



REPUBLIC OF KENYA



KENYA LAW

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**Gori & another v Nyandika (Civil Appeal E085 of 2021)
[2023] KEHC 3209 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E085 OF 2021**

**WA OKWANY, J
APRIL 13, 2023**

BETWEEN

JOSEPHAT MOTANYA GORI 1ST APPELLANT

PATRICK MAINA GICHUHI 2ND APPELLANT

AND

WYCLIFFE AGASA NYANDIKA RESPONDENT

*(Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.)– RM
Nyamira dated and delivered at Nyamira on the 18th day of October 2021
in the original Nyamira Chief Magistrate’s Court Civil Case No. 95 of 2020)*

JUDGMENT

1. The Respondent herein sued the Appellants before the Lower Court claiming both general and special damages arising out of the injuries he suffered in a road traffic accident that occurred on February 24, 2020.
2. A summary of the Respondent’s case before the trial court was that he was on February 24, 2020 lawfully riding motor cycle Registration Number xxxx along Nyamira – Corner T Road when due to the negligence of the driver of the Appellants’ motor vehicle Registration Number xxxx an accident occurred when the vehicle hit the motor cycle thereby causing the Respondent serious injuries.
3. The Appellants filed a defence to the plaint wherein they denied all the allegation contained in the plaint and averred that, if indeed the accident happened, then the same was caused and/or largely contributed to by the Respondent’s negligence.
4. Through a consent recorded before the trial court on September 27, 2021, parties agreed to apportion liability at 20% to 80% in favour of the plaintiff/respondent.



5. The Lower Court thereafter rendered a judgment on quantum in favour of the Respondent as follows:
 - 1 General damages Kshs 1,500,000.00
 - 2 Special damages Kshs 79,750.00
 - 3 Sub-total = Kshs 1,579,750.00
 - 4 Less 20% ___(Kshs 315,950.00)
 - 5 Total Kshs 1,263,800.00
6. Aggrieved by the judgment on quantum, the Appellant filed the instant appeal wherein he listed the following grounds in the Memorandum of Appeal: -
 1. That the award of General damages awarded to the Respondent was manifestly and inordinately excessive in the circumstances.
 2. That the Learned trial Magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.
 3. The Learned Trial Magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.
 4. The Learned Trial Magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on quantum.'
7. The appeal was canvassed by way of written submissions.
8. As the first appellate court, the duty of this court is to re-consider and re-evaluate the evidence tendered before the trial court in order to arrive at its own conclusion while bearing in mind the fact that it neither saw nor heard the witnesses testify. In *Williamson Diamonds Ltd and Another vs Brown [1970] EA 1*, the court held that: -

' The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.'
9. Further, in *PII Kenya Limited vs Oppong [2009] KLR 442*, it was held that: -

' It is the duty.....of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing ad seeking the witnesses and their demeanor and giving allowance for that.'
10. The Appellant faulted the trial court for making an award of general damages that is inordinately excessive when compared to the awards made in other similar cases.
11. The Appellants argued that the trial Magistrate should have taken the authorities they had cited into account in arriving at a reasonable award. Reference was made to the guidelines in assessment issued by the Court of Appeal in *SJ vs Francesco Di Nello & Another [2015] eKLR* where it was held: -



- ' 17. The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case we refer to that of *Ossuman Mohamed & Another v Saluro Bundit Mohamed*, Civil Appeal No 30 of 1997 (unreported) wherein the following passage, in the case of *Kigaragari v Aya* [1982 – 1988] IKAR 768 is employed;
'Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees.'
12. On his part, the Respondent submitted that the trial court's findings on quantum were merited as they were purely based on the facts and the evidence on record. It was submitted that the decision on general damages was just and fair compensation for the Respondent's injuries. In this regard, the Respondent cited several authorities where, for similar injuries, the claimants were awarded between Kshs 1.5 million to 2 million general damages.
13. The main issue for determination is whether this court should interfere with the award on quantum of damages.
14. It is trite that an appellate court will not ordinarily interfere with the trial court's award on damages. The principles upon which an appellate Court can interfere with an award of damages were stated in *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini vs AMM Lubia & Ano (1982-88)1 KAR 777* where the Court of Appeal stated as follows:
'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.'
15. In the instant case, the Respondent pleaded and tendered evidence to show that he sustained the following injuries in the said accident: -
- (i) Left radius fracture;
 - (ii) Left ulna fracture;
 - (iii) Left tibia fracture;
 - (iv) Left fibula fracture;
 - (v) Left ankle dislocation;
 - (vi) Left 3rd, 4th & 5th rib fractures;
 - (vii) Bruises on the face;
 - (viii) Cut wounds on the lower limbs;
 - (ix) Bruises on the upper limb;
 - (x) Permanent disability assessed at 40%
16. A perusal of the Record of Appeal shows that PW4, Dr Morebu Peter Momanyi, produced a Medical Report which confirmed the Respondent's injuries and indicated that the Respondent's recovery



was likely to take a very long time. The report further stated that the Respondent would require physiotherapy and occupational therapy. The doctor noted that the dislocation is likely to complicate later with post-traumatic chronic arthritis. He further noted that the Respondent was due for surgery for the fractured bones to be corrected with metal implants for proper bone alignment at an estimated cost of Kshs 400,000/=. He assessed permanent disability at 40%.

17. While the Appellant argued that an award of Kshs 1,200,000/= would be sufficient and reasonable compensation in the circumstances of this case, the Respondent maintained that the trial court's award of Kshs 1,500,000/= was commensurate with his injuries and in tandem with the authorities he had cited.
18. I have perused the impugned judgment of the trial court and I note that the trial Magistrate highlighted the Respondent's injuries and considered the parties' respective submissions on quantum, the applicable principles in assessment of damages alongside similar decided cases before arriving at the award of Kshs 1,500,000/= general damages. The court rendered itself as follows on damages: -

' It is beyond argumentation that no two accidents will ever result in exactly the same injuries or the same set of injuries. Accordingly, it is the duty of the court, on the basis of its best appreciation of the various authorities cited and using its closest approximation of the compensable value of the injuries in the case before it relative to those cited in authorities, and given the passage of time, to pronounce itself on the appropriate compensation.

In *Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No 7 of 2015 [2015] eKLR*, DS Majanja J expressed himself thus: -

'The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases, it ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.'

19. My finding is that it has not been demonstrated that the trial court's award was so excessive as to require the intervention by this court, nor has it been shown that the award was arrived at by application of wrong principles.
20. It is worth mentioning that while the Appellant proposed an award of Kshs 1,200,000/= general damages before the Lower Court, the Respondent's proposal was for Kshs 2,500,000/=. I find that the court's award of Kshs 1,500,000/= was, in the circumstances of this case, a reasonable assessment.
21. In conclusion, I am not persuaded that the instant appeal is merited and I therefore dismiss it with costs to the Respondent.
22. Orders accordingly.

Judgment dated, signed and delivered at Nyamira via Microsoft Teams this 13th day of April 2023.

W. A. OKWANY

JUDGE

