



REPUBLIC OF KENYA



KENYA LAW
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**Waweru & another v Kyungu (Civil Appeal 55 of 2016)
[2023] KEHC 3792 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 55 OF 2016
SC CHIRCHIR, J
APRIL 18, 2023**

BETWEEN

HUMPHREY THUKU WAWERU 1ST APPELLANT

DAVID KINUTHIA MUNIU 2ND APPELLANT

AND

DANA NZILANI KYUNGU RESPONDENT

*(Being an Appeal from the Judgment of Hon. Kurumba – Rm,
Delivered On 29.9.2016 in Kandara CMCC No. 27 of 2015))*

JUDGMENT

1. The appeal herein arises from the judgment of Chief Magistrate's Court at Kandara in SRMCC No. 27/2015. The lower court suit arose out of a Road Accident which occurred on 28th November, 2014 along Thika – Kandara road involving motor vehicle registration No. KBQ308Y, and the Respondent herein who was a pedestrian along the said road. The Respondent's claim was for general and special damages.
2. The parties entered a consent on 16th March 2018, wherein liability was shared in the ratio of 80/20 in favour of the plaintiff. The parties also consented to have the assessment of damages proceed by way of written submissions.
3. The court delivered judgment on 29.9.2016 the terms of which were as follows:-
 - a. General damages kshs.750,000.00
 - b. Special Damages Kshs. 3,000.00
 - c. Future medical expenses kshs. 60,000.00



Total Kshs.813, 000.00

4. The Appellant was aggrieved by the judgment and preferred this appeal.

Grounds of Appeal

1. That the award of general damages of kshs.750, 000.00 was excessive in the circumstances.
2. The Trial court misdirected itself in failing to consider that comparable injuries should attract comparable awards.
3. That the award on general damages was not justified
4. The trial court erred in failing to subject the award to the appointment on liability which had been agreed to by the parties
5. The trial court erred in awarding the costs of removal of implants of kshs. 60,000.00 notwithstanding that the plaintiffs had not specifically pleaded.
6. The trial court failed to consider the Appellant's Doctor's Medical Report.
7. Trial Magistrate misdirected herself in finding that the Respondent was entitled to the damages awarded.

The appeal was canvassed by way of written submissions.

Appellant's Submissions

5. The appellant urged the court to consider that Dr. Wokabi's report is more accurate compared to that of Dr. Karanja in assessing the degree of injuries sustained. Their submission is based on the fact that Dr. Wokabi examined the Respondent about 8 months after the examination by Dr. Karanja.
6. That the award was excessive, when considered against Dr. Wokabi's assessment. It is further submitted that the trial Magistrate did not lay a basis for the award of Kshs.750, 000.00 as she did not cite any Authority on which she relied on. The Appellant contends that the award therefore, failed the test of comparable awards. The appellant relied on the case of Simon Taveta vs. Mercy Mutitu Njeru [2014]eKLR to buttress their submissions.
7. On the comparable awards, the appellant as invited the court to look at the following past decisions:
 - i. Reamic Investment Limited –s- Joan Amenga Samuel [2021]eKLR
 - ii. TAM vs. Richard Kirimi Kinoti [2015]eKLR
 - iii. Erick Ratemo – vs- Joash Nyakweba Ratemo [2018] eKLR

Respondent's submissions

8. On general damages, the Respondent submits that the award of kshs. 750,000.00 was just, fair, reasonable and was based on comparable awards. The respondent relied on the case of Kornelius Kweya Abichet vs. C & P Shoe Industries Limited (2008)eKLR.
9. On the issue of liability, the Respondent accepts the Appellant contention on the aspect of apportionment but argues that the recourse for the Appellant is a Review not an Appeal as the error was apparent on the face of the Record.



10. On the future medical expenses, the Respondent argues that this item was specifically pleaded and evidence was lead to prove it.

Analysis and Determination

11. The role of this court as the 1st appellate court is to look at the evidence afresh, re-evaluate and make its own findings. (Karanja Mwangi Jackson & another vs. Nancy wanjira Nyaga [2021] eKLR)
12. From the grounds of appeal, the following issues arise for determination
 - i. Whether the award on damages should have been subjected to apportionment.
 - ii. Whether the award of future medical costs was erroneous.
 - iii. Whether the award on general damages was too excessive in the circumstances.

