



REPUBLIC OF KENYA



**Gathua & another v Muthiani (Civil Appeal 7 of 2023)
[2024] KEHC 10763 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 7 OF 2023
H NAMISI, J
SEPTEMBER 19, 2024**

BETWEEN

BENJAMIN NJOROGE GATHUA 1ST APPELLANT

BENJO (K) LIMITED 2ND APPELLANT

AND

**JANE MUTHIANI ALIAS JANE MUTHONI ALIAS JANE KAWEMBE
MUTHIANI RESPONDENT**

*(Being an Appeal from the judgement of Hon. M. W. Wanjala, Senior
Resident Magistrate delivered in Thika CMCC No. 1009 of 2015)*

JUDGMENT

1. This appeal arises out of an accident that occurred on 12 December 2014 involving motor vehicle registration number KBL 908W Mitsubishi Bus, in which the Respondent was travelling as a fare paying passenger. The accident occurred along Thika -Garissa Road, at Maguguru corner. The motor vehicle was owned by the 2nd Appellant and driven by the 1st Appellant. As a result of the accident, the Respondent sustained the following injuries:
 - i. Fracture left humerus;
 - ii. Fracture left distal radius ulna;
 - iii. Fracture left distal 1/3 clavicle;
2. By Plaint dated 12th October 2015, the Respondent instituted proceedings against the Appellants, seeking general damages for pain and suffering, special damages of Kshs 76,990/=, future expenses of Kshs 80,000/= costs of the suit and interest.
3. The Appellants entered appearance and filed a Statement of Defence dated 28 October 2015.



4. At the hearing, the Respondent testified that the driver of the motor vehicle was speeding, as a result of which the driver lost control and the vehicle rolled. The Respondent produced several documents including the Discharge Summary from Kijabe Hospital, taxi receipts, receipts for payments to Kijabe Hospital, Police Abstract and motor vehicle records.
5. The parties entered consent on the production of the medical report dated 8 August 2015 by Dr. Karanja. It was also agreed that the report by the Appellants' doctor, Dr. Leah Wainaina, would be produced by consent and annexed to the Appellants' submissions. The Appellants closed their case without calling any witness.
6. In her submissions, the Respondent argued for general damages of Kshs 2,800,000/=. She relied on the cases of *Alphonza Wothaya Warutu & Another -v- Joseph Muema*, Makueni HCCC No. 01 of 2017; *Easy Coach Ltd v Emily Nyangasi, Kisumu* HCC NO. 20 of 2015, *Gurvev Eng & Construction Ltd -v- Allan Otieno*; Nairobi HCC NO. 664 of 2012.
7. In their submissions, the Appellants argued that without any conclusive evidence pointing to the Appellants' driver's negligence, the Respondent had failed to prove her claim on a balance of probabilities and that the same ought to fail. Regarding quantum, the Appellants submitted that a sum of Kshs 200,000/= would suffice. They relied on the case of *Simon Mungai Kariuki -v- Fatma Hassan* [2017] eKLR.
8. The trial court then delivered the impugned judgment in favour of the Respondent against the Appellants, jointly and severally, as follows:
 - i. Liability at 100%
 - ii. General Damages of Kshs 1,500,000/=;
 - iii. Special Damages of Kshs 76,990/=;
 - iv. Future medical expenses Kshs 80,000/=
 - v. costs of the suit
 - vi. interest (ii), (iii), (iv) and (v) at court rates from the date of judgement
9. The Appellants, being dissatisfied by the judgement, lodged an appeal on the following grounds:
 - i. That the learned Magistrate erred in fact and law and misdirected himself in finding that the Respondent is entitled to general damages of Kshs 1,500,000/=:, special damages of Kshs 76,990/= and future medical expenses of Kshs 80,000 with costs and interests;
 - ii. That the trial magistrate erred in law and fact and misdirected himself when he failed to consider the Appellants' submissions on both points of law and facts;
 - iii. That the Learned Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the Appellants;
 - iv. That the learned Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (to apply precedents and tents of law applicable);
 - v. That the learned Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum thereby arriving at a wrong decision unsustainable in law;



- vi. That the learned Magistrate erred in law and fact in arriving at the said decision;
 - vii. 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;
 - viii. That the learned Magistrate erred in fact and law in failing to consider conventional awards in cases of similar nature.
10. Directions were given to canvass the appeal by way of written submissions. The Respondent filed her undated submissions. By the time of writing this judgement, the Appellant had not filed submissions.
 11. I have considered the Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal as well as submissions by the parties. Despite the numerous grounds of appeal, the appeal relates only to the issue of the quantum of damages assessed by the trial court.

