



REPUBLIC OF KENYA



KENYA LAW
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**Waeru & another v Mwambura (Civil Appeal E305 of 2020)
[2023] KEHC 19060 (KLR) (Civ) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 19060 (KLR)

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

CIVIL

CIVIL APPEAL E305 OF 2020

DO CHEPKWONY, J

APRIL 20, 2023

BETWEEN

CHARLES NGUGI WAERU 1ST APPELLANT

MULTIPLE HAULIERS TRANSPORT & CONTRACTORS 2ND APPELLANT

AND

PETER NJOGU MWAMBURA RESPONDENT

*(Being an Appeal from the Judgment of Hon. P. N. Gesora (CM) in
Milimani CMCC No.822 of 2001 delivered on 26th April, 2020)*

JUDGMENT

Background

1. By a Plaint dated 5th December, 2000, the Respondent instituted a suit against the Appellants seeking for the following prayers;
 - a) Special damages as pleaded.
 - b) General damages.
 - c) Costs of the suit.
 - d) Interest on (a), (b) and (c) above at court rates.
 - e) Any other relief this Honourable Court may deem fit to grant.
2. The Respondent in his Plaint pleaded that the 2nd Appellant was the registered owner of Motor Vehicle Registration Number KG 2847 whereas the 1st



- Appellant, its director employee, agent, servant and or driver.
3. On or about 31st March, 1999, the Respondent was lawfully taking a meal in a restaurant off Rangwe road, Industrial area, Nairobi, when the 2nd Appellant's Director, employee, servant, agent and or driver of the said 1st Appellant so negligently, managed controlled and or Drove Motor Vehicle Registration Number KG 2847 that he lost control and the vehicle mounted into the restaurant causing it to hit the Respondent and as a result, the Respondent sustained severe physical injuries.
 4. The particulars of the alleged negligence are pleaded at Paragraph 5 of the Plaint as follows:-
 - a) Speeding in the circumstances.
 - b) Failing to give any or any adequate sign of his approach to the Plaintiff.
 - c) Failing to keep any or any proper look out.
 - d) Failing to have any or any due regard to people who were or were expected to be in the said restaurant and particularly that of the of the Plaintiff.
 - e) Failing to see the said restaurant in time or at all.
 - f) Permitting and or causing the said motor to veer off the road onto the said restaurant.
 - g) Failing to stop, slow down, swerve, or in any other way to manage or control the said vehicle to avoid the accident.
 - h) Causing the accident.
 - i) So far as is reasonably practicable under the circumstances, the Plaintiff will rely on the doctrine of Res ispa Loquitor.
 5. By reason of the accident, the Respondent sustained severe physical injuries as pleaded at Paragraph 6 of the Plaint as follows:-
 - a) Comminuted fracture of left femur (sub trochanteric).
 - b) Degloving wounds on the left leg and a laceration on right leg.
 - c) Neck injuries with pain and stiffness.
 - d) He lost consciousness for 1 hour.
 6. The Respondent pleaded present complaints at Paragraph 6 of the Plaint as follows;
 - a) He feels dizzy most of the time.
 - b) He has pain on the right gluteal area.
 - c) He cannot walk and uses crutches for support.
 7. The Respondent pleaded an award of special damages of Kshs.5,700/= as particularized at Paragraph 6 of her Plaint. He further claimed for damages including future expenses and reduced earning capacity.
 8. The suit was defended by the Appellants by a defence dated 12th March, 2001 denying liability and the averments as contained in the Plaint and put the Respondent to strict proof thereof.



9. Pursuant to orders of the trial court the Respondent amended his Complaint on 7th June, 2004. The amendments included that the Respondent requires future surgery to remove the metal plates estimated at Kshs.100,000/=. The other changes included Police Abstract Kshs.100/=. 3 medical reports Kshs.7,500/=. medical and related expenses Kshs.329,951/= and Transport from Nyahururu home to Nairobi for 3 surgeries and examinations and post operation Kshs.155,000/=. The total claim on special damages Kshs.492,551/=. In his amended Complaint, the Respondent also included a prayer for general damages for pain and suffering and loss of amenities, costs of future medical care and loss of reduced earning capacity as aforesaid.
10. The Appellants in their Amended Defence dated 20th September, 2007 denied the contents of Paragraph 6 as amended and reiterate that they are not liable for the Respondent's future medical expenses. They further denied the particulars of special damages as pleaded and put the Appellant to strict proof thereof.

