



**Getembe Prime Distributors Ltd v Okeyo (Civil Appeal  
151 of 2021) [2023] KEHC 21449 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21449 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 151 OF 2021  
PN GICHOHI, J  
JULY 19, 2023**

**BETWEEN**

**GETEMBE PRIME DISTRIBUTORS LTD ..... APPELLANT**

**AND**

**PATRICK NYAMWEYA OKEYO ..... RESPONDENT**

*(Appeal from the Judgment and decree of Hon. Mutua Paul Kipkemoi  
(SRM) dated 18th October 2021 in Kisii CMCC No. 728 of 2019)*

**JUDGMENT**

1. On October 18, 2019 the trial magistrate delivered judgment in the suit filed by the Respondent against the Appellant on September 18, 2019 being Kisii CMCC No. 728 of 2019 where he apportioned liability at the ratio of 30: 70 in favour of the Respondent as against the Appellant. On quantum awarded the Respondent Kshs. 1,500,000/= as general damages and Kshs. 16,440/= as special damages. He also awarded costs and interest from the date of judgment.
2. Aggrieved by this decision the Appellant filed this appeal on the grounds that:
  1. The award of general damages was manifestly and inordinately excessive in the circumstances .
  2. The learned trial Magistrate acted in error by failing to properly evaluate the evidence on record thus reaching at an erroneous decision.
  3. The learned trial Magistrate erred in law by misapprehending the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.
  4. The learned Magistrate erred in law and in fact in by relying on extraneous issues as a basis of determination on liability.
3. The Appellants therefore sought that:



- a. That the judgment and/or Decree of the learned trial Magistrate dated October 18, 2021 be set aside, varied and /or quashed.
  - b. The court be pleased to revisit the issue of assessment of quantum of damages payable and assess /review/vary the same to a reasonable amount commensurate to the injuries sustained by the Respondent.
  - c. Cost of the Appeal be borne by Respondent.
  - d. Any such orders that this court shall deem just and expedient in circumstances.
4. It is apparent from the lower court record that pleadings by both parties were later amended and there was introduction of a Third Party through leave of the court granted to the Appellant. In the amended plaint dated February 13, 2020, the Respondent alleged that on or about January 1, 2019, he was travelling as a lawful pillion passenger on motor cycle registration number KMEN 8XX H along Kisii -Migori road and while at the Kisumu/Migori Junction area or thereabout, the driver of motor vehicle Registration number KCK 5XXG negligently drove, managed, and controlled the said motor vehicle and permitted it to collide with the said motor cycle as a result of which the Respondent sustained:
- i. Laceration to the forehead
  - ii. Contusion to the head
  - iii. Chest contusion
  - iv. Fractures on the ribs
  - v. Contusion to the lower back
  - vi. Fracture of the left humerus
  - vii. Fracture of the left radius and ulna
  - viii. Fracture on the right tibia/fibula bones
  - ix. Abrasions to the left leg
5. He claimed that the Appellant was vicariously liable for the accident and the injuries sustained by the Respondent.
6. In its Amended Defence dated March 10, 2020, the Appellant denied the claim and pleaded that if an accident had occurred the same was contributed by the Respondent's own negligence while riding the said motor cycle carelessly as a result of which he lost control and rammmed into the motor vehicle Registration number KCK 5XX G- Make- Isuzu Pickup.
7. The Appellant then filed Chamber Summons Application dated August 25, 2020 with a view seeking leave to issue Third Party Notice to one Vincent Nyamweya Makori who was the owner of a motor cycle, registration Number, KMEN 8XXH which occasioned the Accident that led to the injuries suffered by the plaintiff. To support the Application, the Appellant attached to the application an Affidavit sworn by one Mose Jared.
8. Mose Jared averred that the accident was occasioned by the rider of the motor cycle who was over speeding thus unable to manage it leading it to hit and /or knock the motor vehicle which lost direction out of the impact and ran into a ditch. The Appellant was allowed to join the third party but it was unable to serve the Third Party. The court decided to proceed to hear the matter without the third party.



