



**ENA Investment Limited v Onduso (Civil Appeal E092 of 2021)
[2023] KEHC 23549 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E092 OF 2021
WA OKWANY, J
OCTOBER 5, 2023**

BETWEEN

ENA INVESTMENT LIMITED APPELLANT

AND

ROBERT NYAIRA ONDUSO RESPONDENT

((Being an Appeal from the Judgment and Decree of by Hon. S.K. Arome Resident Magistrate in the Principal Magistrate's Court at Keroka in PMCC No. 176 of 2019 on 17th November 2021))

JUDGMENT

1. The respondent herein was the plaintiff before the Lower Court where he filed a plaint dated December 13, 2019 claiming, *inter alia*, damages arising out of a road traffic accident. The respondent's case was that he was, on or about November 2, 2019, a lawful passenger aboard motor vehicle registration No. KCP 839V traveling along Keroka-Kisii road when the appellant's driver negligently drove motor vehicle registration No. KCG 024Z thereby causing it to violently collide with the vehicle that he had boarded. It was the respondent's case that he suffered grievous bodily injuries as a consequence of the said accident.
2. The lower court heard the matter and entered judgment in favour of the respondent as follows: -
 - Liability 100% against the defendant (appellant)
 - General damages for pain and suffering – Kes 250,000/=
 - Special damages - Kes 20,010/=
 - Total = Kes 270,010/=
3. Aggrieved by the decision of the trial court, the appellant filed the instant Appeal through the memorandum of appeal dated November 30, 2021 wherein it listed the following grounds of appeal: -



1. That the learned trial magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by any evidence adduced or applicable in law.
 2. That the learned trial magistrate erred in law and in fact in failing to attach due weight to the appellant's evidence and submission and authorities attached to.
 3. That the learned trial magistrate erred in law and in fact in assessing and awarding general damages and special damages wherein the respondent failed to prove her case.
 4. That the learned trial magistrate erred in law and in fact in finding that the plaintiff had proved the injuries as pleaded whereas the initial treatment notes showed otherwise.
 5. That the learned trial magistrate erred in law and in fact in injudiciously, arbitrarily and exorbitantly awarding the Respondent a sum of Kes 250,000/= as general damages which amount was manifestly excessive and high in the circumstances for minor soft tissue injuries and which connotes an erroneous estimate of damages.
 6. That the learned trial magistrate erred in law and in fact in apportioning liability at the ratio of 100% against the defendant and in favour of the plaintiff despite overwhelming evidence to the contrary.
 7. That the learned trial magistrate erred in law and in fact by applying strict liability in a tort of negligence.
 8. That the learned trial magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arriving at an excessive and unjustified award.
 9. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's evidence and submissions on record.
4. The appeal was admitted for hearing and directions were issued that it be canvassed by way of written submissions.
 5. The appeal challenges the award of general damages in the sum of Kes 250,000/=. The appellant contends that the award is inordinately high and not commensurate with the injuries that the respondent sustained in the accident. Reference was made to the decision in *Power Lighting Company Ltd & another v Zakayo Saitoti Naingola & another* in which the case of *Jennifer Mathenge v Patrick Muriuki Maina* (2020) eKLR was cited, wherein the principles governing the award of damages were discussed.
 6. The appellant argued that an award of Kes 100,000/= is adequate compensation for the respondent's injuries. It cited the decisions in the cases of *Ndung'u Dennis v Ann Wangari Ndirangu & another* (2018) eKLR where an award of Kes 300,000/= for soft tissue injuries to the lower right leg and back was reduced to Kes 100,000/= on appeal; *HB (Minor suing through mother & Next Friend DKM) v Jasper Nchonga Magari & another* (2021) eKLR where the court upheld an award of Kes 60,000/= for soft tissue injuries on the head, neck, thorax, abdomen and limbs; and *Eva Karemi & 5 others v Koskei Kieng & another* (2020) eKLR where the appellants were awarded between Kes 40,000/= and 70,000/= for soft tissue injuries.
 7. The respondent, on his part, urged this court to refer to the principles set out in *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another No. 2* (1987) KLR at page 35, *Catholic Diocese of Kisumu v Sophia Abieng Tete*, Civil Appeal No. 284 of 2001 (2004) 2 KLR 55 and *Butt v*



Khan (1982-1988) 1KAR when considering whether or not to interfere with an award of damages. He also cited the case of *Southern Engineering Company Ltd. v Musingi Mutia* (1985) KLR 730 wherein the Court of Appeal stated that the award of damages is a matter of discretion of the judge which must be exercised judiciously.

