



**Birkigit v Horizon Coach Company Limited & another (Civil Appeal  
25 of 2020) [2023] KEHC 24235 (KLR) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL 25 OF 2020  
GMA DULU, J  
OCTOBER 23, 2023**

**BETWEEN**

**CORINNA RAHMA BIRKIGIT ..... APPELLANT**

**AND**

**HORIZON COACH COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BASARI COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(From the judgment in Civil Case No. 188 of 2015 at Makindu  
Law Courts on 12th November 2019 by Hon. J. O. Magori (SPM))*

**JUDGMENT**

1. In a judgment delivered on 12<sup>th</sup> November 2109, the Magistrate’s court concluded as follows:-  
  
“Accordingly, I enter judgment in favour of the plaintiff against the defendants jointly and severally as follows:-
  - a. General damages Kshs. 450,000.00
  - b. Special damages Kshs. 554,311.42Total Kshs. 1,004,311.42  
  
The plaintiff is also awarded costs of this suit and interest at court rates.”
  
2. Dissatisfied with the decision of the trial court, the appellant who was the plaintiff in the trial court has come to this court on appeal through counsel Sherman Nyongesa & Mutubia Advocates on the following grounds:-



1. The learned Magistrate erred in law and fact in awarding the appellant excessively low damages for injuries when the evidence on record was that the appellant sustained severe and life threatening injuries that could not be sufficiently compensated by an award of Kshs. 450,000/=
  2. The learned Magistrate erred in law and fact in failing to properly appreciate the injuries sustained by the appellant thereby arriving at a wrong award that was not commensurate with the injuries sustained.
  3. The learned trial Magistrate erred in law and fact by failing to provide or assign any reasons for the low award in general damages, in favour of the appellant.
  4. The learned trial Magistrate erred in law and fact in failing to consider the submissions and comparable authorities relied on by the appellant on the question of the award of general damages for similar injuries thereby arriving at a decision that was not comparable to similar awards by other courts of law, particularly superior courts.
  5. The learned trial Magistrate erred in law and fact in failing to award the appellant Kshs. 2,500,000/ general damages as submitted by the appellant.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Sherman Nyongesa & Mutubia Advocates for the appellant as well as the submissions filed by Kimondo Gachoka & Company Advocates for the respondents. Both sides relied on decided court cases.
  4. Under Section 28 of the *Civil Procedure Act* (Cap.21), this court as a first appellate court is not bound to follow the trial court's findings of fact. This position has been repeatedly echoed by courts and I will only cite the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 132 wherein the Court of Appeal for East Africa stated as follows:-
 

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the court of appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
  5. This being an appeal against the quantum of damages awarded, I have also to be guided by the principle stated in the case of *Butt v Khan* (1981) eKLR 349 wherein it was held that in order for an appellate court to interfere with the quantum of damages awarded by a trial court, it must be shown that in assessing damages, the trial court, took into consideration an irrelevant fact, or failed to take into account a relevant fact, or that the sum awarded is so inordinately low or high that it must be a wholly erroneous estimate of the damage, or that a wrong principle of law was applied.
  6. At the trial herein, the appellant called one witness PW1 Corinna Rahma Birkigit, the appellant a 4<sup>th</sup> year university student at Moi University. It was her evidence that she was a passenger in a Harizon bus from Mombasa to Nairobi when an accident occurred at Makindu and she was injured and taken to hospital for treatment.
  7. She relied on several documents and receipts which she produced as exhibits, she also relied on Mombasa High Court Civil Case No. 80 of 2015 wherein liability was found at 100% against the respondent, and asked for award of damages. She was not cross-examined.



8. After several adjournments, on 3<sup>rd</sup> September 2019 the parties counsel Mr. Morara and Mr. Wasolo entered a consent as follows:-

“By consent liability be entered in favour of the plaintiff against the defendant in the ratio 80/20 as per the judgment on liability in the last suit number 114 of 2019 in Makindu court.”
9. On the same 3<sup>rd</sup> September 2019, as submissions had already been filed herein by the parties counsel, judgment was by consent set for 12<sup>th</sup> November 2019.
10. I note that in the judgment delivered on 12<sup>th</sup> November 2019 herein, the trial court discounted the consent on liability entered by counsel, because the consent purported to put 20% liability on a 3<sup>rd</sup> party who was not a party herein. The Magistrate thus found liability against the respondent herein to be 100%.
11. I agree with the trial Magistrate conclusion refusing to accept the purported consent, as a consent can only be entered into by participating parties in the said consent as it is in the form of a contract. Thus the purported consent committing a non-participating and consenting party, was not a consent at all.
12. With regard to re-evaluating the evidence on record herein, the evidence of PW1 was not controverted either through cross-examination or contra evidence. I thus conclude that the evidence of PW1 was the only evidence which could be validly considered by the trial court in determining the quantum of damages, as the respondent did not even file a second medical report, though they were given a chance to do so.
13. I note also that at the trial, the counsel for the appellant asked for Kshs. 2,500,000/= as general damages, while the respondents counsel asked for Kshs. 200,000/= as general damages, and the trial court awarded Kshs. 450,000/= as general damages.
14. On appeal, counsel for the appellant reiterated in submissions that the appellant suffered 7% permanent disability as assessed by Dr. Adede. Counsel specifically cited the case of *Gilbert Nicholas Otiemo v Oil Crop Development Company Ltd & Another* (2009) eKLR where the court awarded general damages of Kshs. 1,200,000/= in July 2009, and the case of *Mchari Teweolage v Darius Muasya Mainji* (2013) eKLR wherein in 2013 the court awarded general damages of Kshs. 1,500,000/=
15. Counsel for the respondent on the other hand, in submissions on appeal cited the case of *Rayan Investments Ltd v Jeremiah Mwakulegwa Kasha* (2017) eKLR wherein the court awarded general damages of Kshs. 300,000/=, and the case of *Mbithi Muinde William v Rose Muthen Mulatia* (2019) eKLR wherein Kshs. 400,000/ general damages was awarded.
16. I appreciate that courts are required to make comparative awards of general damages, even though each case has its own different fine details – see *Michael Okello v Priscilla Atieno* (2012) eKLR.
17. Having reconsidered the evidence of the appellant on record which is not contested, in my view, the award of general damages by the trial court herein did not fully appreciate the seriousness of the injuries suffered, and thus the trial court awarded a manifestly low figure of general damages. With several operations and hospitalisations undergone by the appellant, the pain experienced, the type and number of injuries suffered, the 7% permanent disability assessed by the doctor Adede, in my view the award of Kshs. 450,000/= as general damages reflected an inordinately low figure. In my view, even if the amount sought by the plaintiff's counsel was on the higher side, with the injuries suffered herein and the case authorities, an award of Kshs. 2,000,000/ as general damages would be a reasonable figure.



18. I will thus interfere with the award of general damages by the trial court, and substitute an award of Kshs. 2,000,000/= as general damages.
19. With regard to costs, the costs will follow the event. I will thus award costs of appeal to the appellant.
20. Consequently, I allow the appeal and set aside the award of Kshs. 450,000/= as general damages and order as follows in favour of the appellant against the respondents jointly and severally: –
  - a. General damages Kshs. 2,000,000.00
  - b. Special damages Kshs. 554,311.42  
Total Kshs. 2,554,311.42
  - c. The appellant is awarded the costs of the appeal and interest until payment in full.

**DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF OCTOBER 2023 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred – Court Assistant

Ms. Juma holding brief for appellant

Ms. Waweru holding brief for respondent

