



REPUBLIC OF KENYA



**Greenline Bus Co Ltd & another v Maina (Civil Appeal
E80 of 2021) [2023] KEHC 4009 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E80 OF 2021**

SM MOHOCHI, J

MAY 4, 2023

BETWEEN

GREENLINE BUS CO LTD 1ST APPELLANT

JOHN WAITHAKA THUO 2ND APPELLANT

AND

VICTOR KANENE MAINA RESPONDENT

*(Being an appeal from the Judgment/Decree of the Hon. E. Kigen
(SRM) delivered on 2nd July, 2021, in Eldoret CMCC No. 392 of 2019)*

JUDGMENT

1. The appeal is mainly on quantum.
2. By a plaint dated May 14, 2019, Victor Kanene Maina, the respondent sued the appellants seeking general damages, special damages and costs plus interest of the suit arising from a road accident that occurred on November 24, 2017 along Eldoret- Webuye road, at Mareba involving motor vehicle registration number KBE 995 M-ZE 2337 and motor vehicle registration number KBZ 765V in which the respondent was travelling in as a passenger and as a result of which the respondent sustained severe injuries.
3. In a joint statement of defence dated July 26, 2019 the appellants herein denied the occurrence of the said accident. In the alternative, they blamed the respondent and the driver of motor vehicle registration number KBE 995 M-ZE 2337 for occasioning the said accident.
4. On February 5, 2020, by consent liability was entered in the ratio of 90%: 10% in favour of the respondent.



5. After trial, Hon E. Kigen (SRM) delivered judgment on July 2, 2021, in which damages were assessed as hereunder: -
 - a. General damages.....Kshs 1,200,000/=
 - b. Special damages..... Kshs 28, 087/=
 - c. Less 10% contributory negligence.....Kshs 48,097/=
 - d. TotalKshs 1,080,000/= plus, costs & interests

6. Aggrieved by the judgment of the trial court, the appellants filed a memorandum of appeal dated July 16, 2021, citing the following (refined) grounds: -
 - a. That, the learned magistrate’s decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law, and has occasioned miscarriage of Justice.
 - b. That, the learned magistrate, erred law and misdirected himself, when he failed to consider the provisions set out in *The Insurance (Motor Vehicle, Third Party Risks) (Amendment) Act 2013* cap 405.
 - c. That, the learned magistrate erred in law and in fact, in awarding a quantum of damages inconsistent with injuries pleaded and proved to have been sustained by the plaintiff.
 - d. That, the learned magistrate having mis-apprehended and mis-understood the extent and severity of the injury, erred in law and in fact. in relying on authorities which were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.
 - e. That, the learned magistrate erred, in assessing an award hereunder which was inordinately high and wholly erroneous estimate of the loss and damage suffered by the plaintiff;
 - i. General damages.....Kshs 1,200,000/=
 - ii. Special damages..... Kshs 28, 087/=
 - iii. Less 10% contributory negligence...Kshs 48,097/=
 - iv. TotalKshs 1,080,000/= plus, costs & interests.
 - f. This ground was a replica of ground (a) above (emphasis is mine)

7. On November 28, 2022, the court issued notices to the respective counsels to file submissions within (7) days from the date of the notice. The respondent on October 26, 2022 filed his submissions whereas the appellant’s did not file any, the court notes the appellant’s prayer for the reassessment of the award.

The Respondent’s Submissions

8. Counsel Matekwa for the respondent submitted that, from the medical reports that were tendered, the respondent sustained the following injuries;
 - a. Blunt injury to the head with a cut wound on the occipital scalp
 - b. Blunt injury to the mouth, with removal of the lower right, second molar,
 - c. Blunt injury to the chest,
 - d. Fracture of the right tibia/fibula,



- e. Bruises and lacerations on the right hand posteriorly.
9. The trial court, made an award of Kshs 1,200,000/= in general damages, which the respondent contended was reasonable and commensurate to the injuries sustained.
10. In support of his submissions, Counsel Matekwa for the respondent relied on the following cases; *Julian Mumo Kisimbi v Mohamed Sheikh Omar Bin Dahman & another* (HCCC No 8 of 1997) where the court awarded the plaintiff, Kshs 1,300,000/= as general damages for fracture of the right femur, fracture of the left femur, left fibula, avulsion fracture of the right tibial spine, fracture of the right and left mandible, one broken upper canine tooth, laceration of the face and all the limbs with haemorrhagic shock and the case of *Humphrey Kaingu v KPA* (HCCC No 30 of 1993) where the court awarded the plaintiff, Kshs 1,500,000/= as general damages for fractures of the neck, fracture of the left femur, fracture of the left tibia and fibula, fracture and dislocation of the left ankle and chest injuries.
11. Further, counsel for the respondent, argued that as per the medical report prepared by Dr Sokobe, the injuries that were sustained by the respondent were quite serious. counsel, maintained the award on general damages was therefore not inordinately high so as to warrant the interference by this court.
12. Regarding special damages, the counsel urged the court to uphold the award of Kshs 28,087/= which counsel submitted was specifically pleaded and proved by way of receipts.
13. Lastly, counsel for the respondent urged the court to dismiss this instant appeal with costs to the respondent.

