



**Great Rift Express Shuttle Services Ltd v Khaseke (Civil Appeal
16 of 2020) [2023] KEHC 27399 (KLR) (12 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 27399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 16 OF 2020
GL NZIOKA, J
SEPTEMBER 12, 2023**

BETWEEN

GREAT RIFT EXPRESS SHUTTLE SERVICES LTD APPELLANT

AND

COLLINS ANDIA KHASEKE RESPONDENT

*(Being an appeal against the decision by Hon. Martin Mutua Resident
Magistrate (RM) dated on 16th December 2021, delivered vide Civil
Case No. 740 of 2017 at the Chief Magistrate's Court at Naivasha)*

JUDGMENT

1. By a plaint dated 19th September 2017, the plaintiff (herein “the respondent”) sued the defendant (herein “the appellant”) seeking for judgment against the appellant and the following orders: -
 - a. General damages for pain and suffering.
 - b. Special damages in the sum of; Kshs. 267,382
 - c. Costs of the suit.
 - d. Interest on (a), (b) and (c) above at court’s rates
 - e. Any other relief that the court may deem fit and just to grant
2. The respondent’s case is that, on 10th February 2017, he was travelling as a lawful passenger in a motor vehicle registration No. KCB 954H along the Nairobi – Naivasha Road and when the vehicle reached at Soko Mjinga it veered onto the wrong side of the road and collided with another motor vehicle.
3. That, at the time of the accident, the appellant was the registered owner of the said vehicle and it was being driven by his employee, servant, agent and/or authorized driver.



4. Further, the appellant's subject vehicle was driven negligently and/or in a careless manner. That the driver was driving too fast, failed to slow down, swerve or brake to avoid the accident. Further he failed to; keep proper look out for other road users, observe traffic rules, maintain control of the motor vehicle, drove the vehicle without due care and attention thus causing the accident.
5. Furthermore, the appellant was negligent for allowing a defective motor vehicle to be driven on a public road and by a reckless, incompetent and unqualified driver.
6. That as a result of the accident he sustained the following bodily injuries:
 - a. Fracture of the distal end of left radius
 - b. Cut wound on the right wrist
7. However, the appellant filed a defence dated 5th March 2018 and denied that it was the registered owner of the motor vehicle, that the respondent was a lawful passenger in the motor vehicle on the said date, and that the accident occurred as alleged in the plaint.
8. However, on a without prejudice basis, the appellant pleaded that, if the accident ever occurred at all, it was caused solely or substantially contributed to by the respondent. That, the respondent failed to take adequate precaution to protect himself, or heed the safety precautions, or traffic rules or buckle up.
9. When the matter came up for hearing in the trial court on the 16th September 2019, the parties entered a consent and apportioned liability in the ratio of 90:10% in favour of the parties.
10. The parties canvassed the issue of damages by way of written submission and admitted by consent of the parties, the plaintiff's documents dated 19th September 2017, and the medical report by Dr. Jenipher Kahuth.
11. By a judgment dated 16th December 2019, the trial court held entered judgment in favour of the respondent as follows:
 - a. Liability 90:10 in favour of the plaintiff
 - b. General damages-----Kshs. 700,000
 - c. Special damages-----Kshs. 267,382
 - Total -----Kshs. 967,382
 - Less 10% contribution-----Kshs 96,738
 - Total -----Kshs. 870,644
 - d. Cost of the suit
 - e. Interest on the above.
12. However, the appellant is aggrieved purely on the award on quantum based on the grounds that: -
 - a. The learned Magistrate erred in fact and in law in finding that the respondent was entitled to general damages of Kshs. 700,000 since the Honourable court failed to consider the medical report by the appellant's doctor while assessing damages which are excessive.
 - b. The learned Magistrate erred in fact and in law in finding that the respondent had suffered a fracture and dislocation in view of the evidence tendered where the respondent had suffered only a fracture and awarded general damages that were too high.



