



REPUBLIC OF KENYA



KENYA LAW
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**Ondiek & another v Simba (Civil Appeal 167 of 2019)
[2023] KEHC 3073 (KLR) (Civ) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 167 OF 2019

AN ONGERI, J

APRIL 14, 2023

BETWEEN

CAROLINE ONDIEK 1ST APPELLANT

CAROLINE NJOKI MAINA 2ND APPELLANT

AND

SABRINA NEEMA SIMBA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D. O. Mbeja
(SRM) in Milimani CMCC no. 7696 of 2013 delivered on 12/6/2019.)*

JUDGMENT

1. The two appellants were the defendants in Milimani CMCC no. 7696 of 2013 where judgment was entered in favour of the respondent Sabrina Neema Simba in the sum of kshs.2,000,000 in respect of general damages for pain and suffering and special damages of kshs.711,599.
2. The award was subject to 15% contribution on liability which was agreed upon by the parties.
3. The respondent was involved in a road traffic accident on 7/12/2010 along Kapiti Road in South B Estate Nairobi when she was hit by motor vehicle registration no. KBH 753T which was being driven by the second appellant and was owned by the first appellant.
4. The motor vehicle swerved off its lane and violently knocked down the respondent and she sustained the following injuries
 - i. Closed fracture of the right tibia
 - ii. Closed fracture of the right fibula



iii. Multiple cuts on the leg and foot.

5. The appellants who are aggrieved by the assessment of damages have filed this appeal on the following grounds:
 1. The learned magistrate erred in law and in fact in awarding general damages for pain and suffering of Kshs.2,000,000.
 2. The learned magistrate erred in law and in fact on awarding special damages of Kshs.711,597.
6. The parties filed written submission in the appeal.
7. The appellant submitted that considering the injuries suffered by the respondent the award for general damages should be set aside and substituted with an award of Kshs.300,000- 500,000. In support they cited *Antony Mwangi v Martin Mururi* [2008] eKLR where the plaintiff suffered severe injuries to the body, including, head injury, fractures of both arms and left leg, deep cuts to the limbs and trunk; deformity of the left upper arm and hand; and left leg shorted by 2cm. The trial court awarded Kshs.400,000.
8. On special damages the appellants submitted that special damages must not only be specifically pleaded but proved. The respondent in her evidence pleaded that her father paid the same and was unaware of the quantum. In his own testimony his employer's insurer settled the hospital bills. The hospital invoice marked MF1 dated 17th December 2010 was never produced in evidence and PW3 confirmed that UAP insurance paid the hospital bill.
9. The respondent in her submission argued that in the assessment of general damages the method of approach should be that comparable injuries should, as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. That for this court to disturb the award made the appellants have to show that the trial court disregarded any of the principles provided in *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu* Civil Appeal No. 284 of 2001 where it was held;

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.

As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”
10. On special damages she contended that the costs incurred at the Nairobi hospital was presented as evidence by Mr. James Chomba who was a senior accountant at the said hospital and duly authorized to present the same. She therefore complied with the law in terms of claiming special damages.
11. It was argued further that she could claim payment of special damages from the appellants where the hospital bills were paid through an insurance policy through the doctrine of subrogation and in



support the respondent cited *Leli Chaka Ngoro v Maree Ahmed & another* Civil Appeal No. 22 of 2015

“My finding on this issue is that personal accident claims are not affected by the doctrine of subrogation. The doctrine of subrogation applies to indemnity insurance claims. In cases of indemnity, the insured loss is premeditated and can be computed upto the last cent. In personal accident claims, one cannot compute the extent of the suffered injuries. A lost limb cannot be replaced by an artificial one irrespective of the latter’s costs. If an accident victim can recover payment out of a personal accident policy, that is an added advantage which should not benefit the tortfeasor.

With regard to the issue of double payment, I am satisfied that the recovery of the special damages from the respondents would not amount to double payment. Assuming the respondents came to know about the settlement of the bills after they had paid the appellant, could the respondents claim the money from the appellant or his insurer. My answer to this is “No”. This is because the respondents are not party to that arrangement between the appellant and his insurer. The respondents are simply liable to satisfy the amount of damages suffered by the appellant. This does not amount to double compensation.”

12. This being a first appellate court, the duty of the court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether to support the findings of the trial court. see Court of Appeal for *East Africa in Peters v Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. 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
 - iii. 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.
13. The sole issue for determination in this appeal is whether the award of damages of kshs.2 million in respect of general damages and ksh.711,597/= in respect of special damages were erroneous and whether the same should be set aside.
14. The appellant submitted that the trial court failed to consider comparable decisions submitted by the appellants and therefore arrived at an erroneous award.
15. The appellants proposed general damages of kshs.300,000 and relied on the case of *Antony Mwangi v Martin Muiruri* (2008) eKLR where kshs.400,000 was awarded for head injury, fractures of both arms and left leg, deep cuts to the limbs and trunk deformity of the left upper arm and hand and shortening of the left leg by 2cm.
16. On the issue of special damages the appellant submitted that the sum of ksh.711,599 was paid pursuant to an insurance cover (by UAP insurance company) which cover was extended to the father of the respondent
17. The respondent submitted that the award of damages was not erroneous and relied on the following authorities:



- i. Alex Wachira Njagua v Gathuthi Tea Factory & Another (Civil Case no. 92 of 2008) where ksh.3,000,000 was awarded for similar issues.
 - ii. *Susan Wanjiru Njuguna v Keringet Flowers Ltd & 2 Others* (Nakuru HCCC 64 of 2001) where 3,000,000 was also awarded.
 - iii. *Wachira Njuguna v Gathuthi Tea Factory and Another* (Civil Case no. 92 of 2008) where 3 million was also awarded.
18. On the issue of special damages, the respondent submitted that the doctrine of subrogation is not applicable in personal injury claims.
 19. The respondent relied on the case of *Leli Chaka Ndoro v Maree Ahmed & Another* (Civil Appeal no. 22 of 2015)
 20. On the issue as to whether the award of damages in this case is erroneous, I find that the general damages awarded were excessively high. I have considered the authorities relied on by the respondent and the same are not comparable.
 21. I award general damages of kshs.1,000,000 in respect of pain and suffering.
 22. The award of kshs.711,597 is correct since it is not in dispute that the doctrine of subrogation does not affect personal injury claims.
 23. In the case *Reinan v Pacific Motor Trucking Company* the court stated as follows: -

“The term “double recovery” implies that a plaintiff has received and will retain the same remuneration from two outside sources – the defendant and a third-party benefit provider – to compensate for a single harm. However, rarely will that assumption prove entirely accurate. A plaintiff who receives life or medical insurance benefits from a third-party provider generally will have paid premiums for those benefits or will have earned them as compensation for employment. Similarly, a plaintiff who receives retirement benefits, whether from a private corporation or a government program, generally will have earned or invested those funds. In addition, there are many instances in which the third-party benefit provider retains a right of subrogation for any tort award that beneficiaries recover. As a result, the collateral benefits paid by a third party may only reimburse the plaintiff for his or her prior labor or investment or may be returned to that third party”
 24. I accordingly partially allow the appeal and I award a total of kshs.1,711,597 less 15 % liability.
 25. The judgment of the Trial court is accordingly set aside and judgment be and is hereby entered in favor of the respondent against the appellants in the sum of kshs.1,455,257.45 plus costs and interest at court rates from the date of filing the appeal until payment in full.
 26. Since the appeal succeeded partially, each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

A. ONGERI
JUDGE

In the presence of:

.....for the 1st Appellant



.....for the 2nd Appellant

.....for the Respondent

