



REPUBLIC OF KENYA



**Gituku & another v Kung'u (Civil Appeal E046 of 2021)
[2023] KEHC 17538 (KLR) (Civ) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17538 (KLR)

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

CIVIL

CIVIL APPEAL E046 OF 2021

CW MEOLI, J

MAY 11, 2023

BETWEEN

GEORGE KAIRU GITUKU 1ST APPELLANT

DAVID KINYUA WAWERU 2ND APPELLANT

AND

STEPHEN NDUWA KUNG'U RESPONDENT

*(Being an appeal from the judgment of G.A Mmasi (Mrs.) (SPM) delivered
on 15th January 2020 in Nairobi Milimani CMCC No. 7124 of 2017)*

JUDGMENT

1. This appeal emanates from the judgment delivered on January 15, 2020 in Nairobi Milimani CMCC No 7124 of 2017 (hereafter the lower court suit). The suit was brought by Stephen Nduwa Kung'u, the plaintiff in the lower court (hereinafter the Respondent) and was commenced by way of a plaint filed on October 3, 2017 (and amended on September 25, 2018). George Kairu Gituku and David Kinyua Waweru were named as the 1st and 2nd defendant/defendants in the lower court (hereinafter the 1st & 2nd Appellant/Appellants). The Respondent's claim was for damages on account injuries sustained as a result of a road traffic accident that occurred on July 31, 2017.
2. It was averred that at all material times the 1st Respondent was the authorized driver of motor vehicle registration number KCC 246V (hereafter suit motor vehicle) and the 2nd Respondent the registered owner. That the Respondent was lawfully pushing a trolley along River Road in Nairobi when the 1st Respondent with the authority and in the course of his employment with the 2nd Respondent, so negligently, carelessly and or recklessly drove, managed and or controlled the suit motor vehicle that it



lost control, veered off the road and violently knocked down the Respondent as a result of which he sustained severe bodily injuries, in respect of which he has suffered loss and damage.

3. The Appellants filed a joint statement of defence on March 15, 2018 denying the key averments in the plaint and liability. On their part they averred strictly without prejudice to the averments in the statement of defence and in the alternative that the occurrence of the accident as maybe proved by the Respondent was caused solely and or substantially contributed to by the Respondent's own negligence.
4. The suit proceeded to a hearing during which the Respondent was the only party to adduce evidence. In its judgment, the trial court found the Appellants jointly and severally liable and awarded to the Respondent damages as hereunder: -
Pain and Suffering – Kshs 800,000.00/-
Future Medical – Kshs 200,000.00/-
Loss of Earning Capacity – Kshs 250,000.00/-
Special Damages – Kshs 103,300.00/-
Total Kshs 1,353,300.00/-
5. Aggrieved with the outcome, the Appellants preferred this appeal challenging the judgment based on the following grounds:-
 1. The learned magistrate erred in fact and in law in finding that the Respondent was entitled to general damages of Kshs 800,000/-.
 2. The learned magistrate erred in fact and in law in finding that the Respondent was entitled to general damages that were too high in view of the evidence tendered and the injuries she suffered. The award was too high and the same is not justified.
 3. The learned magistrate erred in fact and in law in finding that the Respondent was entitled to general damages that were too high in view of the evidence tendered and the Respondent did not prove the injuries suffered. The same was too high and the same is not justified.
 4. The learned magistrate erred in fact and in law in failing to arrive at a just and fair determination on quantum.” (sic)
6. The Appeal was canvassed by way of written submissions. As evidenced by the Appellants memorandum of appeal, counsel's submissions were riveted on quantum of damages. While reiterating the principles guiding the award of damages, counsel anchored his submissions on the decision in *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR and *Kigaraari v Aya* (1982-88) 1 KAR 768 in urging the court to disturb the award on damages. Concerning the award on general damages, counsel restated the Respondent's injuries and attendant sequela and urged the court to review the award of the trial court downwards to Kshs 350,000/-. A raft of decisions among them being *litan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR, *Zachariah Mwangi Njeru v Josphe Wachira Kanoga*, Nyeri HCCA No 9 of 2012 as quoted in *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR], and *Wakim Sodas Limited vs. Sammy Aritos* [2017] eKLR as quoted in *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR were called that regard.
7. Addressing the award of future medical expenses coupled with loss of earnings and earning capacity, counsel contended that the Respondent did not adduce evidence in support of the claims which ought to be specifically pleaded and proved. Counsel cited the case of *Board of Governors Ongata Academy*



