



**Living Room International & another v EA (Suing Through Next Friend HM) (Civil Appeal 162 of 2018) [2024] KEHC 12142 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 162 OF 2018  
RN NYAKUNDI, J  
OCTOBER 11, 2024**

**BETWEEN**

**LIVING ROOM INTERNATIONAL ..... 1<sup>ST</sup> APPELLANT**

**JOSHUA KIPCHIRCHIR ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EA (SUING THROUGH NEXT FRIEND HM) ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Honourable C. Obulutsa – (Chief Magistrate) delivered on 16th July, 2018 in Eldoret CMCC No. E709 of 2016 between EUGINE ATLANYI (Suing through next friend) HELLEN MINAYWA –VS- LIVING ROOM INTERNATIONAL AND JOSHUA KIPCHIRCHIR)*

**JUDGMENT**

**Representation:**

M/s Omwenga & Company Advocates

M/s Alwanga & Company Advocates

1. The instant appeal is only on quantum. At the trial court, the Respondent filed a claim against the appellant seeking general damages, special damages and costs and interests of the suit arising from road accident that occurred on 09.06.2016, wherein it is alleged that the Respondent was a lawful pedestrian at Majengo-Mugunga rough road when the 2<sup>nd</sup> Appellant drove motor vehicle registration number KAY 082F so recklessly, carelessly and negligently and caused it to violently knock down the Plaintiff-minor from the front and as a result the Respondent sustained injuries.
2. The appellants in response to the claim denied the manner in which the alleged accident occurred as put by the Respondent. In the alternative, they blamed the Respondent for being negligent.



3. After trial Judgment was delivered on 16/07/2018 and the Appellants was found 85% liable as per the consent recorded and damages assessed as hereunder: -
  - a. General Damages..... Kshs. 400,000/=
  - b. Special Damages..... Kshs. 6,160/=
  - c. Total ..... Kshs. 406,160/=
  - d. Less 15% ..... Kshs. 60,924/=
  - e. Net ..... Kshs. 345,240/=
  - f. Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal only on quantum on (5) grounds: -
  - i. That the learned trial magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 400,000/= as general damages that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.
  - ii. That the learned trial magistrate erred in law and fact by awarding the Respondent a special damages of Kshs. 6,160/= which were not proved by the Respondent herein.
  - iii. That the learned trial magistrate erred in law and fact in failing to consider the Appellants' submissions and legal authorities relied upon in support to the defence thereof.
  - iv. That the learned trial magistrate erred in law and fact by over relying on the Respondent's submission and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.
  - v. That the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.
5. The appeal was canvassed vide written submissions. The Appellant on 5<sup>th</sup> February, 2024 filed submissions of even date while the Respondent on 6<sup>th</sup> March, 2024 of even date.

### **The Appellant's Submission**

6. Learned Counsel Mr. Omwenga for the Appellants couched three issues for determination as follows:
  - a. Whether the general damages awarded are exorbitant and/or inordinately high as compared to the injuries sustained.
  - b. Whether the special damages awarded were sufficiently proved.
  - c. Who will bear the costs of the Appeal?
7. On the first issue, it was submitted for the Appellants that the general damages awarded were inordinately high to represent a fair award for the compensation of injuries sustained. On this he cited the case of H. West and Son Ltd. V. Shepherd (1964) AC. 326. Learned counsel pointed out that during the hearing of the Plaintiff's case, PW1 – Patrick Kimeto testified that the Respondent herein sustained soft tissue injuries which had healed well as at the time he was testifying in court. Further that PW 2 – Dr. Joseph Sokobe who was the examining doctor also testified and produced a medical report indicating that the Respondent sustained soft tissue injuries which were healing well. PW4- Hellen Ninaywa on the other hand confirmed that her son had fully recovered from the sustained injuries.