- c. The learned Magistrate erred in fact and in law in finding that the respondent was entitled to general damages that were too high in view of the evidence tendered.
 - d. The learned Magistrate erred in fact and in law in failing to consider the appellants' submissions on quantum.
 - e. The learned Magistrate erred in fact and in law in failing to consider the appellants' submissions on quantum and provisions of the amended Cap 405 *Insurance (Motor Vehicle Third Party Risks) Act*, 2013, as per the schedule guiding amount awardable column 39 (a).
 - f. The learned Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
13. The appeal was disposed of vide filing of submission. The appellant in its undated submissions outlined the principles that guide an appellate court in considering whether to interfere with an award of damages and relied on the case of; *Power lighting Company limited & another v Zakayo Saitoti Naingola & another* (2008) eKLR cited in *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR.
 14. The appellant argued that damages are meant to compensate a party for the loss suffered and should be commensurate with the injuries suffered and the court consider whether the damages awarded herein are inordinately too high or too low.
 15. The appellant submitted that, a sum between Kshs. 150,000 and Kshs. 300,000 would be reasonable to sufficiently compensate the respondent for the injuries he sustained and relied on the case of *Paul Karimi Kithinji v Joseph Mutai Kireria* [2018] eKLR where the plaintiff sustained minor lacerations on the face, a segmental fracture of the right ulna, and was admitted to hospital for three (3) days. That the High Court on appeal set aside the award of general damages for Kshs 250,000 and substituted it with an award of Kshs 150,000.
 16. Further, in the case of; *Philip Musyoka Mutua v Leonard Kyalo Mutisya* [2018] eKLR the court set aside the award by the trial court and awarded as sum of; Kshs. 300,000 for pain and suffering where the respondent suffered a cut wound near the right eye, blunt injury to the forehead and both shoulders, bruises on the chest and left hand, a deep cut wound on the left hand and a fracture distal left radius.
 17. Furthermore, in *Patrisia Adhiambo Omolo v Emily Mandala* [2020] eKLR the court awarded Kshs. 180,000 as adequate compensation for pain and suffering where the victim sustained a fracture of the left forearm radius and ulna bones, colles fracture of the left forearm, swollen deformed distal aspect of the left forearm, multiple bodily injuries.
 18. The appellant urged the court to allow the appeal and award him the costs of the appeal on the ground that costs follow the event and relied on section 27 of the *Civil Procedure Act*.
 19. However, the respondent in submissions dated 1st July 2022 argued that the medical reports of Dr. Wokabi and Dr. Jenipher Kahuthu confirmed that he suffered a fracture of the left radius. That, in the case of; *Amazon Energy Limited v Ramadhan Kalume Kalama* [2019] eKLR the High Court affirmed the award of Kshs 600,000 by the trial court where the respondent suffered a commuted fracture of the left radius.
 20. He also relied on the case of; *Peris Mwikali Mutua v Peter Munyao Kimata* (2008) eKLR where the High Court upheld an award of Kshs 450,000 issued by the trial court where the respondent sustained a fracture on the radius and ulna of the left arm.



