



REPUBLIC OF KENYA



KENYA LAW
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**Sifa Cleaning And Bins Services Limited v Kamau (Civil Appeal
E124 of 2021) [2023] KEHC 1623 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E124 OF 2021
MM KASANGO, J
MARCH 10, 2023**

BETWEEN

SIFA CLEANING AND BINS SERVICES LIMITED APPELLANT

AND

MARY WANJIRU KAMAU RESPONDENT

*(Being an Appeal against the judgment/decree of the Chief Magistrate's Court at Kiambu
(Hon. S. Atambo, CM) dated 14th of June 2021 in Kiambu CMCC No. 495 of 2019)*

JUDGMENT

1. Mary Wanjiru Kamau, the respondent was injured while she travelled in Motor vehicle registration No KBA 456 B. The accident was as a result of collision between vehicle registration No KBA 456B and vehicle registration No. KCA 483Y. vehicle registration No KCA 483Y is registered in the name of SIFA Cleaning And Bins Services Ltd, the appellant. The trial court, Kiambu Chief Magistrate Court by its judgment of June 14, 2021 apportioned Liability for the accident at 85% against the appellant and 15% against the owner of motor vehicle KBA 456B. The trial court awarded the respondent Ksh 1 million in general damages; Ksh 600,000 in loss of amenities; Ksh 700,000 for future medical expenses; and Ksh 345,336. The appellant was aggrieved by the trial court's judgment and has therefore filed this appeal. The owner of vehicle registration No. KBA 456B is not a party to this appeal.
2. This is first appellate court. The consideration of this appeal will be as stated by the court of appeal in the case of *Gitobu Imanyara And 2 Others v Attorney General* (2016) eKLR VIZ:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though



it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

3. The appellant faulted the trial court in awarding the respondent under two separate heads for general damages and loss of amenities. In appellant’s view the trial consolidated those two heads and awarded a consolidated amount. Appellant placed its reliance on the case of *Benuel Bosire v Lydia Kemunto Mokora* (2019) eKLR in its written submission appellant in further elaboration of its argument stated:

“The appellant therefore submits that the learned Magistrate erred in awarding the respondent general damages for pain and suffering separately from general damages for loss of amenities which was against what had been pleaded.”
4. Appellant did however concede that in its written submissions before the trial court it had accepted the respondent was entitled to loss of amenities and had suggested the respondent be awarded Ksh 200,000 on the head.
5. Appellant submitted this Court should grant a global award for general damages of Ksh 700,000.
6. The respondent in response to appellant’s submission on the trial court’s awards in damages by cautioning this Court not to disturb those awards unless the same were excessive or low as to be erroneous estimate cited the cases *Kenfro Africa Limited T/a Meru Express Service, Gathogo Kanini v amm Lubia & Another* (1998) eKLR and the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR5.
7. Acknowledging that the above cited cases indeed set the jurisprudence on appeal from awards in damages, it is therefore important to set out the injuries the respondent suffered.
8. I begin by making reference to the Kenya Police Medical Examination Report (P3 Form). It is dated March 13, 2019. That report noted that the respondent’s clothes “were torn and soaked in blood”. That statement militates against submission by the appellant that the respondent suffered soft tissue injuries. The P3 form noted injury (avulsion) on the right side of the respondent’s head, and lacerations and bruises on the right arm and lacerations on the right knee. The doctor in that form categorized the injury as harm.
9. Doctor GK Mwaura of Kinoo Medical Clinic noted by his report dated June 29, 2019 the following injuries:-
 - a. De-gloving injury - involving the right temple and right cheek.
 - b. Multiple deep cuts-right upper arm, right elbow and right proximal fore arm.
 - c. Deep cut wound right knee.
 - d. Bruises-both cheeks.
 - e. Loss of consciousness.
10. That doctor noted that although respondent had healed from those injuries there however were persistent complications such as:-
 - a. Disfiguring scars- right temple face right side and left thigh (donor site).
 - b. Disfiguring scars and keloids- right fore arm.
 - c. Pain and weakness - right upper limb.