Issues for Determination

14. After going through the record, the written submissions as well as the authorities cited by both parties, I opine that the following are the issues for determination: -
 - a. Whether the sum of Kshs 1,200,000/- awarded by the trial court as general damages to the respondent, was manifestly excessive? and
 - b. Who should bear the costs?

Analysis

15. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, the same court stated with regard to the duty of the first appellate court;

“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.”
16. This court is guided by the Court of Appeal in, *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, cited the case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p 730 where Kneller J.A said: -

“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. See *Ilango v Manyoka* [1961] EA 705, 709, 713; *Lukenya Ranching And Farming Co-operatives Society Ltd v Kavoloto* [1970] EA, 414, 418, 419.”

17. The court further refers to the case of *Gicheru v Morton and another* (2005) 2 KLR 333 where the court stated: -

“In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.”

18. Madan, JA (as he then was), on the difficulties that confront a judge in assessment of general damages in the context of personal injuries claims as follows in *Ugenya Bus Service v Gachiki*, (1976-1985) EA 575, at page 579: -

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.”

19. The appellant in its memorandum of appeal contends that the general damages of Kshs 1,200,000/= awarded by the trial court was inordinately high in light of the injuries suffered by the respondent.

20. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”

21. The Court of Appeal while analysis quantum in *Catholic Diocese of Kisumu v Tete* [2004] eKLR stated: -

“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.”

22. In the case of *Kitavi v Coast Bottlers Limited* [1985] KLR 470) court stated: -

“It is now settled law that what the appellant was entitled to was a reasonable compensation assessed with moderation and conformity with the general method of approach, local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency but awards will very much depend on the facts of each case and any attempt to standardize “or rigidly” classify them will be in vain and wrong...”

23. Re-evaluating the material and evidence placed before the trial court, in his plaint, the respondent pleaded that he suffered the following injuries:

- a. Blunt injury to the head with a cut wound on the occipital scalp



- b. Blunt injury to the mouth, with removal of the lower right, second molar,
- c. Blunt injury to the chest,
- d. Fracture of the right tibia/fibula,
- e. Bruises and lacerations on the right hand posteriorly.

Issue (a) Whether the award in general damages, was manifestly excessive?

24. It is true that where a trial exercises its discretion and makes an informed award on damages, an appellate would rarely interfere unless it is shown that the trial court considered an irrelevant factor or disregarded a relevant or that the amount awarded in so inordinately high or so low as to amount to erroneous estimate of principle.
25. This principle was well illustrated in the decision of *Kemfro Africa Ltd T/a Meru Express Service & Another v Mm Lubia & another* [1998] eKLR where the Court of Appeal held as follows: -
- “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 high that it must be a wholly erroneous estimate of damages.”
26. The respondent herein pleaded, that he suffered the following injuries; blunt injury to the head with a cut wound on the occipital scalp, blunt injury to the mouth, with removal of the lower right, second molar, blunt injury to the chest, fracture of the right tibia/fibula, bruises and lacerations on the right hand posteriorly.
27. Dr Joseph Sokobe corroborated the evidence of the respondent *vide* a medical report dated April 10, 2019 admitted on consent on the March 3, 2021, he confirmed the respondent suffered the pleaded injuries and that he sustained both soft and bony tissue injuries from which he has recovered.
28. The appellant on their part similarly led no evidence to controvert the nature of injuries that the respondent sustained.
29. It is trite that comparable injuries should attract comparable damages, the Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that: -
- “The context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
30. In the case of *Bawani Stores Limited & another v Margaret Magiiri Gitau* [2015] eKLR, the plaintiff was awarded Kshs 450,000/- for compound fracture of the left fibula in the distal 1/3 and fracture of the left medial malleolus.
31. In *Ndwiga & another v Mukimba* (civil appeal E006 of 2022), where the plaintiff sustained tenderness and swelling of the left leg, fracture of tibia and fibula left leg, the court reviewed and set aside an award of Kshs 1,200,000/- on account of general damages for pain, suffering and loss of amenities and substituted the same with an award of Kshs 500,000/-.
32. In *Nahson Nyabaro Nyandega v Peter Nyakweba Omboga* [2021] eKLR, where the plaintiff sustained injuries including; bruises on the face, compound fracture of the right tibia bone, cut wound on the



right leg, the court reviewed and set aside an award of Kshs900,000/- on account of general damages for pain, suffering and loss of amenities and substituted the same with an award of Kshs 650,000/-.

33. From the above authorities, it is evident that courts have awarded lower amounts in general damages in the past even in cases where the victims sustained other injuries in addition to fractures of the tibia and fibula of both legs. In the instant case, I note that the learned magistrate awarded general damages indicating the authorities that she had relied upon so as to arrive at the award of Kshs 1,200,000/-. I hold the considered view that the said award was manifestly high to warrant interference by this court.
34. I therefore interfere with the same and substitute the award of Kshs 1,200,000/- with an award of Kshs 700,000/= for general damages.
35. The appellant has been successful in this appeal. However, in this case, this court should order that each party do bear their own costs as the appeal was only on quantum and the fact that the respondent's costs as awarded in the trial court are considerably reduced in view of the reduction of the general damages in this appeal.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 4TH DAY OF MAY, 2023.

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MOHOCHI S.M (JUDGE)

