



**Lelekuti v Thumbi (Civil Appeal 10 of 2014)
[2023] KEHC 20122 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL 10 OF 2014
GMA DULU, J
JULY 12, 2023**

BETWEEN

ALLEN ARCHIE LELEKUTI APPELLANT

AND

SAMUEL THUMBBI RESPONDENT

((Being an appeal against the decision of Hon L.N.Wasige – Principal Magistrate in Criminal Case No.23 of 2021 delivered at Kaloleni on 6th day of December, 2021))

JUDGMENT

1. In a judgment delivered by the Magistrate on 17th September 2014, the learned Magistrate found in favour of the plaintiff (now appellant) and concluded as follows:-

“Back to the case before me, I have taken into account that money compensation for body injuries is a difficult task but the best that can be done is to give an award that falls within the current thought. I opine that a sum of eight hundred thousand (Kshs. 800,000/=) will be modest figure as general damages. Special damages Kshs. 50,025/ plus costs and interest”.

2. From the above judgment, Allen Archie Lelekuti (who was the plaintiff) filed an appeal through a Memorandum of Appeal dated 16th October 2014 through Counsel Moses Mwakisha & Company on the following grounds:-
 1. That the learned trial Magistrate erred in fact in his appreciation of the nature and extent of injuries suffered by the appellant and thereby rendered an award in damages that was manifestly low.
 2. That having regard to the entire circumstances of the case the learned trial Magistrate erred by granting an award of Kshs. 800,000/= in general damages.



3. From documents filed, I see in the file a notice of abandonment by counsel, filed by the appellant dated 29th August 2019 and was filed on the same 29th August 2019. Thereafter, appellant chose to act in person in the appeal, and filed a notice to act in person.
4. However, on 27th March 2021, a notice of appointment of advocate dated the same 27th March 2021 was filed by Mutinda & Wambura Nthiga as advocates for the appellant. Thus these advocates act for the appellant.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mutinda & Wambura Nthiga Advocates for the appellant, and two sets of submissions filed by Mwazighe & Company Advocates for the respondent. I note that the respondent's counsel has stated in submissions that the appellant had already executed a decree and was paid Kshs. 1,321,240/= and his advocate acknowledged receipt of payment, but now is reviving his appeal.
6. In my view, the contention by the respondent's counsel regarding payment of the decretal amount on signing decree, is a technical point which I have to determine first.
7. In my view, that technical point does not disable the progress or validity of the present appeal, as it is admitted that the appeal herein was filed before payment was made, and that the previous counsel for the appellant abandoned the appellant, and the appellant had to act in person and later appointed another advocate.
8. Secondly, there is no reference or even a suggestion that a consent was signed by the parties or their advocates to compromise the appeal based on the above payment of the decretal sum.
9. Thirdly, this court in a ruling delivered on 17th February 2022 by Lady Justice A. Ong'injo allowed the appellant to prosecute his appeal, and dismissed an application by the respondent to strike out the appeal.
10. Coming now to the substance of the appeal herein, this being a first appeal, I am guided by the reasoning in the case of *Selle & Another =Versus= Associated Motor Boat Company Ltd and Others (1968) EA 123* in which the Court of Appeal stated a first appellate court, has a duty to analyse and re-evaluate all the evidence on record in order to reach its own conclusions bearing in mind that it did not see witnesses testify to determine their demeanour.
11. This being an appeal on quantum of damages, I have also to be guided by the legal principle that the function of awarding of general damages is an exercise of discretionary power by a trial court and appellate courts should be slow to interfere with that discretion. In particular, I will cite the case of *Sheikh Mustan Hassan =Versus= Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457* wherein the Court of Appeal inter alia, stated as follows:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect.”
12. At the trial herein, only one witness the appellant testified as PW1. He produced a police abstract and a medical report as exhibits. He also produced treatment notes. He was not cross-examined or challenged in any way.



13. I note that the medical report produced as an exhibit, dated 3rd August 2011 signed by doctor Ajoni Adede was filed in this appeal as a supplementary record of appeal on 2nd May 2021.
14. It is recorded in the said medical report, that the appellant suffered permanent partial disability to the neck vertebral column, left shoulder and left upper limb due to multiple deformities, multiple joint stiffness, pain and post fracture arthritis. The left radius and ulna forearm bones contribute to the wrist joint and this is how the wrist joint becomes affected. Estimate permanent partial disability was assessed at 16% per cent.
15. On quantum, from the record of the trial court, the appellants counsel merely cited to the trial court some court cases, but did not indicate any figure or estimate for general damages to be awarded by the trial court. On appeal also the appellant's counsel has cited a number of cases such as Zachary Keriithi =Versus= Jashon Otieno Ochola (2016) eKLR, where Kshs. 1,500,000/= was awarded, James Thiongo =Versus= Nduati Njuguna Ngugi (2012) eKLR general damages Kshs. 1,800,000/= and Hussein Ali Shariff alias Hussein Ali =Versus= A. L. L. (minor suing through FTL) (2018) eKLR where Kshs. 2,000,000/= general damages was awarded and Edward Njoroge Gichomo =Versus= Patrick Simiyu Wekesa Mytrade Ltd (2004) eKLR where general damages of Kshs. 1,600,000/ was awarded, but counsel has also not suggested any figure of general damages to be awarded, and has not disputed that his client was paid Kshs. 1,321,240/= after the decision in the Magistrate's court.
16. In my view, from the scant information and evidence put before the trial court, as well as the submissions of counsel therein where no specific figure of general damages was proposed or suggested by counsel to the Magistrate, it cannot be said that the Magistrate's award of general damages was inordinately low.
17. Even on appeal, instead of the appellant's counsel proposing a figure of general damages to be awarded by this court, he has merely cited cases two of which were determined between 2016 and 2018, much later than the judgment in the Magistrate's court herein which was delivered on 17th September 2014. The figures of awards of general damages in those cases was at Kshs. 1,500,000/= and Kshs. 2,000,000/= respectively.
18. Counsel also relied on two cases one of 2012 where Kshs. 1,800,000/= was awarded and another decided in 2004 with general damages of Kshs. 1,600,000/=
19. In my view, considering the discretionary power which the trial court had in awarding damages, and in the circumstances of this case, though the award of Kshs. 800,000/= as general damages might appear to be conservative, it has not been demonstrated on appeal to be inordinately low. I will thus not disturb that figure.
20. I thus find no merits in the appeal against quantum of damages. I dismiss the appeal, but order that each party will bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2023 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Wambura for appellant



Mr. Mwazighe for respondent

Mr. Otolu court assistant

