



**Tahmeed Transporters Ltd & another v Simiyu (Civil Appeal
E017 of 2022) [2023] KEHC 4084 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E017 OF 2022**

SM MOHOCHI, J

MAY 4, 2023

BETWEEN

TAHMEED TRANSPORTERS LTD 1ST APPELLANT

ANTHONY MULINGE 2ND APPELLANT

AND

EVANS WEKESA SIMIYU RESPONDENT

*(Being an appeal from the Judgment/Decree of the Hon. B. K. KIPTOO
(SRM) delivered on 28th January, 2022, in Eldoret CMCC No. 116 of 2020)*

JUDGMENT

1. The appeal is mainly on quantum.
2. By a Plaint dated 30th October, 2020, Evans Wekesa Simiyu, 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 27th September, 2020 along Eldoret- Nakuru road, at KEN-KNIT involving motor vehicle registration number KCD 818 D-ZE 7713 and a bicycle which the Respondent was cycling and as a result of which the Respondent sustained severe injuries.
3. In a joint statement of defence dated 25th November, 2020 the Appellants herein denied the occurrence of the said accident. In the alternative, they blamed the Respondent who was a pedal cyclist for occasioning the said accident.
4. On 7th December, 2020, by consent liability was entered in the ratio of 90%: 10% in favour of the Respondent.
5. After trial, Hon. B. K. Kiptoo (SRM) delivered judgment on 28th January, 2022, in which damages were assessed as hereunder: -



- a. General Damages.....Kshs.300,000/=
 - b. Special Damages.....Kshs.8, 419/=
 - c. Less 10% contributory negligence.....Kshs.30,841/=
 - d. TotalKshs.275,577/=
- Plus, costs & interests
6. Aggrieved by the judgment of the trial Court, the Appellants filed a memorandum of appeal dated 18th February, 2022, citing the following (refined) grounds: -
 - a. That, the learned magistrate, erred law and in fact, in adopting wrong principles in assessment of damages payable to the Respondent;
 - b. That, the learned magistrate, erred law and in fact, in awarding damages which were excessive in the circumstances in view of the injuries sustained by the Respondent; and
 - c. That, the learned magistrate, erred law and in fact, by awarding the Respondent Kshs 300,000/- as general damages for soft tissue injuries which is inordinately high.
 7. On 23rd November, 2022, the Court issued notices to the respective Counsels to file submissions within (7) days from the date of the notice. The Appellant filed written submissions on the 14th December 2022 while the Respondent on the 17th January 2023 indicated he had filed his written submissions the same were not in the court file and as such the appeal shall be determined as if no written submissions were filed by the Respondent.

The Appellant's Submissions

8. Regarding quantum, the Appellants submitted that the trial Magistrate in this matter misdirected himself as to the nature of the injuries that were sustained by the Respondent and thus awarded damages that were manifestly high. The Appellants cited the case of *Butt v Khan* [1975] eKLR to buttress their argument.
9. The Appellants submitted that, from paragraph 8 of the statement of claim, the Respondent sustained the following injuries: -
 - a. Blunt injury to the head chest;
 - b. Bruises and Blunt injury to the upper limb;
 - c. Bruises and Blunt injury to the right hip;
 - d. Bruises and Blunt injury to the right thigh; and
 - e. Bruises and Blunt injury to the right knee.
10. The Appellants submit that the injuries sustained by the Respondent were soft tissue injuries that would attract a much lower award in general damages than the judgement award and sought reliance on the following authorities: -
 - a. *PF (Suing as the next friend and Father of S.K (Minor) v Victor O. Kamadi & Anor* [2018] eKLR Where the Court awarded Kshs 100,000/- as general damages for soft tissue injuries;
 - b. *Pan African Hauliers Ltd v Paul Webuye Chiter* [2021] eKLR where the High Court upheld the award of Kshs 80,000/- as general damages for soft tissue injuries; and



