



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Gatingu v Mungai (Civil Appeal E010 of 2020)
[2023] KEHC 20511 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E010 OF 2020
LM NJUGUNA, J
JULY 21, 2023**

BETWEEN

PETER NYAGA GATINGU APPELLANT

AND

SERAH NYAMBURA MUNGAI RESPONDENT

JUDGMENT

1. The respondent herein was the plaintiff in CMCC No. 454 of 2017 in which she sued the appellant vide a plaint dated the 13th day of December 2017, in which, she claimed general damages, special damages, costs of the suit and interest.
2. Her cause of action is based on a Road Traffic Accident that occurred on the 18th day of May, 2017 along Kenyatta way in Nyeri Township. It was pleaded that on the said date, the respondent was a lawful pedestrian crossing the road at a zebra crossing, when the appellant's authorized driver and /or agent drove motor vehicle registration No. KCB 315F Toyota Station Wagon so negligently that it hit the respondent thereby occasioning her serious injuries, loss and harm.
3. The particulars of negligence, those of injuries and special damages are set out in paragraph 4 of the plaint. She prayed for orders as set out in the plaint.
4. The appellant filed the defence dated the 19th of March, 2018 in which, he denied the respondent's claim. In the alternative, he pleaded negligence on the part of the respondent and averred that if the accident did occur, the same was solely caused and/or substantially contributed to, by negligence on the part of the respondent. In addition, it was pleaded that no demand and/or notice of intention to sue preceded the institution of the suit and therefore, the respondent is not entitled to costs. The particulars of negligence and those of injuries were also denied and therefore, it was prayed that the suit be dismissed with costs.



5. On the 23rd day of July, 2019, parties entered a consent on liability in the ratio of 90:10% in favour of the respondent.
6. In his judgment delivered on the 3rd day of December, 2020 the learned magistrate entered judgment on quantum against the appellant in the sum of Kshs. 800,000/= as general damages and special damages of Kshs.3000/= less the contributory negligence at 10%, leaving a total of Kshs. 723,000/=. The respondent was also awarded the costs of the suit.
7. The appellant being dissatisfied with the award on damages have appealed to this court vide the memorandum of Appeal dated 18th December, 2020 in which, he set out three (3) grounds of appeal. Looking at the grounds of appeal, the appellant's main contention is on award of general damages.
8. Directions were taken that the appeal be canvassed by way of written submissions and all parties complied with the said directions.
9. The appellant submitted that while arriving at an award, the court should consider the injuries and any long term effect envisaged and based on the pleadings and evidence adduced before the court. That the injuries allegedly suffered by the respondent were soft tissue injuries on the left side of the head, friction injuries on both knees and bruises on the dorsal aspect of both hands. That the trial court award was inordinately high thus setting a bad precedent. Reliance was placed on the case of Sosphina Company Limited Vs James Gatika Ndolo NRB CA Civil Appeal No. 315 of 2006.
10. The appellant argued that the assessment of damages ought to have been based on the respondent's pleadings and not on her submissions that she suffered subarachnoid hemorrhage, an injury that the respondent did not specifically plead in the plaint. The appellant in his bid to support his proposition placed further reliance on the cases of Michael Odiwuor Obonyo Vs Clarice Odera Ogunde [2021] eKLR and Francis Ndungu Wambui & 2 Others Vs Benson Maina Gatia [2019] eKLR. In the end, the appellant urged the court to allow the appeal herein.
11. The respondent in opposition submitted that it was not demonstrated how an award for Kes 800,000 for the injuries sustained by the respondent was too high to warrant this Honourable Court's interference. Further that, the appellant failed to attach the judgment and decree from the lower court and therefore, the same renders the appeal incompetent. Reliance was therefore placed on the case of Lucas Otieno Masaye Vs Lucia Olewe Kidi Kisumu ELCA No. 27 of 2020. In the same breadth, the respondent further in his supplementary submissions argued that the Honourable Court can only interfere with the award of damages if the same is manifestly too high or too low to occasion miscarriage of justice. That the same does not apply herein for the reason that the award is modest and reasonable. It was argued that the respondent proposed an award of Kes. 800,000/= and the court upon evaluation of facts and law arrived an award of Kes. 800,000/= on general damages. The respondent placed reliance on the case of John Mwanza Mwilu Vs Githinji Wahinya Kajiado HCCA N0. 17 of 2016 eKLR and Butt Vs Khan [1981] KLR to buttress the fact that an appellate court should not disturb quantum just because, as the appellate court, it is of the opinion that had it heard the case in the first instance, it would have given a higher award. That it was not demonstrated how an award of Kes. 800,000/= for the injuries sustained by the respondent was too high to warrant this Honourable court's interference. In the end, this court was urged to dismiss the appeal herein with costs to the respondent.
12. The appeal herein is on quantum of damages and the only issue for determination is whether the learned magistrate used the correct principles in assessing the quantum of damages that he awarded to the Respondent.
13. Before determining the appeal on its merits, the respondent argued that the appellant failed to attach the judgment and decree from the lower court and therefore, the same rendered the appeal incompetent



as the same goes contrary to the provision of Order 42 Rule 13 (4) of the Civil Procedure Rules. In response to the same, this court will seek for guidance in the Court of Appeal in the Case of Emmanuel Ngade Nyoka Vs Kitheka Mutisya Ngata Civil Appeal No. 63 of 2016 [2017] eKLR where it was held:

“Starting with the first issue, it is true that the record of appeal before the first appellant court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 13(4) of the Civil Procedure Rules...