Analysis & Determination

12. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123.
13. In an appeal on quantum, the court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were set out in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

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 Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
14. It was the Respondent's testimony that following the accident, she was taken to Thika Level 5 Hospital where she was treated and referred to AIC Kijabe Hospital. The Respondent was admitted at Kijabe from 13 December 2014 to 22 December 2014. A metal plate was inserted into her left hand. Upon discharge, the Respondent attended the Hospital for follow up.
15. The Respondent produced a Medical Report by Dr. George Karanja dated 18 August 2015. At the time of the examination, the Doctor noted that the Respondent was in fair general condition. In his opinion, the Respondent had sustained grievous injury and had had surgery to fix the fractures. The left arm required continued physiotherapy to restore movements. The Doctor estimated the cost of removal of the implants at Kshs 80,000/= and noted that the Respondent stood a high chance of developing osteoarthritis of the left upper limb.
16. The Appellants also produced a Medical Report by Dr. Leah Wainaina dated 10 December 2015. At the time of the examination, the Doctor observed that the Respondent was in good general condition, walking in a normal gait. She, however, had restricted use of the left hand. The Doctor estimated the cost of removal of the implants at Kshs 30,000/= in a mission or government hospital. The Doctor



also noted that the Respondent was at risk of developing post traumatic osteoarthritis of the left elbow joints.

17. In the impugned judgement, the trial court referred to the reports by both doctors. In awarding the amount of Kshs 1,500,000/= in general damages, the court considered the medical reports, the authorities cited by the parties as well as the inflationary rates.
18. Turning to whether the general damages awarded by the trial court were exceedingly high, I am guided by the principle in the assessment of damages that an award must reflect the trend of previous, recent and comparable awards. In the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR, the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

19. I have looked at comparable cases. In *Gogni Rajope Construction Company Limited v Francis Ojuok Olewe*, Civil Appeal No. 1 Of 2014, Majanja J. reduced the award of Kshs 800,000/= to Kshs 350,000/= for fracture of radius and ulna as well as dislocation of elbow joint.
20. In *Joseph Njuguna Gachie v Jacinta Kavuu Kyengo*, Hcca No. 31 Of 2017, Odunga J. reduced to Kshs 600,000/= the general damages which the trial Court had assessed at Kshs 1,000,000/=. The Plaintiff had suffered blunt temporal injury with swelling; facial bruises; blunt injury on the left forearm; and comminuted fracture of left radius and dislocated left ulna joint.
21. In *Jaldessa Diba t/a Dikes Transporters & Another v Joseph Mbiti Isika* (2013) eKLR, the court awarded Kshs. 350,000/- for fractured and dislocated right clavicle among other soft tissue injuries.
22. In *Mary Akinyi Atella v Omondi Beatrice Monica* [2021] eKLR, plaintiff suffered left elbow comminuted fracture, right Ulnar shaft fracture and Multiple lacerations. The Court substituted the lower court award with an award of Kshs 500,000/=.
23. In view of the cited authorities, it appears that an award of Kshs 1,500,000/- for general damages by the trial court was excessively high. Upon considering the damages awarded in the authorities I have just cited, and their age, I find that an award of Kshs 600,000/= to be reasonable and adequate to compensate for the injuries suffered in this case.
24. With regard to special damages, it is trite law that special damages ought to be specifically pleaded. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (1992) KLR 177 stated that:-

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

25. The Respondent pleaded special damages of Kshs 76,990/=. In its judgement, the trial court found that the Respondent had proved the same and awarded the said amount. I have looked through the



lower court file and found some receipts relating to transport costs, as well as some faded receipts, no doubt due to age. Without the benefit of having heard the witnesses and seen the evidence produced, I am reluctant to interfere with the finding of the trial magistrate, who, having evaluated the evidence produced, found that the Respondent had proved her claim for special damages.

26. Regarding the future medical expenses, the trial court observed that both doctors agreed on the need for removal of the implants in the Respondent's arm. What differed was the estimates. The trial court awarded Kshs 80,000/- as estimated by the Respondent's doctor, in consideration of the passage of time. Notably, the estimates were given 2015 and judgement was delivered in 2022, a time span of 7 years. With this in mind, I see no justifiable reason for interfering with this award by the court.
27. Accordingly, I allow the appeal and set aside the award of Kshs 1,500,000/= for general damages by substituting it with Kshs 600,000/-. The final award is as follows:
 - i. Liability at 100%
 - ii. General Damages of Kshs 600,000/=;
 - iii. Special Damages of Kshs 76,990/=;
 - iv. Future medical expenses Kshs 80,000/=
 - v. costs of the suit
 - vi. interest (ii), (iii), (iv) and (v) at court rates from the date of judgement
28. Considering the outcome of the appeal, each party shall bear its own costs.

DATED AND DELIVERED AT THIKA THIS 19 DAY OF SEP 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

N/A..... for the Appellants

N/A..... for the Respondent