9. At the hearing of this case, PC Moses Kasera (PW1) attached to Kisii Traffic Base produced police abstract regrading this accident reported which involved a motor vehicle registration number KCK 5XX G- Make- Isuzu and a motor cycle registration Number, KMEN 8XXH.
10. He explained that the Plaintiff was a pillion passenger in the motor cycle while the Appellant was the policy holder of the accident motor vehicle. That the motor cycle and the vehicle were headed in opposite direction when the two collided. After that , the rider was carried from the scene leaving the pillion passenger (Respondent) in pain but he was later taken to the hospital for treatment. He explained that the accident was reported first by the driver of the motor vehicle and later by the Respondent.
11. While adopting his statement dated February 13, 2020 and filed in court, the Respondent (PW2) testified that he was travelling as passenger on a motor cycle from Suneka Market on January 1, 2019 when he was hit by a motor vehicle. He was later taken to Kisii Teaching and Referral Hospital where he was examined treated and discharged.
12. He produced a discharge summary as an exhibit. He later reported the matter at Kisii Traffic Base where he was issued with a P3 form which was duly filled at the hospital. He also produced all receipts for Kshs. 16, 420/= being medical expenses incurred at the hospital. He stated that he was examined by one Dr. Nyameino but he was yet to heal as he was still on medication.
13. The defence closed its case without calling any witness.

#### **Appellants Submissions**

14. In submissions dated January 10, 2023 and filed by the firm of O.M. Otieno & Co. Advocates, counsel submits that the trial magistrate erred in failing to subject the said ratio of 30:70 in both general and special damages.
15. On the award of Kshs. 1,500,000/=, counsel submits that award is inordinately high as compared to the damages awarded in similar cases. He therefore proposes that Kshs.1,000,000/= would have been reasonable compensation as the second medical report by Dr. J.A.S. Kumenda had reduced the permanent disability ratio to 10%. Lastly, he urges the court to subject both the general damages and special damages to 30% contribution and the costs of the appeal be awarded to the Appellant.

#### **Respondent's Submissions**

16. In their submissions dated January 12, 2023, counsel cites the case of James Gikonyo Mwangi v DM (Minor Suing through his mother and next friend, IMO) [2016] eKLR and submits that despite being allowed to file Third Party Notice, the Appellant failed to serve and therefore the Third Party was not a party to the suit. He therefore submits that he is in agreement with the decision by the trial magistrate in regard to third party.
17. On the award of damages, counsel submits that it is discretionary and the appellate Court should not interfere with the award unless the award is inordinately high or low as to represent an entirely erroneous estimate or that the court proceeded on wrong principles or misapprehended the evidence in some material respect. In this case , he submits that the award made by the trial court was not inordinately excessive to warrant this court to overturn the same.
18. However, while citing the case of Janet Kathambi v Charity Kanja Njiru [2021] eKLR, he submits that the Respondent's view is that being only a pillion passenger on the motor cycle, the Respondent had no control of the motorcycle and therefore, the Appellant ought to have been held 100% liable.



19. He pointed to this court that both the Appellant and the Respondent had requested the trial court to award Kshs. 1,500,000 as general damages. Further, submits that court correctly analysed the evidence on record, perused both the Appellant's and Respondents Submissions before awarding Kshs. 1,500,000 as general damages. He submits that the Appellant cannot claim the award was excessive.

