



REPUBLIC OF KENYA



**Saro v Kitua & another (Civil Appeal 194 of 2021)  
[2023] KEHC 824 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 824 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 194 OF 2021  
MW MUIGAI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**JOSHUA SAFARI SARO ..... APPELLANT**

**AND**

**LEONARD KITUA ..... 1<sup>ST</sup> RESPONDENT**

**BLUE CLOUDS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment by the Hon. B. Kasavuli Principal  
Magistrate Mavoko in Civil Case No. 284 Of 2020 Delivered On 29.11.2021)*

**JUDGMENT**

**Trial Court Record**

**Plaint**

1. The cause of action arose on or about February 26, 2020 when the Plaintiff was lawfully travelling as a fare paying passenger along Nairobi- Mombasa road in motor vehicle registration number xxxx when the said motor vehicle was allegedly negligently, recklessly and/or carelessly driven by the defendants driver, servant, agent or employee at a high speed and without due care to other road users that it lost control and rolled several times thereby causing a road traffic accident as a result of which the Plaintiff sustained serious injuries namely, on the right shoulder, right elbow and right side ribs for which he claims damages. Traffic Police Officers came to the scene of the accident and he was taken to Athi River Shalom Community Hospital. He later went to Athi River Police Station and recorded his statement, and was issued with P3 Form and later Police Abstract.
2. The Plaintiff as a result of the accident suffered loss and damage and the particulars of injury include, blunt injuries to the chest and tenderness on the right upper limb.



3. The Plaintiff deposed that there was negligence on the part of the defendant and/or its agent or servant was particularized as follows;
  - a. Driving motor vehicle registration number xxxx in a careless manner
  - b. Driving in an excessive speed in the circumstances of the road
  - c. Failure to slow down, brake, swerve or act in any other reasonable manner to avoid the said accident
  - d. Failure to keep proper look out of other road users
  - e. Driving in zig-zag manner in the circumstances
  - f. Driving on the wrong side of the road
  - g. Failure to prevent the said accident
  - h. Driving without due care and attention
  - i. Driving a defective motor vehicle registration number xxxx.
4. The Plaintiff averred that he would rely on the provisions of the Traffic Act, Highway Code Act as well as the doctrine of res ipsa loquitor and vicarious liability
5. The Plaintiff attached copies of the following documents to the Plaintiff, namely,
  - a. Copy of ID card – Joshua Safari Saro ID xxxx
  - b. Athi River Shalom Community Hospital of February 28, 2020
  - c. Official receipt for Kshs 3,000/- for the Medical Report
  - d. Medical Report by Dr Elizabeth Kimungunyi
  - e. 3 Form
  - f. Police Abstract dated April 15, 2020
  - g. Registrar of Motor Vehicles- Copy of Records
  - h. Demand Letter April 28, 2020
6. In the Plaintiff dated December 1, 2021, the Plaintiff prayed for the following orders from the court;
  - a. General damages
  - b. Special Damages Kshs 4350/-
  - c. Costs of the suit
  - d. Interest

### **Statement Of Defense**

7. The Defendants jointly filed a defense on July 24, 2020 in which they denied the contents of the Plaintiff and averred that the accident occurred due to the Plaintiff's negligence. The negligence was particularized as follows;
  - a. Failing to take any adequate precaution for his safety



- b. Failing to heed the instructions on safety precautions when travelling
  - c. Failing to heed the traffic rules and regulations when travelling.
8. The Defendants averred that if the accident occurred, it was beyond their control and indicated that they would plead *volenti non fit injuria* asked the court to dismiss the suit.

## **HEARING**

### **The Plaintiff case had 2 witnesses.**

9. PW1 was Joshua Safari Saro who adopted his witness statement and stated that the registration number of the motor vehicle was xxxx that caused an accident. He was injured on the hand, back and chest. He produced the list of documents save for the Medical Report and the Police Abstract. He prayed for damages and costs. He blamed the driver and owner and said that the driver was speeding and caused the accident.
10. Upon cross examination he said his Identity Card number is/was xxxx and that he had the ID card with him. He stated that he was seated on 4<sup>th</sup> seat behind driver on the day the accident occurred and he was injured on hand, back and chest. He told the doctor he had a back injury. He had not healed and was still under medication at Shalom Hospital.
11. PW2 was Dr Kimunguyi, said she examined the Plaintiff on March 4, 2020. he had blunt injuries on chest and upper limb. She produced a medical report and a receipt.
12. Upon Cross examination, she stated that he had an STI only.
13. The police abstract was produced by consent.

### **Defence Case**

14. The Defence did not call any witness.

### **Trial Court Judgment**

15. The Trial Court adopted liability of 100% against the defendants as ordered in Mavoko CMCC 299 of 2020.
16. On quantum, the court indicated that it considered the submissions of parties relied upon and authorities and awarded Kshs 50,000 as general damages. Special damages of Kshs 4,350 was also awarded together with costs and interest.