v Gabriel Ngaiyaiya Rumoi [2021] eKLR, and *S J v Francesco Di Nello & another* [2015] eKLR *inter alia* urging the court to set aside the said awards and in conclusion, urged the court to allow the appeal with costs.

8. Counsel for the Respondent simultaneously addressed the Appellants grounds of appeal. He too echoed the principles that guide an appellate court on a first appeal. Asserting that the trial court's exercise of judicial discretion is not to be interfered with unless it is shown the exercise was based on wrong principles. Summarily, submitting on the Appellants grounds of appeal, counsel relied on the decisions in *Ratnam v Kumarasamy & another* ALL ELR (1964), *Samken Limited & Anor v Mercedes Sanchez*, Nairobi Civil Application No 21 of 1999, *Peter Mburu Echaria v Priscilla Njeri Echaria* [2001] eKLR, *Mbogo v Shah* (1968) EALR and *Butt v Khan* (1982-88) 1 KAR to contend that the Appellants have failed to demonstrate error on the part of the trial court . The court was urged to dismiss the appeal with costs.
9. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle -vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. The appeal before this court turns on the question of quantum of damages. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.”



11. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] 1 KAR 5 that:

“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”.

See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No 284 of 2001; [2004] eKLR.

12. Pertinent to the determination of issues are the pleadings, which form the basis of the parties’ respective cases before the trial court. The Respondent particularized his injuries and loss at paragraph 6, 7 and 7A of the amended plaint as follows: -

“6. By reason of the matters aforesaid the Plaintiff sustained severe bodily injuries, endured great pain and suffering and has been out to suffer loss and damage.

Particulars of Injuries suffered by the Plaintiff

- i. Blunt head injury.
- ii. Soft tissue injury to the left shoulder joint.
- iii. Soft tissue injury to the left hip joint.
- iv. Fracture of the right ankle joint with displacement of the fractured fragments.
- v. Fracture of the base 1st Metatarsal bone of the right foot.
- vi. Fracture dislocation of the proximal interphalangeal joint of the 2nd toe of the right foot.

.....

Prior to the accident subject matter herein the Plaintiff was energetic, prosperous and hardworking businessman earning a monthly income of Kshs 17,000/- but due to the injuries sustained in the said accident the Plaintiff can no longer engage on any gainful occupation and the Plaintiff claims loss of earnings and loss of earning capacity.

7A. As a direct consequence of the accident subject matter, the Plaintiff will need surgical removal of the implants inserted at the fracture site of the right ankle joint at an estimated cost of Kshs 400,000/- including surgery, hospitalization as well as anesthetic costs. The Plaintiff claims the said amount being costs of future medical care.” (sic)

13. In its judgment, the trial court after restating and examining the respective parties’ evidence stated as follows: -

“...Quantum of Damages



.....The doctor opined that the injuries sustained by the Plaintiff as the blunt head injury has caused the Plaintiff to be having persistent headaches. The Plaintiff was operated to fix the fractures.

The Plaintiff in his submission proposed an award of Kshs 1,200,000/- (one million two hundred thousand shillings only as general damages for pain and suffering and loss of amenities)

(b) Future medical costs

Dr. Bhanji in his medical report proposed an award of Kshs 400,000/- (four hundred thousand shillings which will cater for surgery for the removal of the implants fixed to stabilize the fractures)

(c) Loss of earning and earning capacity

The Plaintiff proposed an award of Kshs 540,000/-

Special costs Kshs 103,000/-

I have considered the authorities cited in comparison with the injuries the Plaintiff sustained and or suffered and the awards given into consideration, the inflationary trend since the judgment were given.

