



REPUBLIC OF KENYA



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**Machoka & another v Kerubo (Civil Appeal E010 of 2022)  
[2023] KEHC 1283 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E010 OF 2022  
CW GITHUA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**THADAEUS MOMANYI MACHOKA ..... 1<sup>ST</sup> APPELLANT**

**ZACHARY ADONGO ALEX ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LYDIA KERUBO ..... RESPONDENT**

*(Being an appeal from the Judgement and Decree of Hon. D.O. Mac'Andere  
RM dated 4th February 2022 in Kisii CMCC No. 946of 2019)*

**JUDGMENT**

1. The appellants, Thadaeus Momanyi Machoka and Zachary Adongo Alex were the defendants in Kisii CMCC No 946 of 2019. In the suit, the respondent Lydia Kerubo, then the plaintiff, sued the appellants seeking general and special damages following personal injuries sustained in a road traffic accident involving her as a pedestrian and motor vehicle Reg No KAR 346W.
2. In her plaint dated December 13, 2019, the respondent averred that the accident which occurred on November 10, 2015 on a road within Kisii township was caused by the negligence of the 2<sup>nd</sup> appellant who was the 1<sup>st</sup> defendant's authorized driver and or agent. It was the respondent's case that the 2<sup>nd</sup> appellant negligently controlled or managed motor vehicle Registration No KAR 346W as a result of which it violently collided with her occasioning her personal injuries. The particulars of the 2<sup>nd</sup> appellant's alleged negligence are pleaded in paragraph 5 of the plaint.
3. In their joint statement of defence dated February 6, 2020, the appellants denied liability in toto and put the respondent to strict proof thereof. Without prejudice, they pleaded that if the accident occurred which was denied, it was caused or substantially contributed to by the respondent's



negligence. The particulars of the respondent's alleged contributory negligence were pleaded in paragraph 6 of the defence.

4. After a brief hearing in which only the respondent and one other witness testified, the trial court delivered its judgment on February 4, 2022 and held the appellants jointly and severally liable for the accident at 100% and awarded the respondent Kshs 500,000 as general damages and Kshs 22,050 as special damages together with costs of the suit.
5. The appellants were aggrieved by the trial court's decision on both liability and quantum. In their memorandum of appeal dated February 7, 2022 and filed on February 17, 2022, the appellants advanced ten grounds of appeal which were mainly a duplication of each other. The appellants principally complained that the learned trial magistrate erred in law and facts by: finding them 100% liable which was against the weight of evidence on record; failing to consider the appellants' submissions on quantum and liability; awarding the respondent Kshs 500,000 in general damages which was inordinately high considering the nature of the injuries she sustained; and, by failing to consider conventional awards in similar cases.
6. In compliance with the court's directions, the appeal was prosecuted by way of written submissions which both parties duly filed. The respondent was the first to file her submissions on August 8, 2022 while those of the appellants were filed on November 18, 2022.
7. In their submissions, the appellants abandoned their appeal on liability and focused on challenging the quantum of damages awarded to the respondent. They invited me to set aside the trial courts judgement on quantum on grounds the award of Kshs 500,000 as general damages was inordinately high given the injuries sustained by the respondent which were soft tissue injuries. In the appellants' view, an award of Kshs. 50,000 would have been fair and adequate compensation for the said injuries.

For this proposition, the appellants relied on the following authorities;

*HB (Minor suing through mother and next friend DKM) v Jasper Nchonga Magari & another* [2021] eKLR where Kshs 60,000 was awarded and affirmed on appeal for multiple soft tissue injuries on the neck, thorax, abdomen and limbs. *Eva Karemi & 5 others v Koskei Kieny & another* [2020] eKLR where the six appellants were awarded between Kshs 40,000 to Kshs 65,000 for different soft tissue injuries. *Cyprian Jairo Odhiambo v Robiri Gitanda* [2021] eKLR where the High Court reduced an award of Kshs 250,000 to Kshs 150,000 for blunt trauma to the lower back, bruises on the right leg and blunt trauma to the right knee.