### **Appeal**

17. Dissatisfied by this Judgment, the Appellant filed this Appeal seeking to set aside the judgment and assessment be done based on evidence before the court and prevailing range of comparable awards.
18. The Appeal is founded on the following grounds, THAT;
  - a. The Learned Magistrate erred in law and fact and ended up misdirecting himself in awarding extremely low quantum of damages of Kshs 50,000 for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted to the Appellant herein



- b. The Learned Magistrate erred in law in making such a low award as to show that the Magistrate acted on a wrong principle of law
  - c. The Learned Magistrate's award on damages was so low as to be entirely erroneous
  - d. The Learned Magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the Plaintiff. And failed to be guided by authorities on comparable awards and hence ended up making a low award in view of the medical evidence presented before the court.
  - e. The Learned Magistrate erred in law and fact in failing to consider the plaintiff's submissions and authorities in making a finding on quantum.
  - f. The whole judgment on quantum was against the weight of evidence before the court.
19. The Appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

20. The Appellant filed submissions on August 22, 2022 and its main submission was that the quantum was inordinately low. It was submitted that the Trial Magistrate stated that the defendants list of authorities presented a better view of the injuries and assessment as compared to the Plaintiff's injuries. Reliance was placed on the cases of *Butt vs Khan [1977] eKLR*, *Selle vs Associated Motor Boat Company Limited [1968] EA 123*, *West (H) & Son Limited vs Shephard [1964] Ac 326* at 345 and *PJ Dave Flowers Limited vs David Simiyu Wamalwa [2018] eKLR*.
21. While relying on the case of *Joseph Kimani Gathaga & Another vs Dickson Ndungu Njoroge [2019] eKLR* where an award of Kshs 240,000 was given for soft tissue injuries on the legs, hands, back and chest, *John Kaindo Ngugi & Another vs John Kimani Iraya [2020] eKLR* where an award of Kshs 250,000 was given for soft tissue swelling of the right upper limb, around the wrist joint, scalp and leg and the case of *Michael Okello vs Priscilla Atieno [2020] eKLR* where an award of Kshs 250,000 was given for multiple injuries to the legs, chest and back, the court was urged to give an award of Kshs 250,000 and Kshs 3550 as special damages.

### **Respondent Submissions**

22. The Respondent filed submissions on October 17, 2022 and submitted that the award of Kshs 50,000/ = was sufficient. Reliance was placed on the case of *JK (A minor suing through father & next friend NKM vs Jasper Nchonga Magari & Another [2021] eKLR* where an award of Kshs 30,000 was upheld, *HB (Minor suing through mother & next friend DKM) vs Jasper Nchonga Magari & another [2021] eKLR* where Kshs 60,000 was awarded.
23. The Respondent prayed that the Court sets aside the judgment and reassesses quantum based on the Respondents submissions the Appeal be allowed as prayed and are awarded costs of the appeal.

### **Determination**

24. This Court considered the Trial Court record, the Memorandum of Appeal and the submissions of the parties and the only issue for determination is that of quantum.
25. This being a first Appeal, I am guided by the case of Court of Appeal for East Africa in *Peters -vs- Sunday Post Limited [1958] EA 424* where the principles of review in an Appeal of the 1<sup>st</sup> Appeal are elucidated as



- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. . In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - c. It is not open to the first appellate court to review the findings of a Trial Court simply because it would have reached different results if it were hearing the matter for the first time.
26. It is not in contention that the accident occurred on February 26, 2020 when the Plaintiff was travelling as a fare paying passenger along Nairobi- Mombasa road in motor vehicle registration number xxxx as a result of which he sustained the following injuries; chest and Tenderness on the right upper limb. The injuries pleaded in the Plaint are the ones in the medical report by Dr Elizabeth Kimunguyi dated March 4, 2020.
27. The doctor concluded that 'Joshua suffered harm, sustaining soft tissue injuries of mild severity which caused him pain and suffering.' This is also not in contention, the only issue is the quantum of damages.
28. In *Mbogo & Another v Shah [1968] EA 93*, the Court, (Sir Newbold, P) stated at page 96:
- ' A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.'
29. The East African Court of Appeal in the case of *Woodruff vs Dupont [1964] EA 404* held that:
- ' The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them. The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are 'such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.' The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.'
30. In *Jobson Evan Gicheru v Andrew Morton & Another [2005] eKLR*, the Court of Appeal stated:
- ' It is trite that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount



awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.'

31. The Appellant contends that the Trial Magistrate stated that the defendants list of authorities presented a better view of the injuries and assessment as compared to the Plaintiff's injuries however there is no such sentiment on record.
32. The fact of the occurrence of the road traffic accident by Reg xxxx is not contested and the resultant injuries occasioned on the Plaintiff who was a passenger in the said vehicle on the fateful day. The Plaintiff was not attributed any contributory negligence but 100% liability against the Defendants as per the pilot case Mavoko CMCC 299/2020. The appeal is with regard to reassessment of quantum only.