I proceed to assess the quantum of damages as follows:

1. Pain and suffering Kshs 800,000/- (Eight Hundred Thousand Shillings Only)
2. Future medical costs Kshs 200,000/- (Two Hundred Thousand Shillings Only)
3. Loss of earnings and earning capacity Kshs 250,000/- (Two Hundred and Fifty Thousand Shillings Only)
4. Special damages Kshs 103,300/- (One Hundred and Three Thousand Three Hundred Shillings Only)

Judgment is entered in favour of the Plaintiff as against the defendants jointly and severally in the sum of Kshs 1,353,300/- (One Million, Three Hundred and Fifty Three Thousand, Three Hundred Only) plus costs of the suit and interest at court rates” (sic)

14. During the trial, Dr. N.H Bhanji testified as PW1 and the medical report he prepared dated September 6, 2018 was tendered as PExh.1a. The Respondent testified as PW3 and produced the treatment note from Shikamoo Medical Centre and Discharge Summary from St. Teresa’s Hospital, as PExh.5b & PExh.6 respectively. The earliest report, PExh.6, was prepared roughly a week after the accident. It essentially listed the Respondent’s injuries to comprise a fracture of the ankle and foot with management being by way of ORIF. This injury was not challenged at the trial, and neither was the Respondent subjected to a second medical examination to ascertain the degree of the injuries.



15. The medical report PExh.1a was prepared on 06.09.2018, more than a year after the accident and the most recent on the Respondent's injuries. The report set out in detail the Respondent's injuries and attendant sequela. PW1's prognosis on the Respondent was captured in extenso therein as follows:-

“Stephen Nduva Kung'u sustained blunt head injury as well as severe injuries to the right ankle joint, to the right foot as well as soft tissue injuries as a result of the accident.... The injuries to the right ankle joint caused a Weber C Fracture with displacement of the fractured fragments and the injury to the right foot caused fracture of the big toe and as well as the 2nd toe. He had to be admitted to St. Teresa and Maternity Nursing Home in Kikuyu and had to undergo surgery....His complaint regarding pain in the upper arm is subjective. The physical examination revealed no evidence to support this complaint. The rest of his complaints are in my opinion valid and are directly as a result of the injuries sustained during the accident.

Regarding the future prognosis the following points are worthy of note:-

1. The blunt head injury which he sustained has resulted him having frequent headaches. This symptom is incapacitating and will take a long time to subside.
2. The injury to the right ankle joint has been managed by means of metal plates and screws. These have caused considerable deformity of the ankle joint as well as restriction in movements of the same. The physical examination revealed that the movement of the right ankle joint were markedly restricted in comparison to those of the left.
3. The metal implants have not yet been removed. They are already due for removal. Such a removal of implants if are done in a private institution, would in my opinion cost in the region of Kshs 400,000/-.....including surgery, hospitalization as well as anaesthetic costs.
4. ...
5. Failure to do this surgery and a corrective surgery, if necessary would result in restriction of movements of the right ankle joint being permanent in nature”
6.
7.
8.

Hence considering above points, it is unlikely that Stephen Nduva Kung'u will recover from this injuries in the near future.” (sic)

16. The above evidence was not put to any serious challenge at the trial save for the issue of future medical expenses resultant from the injuries sustained. Undoubtedly, the injuries suffered by the Respondent herein were relatively severe and must have caused him a great deal of pain and extended periods of morbidity, not to mention subsequent surgical intervention. Equally, from PExh.1a the injuries predisposed him to attendant sequela. Nonetheless, as observed by the English Court in *Lim Poh Choo v Health Authority* (1978)1 ALL ER 332 and echoed by Potter JA in *Tayab v Kinany* (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation.



In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”

See also *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR and *Kigaraari v Aya* (1982-88) 1 KAR 768.