### **Determination**

20. Having evaluated the evidence before the trial court as required of the first appellate court, the issues that come up are on liability and quantum.
21. Regarding liability, it is not disputed in this appeal or before the lower court that the Respondent was a pillion passenger on the accident motor cycle. As correctly put by the Respondent's counsel, the rider of the motor cycle was not a party to the suit as he had not been served with the Third-Party Notice. The issues before court were therefore for determination as between the parties therein only as was held in the case of James Gikonyo Mwangi (supra).
22. On the issue of liability, the trial magistrate held:
- “Who is to blame? The plaintiff claimed that the defendant agent knocked him. That he was over speeding. No evidence was tendered by defence to counter this narrative. The Plaintiff admitted that he was not wearing a helmet and reflective jacket. In my view the extent of injuries would have been mitigated if the plaintiff had protective gears. Both are to blame . Nobody gave evidence to link the third party with the said accident. Liability is now apportioned in the ratio of 30: 70 in favour of the plaintiff as against the Defendant.”
23. This is a well-reasoned finding and based on the evidence on record and as can be discerned from the case law. There is no cross appeal in this case and therefore the appellant cannot now argue that the trial magistrate ought to have held the Respondent 100% liable.
24. On general damages, parties aptly appreciate the now settled principles of law on the parameters within which the Appellate Court may interfere with award of general damages by the trial court bearing in mind that the trial court exercises its discretionary power to arrive at a particular figure as damages again guided by comparable awards for such injuries. In this case , there was no dispute as to the nature of injuries sustained by the Respondent. They were both soft tissue and skeletal.
25. In appreciation of the seriousness of the injuries sustained by the Respondent, both parties cited in their submissions, cases where comparable awards were made for comparable injuries and each of them proposed an award of Kshs. 1,500,000/= as reasonable compensation to the Respondent in the circumstances. In his judgment, the trial magistrate held:

“The plaintiff proposed and submitted that the general damages for the injuries sustained and the pain suffered to be Kshs. 1,500,000 relying on the following cases:

- i. FrancisNdungu wambui & 2 others vs VK (a minor suing through next friend and mother MCWK (2019) eKLR. In this case the respondent suffered soft tissue injuries to the upper limbs, compound fracture of distal fibula as well as loss of consciousness. General damages were assessed at 1,000,000
- ii. Peter Namu Njeru vs Philemon Mwagoti (2016) eKLR. The plaintiff sustained comminuted crush fracture of distal ½ of the right radius, avulsion fracture of the ulna steroid process and fracture of the 6<sup>th</sup> rib of the posterior aspect. General damages were assessed at 700,000.



The defendant also submitted that an award of Kshs. 1,500,000 is very reasonable in the circumstances relying the cases of Danshire Muteti Wambua VS KPLC Co. Ltd(2013) eKLR and Hellen Atieno Oduor vs S.S Mehta & Sons and another (2015) eKLR. In both cases the plaintiffs suffered multiple fractures and were awarded Kshs. 1,500,000 in each case.

There is convergence on the quantum payable as general damages. I have no difficulties under the circumstances in awarding the plaintiff Kshs. 1,500,000 as General damages considering the proposals made and comparable awards. “

26. It is therefore irrational for the Appellant to argue in the appeal that the award was excessive in the circumstances herein. The argument is an afterthought that does not add value to this appeal. Further, the Appellant cannot introduce a second medical in submissions to argue about reduction of permanent disability in an attempt to attack the award of general damages and in support of his proposal of substitution of the award with Kshs. 1,000,000/=.

27. As regards subjecting the 30% liability of the both award of general and special damages, is clear that trial Magistrate did not indicate that the awards for special and general damages were subject to a 30:70 liability ratio that he had earlier determined. He ought to have done so in his final order. Though the decree extracted clearly capture the apportionment of liability, it does show tabulation to clearly reflect the take away by the Plaintiff. For avoidance of doubt, the final award should be:

General damages.....Kshs. 1,500,000.00  
Special damages.....Kshs. 16,440.000  
Total.....Kshs. 1, 516,440.00  
Less 30% contributory negligence..Kshs. 454, 932.00  
Judgment in favour of the Respondent against the Appellant  
Kshs. 1,061,508.00 costs and interest.

28. I hold that failure to tabulate the above in the judgment is not fatal and neither is it in the extracted decree as no party would be expected to be misled in such calculations. In the upshot, this appeal is dismissed for lack of merit. It is dismissed with costs to the Respondent .

**DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF JULY 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

N/A for Appellant

N/A for Respondent

Kevin Isindu, Court Assistant