- c. *FM (Suing as the next friend and Mother of MWM v JNM & Anor* [2020] eKLR where the Court awarded Kshs 100,000/- as general damages for Blunt object injuries to the head, neck, thorax, abdomen and limbs.
11. It would be appropriate to commence the analysis of this appeal affirming the law and power of the Court to review or vary or affirm the impugned Judgment. G. V. Odunga's Digest on civil case Law and Procedure 3rd Edition Vol. 2 at page 501 paragraph (K) citing with approval the principles in *Peters v Sunday Post Ltd* [1958] EA 429 and *Shah v Aguto* [1970] EA 265 stated: -

“The Court on first appeal has jurisdiction to review the evidence in order to determine whether the conclusion originally reached on that evidence should stand. It is a strong thing for the appellate Court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing, hearing witnesses. But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate Court might itself come to a different conclusion.”(See also *Sotiros Shipping Inc v Smler Solholt* {1983} 1 Lloyds Rep 605).

Issues for Determination

12. 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. 300,000/- awarded by the trial court as general damages to the Respondent, was manifestly excessive? and
 - b. Who should bear the costs?

Analysis

13. 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 reanalyse 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.”

14. 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] E.a. 705, 709, 713; *Lukenya Ranching And Farming Co-operatives Society Ltd v Kavoloto*[1970] E.A., 414, 418, 419.”



15. 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.”

16. 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.”

17. The Appellant in its Memorandum of Appeal contends that the general damages of Ksh. 300,000/= awarded by the trial court was inordinately high in light of the injuries suffered by the Respondent.

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

19. 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.”

20. 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...”

21. 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 chest;
- b. Bruises and Blunt injury to the upper limb;
- c. Bruises and Blunt injury to the right hip;



- d. Bruises and Blunt injury to the right thigh; and
- e. Bruises and Blunt injury to the right knee.

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

22. 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 an erroneous estimate of principle.
23. 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.”
24. The Respondent herein pleaded, that he suffered the following injuries; blunt injury to the head chest; bruises and blunt injury to the upper limb; bruises and blunt injury to the right hip; bruises and blunt injury to the right thigh; and bruises and blunt injury to the right knee.
25. Dr. Joseph Sokobe corroborated the evidence of the Respondent vide a medical report dated 28th September 2020 admitted on consent on the 7th December 2021, he confirmed the Respondent suffered the pleaded injuries and that he sustained multiple soft tissue injuries from which he had not recovered at the time.
26. The Appellant on their part similarly led no evidence to controvert the nature of injuries that the Respondent sustained.
27. 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.”
28. In the case of *Francis Omari Ogaro v JAO (minor suing through next friend and father God*[2021] eKLR, the Court reviewed and set aside the award of Kshs. 230,000/= and substituted it for Kshs. 180,000/= where the respondent had suffered blunt force injuries and soft tissue injuries.
29. In *Ndwiga & another v Mukimba* (Civil Appeal E006 of 2022), Where the Plaintiff sustained, a chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle, and bruises on the right toes and left knee, the Court reviewed and set aside an award of Kshs 500,000/- on account of general damages and substituted the same with an award of Kshs 150,000/-.
30. In *George Mugo & Another v AKM (minor suing through next friend and mother of AM* [2018] where Kemei J substituted an award of Kshs. 300,000 with an award of Kshs. 90,000 as general damages for blunt injuries on the left shoulder, blunt chest injury interior, blunt injury to left arm, and bruises on the left wrist.



31. From the above authorities, it is evident that Courts have awarded lower amounts in general damages in similar cases where the victims sustained soft tissue injuries in addition to blunt force injuries and contusions. In the instant case, I note that the learned magistrate awarded general damages without reliance on any precedent. I hold the considered view that the said award was manifestly high to warrant interference by this Court.
32. I, therefore, interfere with the same and substitute the award of Kshs 300,000/- with an award of Kshs 150,000/= for general damages.
33. The special damages as assessed by the trial Court remain unaffected.
34. 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 OF MAY, 2023.

MOHOCHI S.M (JUDGE)

In the Presence of

Ms. Nyabuto for the Appellant

Mr. Matekwa Holding Brief for Okara for the Respondent

Mr. Kenei C.A