...the Respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

“The word “decree” has been defined by the *Civil Procedure Act* Cap 21 to include judgment. Infact the *Civil Procedure Act* as provided at Section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.

This is the essence of the proviso to the definition of the term “decree”. According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court; consequently, he reasoned the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon court to go for substantive justice as opposed to technicalities. Further, holding otherwise would have run counter to the overriding objective as captured in section 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice the Appellant suffered with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

[Also See Kenya Women Micro Finance Ltd Vs Martha Wangari Kamau[2020].

14. Whereas the record of appeal did not have a certified copy of the decree being appealed against, the appellant attached a certified copy of the proceedings and later on filed a copy of the said decree. Further, it was not shown what prejudice the respondent suffered by the failure to annex the certified copy of the decree in the record of appeal. I therefore find that the appellant’s failure to annex the certified copy of the decree in time cannot be a basis for striking out the appeal.
15. It is outright that the respondent sustained the following injuries:
 - i. Blunt injury to the left side of the head.
 - ii. Friction injuries to both knees.
 - iii. Bruises on the dorsal aspect of both hands.
16. From the pleadings, the defendant/appellant had proposed an amount of Kes. 60,000/= as an adequate compensation stating that the same was in recognition of the inflation of the shilling and further, the nature of the injury; the plaintiff in opposition had proposed an amount of Kes. 800,000/= as adequate general damages for pain and suffering and loss of amenities.



17. The trial court after considering the evidence and submissions of the parties herein vis a vis the law, delivered a judgment on 03.12.2020, for the respondent against the appellant as noted in the said judgment.
18. This court is persuaded by the fact that the respondent having sustained injuries in the accident herein, she indeed deserves to be compensated. In the case of *Kim Pho Choo Vs Camden & Islington Area Health Authority (1979) I, Aller 332* cited in the case of *Nancy Oseko Vs Board of Governors Masai Girls' High School [2011] eKLR* where the court stated:-

“In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.”
19. In the case of *Francis Ochieng and Another Vs Alice Kakimbo (Supra)* the plaintiff sustained injuries to the head with bilateral temporal-parietal scalp haematoma, back pain, bleeding from the left ear, sub conjunctival hemorrhage and parietal scapionosis on both eyes. He was an inpatient for 7 days and experienced dizziness and was still undergoing treatment during the trial. She was awarded KShs.350,000/= general damages in 2015.
20. In the case of *Ndungu Dennis Vs Ann Wangari & Another, Kiambu HCCA 54/2016* decided in February 2018, the High Court awarded KShs.100,000/= general damages to the plaintiff who sustained injuries involving a blunt head injury, head concussion (brief consciousness), blunt injuries to the chest and both hands. The Medical report stated that he experienced back pains and chest pains on exertion.
21. In the case of *Mbati John & Another Vs China Zhogxing Construction Company Limited and Another [2016] eKLR* decided in February 2016, the plaintiff was awarded KShs 75,000/= for injuries involving blunt trauma to the occipital region of the head, bruises of the right shoulder girdle, blunt trauma to the anterior chest, cut wounds on the lumber region of the back and bruises of the knuckles of the left hand.
22. Similarly, in the case of *Mumias Sugar Company Limited Vs Julius Abuko Shibia [2015] eKLR Kakamega HCCA 112/2011*, an award of KShs.100, 000 was made in favour of the plaintiff who suffered blunt injury to the neck, blunt injury to the occipital region of the head, blunt injury to the right shoulder, complaints of neck pain on and off with backache.
23. From the avalanche of authorities listed above, it is indeed impossible to find similar authorities where the plaintiffs sustained same injuries. It is for that reason that the court must consider only comparable injuries and awards.
24. For the above reasons, I am persuaded that the trial Court did not take into account the principles applicable in awarding general damages for personal injuries. She failed to take into account the more recent and more relevant authorities where the injuries compared well although no two cases can be similar.
25. Accordingly, I find the appeal challenging quantum of damages justified. The award of Kes.800,000/= as general damages for injuries that had healed with no evidence of continuing medication or hospitalization of the plaintiff/respondent herein was not supported by evidence and comparable decided cases.
26. Further, the injuries listed herein are the ones that the respondent was bound by her pleadings and the extraneous facts/evidence considered by the trial court was uncalled for. [See *Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinda Mule & 3 Others [2014] eKLR*].



27. In the premises, I allow this appeal, set aside the award of Kshs. 800,000/= made by the trial court and substitute the same with an award of Kshs. 300,000/= less 10% contribution. This sum shall earn interest at court rates from the date of judgment in the lower court until payment in full. The award on special damages remain undisturbed.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

...for the Appellant

.....for the Respondent