- d. Pain and blood loss.
 - e. Permanent degree or incapacity assessed at 5% - right upper limb.
 - f. Grievous harm injuries.
 - g. Future medical expenses to remove keloids and dis-fighting scars, surgeon at cost of Ksh 700,000.
11. Doctor Wambugu’s report dated May 27, 2020 noted injuries the respondent sustained as:-
- a. De-gloving wound right temporary scalp.
 - b. Multiple Lacerations right upper limb.
12. The report noted that respondent had skin grafting done to the wound at the temporal scalp extending to the cheek. It further noted that the injury had left scarring as having significant cosmetic concern.
13. The trial court in its judgment had this to say:-

“I have considered the parties submissions on general damages. I have also considered the medical reports tendered in evidence. The injuries sustained by the plaintiff are confirmed by the three medical reports. This Court also had an opportunity to see the plaintiff and understands when she states that she suffered and continues to suffer psychologically given that her self-esteem was injured and the children run when they see her. The injuries to her face were extensive. She also suffered pain during skin grafting on her thigh.”

14. The trial court after considering the authorities relied upon by the appellant and respondent awarded the respondent Ksh 1 million in general damages and Ksh 600,000 for loss of amenities. The appellant submitted that those awards are exaggerated and requests this Court to disturb those awards.
15. I have set out above the trial court’s finding of fact on the injuries suffered by the respondent. Additionally, the trial court had the benefit of seeing the respondent as she testified and therefore undoubtedly was able to see the scarring which has affected the respondent’s self-esteem. There is no basis laid before this Court why those awards should be disturbed in this appeal. The appellant would best be reminded of the holding in the case *Bashir Ahmed Butt v Uwais Ahmed Khan* (Supra) that:-

“General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries.... it must be recalled that no two cases are exactly alike...”

16. Appellant also erred to raise the issue, for the first time before this Court, of the two awards of general damages and of loss of amenities. Appellant cannot raise in an appeal an issue which was not raised before the trial court. A case in point is *Perfect Scan Limited v Harrison Kabindi Said* (2021) eKLR thus:-

“In any event, this Court would be placed in an awkward situation were it to (sic) uphold the argument of the appellant where it is been (sic) called upon to decide on an issue which is raised for the first time on appeal. If this Court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on an appeal but be acting as a court of the first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate’s court.



17. It follows the appellant is estopped arguing that the trial court in error awarded general damages and also in respect to loss of amenities. It is noteworthy that the appellant did not cross examine the respondent on those awards but more importantly appellant in its written submission submitted on how much the court should award for loss of amenities.
18. In my judgment I find and hold that the appellant has failed to show a basis for interfering with awards made by the trial court in both general damages and for loss of amenities. That ground of appeal is rejected and the trial court's awards are affirmed.
19. Appellant has faulted the trial court on its award of Ksh 700,000 for future medical expenses. The basis upon which it is submitted that award should be reduced was because Doctor Wambugu did not state there was need for future medical intervention. All the doctors' report that were produced in evidence were admitted in evidence without calling their makers. That notwithstanding, the appellant did not question in cross examination of the respondent as she produced Doctor Mwaura's report on that future medical expense.
20. There is no foundation which can justify this court disturbing the award for future medical expense. That ground appeal fails.
21. Similar fate befalls the ground of appeal that this Court should deduct from the special damages award the amount allegedly paid by the National Hospital Insurance Fund (NHIF). Appellant's counsel did not object to the receipts that were produced by the respondent in proof for special damages. Neither was the respondent cross examined on that aspect. This ground of appeal similarly fails.
22. On the whole, there is no merit in this appeal.

Disposition

23. The judgment of the court is that in view of the findings made here, this appeal is dismissed with costs which are assessed at Ksh 130,000.
24. Orders accordingly.

JUDGMENT DATED and DELIVERED at KIAMBU this 10th day of MARCH, 2023

MARY KASANGO

JUDGE

Instructed by Ochieng K. and Associates for Appellant:- Mr. Kennedy Ochieng

Instructed by C. N. Ngugi and Associates for the Respondent:- Mr. Kairu

JUDGMENT *delivered virtually.*

MARY KASANGO

JUDGE