Apportionment of liability

13. The record shows that on 16.3.2016, parties entered into a consent wherein liability between the parties was apportioned in the ratio of 80:20 in favour of the plaintiff. This should have been taken into consideration in arriving at the net award. As pointed out by the Respondent, this was clearly a case of an error in the face of the record which the appellant should have taken up by way of review.
14. However, nothing prevents a party from taking up a matter on Appeal which could also be resolved by way of review. There is no contestation on the issue of the apportionment .Consequently, I hold and find that the total award shall be subjected to apportionment of 80:20 in favour of the Respondent.
15. On the cost of future treatment, this is in the nature of special damages and there are a host of decisions that have been made setting out the principles governing special damages. It is trite law that Special Damages must be specifically pleaded and strictly proved. On paragraph 10 of the plaint, it is pleaded that the Plaintiff requires removal plates at an estimated cost of kshs.60, 000.
16. On the prayers at paragraph (c) of the plaint, she prayed for future medical expenses. Even though the issue of special damages had been raised as a ground of Appeal, the Appellant’s submissions are silent on it, and therefore am unable to know what their quarrel was in this regard. I am satisfied that the cost of future treatment was specifically pleaded.
17. The said damages was also strictly proved. Both Dr. Karanja and Dr. Wokabi indicated in their reports that the metal implants will need removal at the costs of kshs.60, 000.00.

Were the general damages too excessive?

18. Assessment of damages is an act of discretion, and the basis of interfering with the trial court’s assessment has been set out in several past decisions.

In Bashir Ahmmed Butt vs. Uwais Ahmed Khan (1982-1988)KAR, cited by the Respondent, the Court of Appeal held, “An appellate court will not disturb an award for general 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...”
19. In the case of Loise Wanjiku Kagunde vs. Julius Gachau Mwangi CA 142 of 2003, the Court of Appeal held “We appreciate that the assessment of damages is more like an exercise of individual discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that



the judge acted on wrong principles of law or has misapplied the facts or has for those other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate Court would have awarded but whether the lower court acted on the wrong principles (see *Munga vs Musila* (1984) KLR 257.)”

20. According to Dr. Karanja in his report dated 27th January 2015, the Respondent sustained head injury with multiple facial bruises, multiple bruises on both hands and fracture right femur. She was hospitalized for 14 days. At the time of examination she walked with the aid of crutches. In his estimation it was going to take her a period of 4 months to resume her normal duties.
21. Dr. Wokabi examined the Respondent on 24th September 2015 and he stated that the Respondent had suffered loss of consciousness and multiple wounds on the scalp and fracture of the right femur. She was left with multiple scars on the scalp. At the time of examination, he was of the opinion that she had recovered well and she will not suffer any permanent disability.
22. The Appellant has pointed out, correctly that in assessing damages at kshs.750, 000.00 the trial Magistrate did not cite any authority she relied on. That notwithstanding, was the award too excessive to constitute an erroneous estimate?
23. A look at the following recent decisions will provide some guidance:

In the case of *Restory Ltd & another vs. Samuel honge Kagoko* (2022) eKLR the claimant sustained a fracture of mid shaft left femur and soft tissue injuries. The high court reduced the lower award of kshs. 1,400.00.00 to ksh.800, 000.00 in March 2022.

In *Hussein Diary Ltd. Vs. Asha Moyer Moteo, Anthan & 3 others* (2021)eKLR, the court reduced an award of ksh.1,600.000 given by the lower court to Kshs.600,000.00 in respect of injuries which were fairly similar to the present case.

In *Jackson Musalika Mwangangi vs. Onesmus Nzioka & another* (2021)eKLR, the court awarded kshs.200,000 for injuries fairly similar to the present case.
24. In view of the foregoing, the award of kshs.750, 000.00 compares well with similar awards for comparable injuries taking into consideration the factor of inflation. The award cannot be said to be too excessive to warrant his court interference. I uphold the same.
25. In conclusion, this appeal partly succeeds. There shall be judgment for the Respondent in the following terms.
 - a. General damages – kshs.750,000.00
 - b. Special damages kshs. 3,000/-
 - c. Future medical expenses kshs. 60,000.00Total Kshs 813,000.00
Less 20% (ksh.162, 600)
Net Kshs.650, 400.
 - (d) Interest at court rates from the date of the judgment of the lower court.
 - (e) The respondent shall have the costs of the suit in the lower court.
 - (f) Each party to bear their own costs in this appeal.

Dated and signed and delivered at Kakamega virtually this 18th day of April, 2023



S. CHIRCHIR

JUDGE

In the presence of:-

Susan- Court Assistant

Mr.Aoko for Shem Kebongo for the Respondent

No appearance by the Appellant.