8. It was the submission of counsel that in light of the testimonies and the evidence on record, it is evidently clear that the Respondent sustained minor soft tissue injuries which had healed well as at the time of hearing. Mr. Omwenga argued that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. Further that, different courts have been cautious against the invitation to make exorbitant awards because doing so is against public policy. Whenever the insurers are burdened to pay high sums in compensation, the effect will be directly felt by their clients through increased premiums. He relied on the case of *Kigaragari v Aya (1985) eKLR*. In light of the cited decision, learned counsel argued that the trial magistrate misdirected himself by over relying on the authorities cited by the Respondent without bearing in mind the nature of the injuries in the cited authorities thus leading him to make an erroneous estimate which we urge the court to interfere with and set it aside.
9. To support the appeal on quantum, learned counsel borrowed from the following decisions:
  - a. *HB (minor suing thought mother & next friend DKM) v Jasper Nchonga Magari & another (2021) Eklr* where the claimant sustained blunt object injury to the head and neck, thorax, abdomen and limbs. The Appellate court affirmed the decision of the trial court in awarding Kshs. 60,000/= to the Claimant/Appellant.
  - b. *Eva Karemi & 5 others v Koskei Kieng & another (2020) Eklr*, the Appellate court affirmed the trial court's decision in awarding Kshs. 70,000/= to one of the appellants who had sustained soft tissue injuries to her right thigh and bruises on her lower and upper limbs.
  - c. *FM (Minor suing through Mother and next friend MWM) v JNM & another (2020) Eklr*.
10. From the cited decisions, Learned Counsel Mr. Omwenga proposed an amount in damages of Kshs. 60,000/=.
11. Regarding special damages, counsel argued that the Respondent produced a receipt of Kshs. 6,000/= as Pexh 4 allegedly being the receipt paid in obtaining a medical report and p3 form. The Appellant challenged the receipt for non-compliance with the *Stamp Duty Act* which requires that receipts must bear stamps. That the court awarded the special damages without addressing the challenge by the Appellants that the receipts produced were not qualified to be relied upon in evidence. Further that is also not clear how the trial court awarded the additional Kshs. 160/= when no receipt was produced. On this he cited the decision in *Easy Coach Limited v Emily Nyangasi (2017) Eklr*.

### **The Respondent's Submissions**

12. Learned Counsel Mr. Alwanga started by reminding this court of its duty as an appellate court as held in the case of the Court of Appeal for East Africa in *Peters -vs- Sunday post*.
13. It was submitted for the Respondent that this court should be guided by the principle set out in *Odinga Jacktone Ouma -vs- Maureen Achieng Odera (2016) eKLR*.
14. According to counsel, taking account of the salvage of inflation as an additional factor, it was thus right for the trial magistrate to hold as he did in making the award.
15. On special damages, Mr. Alwanga argued that the test to be applied in an award of special damages is clearly articulated in the cases of *Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990* and *Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681* which laid down the principle that special damages in addition to being pleaded must be strictly proved.



16. Consequently, on special damages the Respondent produced receipts from Lumakanda Hospital totalling Kshs. 160/= thus he has clearly proven the amount pleaded as special damages of Kshs. 6,100/= appropriately awarded by the Learned Magistrate.
17. He submitted that the lower court's finding and award be upheld and the Appeal dismissed with costs.

### **Analysis & Determination**

18. This Appeal is purely on assessment of damages to the extent that liability is not in issue. In so far the jurisdiction of this court is concerned, I place reliance in the principles articulated in the following authorities:
  - a. Peters Vs Sunday Post Ltd. [19581 EA 424
  - b. Mbogo & another vs Shah (1968) EA 93
  - c. Selle and another vs Associated Motor Board Company Ltd (1968) EA 123
19. In all these cases, the courts are consistent that in evaluating and scrutinizing the appeal, certain guidelines remain constant. First and foremost, an appeals court as the one I sit in, should bear in mind that it has neither seen nor heard the witnesses. This is an advantage only accorded to the trial court. Why is this important? There is the aspect of evaluating the truthfulness, reliability and correctness of the viva voce evidence tested through the tools provided in the Evidence Act. The conclusion drawn by a trial court on the demeanour of a witness carries weight in establishing proof of existence or non-existence of a fact in issue for a party to secure judgment against the adversary. In the second limb, in judicial decision making exercise of discretion plays a critical role and for an appellate court to impeach that discretion, there are clear principles which have been set out by the Court of Appeal in the case of Kenya Bus Services Limited vs Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 thus:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.” See also *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR*
20. As part of the compensation, in accident claim injuries the general frame is the head commonly referred to as pain and suffering and loss of amenities. It is expected that the trial court would appreciate by way of evidence:
  - a. Severity of the initial injury;
  - b. Period taken to recover from any symptoms
  - c. The extent of any continuing symptoms which manifest post the accident or injury
  - d. Whether a substantial recovery has taken place at the time of the claim and assessment of damages or it will take place in the short or medium term level
  - e. Whether the injury or injuries did interfere with the quality of life and leisure activities of the claimant and finally but not least, the impact if any on the education, occupation or work



activities of the Claimant and the issue of prognosis to include any future vulnerability is also a component associated with assessment of damages.

21. It is in this respect the court in the persuasive case of *West (H) & Son Ltd (1964) A.C. 326* at page 341 spoke as follows:

“I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”

22. Additionally, in the case of *Kigaragari v Aya [1985] eKLR*, Nyarangi J. as he was then stated thus:

“I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

23. The specific combination of facts in each case is unique. How does the trial court determine which items of laws to can consider? He/she is limited first of all by the evidence and the pleadings and secondly by the customary rules and principles already settled in the past existence of the High Court and Court of Appeal for measuring damages arising out of the tort of negligence in this case personal injury claims. Here the Respondent from the Evidence sustained physical injuries, he stated that to involve the following bodily harm:

- a. Bruises on the scalp
- b. Bruises on the face
- c. Blunt injury to the pelvis