### **Medical History/records**

33. The Plaintiff attached medical records that disclosed injuries treatment and severity and/or permanence of the injuries as follows;
  - a. Athi River Shalom community Hospital Report of February 28, 2020  
Indicates that the Plaintiff was treated at their facility on February 26, 2020 and complained of right shoulder and elbow pains and severe pains on the right side and a radiograph of the chest was normal. He was diagnosed with soft tissue injuries treated with oral antibiotics and analgesics and allowed home in a stable condition.
  - b. The Medical Report by Dr Elizabeth Kimunguyi of March 4, 2020 indicates the Plaintiff sustained blunt injuries to the chest and tenderness on the right upper limb. The plaintiff was treated with painkillers. The Plaintiff suffered harm sustaining soft tissue injuries of mild severity which caused him pain and suffering and was in fair general condition.
  - c. The P3 form filled in on March 3, 2020 confirmed the plaintiff sustained blunt injuries to the chest elbow and shoulder. The injuries were classified as harm.

### **Case-law**

34. This Court considered the comparative cases submitted on similar injuries for reassessment of quantum. The Plaintiff/Appellant submitted;
  - a. Joseph Kimani Gathaga & Another vs Dickson Ndungu Njoroge [2019] eKLR where an award of Kshs 240,000 was granted on appeal for soft tissue injuries on the legs, hands, back and chest from Kshs 500,000/- .  
This Court notes that herein liability was apportioned 85%/15% and injuries comprised of head concussion, swollen tender face and tender left knee, bruises on peri-orbital region and on left hand, blunt injuries on left leg back and chest and cut and swelling left elbow.
  - b. John Kaindo Ngugi & Another vs John Kimani Iraya [2020] eKLR where an award of Kshs 250,000 was granted on appeal for soft tissue swelling of the right upper limb, around the wrist joint, glazes on the right leg associated with swelling, soft tissue injury to the scalp and scars on the tibia, tube tuberosity on the right and mid leg, from Kshs 500,000/-
  - c. Michael Okello vs Priscilla Atieno [2020] eKLR where and award of Kshs 250,000 was granted on appeal for blunt injury to the head, forehead, neck, chest and fracture of 1<sup>st</sup> anterior rib,



bruises and blunt injury on the left shoulder and left upper limb and right upper and lower limb from Kshs 500,000/- in general damages.

- d. The Respondent submitted that the award of Kshs 50,000 was sufficient. Reliance was placed on the case of JK (A minor suing through father & next friend NKM vs Jasper Nchonga Magari & Another [2021] eKLR where an award of Kshs 30,000 was upheld on appeal for the child who sustained injuries classified as soft tissue with no major complaints of partial/permanent liability with regard to the injuries.
  - e. HB (Minor suing through mother & next friend DKM) vs Jasper Nchonga Magari & another [2021] eKLR where Kshs 60,000 was upheld on appeal for blunt injuries head, neck, thorax and abdomen and were termed soft tissue injuries in terms of gravity.
35. This court has considered the authorities cited before the Trial Court where the Defendant/ Respondent submitted Kshs 50,000/- and the Plaintiff/Appellant Kshs 100,000/- and those before this court as outlined above.
  36. In *Cornilliac vs St Louis [1965] 7 WLR 491* the principles considered in assessment of damages include; nature and extent of injuries sustained; nature and gravity of the resulting physical disability, pain and suffering loss of amenities suffered and extent to which consequentially the claimant's pecuniary prospects have been materially affected.
  37. The Plaintiff was injured from the accident and sustained soft tissue injuries and treated with painkillers and discharged.  
  
The injuries were classified as harm. The medical treatment documents/reports did not disclose any partial or permanent disability, the Plaintiff was not admitted in hospital or treatment extended and pain and suffering was mild.
  38. The authorities cited by the Appellant as shown above include various and/or extensive injuries sustained that justify assessment of higher awards than the injuries sustained by the plaintiff herein. Secondly, this Court finds the Trial Court considered relevant legal principles in finding liability and assessing quantum.
  39. The cases cited by the Respondent whose injuries are similar to the ones in this case are of much lower award of damages than the general damages granted by the Trial Court.
  40. This Court finds no legal basis or reason to disturb the assessment by the Trial Court. The award was sufficient in the circumstances.
  41. It is trite law that special damages must be specifically pleaded and proved. This was reiterated in the case of *Capital Fish Limited v Kenya Power and Lighting Company Limited [2016] eKLR* The Appellant provided and produced receipts for the motor vehicle search of Kshs 550, medical receipts amounting to Kshs 800/-, medical receipt of Kshs 3,000/-. In total amounting to Kshs 4350/-, that is what was awarded by the Trial Court.

### **Disposition**

1. The Trial Court judgment of November 29, 2021 is upheld, the Appeal fails and is dismissed.
2. Costs of the Appeal are awarded to the Respondent.
3. It is so ordered.



**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 9<sup>TH</sup> FEBRUARY, 2023  
(PHYSICAL/VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**NO APPEARANCE - FOR THE APPELLANT**

**NO APPEARANCE - FOR THE RESPONDENT**

**GEOFFREY/PATRICK - COURT ASSISTANT (S)**

