted the liability finding from a test suit in Kiambu CMCC no. 304 of 2021, between Salome Wambui Miruru and Ezekiel Ken Otieno Karia. In the judgment delivered on 28th November, 2022, liability was determined to be 100%. The trial court addressed itself on the issue of quantum and awarded Kshs. 150,000/- as general damages for the injuries sustained and Kshs. 3,550/- as special damages.
4. The Appellant has raised 16 grounds of appeal, which are:
 - i. The trial magistrate erred in law and in fact in finding that the appellant was wholly liable for the occurrence of the alleged accident.



- ii. The trial magistrate erred in law and in fact in finding that the plaintiff had discharged their burden of proof on a balance of probabilities.
- iii. The learned magistrate erred both in law and in fact to appreciate that the plaintiff's evidence was misleading and fraudulent.
- iv. The learned trial magistrate erred in law and in fact by failing to consider the defence evidence tendered to find the plaintiff's case as fraudulent.
- v. The learned trial magistrate erred in law and in fact and he misdirected himself in failing to appreciate the principle of a just and fair hearing.
- vi. The learned trial magistrate's decision occasioned a miscarriage of justice.
- vii. The learned trial magistrate acted on wrong principles of law.
- viii. The learned chief magistrate misdirected himself in law by assessing general damages for pain, suffering and loss of amenities that were manifestly excessive and incomparable to the common judicial awards.
- ix. The learned magistrate erred in awarding the respondent the sum of Kshs. 150, 000/= for general damages for pain, suffering and loss of amenities and the sum of Kshs. 3, 550/= for special damages.
- x. The award in quantum of general damages for pain, suffering and loss of amenities in the circumstances is so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the respondent.
- xi. The award in quantum of damages of damages for pain, suffering and loss of amenities is altogether disproportionate and is not in keeping with other comparable awards made in respect of similar circumstances.
- xii. The learned chief magistrate erred both in law and in giving a very high award in quantum of damages for pain, suffering and loss of amenities contrary to the evidence given in court.
- xiii. The learned chief magistrate erred in law in making such a high award as to show that the magistrate acted on wrong principles of law.
- xiv. The learned chief magistrate's award on general damages for pain, suffering and loss of amenities was inordinately high as to be entirely erroneous.
- xv. The learned chief magistrate erred in fact and law by totally disregarding the appellant's submissions and authorities in making a finding on quantum of damages.
- xvi. The judgment on quantum of damages was against the weight of the evidence.

3. The Appellant seeks for orders that:-

- a. The appeal be allowed.
- b. This honourable court be pleased to vary, vacate, review and/ or set aside the judgment of the lower court both on liability and quantum.
- c. This honourable court be pleased to order that the respondent's case in the lower court stands dismissed with costs.



- d. In the alternative to prayer (c) above, that this honourable court be pleased to review or set aside the award on quantum.
 - e. This honourable court be pleased to assess downwards the quantum of damages awarded to the respondent.
 - f. The respondent pays the costs of this appeal and the costs in the lower court.
 - g. Such further relief be granted as may appear just and expedient.
4. Parties agreed to canvass the appeal through written submissions. The Appellant filed written submissions dated 6th June, 2024, while the Respondent did not.

Analysis And Determination

5. In *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) the court stated as follows:

“2. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited*.”

6. I have carefully considered the grounds of appeal, the record of appeal, and the submissions before this court and find that the issues that arise for determination are whether the apportionment of liability was correct, whether the award of general damages was excessive to warrant interference by this court and who should bear the costs of the appeal.

Liability;

7. This court is being called upon to interfere with the liability apportioned by the trial court. The lower court record shows that on 22nd November, 2024, the parties informed the court that liability had been determined in a test suit - Kiambu CMCC 304 of 2021 - and proceeded on quantum through written submissions. A copy of the judgment in the test suit was furnished to the court on the same date. The Judgment was delivered on 28th November, 2022.

8. The Civil Procedure Rules provide for test suits in Order 38 Rules 1 and 2; -

Order 38 – Selection of Test Suit

[Order 38, Rule 1.]: Staying several suits against the same defendant

Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.

[Order 38, Rule 2.] Staying similar suits upon application by defendant



Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several dependants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues.

9. The Appellant acknowledged in his submissions on appeal and before the lower court that the case Kiambu CMCC E304/2021 had been selected as a test suit. The accident was the same cause of action in the case now on appeal. Once liability was established in the test suit, it was binding and applied to the other cases within the scope of the test suit.
10. The judgment in the test suit shows that liability was entered at 100% against the defendant, who is the appellant in this case. The issue of liability was fully determined in the test suit, and the trial court in Kiambu CMCC E301/2021 was bound to adopt the apportioned liability or provide reasons for departing from it. The trial court correctly adopted the finding on liability.

Quantum;

11. The Respondent pleaded in the plaint dated 29th March, 2021 that she sustained the following injuries;
 - a. Blunt head injuries
 - b. Blunt trauma to the right eye
 - c. Soft tissue injuries- both hands
12. In *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”
13. My duty as an appellate court is threefold regarding the quantum of damages: -
 - (a) To ascertain whether the Court applied irrelevant factors or left out relevant factors;
 - (b) To ascertain whether the award is too high as to amount to an erroneous assessment of damages;
 - (c) The award is simply not justified by evidence.
14. Both parties confirmed to the trial court that they were proceeding with the assessment of quantum through written submissions. The trial court considered the authorities that the parties relied on in their submissions when assessing damages. The respondent proposed an award of Kshs. 350,000/-, whereas the Appellant submitted an award of Kshs. 100,000/- as adequate compensation for the injuries sustained.
15. The Appellant relied on the case of *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR, in which the Respondent sustained soft tissue injuries to the lower right leg and soft tissue injuries to the back (trunk). The court awarded Kshs. 100,000/- as general damages.



16. The Respondent relied on Meru HCCC No. 70 of 2019 John Mwendwa Kuti & Another v Ibrahim Kunyaga F. Gikonyo, J. The court awarded Kshs. 350,000/- as damages to the respondent who sustained mild head injuries and further relied on the authority of where the Respondent was awarded Kshs.350,000/- as general damages for blunt injury to the chest, bruises of the lower abdomen, bruises of the right hip joint, bruises of the thigh, and bruises on the knee.
17. I find that the injuries outlined in the authorities the Respondent relied upon are more severe than those in the present case. The Respondent's injuries were classified as soft tissue injuries of moderate severity. The trial court further considered a comparative analysis, the age of the authorities, and inflationary trends. Based on the above precedents, I find that the Lower court's exercise of discretion in this issue was reasonable, and, therefore, I decline to upset the lower court's finding on the same. The Kshs.150,000/- award as general damages was adequate in light of the injuries sustained.
18. The award of Ksh.3,550 /- as special damages is as pleaded and proved. The same remains as awarded.
19. Accordingly, the appeal is not merited and is dismissed with costs to the Respondent.
20. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 7TH DAY OF AUGUST, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM

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C. KENDAGOR

JUDGE

In the presence of;

Court Assistant - Hellen

Advocate for the Applicant -

Advocate for the Respondent -

