



**Housemart Company Limited v Kanana (Civil Appeal E070 of 2022)  
[2023] KEHC 22519 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22519 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E070 OF 2022  
TW CHERERE, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**HOUSEMART COMPANY LIMITED ..... APPELLANT**

**AND**

**FAITH KANANA ..... RESPONDENT**

*(Being an appeal from the judgment and decree in Meru CMCC  
NO. E276 of 2021 by Hon. E. Mbicha (PM) on 11th May, 2022)*

**JUDGMENT**

1. On 22<sup>nd</sup> December, 2020, Faith Kanana (Respondent) was knocked down by M/V KCH XXXX belonging to Housemart Company Limited (Appellant) as a result of which she suffered bodily injuries for which Respondent filed Meru CMCC NO. E276 of 2021 seeking damages.
2. By consent dated 28<sup>th</sup> February, 2022, liability was agreed at 90:10% in favour of the Respondent as against the Appellant.
3. By a judgment delivered on 11<sup>th</sup> May, 2022, Respondent was awarded damages in the sum of KES. 1,640,000/- which sums were subject to 10% contribution.

**The Appeal**

4. The Appellant being dissatisfied has appealed on the grounds among others that the award of general damages was inordinately high, receipts for special damages were illegible and that the court failed to consider Appellant's defence and supporting documents and thereby arrived at an erroneous decision. The appeal was heard by way of submission which both parties dutifully filed.



## **Appellant's submissions**

5. Appellant by submissions filed on 22<sup>nd</sup> March, 2023 faulted the trial magistrate for making the award for general damages without analyzing the authorities cited by the parties and thereby arrived at an arbitrary award that was based on wrong principles. In support of this proposition, Appellant relied on decision in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR where the Court of Appeal stated as follows:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”.

6. Appellant likewise urged the court to find that Respondent had not made any submission concerning her claim for future medical expenses and loss of earning capacity.
7. Additionally, Appellant urged that the court to find that special were not proved the receipts thereof having been inadmissible for being illegible and lacking the requisite revenue stamps. In support of this submission, Appellant placed reliance on *Isaac K. Chemjor & another v Laban Kiptoo* [2019] eKLR where the court emphasized that special damages must not only be pleaded but strictly proved and *Leonard Nyongesa v Derrick Ngula Rigba* [2013] eKLR where the court held that:

The position, therefore, is that a receipt for which payment of stamp duty is required under the *Stamp Duty Act* is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it. In my opinion, if that is not done, the court cannot award any damages based on such a receipt.

## **Respondent's submissions**

8. The Respondent's position was that the injuries suffered by the Respondent were severe and commensurate to the award made by the trial court. The court was urged to find that the trial magistrate exercised his discretion correctly and that there being no evidence that the court misdirected itself or acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion, the award not be interfered with (See *Mbogo v Shah* [1968] EA 93).

## **Analysis and Determination**

9. I have considered this appeal in the light of evidence on record, submissions and cited authorities.
10. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle v Associated Motor Boat Co.* [1986] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR).
11. The general principle to be observed by an appellate court in deciding whether to disturb quantum of damages were set out in the case of *Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini v*



*AM Lubia and Olive Lubia* (1982-88) 1 KAR 727 and restated by the Court of Appeal in the case of *Arrow Car Ltd v Elijah Shamalla Bimomo & 2 Others* (2004) eKLR that:

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.'

### General damages

12. Dr. Muthuri Kenneth's report dated 05<sup>th</sup> June, 2021 reveals that Respondent suffered the following injuries:
  - i. Right facial cut – 5cm
  - ii. Upper mouth lip cut wound with swelling
  - iii. Right incisor tooth crown broken
  - iv. Bruises on chest and abdomen
  - v. Severe chest tenderness
  - vi. Lower back tenderness
  - vii. Bruises on right hand
  - viii. Bruises on left hand and forearm
  - ix. Left distal fracture
  - x. Left ankle dislocation
  - xi. Bruises left foot 8 by 6 cm
  - xii. Open wound 3 by 2 cm on left leg
13. The medical report reveals that Respondent suffered one fracture, a dislocation, broken tooth, cuts and multiple soft tissue injuries. At the time of examination 6 months after the accident, Appellant was still in pain and the doctor assessed permanent incapacity at 25%.
14. At the hearing, Respondent asked for KES. 3,000,000/- and cited the following authorities:
  - i. *Sabina Nyakenya Mwanga v Patrick Kigoro & another* [2015] eKLR where the court awarded KES. 3,000,000.00 as general damages for multiple soft tissue, fracture of the right upper arm. fracture of distal femur right thigh bone, fracture of the right patella knee. fracture of the pelvis and fracture of distal radial-wrist
  - ii. *Gabriel Mwashuma v Mohammed Sajjad & Another* [2015] eKLR where the court awarded KES. 3,000,000.00 as general damages fracture of left femur shaft spiral wedge, Pilon tibial comminuted fracture left ankle joint, fibula shaft fracture, abrasive fractures on left patella and femur condyle median, soft tissue injuries on left knee, distinct haematoma especially on the left leg, state of shock through polytrauma and blood loss and Psychogenic stress.
15. Appellant on the other hand offered KES. 400,000/- and cited the following authorities:



- i. *Pauline Gesare Onami v Samuel Changamure & another* [2017] eKLR where the court on appeal confirmed the award of KES. 600,000/- for fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft
  - ii. *Tirus Mburu Chege & Another v JKN & Another* (2018) eKLR where the Respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness the court reduced the award for general damages from KES. 800,000/= to KES 500,000/=.
16. A perusal of the cited cases reveals that those by the Respondent refer to more serious cases whereas *Pauline Gesare Onami v Samuel Changamure & Another* (*supra*) cited by the Appellant appears to have more or less similar injuries to those suffered by the Respondent. Even so, the case is over 8 years old and Respondent in the present case suffered a permanent incapacity of 25%. I find that an award of KES. 800,000/- would be sufficient in the circumstances.

### **Special damages**

17. No doubt special damages must be specifically pleaded and strictly proved. (See *Capital Fish Kenya Limited v. The Kenya Power and Lighting Company Limited* [2016] eKLR.).
18. Contrary to the Appellant's submissions, I have had a chance to see the receipts in support of the special damages and they are not only legible but all bear revenue stamps. I therefore find that the award of KES. 40,704/- was merited.
19. For the reasons given on the foregoing analysis, the appeal partially succeeds and it is hereby ordered:
  1. The award of general damages in the sum of KES. 1,600,000/- is set aside and substituted with an award of KES. 800,000/-
  2. Special damages shall remain as awarded by the trial court
  3. Each party shall bear its own costs of the appeal

**DATED AT MERU THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Morris Kinoti

For Appellant - Ms. Oteko for Kiruki & Kayika Advocates

For Respondent - Mr. Mungai for Kithome L. Mutinda & Co Advocates