Evidence

11. On 11th December, 2018, the matter proceeded for hearing and PW1- Peter Njogu Mwambura, the Respondent testified and stated that he was not employed as a result of the accident he sustained. He was born in 1930. He recalls that on 31st March, 1999 as he was working for M/S GK Brothers Sharti Joiner Ltd as a Carpenter, at about 12.40 pm he was at a kiosk taking lunch when a trailer lost control and hit the kiosk and the wall to G.K Brothers Ltd. They were 6 of them and 2 of them died on the spot. They were rushed to Kenyatta National Hospital and the other injured died. He was fractured on the hip, thigh and metal plates were inserted. He was later taken to Kikuyu Hospital where he was operated on. PW1 stated that he was not able to walk without a stick and seeks for assistance as the fractures have not united due to his age, as the metal implants will be in situ till the end of time. It was PW1's evidence that he was injured on his neck and right leg. He said it was prime mover belonging to M/S Multiple Hauliers that hit the kiosk and was taken to Industrial Police Station. He alleged that it veered off the road for a distance of 30 metres and blamed the driver of the said motor vehicle. He prayed for damages, costs and interest.
12. The Plaintiff was stood down and proceeded with his testimony on 27th February, 2019. He told court that he reported the accident to Industrial Area Police Station whereby he was issued with a police abstract and a P3 form dated 31st March, 1999. He was treated at Kenyatta National Hospital, where he was examined by Dr. Ruga and Dr. Khorler. He incurred expenses of Kshs.281,434/=.
13. On cross-examination. PW1 stated that he was injured and was first treated at Kenyatta National Hospital but he later fell and hurt himself. He stated that the motor vehicle involved was Registration Number KG 2847 and the police carried out investigations.
14. Testifying as PW2, on 31st July, 2019, NO.48769 PC Michael Ndochi, stated that he is attached to Industrial Police Station performing traffic duties. He told court that on 31st March, 1999, a road traffic accident occurred at 12.45pm along Rangwe road off Lunga Lunga road involving Motor Vehicle Registration Number KG 2847 Mercedes Benz lorry and a pedestrian, the Respondent herein who was injured. He identified the driver of the lorry as Charles Ngugi Waweru and the owner of the vehicle as Multiple Hauliers Ltd. He produced a Police Abstract which was marked as PExhibit-1.
15. On cross-examination, PW2 stated that he was producing the abstract to prove the occurrence of the road traffic accident and not the circumstances. He told court has nothing to prove that Multiple Hauliers were the owners of the motor vehicle. On re-examination, it was stated that 'KG' registration relate to vehicles under repair.



16. PW3, Dr. Fred Otsyeno testified on 2nd September, 2019 and stated that he is an Orthopaedic Surgeon at Kenyatta National Hospital. He said that he met the Respondent in 1999 following a road traffic accident and he was injured on the left thigh and left foot. He said that the thigh was fractured and PW1 was admitted for treatment without surgery as he had a wound that resulted into tetanus. He went on to state that PW1 was discharged on 13th June, 1999 and was scheduled for surgery but unfortunately he fell and sustained another fracture on a different spot. He was operated on two different occasions. PW3 stated that he prepared reports which are before court. He saw PW1 on 26th June, 2000 and he had improved. The metal implant was replaced. He again saw him on 18th June, 2002 and found he had healed but the metal implants were to be removed. He suffered pains. He was 87 years and is admitted with a stroke. He produced 3 medical reports marked as PExhibit 5(a), (b) and (c) and that by consent, parties agreed to receipts amounting to Kshs.70,000/= produced and marked as PExhibit-9.
17. On cross-examination, PW1 stated that the Respondent suffered 2 fractures and had implants on the second occasion when he had a fall. He also contended that the Respondent had provided a receipt of Kshs.100,000/= for the removal of implants but it is not traced to the 1st fracture and had not indicated the basis. On re-examination, PW3 stated that the second fall aggravated the matter whereby the cost of removal of the implants was estimated to be a sum of Kshs.100,000/=.
18. Upon completion of the trial, the learned Magistrate delivered its Judgment on 30th April, 2020 in favour of the Respondent. The trial Court awarded a sum of Kshs.3,000,000/= for injuries, pain and suffering and Kshs.70,000/= as special damages. In total, the court awarded the Respondent a sum of Kshs.3,070,000/= plus costs and interest.