24. The medical legal report dated 14<sup>th</sup> June, 2016 confirmed the same injuries and opined them to be of soft tissue in nature with no permanent disability. The furthest the medical doctor went was to make a finding of the residual scars arising out of the accident. Obviously, in any injuries of this nature, there cannot be no definite pecuniary measure for mental anguish or physical pain the respondent suffered in order for the court to put a monetary value to it. The best the trial court does is to exercise discretion by an evaluation of the injuries on the face of it and lean towards the applicable past awards on similar injuries. In such cases, the materiality of the injuries suffered may appear to carry the same characteristics but the depth of the physical harm, mental anguish, psychological trauma, loss of amenities largely will vary from one claim to another. There is no doubt that trial courts can face a dilemma in such cases weighing one factor after another to arrive at a specific award.

25. It is the very reason an appeals court must adhere to the principles laid in *Kemfro Africa Limited t/ a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR* and *Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000*.



26. Comparatively, few instances occur where appellate courts reverse judgements secured in favour of the claimant or in our case the Respondent solely on the ground of erroneous error on the so called measures of damages. For this court to address this appeal in perspective, the question of award of damages as being excessive, it is prudent to look at the recent decisions on the same facts to establish whether the matter of excessiveness of damages as raised by the Appellant holds any weight.
27. The injuries suffered by the respondent were soft tissue injuries. My reading of the following comparable cases will help in arriving at a fair determination:
28. In *Daniel Gatana Ndungu & another v Harrison Angore Katana (2020) eKLR* the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000/- on general damages and substituted it with an award of Kshs 140,000/-
29. In *Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa (2020) eKLR*, the respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was awarded Kshs 300,000/=. On appeal the court set aside that amount and awarded Kshs 150,000/=.
30. Recently, in *Pascal v Ouko (Civil Appeal E005 of 2022) [2023] KEHC 24463 (KLR)*, the respondent suffered a chest contusion, blunt trauma to the back, blunt trauma to the scalp, blunt trauma to the neck, blunt trauma to the upper limbs, blunt trauma to the lower limbs, Lacerations on the right knee and was awarded Kshs 200,000/=. On appeal Korir J set aside that amount and awarded Kshs 150,000/=
31. In evaluating the evidence, the only practical test is whether the total damages fall within somewhere within the necessarily certain limits of fair and reasonable compensation in this particular case going by the recent awards. This might not be errors per se of a trial court just by reason by the size of the verdict of Kshs. 400,000/= but I uphold the view that the sum awarded to the Respondent is not commensurate with the injuries he suffered. Therefore, bringing the award to the category of it being unreasonable. There is enough evidence in the case to support a fair and proportionate award for the soft tissue injuries suffered by the Respondent. This court therefore exercises appellate jurisdiction and discretion to review the trial court's findings of facts culminating into the award which so satisfactorily by the injuries suffered by the Respondent at no prognosis of a permanent disability or any expectation of post-medical treatment. I could have ordered for a new trial in this matter but it suffices that the evidence is sufficient to show the extent of the harm suffered and this court retains the residual power to the extent of setting aside the impugned award and have it substituted with what is considered a fair compensation for the injuries. To that extent the Kshs. 400,000/= awarded as general damages as calculated by the trial court is hereby set aside to a lesser award of Kshs. 200,000/=. This is in conformity with the cited cases *Daniel Gatana Ndungu & another v Harrison Angore Katana (supra)*, *Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa (supra)* and *Pascal v Ouko (Supra)*.
32. As to the Special damages, I have keenly read through the arguments as advanced by the appellant that the Receipt of Kshs. 6,000/= as produced by the Respondent for reasons that it did not comply with the provisions of Section 19 of the *Stamp Duty Act*. However, counsel deliberately left out the provisions of Section 88 of the same legislation which provides as follows:

“Any person receiving any money of one hundred shillings or upwards in amount, or any bill of exchange or promissory note for an amount of one hundred shillings or upwards, or receiving in satisfaction or part satisfaction of a debt any movable property of one hundred



shillings or upwards in value, shall, on demand by the person paying or delivering the money, bill, note or property, give a duly stamped receipt for it.”

33. In my view, the provision is correct but such is not common practice in a normal Kenyan day-to day transactions. To expect an individual to get such stamped receipts is far too much a burden, particularly on transactions such as this. If indeed the Plaintiff received the services of a doctor, it is reasonably expected that such services come at a fee. With that said, I find no reason to disturb the award of special damages and I shall therefore leave it undisturbed.
34. In the final calculation, the summation of the General and Special Damages awarded is Kshs 206,160/=, which shall be subjected to the 15% deduction as to liability.
35. The costs shall be shared by each party.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF OCTOBER 2024.**

In the Presence of:

Ms. Mureithi, Advocate for the Respondent

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**R. NYAKUNDI**

**JUDGE**

Email: xxxx.com