17. As important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the court’s duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. The trial court restated in detail the evidence and submissions before it in respect of the Respondent’s injuries, primarily PExh. 1a. But beyond this, the trial court did not expressly apply the authorities cited to this case.

18. Nevertheless, as observed by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No 284 of 2001 [2004] eKLR the award of general damages is discretionary 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 different figure if it had tried the case in the first instance”.

That said, the Respondent’s injuries, though relatively severe, did not result in any form of permanent incapacitation. It appears from my own review of the material presented before the trial court and comparisons with authorities cited on this appeal that the award for general damages while slightly high is not so excessive as to be an erroneous estimate in the circumstances of this case and the court does not feel justified in interfering.

19. The case of *Leornard Kinuthia v William Sirma Kiboros* (2000) eKLR cited by the Plaintiff in the lower court appeared to compare reasonably well with the instant one, although the injury of the plaintiff in that case included a fracture of the ankle and comminuted fracture of the malleolus and soft tissue injuries. The injuries were severe, and the plaintiff was awarded Ks.700,000/- in general damages. The Appellant does not seem to have filed submissions in the lower court. None are on the original record or the record of appeal. It is unfair for such a party to cite in arguing the appeal, authorities not presented for the consideration of the trial court. In that regard, this court agrees with similar sentiments by Ochieng J (as he then was) in *Silas Tiren & Another v Simon Ombati Omiambo* [2014] eKLR.

20. Turning now to the awards of future medical costs, loss of earnings and earning capacity and special damages, these were not specifically challenged in the grounds contained in the memorandum of appeal. It is trite law that issues for determination by a court are derived from the pleadings by parties. It was not open to the Appellants, having eschewed to include a challenge concerning the said awards in their grounds, to surreptitiously canvass them through submissions.

21. In that regard the court is guided by the wisdom of the Court of Appeal in *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others* [2014] eKLR where in was stated that; -

“The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not be before the learned judge for determination.



.....One of the issues for determination on appeal in the case of Abdul Shakoor Sheikh v Abdul Najeid Sheikh Civil Appeal No 161 of 1991 (ur) was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors Bullen and Leake (12th edition) page 3 under the rubric Nature of Pleadings:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

22. The Court proceeded to state that:-

“It was held in the case of Galaxy Paints Co. Limited v Falcon Guards Limited [2000] 2EA 385 that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for determination. It was further held that unless pleadings were amended parties were confined to their pleadings. This position had been taken in the earlier case of Gandy v Caspair [1956] EACA 139 where it was held that unless pleadings were amended parties must be confined to those pleadings. It was further held that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.

In a judgement delivered recently by this Court on 14th February, 2014 in Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others (Kisumu) Civil Appeal No 20 of 2011 (ur) it was held that a judgement whose basis was on issues not founded on the pleadings was a nullity. This Court proceeded in that case to remit the matter to the High Court for retrial.

23. The Court concluded by stating that:

The position flowing from all the previous judgements we have considered herein is that a judgement must be based on issues arising from the pleadings and the trial judge is not at liberty, as the trial judge in the case leading to this appeal did, to depart from the pleadings or the case before the court to write and deliver a judgement on issues that are not before the court. The difference would of course be where the parties introduce an unpleaded issue in the course of the trial and leave that issue for the court to decide. The court would in that event be entitled to make a necessary finding - See Odd Jobs Mubia [1970]EA 476 where it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision.

The appellant’s complaint in this appeal is basically that the learned judge delivered a judgement on issues that were not pleaded and which were not before the court. We agree. The learned judge adopted a path of doing what she perceived to be “justice” to the parties



but in the event she erred by departing from the general rule that issues for determination in a suit generally flowed from the pleadings and the learned judge could only pronounce judgment on the issues arising from the pleadings.” (Emphasis added).

24. The Court declines the invitation to determine issues not pleaded and therefore not properly before it. In the end the court finds that the appeal herein is without merit and will dismiss it with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Ng'ang'a

For the Defendants: Mr. Mwangi

C/A: Carol