The Appeal

19. Being dissatisfied with the Judgment of the trial Court, the Appellants appealed to this court vide a Memorandum of Appeal dated 8th October, 2020. The Appellants proffers the following Grounds of Appeal amongst other grounds to be adduced at the hearing;
 - a) That the learned Magistrate erred in law and fact in finding and holding the Appellants 100%.
 - b) That the Honourable learned Magistrate erred in law and fact in awarding damages to the Respondent amounting to Kshs.3,070,000/=.
 - c) That quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the Respondent considering the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
 - d) That the learned trial Magistrate erred in law and fact and misdirected himself in failing to consider the submissions by the Appellants together with the authorities relied on by the Appellants.
 - e) That the Honourable Magistrate erred in law and facts by disregarding established principles in awarding damages in the case before him.

The Appellant has sought for the following reliefs: -

- a) That the appeal be allowed.
- b) That the suit be dismissed with costs to the Appellants.



- c) That in the alternative this Honourable Court be pleased to review and reduce the amount of damages awarded by the learned Magistrate.
 - d) That the Respondent pays the costs of this appeal and the costs in the lower court.
 - e) That such further relief as may appear just to the Honourable Court.
20. Following directions by the court on 13th May, 2022, this appeal was prosecuted by way of written submissions. The Appellants' submissions are dated 7th September, 2022 whereas the Respondent's submissions are dated 19th September, 2022.
21. I have read through the Grounds of Appeal, the submissions as well as the authorities relied upon. I endeavor to further consider them in my final analysis.

Analysis and Determination

22. This being the first appellate court, it has a duty to re-evaluate, re-asses and re-consider the evidence adduced before the trial court afresh and come up with its own independent conclusions while keeping in mind that it did not hear the witness testify or observe their demeanour. (See the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123), where the Court restated the principles required of a first appellate court.
23. Similarly, the Court of Appeal in the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, held that;
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
24. I have considered the grounds of appeal by analyzing and evaluating the record of proceedings before the trial Court, the submissions by both parties alongside the cited authorities and the following issues are emerging for this court's consideration;
- a) Whether the trial court erred in holding the Appellants 100% liable?
 - b) Whether the award of Kshs.3,000,000/= as general damages were excessively so high?
25. On the issue of whether the trial court erred in holding the Appellants 100% liable, the Appellants submitted that the Respondent failed to establish liability against them failure to establish the nexus of the Appellants' negligence and the accident. The Appellants cited Section 107 and 108 of the *Evidence Act* which this court has put into consideration. The Appellants submitted that the Respondent did not prove his case on a balance of probability and the appeal should be allowed with costs.
26. In his submissions, the Respondent stated that the Appellants did not adduce any evidence to challenge the injuries sustained by the Respondent and thus the same remained uncontroverted. (see the case of *Swalleh C. Kariuki & Another v Viloet Owiso Okuyu* [2021] eKLR).
27. From evidence on record, the Respondent was taking lunch in a Restaurant the motor vehicle lost control and hit the Respondent together with other people, some of whom suffered fatal injuries.



28. In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009]eKLR, Lesiit J. (as she then was) citing the case of *Autar Singh Bahra and Another v Raju Govindji*, Hccc No.548 of 1998 (Unreported), where the Hon. Justice Mbaluto stated at as follows:-

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

29. The same position was reiterated by Mativo, J (as he then was) in the case of *Mursal & Another v Manese* (suing as the legal administrator of Daphine Kanini Manesa) (Civil Appeal No.E20 of 2021) [2022] KEHC 282 (KLR), where the Court stated that:-

“The Respondent opted not to adduce evidence despite filing a defense denying liability. It is established position that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved.”

30. Therefore, in view of the above analysis and the facts of this case, I will not fault the trial court in finding the Appellants 100% liable for the accident. There is no way the Respondent could have contributed to the accident that found him at the comfort of his chair in a restaurant. The Appellants were rightly found to be 100% liable for the accident.

31. On the issue of whether the award of Kshs.3,000,000/= as general damages were excessively so high, the Appellants submitted that the Respondent alleged to have sustained injuries as a result of the accident which were a commuted fracture of left femur, degloving wounds on the left leg and loss of consciousness for one hour. The Appellants then submitted that in view of the injuries sustained by the Respondent, they proposed that the court finds that an award of Kshs.400,000/= subject to the apportionment on liability would be sufficient compensation as general damages for the injuries sustained from the accident that occurred on 31st March, 1999.