8. On special damages, the appellants submitted that the trial court erred in awarding the respondent Kshs 22,050 whereas Kshs. 7,050 was the only amount that was pleaded and proved. They invited me to set aside the award of special damages and substitute it with an award of Kshs 7,050.
9. On her part, the respondent submitted that the appeal lacked merit and should be dismissed. She advanced the view that the learned trial magistrate correctly exercised her discretion and followed the principles applicable to assessment of damages for personal injuries and awarded an amount that was neither too high nor low as to amount to an erroneous estimate of the damage suffered. In support of her submissions, the respondent relied on the persuasive authority of *Easy Coach Limited v Emily Nyangasi* [2017] eKLR where Cherere, J awarded Kshs 700,000 as general damages for injuries which in her view were similar to those sustained by the respondent.
10. I have carefully considered the parties rival submissions, the pleadings and the evidence on record as well as the authorities cited.

As a general rule, an appellate court ought to be slow in interfering with an award of damages made by the trial court. This is informed by the fact that damages for personal injuries are at large and rest



with the trial court's discretion. However, an appellate court is duty bound to disturb such an award if it was satisfied that in the exercise of its discretion, the trial court applied wrong legal principles or awarded damages that were inordinately high or low as to make it an erroneous estimate of the damage suffered by the Plaintiff.

11. The parameters within which an appellate court can interfere with a trial court's award on damages were succinctly captured by the Court of Appeal in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwanja (Deceased) v Kiarie Shoe Stores Ltd* [2015] eKLR where the court stated as follows;

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge (read magistrate) proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The court 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 inordinately high that it must be a wholly erroneous estimate of the damages”.

See also: *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR, *Kemfro Africa Ltd T/A Meru Express Services & another v Libia & another* [1987] KLR 30.

12. Guided by the above principles, I will now examine whether the learned trial magistrate erred in awarding the respondent general damages in the sum of Kshs 500,000.

In the plaint, the respondent pleaded the following injuries;

1. Blunt trauma to the lower back
2. Blunt trauma to the right elbow
3. Blunt trauma to the left elbow
4. Bruises on the right foot
5. Bruises on the left foot

These injuries were confirmed by Dr Morebu Peter Momanyi who examined the respondent on 26<sup>th</sup> November 2019 about two weeks after the accident and compiled a medical report which he produced as P Exbt 1. The doctor noted that the respondent was in a fair general condition but her injuries had not completely healed. She had tenderness on her lower back which could lead to a condition which would require to be managed by the use of analgesics.

13. In making her award, the learned trial magistrate considered the proposals and submissions made by both parties and the authorities cited but chose to rely on the authority of *Moiz Motors Limited & another v Harun Ngethe Wanjiru* [2021] eKLR where the court awarded the claimant Kshs 500,000 for injuries which in the trial court's view were almost similar to those sustained by the respondent.

My reading of the authority reveals that the plaintiff had sustained the following injuries;

- a. Depressed frontal bone fracture of the skull.
- b. Severe tissue injuries in the face
- c. Soft tissue injuries of the chest