21. The respondent argued that, the sum of Kshs. 700,000 awarded by the trial court was not inordinately high but was judicious taking into consideration the nature of the injuries the appellant sustained, the age of the cited cases, and inflation trends.
22. He relied on the case of; *Stanley Maore v Geoffrey Mwenda* CA 147/2007 (2004) cited in *Daniel Muchemi & Anor v Rosemary Kawira Kiambi* (2018) where it was stated that in the assessment of general damages comparable injuries should be compensated by comparable awards.
23. Further, that the court in the case of; *Shabani v City Council of Nairobi* 1985 eKLR 516 laid out the principles an appellate court should consider in deciding whether to interfere with an award by the trial court. That, the trial court took into account an irrelevant factor, or left out a relevant factor, or the award was inordinately too high or too low as to amount to an erroneous estimate.
24. The respondent submitted that, the appellant had failed to establish any factors to warrant this court to interfere with the trial court's award.
25. Additionally, that an award of between Kshs. 150,000 and Kshs. 300,000 suggested by the appellant is inordinately low considering the severity of his injuries.
26. I have considered the appeal in the light of the material placed before the court including the submissions of the parties. The main issue to determine is whether the sum of Kshs 700,000 awarded as general damages is adequate or excessive.
27. In that regard, the parties relied on medical documents, being a medical report by Dr. Wokabi dated 24th August 2017, and Dr. Jenipher Kahuthu dated 10th September 2017.
28. The trial court considered the subject medical reports and the parties' submissions on quantum wherein the respondent sought for a sum of; Kshs 700,000 as general damages and the appellant submitted that a sum of Kshs 200,000 was adequate. The court awarded Kshs 700,000.
29. In considering the assessment of quantum on the appeal, I am guided by the medical reports which indicate that the respondent suffered a fracture of the distal end of the left radius. According to Dr. Wokabi's report clinically the fracture has united and the wrist is also reasonably rehabilitated. But it indicates that the respondent has slight restriction of full range of movement of the wrist joint conferring slight permanent disability of 60%.
30. In contrast Dr. Kahuthu report states that, although Dr. Wokabi's report indicates the respondent has 60% disability but none is expected after complete healing in 12-24 months. That "the check x-ray indicated that, the fracture was adequately united. Therefore, no disability is anticipated."
31. It is noteworthy that, in assessing damages, the trial court took into account the disability. The court stated that;

"I am persuaded by the same authority annexed by the plaintiff and my view is that Kshs 700,000 strikes accord of fairness and would be sufficient considering the fact that, the plaintiff has a slight disability."
32. It is the considered opinion of this court that, the issue of disability being contentious the trial court ought to have justified why it took it into account.
33. Be that as it may, the trial court relied on the decision in *Brookside dairy Ltd v Peter Butata Wanjohi* (2018) eKLR where the court observed that the injuries sustained therein were similar to those herein. However, the trial court did not tabulate those injuries.



34. However, I note in that case the plaintiff; Peter Butata Wajohi sustained the following injuries:
- a. Compound fracture of the right tibia and fibula
 - b. Fracture to the right medial malleolus
 - c. Fracture to the left lateral malleolus and blood loss
35. It is obvious therefore that, the injuries the plaintiff suffered in that case relied on by the trial court were much more severe than those sustained by the respondent herein. Thus, whereas the plaintiff therein sustained several fractures the respondent herein sustained only one fracture. In this regard, the injuries in both cases are not comparable.
36. The appellant submits that sum of Kshs 150,000 to Kshs 300,000 is sufficient. The appellant relies on the cases of; *Power Lighting Company Limited and Another v Zakayo Saitoti Naingolla & another* (2008) eKLR cited in *Jennipher Mathenge v Patrick Muriuki Maina* (2010) eKLR
37. The respondent on its part cites the cases of; *Peris Mwikali Mutua v Peter Munyao Kimata* (2008) where the High Court upheld an award of Kshs 450,000. The respondent maintained that Kshs 700,000 less 10% contributory liability is not inordinately high. That Kshs 150,000 to Kshs 300,000 the appellant proposes is too low.
38. Taking into account, the submissions of the parties, and the observations of the court and comparable awards, I find that, the award of Kshs 700,000 is inordinately high and I reduce it to Kshs 400,000 taking into account the respondent's hospital discharge summary shows the respondent was admitted on 10th February 2017 and discharged on the same date.
39. Furthermore, I take into account that all the expenses incurred in the form of special damages are already catered for. I therefore enter judgment as follows:
- a. General damaged-----Kshs 400,000.00
 - b. Special damages-----Kshs 267,382.00
 - Total -----Kshs 600,643.80
 - c Plus costs
 - d Interest at court rates from date of judgment to payment in full.
40. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 12TH DAY OF SEPTEMBER, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of: -

Mr. Njuguna for the Appellant

Ms. Kakame H/B for Mr. Bwire for the Respondent

Ms. Ogutu: Court Assistant