32. The Appellants have cited several authorities in support of the award of Kshs.400,000/=. For instance, in the case of *Zachariah Mwangi Njeru v Joseph Wachira Kanoga* [2014]eKLR relied on the case of *Bethwel Mutai v China Road & Bridges Corporation (Mombasa)* HCCC. No.200 of 2007, where the Plaintiff sustained a fracture of the left cervical, fracture of the right humerus and fracture of the right femur. The court awarded Kshs.400,000/= for general damages. Another authority cited is the case of *Gabriel Kariuki Kigathi v Monica Wangui Wangechi* [2006]eKLR, on appeal, the court awarded Kshs.400,000/= as general damages where the Plaintiff had sustained a fracture of the neck, bilateral rib fractures, bilateral lung contusion and injuries to both hands.

33. The Respondent has urged that the trial court applied the relevant legal principles in arriving at quantum. The Respondent was involved in a road traffic accident caused by the 1st Appellant. Therefore, the trial court did not err in law and fact in awarding damages of Kshs.3,070,000/= to the Respondent and neither is the quantum of damages excessive and erroneous. The injuries were confirmed by PW2-Dr. Otsyeno’s three (3) medical reports. The injuries were supported by treatment notes, discharge summary and p3 form and two independent medical reports by Dr. Ruga and Dr. Khorler. The Respondent has relied on the case of *Charles Wanyoike Githuka v John Mwangi Thuo & 2 Others*, Nakuru High Court Civil Case No.68 of 2005, where the Plaintiff was awarded Kshs.2,000,000/= for similar injuries.



34. The Respondent has contended that the Appellants did not adduce any evidence to challenge the injuries he sustained and thus the same remained uncontroverted. Reliance has been placed on the case of Swalleh C. Kariuki & Another v Viloet Owiso Okuyu [2021] eKLR.
35. The Appellants having challenged the award of damages by the trial court. I find it prudent to highlight the principles to be considered in determining the question of general damages. The principles that guide an appellate court in deciding whether or not to interfere with damages awarded by trial were set out in the case of Kemfro Africa Ltd T/A “Meru Express Services [1976]” & Another v Lubia and Another (No.2) [1985]eKLR, where the Court of Appeal held 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 that 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 damages.”
36. It is trite law that an Appellate Court can only interfere with the quantum of damages awarded if in assessing the damages, the court took into account irrelevant factors, or left out an account of 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.
37. The Court of Appeal in the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5, held as follows;
- “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 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”
38. It is now a settled position of law that in reaching quantum of damages, a court considers the nature of injury sustained and the economic inconvenience that the injured party may have been put through. It is also the law that general damages are awarded not to punish the wrong party, but restore the innocent party in a position he or she was could have been, had the damage not occurred.
39. In the case of Odinga Jactone Ouma v Moureen Achieng Odera [2016] eKLR, the Court stated that:-
- “In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards.”
40. Having laid down the principles guiding the award of general damages, I now proceed to determine whether the award by the trial court was indeed excessively high in view of the evidence on record.
41. According to the record, the Respondent suffered a commuted fracture of left femur (sub trochanteric), degloving wounds on the left leg and a laceration on right leg, neck injuries with pain and stiffness and he lost consciousness for 1 hour. The injuries were confirmed by PW3 - Dr. Fred Otsyeno and the 3 medical reports produced as evidence.
42. In his report, Dr. Fred Otsyeno formed an opinion that the Respondent suffered multiple injuries with serious consequences that will require intensive hospital stay. The prognosis of the injuries is grave



while Dr. Maina Ruga in his report stated that it is not possible to determine the final total incapacity until after the planned second operation but it would be in the range of 25 - 40%.

43. In the case of Michael Njagi Karimi v Gideon Ndungu Nguribu & Another [2013]eKLR with injuries comparable to those of the Respondent in this matter, the court stated as follows:-

“In the present case I note that in addition to the fracture in both lower limbs there were also fractures in the right upper limb. Doing the best that I can, and balancing this against that, I will award the Plaintiff general damages of KShs.2 million for pain, suffering and loss of amenities.”

44. In view of the circumstances and the reasons I have stated hereinabove, I find it appropriate to interfere with the awarded of damages by the trial Court. Accordingly, I consider that Kshs.2,500,000/= is the appropriate quantum to be awarded to the Respondent.

45. In the upshot of the foregoing, the appeal partially succeeds and the award of Kshs.3,000,000/= is set aside and substituted with an award of Kshs.2,500,000/=. The award on special damages of Kshs.70,000/= was agreed

by consent of the parties and therefore this court will not interfere. The Respondent will have costs award by the trial Court.

46. Each party shall bear their own costs in this appeal.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...20TH DAY OF ...APRIL... 2023.

D.O CHEPKWONY

JUDGE