- d. Soft tissue injury of both knees
  - e. Soft tissue injury of both hip joints
  - f. Severe soft tissue injury of the toes of the right leg.
14. To support their offer of Kshs 50,000 general damages, the appellants relied on several persuasive authorities as follows:
- i. *Daniel Odhiambo Ngesa v Daniel Otieno Owino & another* [2020] eKLR where Aburili J in dismissing the appeal stated that had the appeal succeeded, she would have awarded the claimant Kshs. 150,000 as compensation for the following injuries; Blunt chest injury, Sprain on the neck on the left side, Dislocation of the right shoulder joint, Blunt abdominal injury, Friction lacerations on the left lower limb, Dislocation at the ankle joint.
  - ii. *Eastern Produce (K) Ltd (Savani Estate) v Gilbert Mubonzi Makotsi* [2013] eKLR where the court awarded Kshs 70,000 for soft tissue injuries of a pricked wound on the left foot (dorsal aspect) which was tender and painful;
  - iii. *George Mugo & another v AKM (minor suing through next friend and mother of AM)* [2018] where Kemei, J substituted an award of Kshs 300,000 with an award of Kshs 90,000 as general damages for blunt injuries on the left shoulder, blunt chest injury interior, blunt injury left arm and bruises on the left wrist.
15. Having re-appraised the injuries suffered by the respondent and the cases relied on by the parties before the trial court, I find that none of the claimants in these cases had injuries which bore any relation to the injuries sustained by the respondent.

It is instructive to note that the claimant in *Moiz Motors Limited & another v Harun Ngethe Wanjiru* [2021] eKLR which was relied on by the learned trial magistrate in making the impugned award did not have comparable injuries with the respondent. The claimant had different and far more severe injuries than the respondent which included a depressed fracture of the skull. I am thus satisfied that the learned trial magistrate wrongly exercised her discretion and acted against the long established legal principle that comparable injuries should be compensated by comparable awards.

16. Given the authorities cited by the appellants to guide the trial court in the assessment of damages and considering that the respondent sustained only multiple soft tissue injuries which were expected to heal without any resultant disability as none was mentioned in the medical report, I find that the award of Kshs 500,000 was inordinately high as to lead to an inference that it was a totally erroneous estimate of the damage suffered.

I find the case of *Cyprian Jairo Odhiambo v Robiri Gitanda* [2021] eKLR more relevant since the claimant therein had suffered almost comparable injuries. I consequently set aside the trial court's award of Kshs 500,000 and substitute it with an award of Kshs 180,000 after taking into account inflationary trends.

17. Regarding special damages, I agree with the appellant that the law is that special damages must be specifically pleaded and proved. The Court of Appeal in *John Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [2013] eKLR reiterated this position and stated as follows;

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that



degree and certainty must necessarily depend on the circumstances and nature of the act complained of”.

18. The respondent pleaded Kshs 22,050 being costs of obtaining a medical report, transport expenses and cost of copy of records which were strictly proved by production of relevant receipts including a receipt proving transport expenses from Nyamira to Kisii which was produced as Pexbt 3.
19. The appellants submitted that the amount claimed as transport expenses was not proved since a receipt to prove the same was not part of the record of appeal. My take is that the fact that the said receipt was not included in the Record of Appeal does not by itself mean that the expenses were not incurred or that they were not proved before the trial court. As a matter of fact, the receipt evidencing transport expenses by the respondent is actually part of the trial court’s record.
20. It must be remembered that it is the appellant’s duty to prepare and compile the record of appeal and having failed to include the said receipt in the record of appeal, the appellants cannot now be heard to say that the respondent is not entitled to reimbursement of the transport expenses incurred during the trial. This is akin to asking the court to allow them to benefit from their own omission to the detriment of the respondent. This I must say amounts to bad practice which must be strongly discouraged by this court.
21. That said, I have come to the conclusion that the respondent’s claim for special damages was specifically pleaded and proved and was correctly allowed by the trial court. The same is hereby affirmed.
22. In the end, the appellants’ appeal partially succeeds to the extent that the trial court’s award of general damages is set aside and is substituted with an award of Kshs 180,000. The amount shall attract interest at court rates from date of judgment of the lower court until payment in full. The award of special damages is maintained and interest on it shall accrue at court rates from the date of filing suit until payment in full.
23. As costs follow the event and the appeal has partially succeeded, the appellants shall pay the respondent’s costs in the lower court but each party shall pay its own costs of the appeal.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT KISII THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**C. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Ndolo for Mr. Njuguna for the appellant

No appearance for the respondent

**Aphline Court Assistant**