8. Reference was also made to the case of *Sophia Company Limited & James Gatiku Ndolo v Daniel Ng'ang'a Kanyi* (2006) eKLR and *Ugenya Bus Services v Gachoki* (1982) eKLR where it was held that courts are required to give awards that are neither extravagant nor excessive. The respondent maintained that the award of Kes 250,000 damages was fair, just and proportionate to the injuries that he suffered in the accident in question.
9. It was further submitted that the respondent's injuries rendered him physically incapable of carrying out any economic activity due to the temporary disability. Reference was made to the case of *Robert Cheserek v Jackline Jepkoech Jimmy* (2019) eKLR where the plaintiff was awarded Kes 300,000/= for bruises on the hips and gum, blunt trauma to the upper area, left hip, legs and loss of one tooth.

Analysis and Determination

10. I have carefully considered the record of appeal, the supplementary record of appeal and the parties' respective written submissions. The duty of the first appellate court was aptly stated in *David Njuguna Wairimu v Republic* [2010] e KLR thus: -

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

11. The main issue for this court's determination is whether the trial court erred in arriving at the determination on liability and quantum as it did. I will first dispense with the issue of liability.

(i) Liability

12. The appellant faulted the trial magistrate for determining liability at the ratio of 100% and in favour of the respondent. According to the appellant, the apportionment of liability was not in line with the evidence on record.
13. It was not disputed that the respondent was a passenger aboard the motor vehicle registration No. KCP 839V when the accident occurred. The respondent produced a police abstract (PEXh6) which confirmed that an accident occurred involving two motor vehicles, to wit, reg. no. KCP 839V in which the respondent was a passenger and the appellant's motor vehicle reg. No. KCG 839V.
14. The record reveals that the appellant, who was the defendant before the trial court, closed its case without presenting any evidence to controvert the respondent's account of how the accident happened. The respondent adopted his witness statement as his evidence in chief before the trial court. He attributed the accident to the negligence of the appellant's driver/agent. He faulted the said driver for driving the appellant's said motor vehicle negligently by overtaking when it was not safe to do so thereby permitting it to collide with the vehicle wherein he was a passenger.



15. My finding is that in the circumstances of this case, the respondent cannot be said to have contributed to the accident in any manner, or at all, in view of the uncontested fact that he was a lawful passenger in the vehicle that collided with the appellant's vehicle. My further finding is that, a finding on distribution of liability could only have been made as between the appellant and the owner of the motor vehicle in which the respondent was a passenger. This distribution could have been possible if the owner of the second motor vehicle was also made a party to these proceedings through third party proceedings. It turns out that no third party proceedings were instituted by the appellant and I therefore find that as matters stood before the trial court, a finding on liability could only have been made as against the appellant. I therefore uphold the trial court's finding on liability at 100% in favour of the respondent.

16. I associate myself with the decision of the Court of Appeal in *Rosemary Mwasya v Steve Tito Mwasya & 2 others*, Civil Appeal No 100 of 2017, (2018) eKLR held that: -

“Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident.”

(ii) Quantum

17. Courts have taken the position that an appellate court can only interfere with an award made by a trial court where it is established that the trial court took into account an irrelevant factor, did not consider a relevant fact or where the amount awarded is inordinately high or low as to amount to an erroneous estimate or where the same was based on lack of or misapprehension of evidence.

18. In *Alfarus Muli v Lucy M Lavuta & another* Civil Appeal No 47 of 1997 the Court of Appeal discussed the circumstances under which an appellate court can interfere with the award of a lower court and held that: -

“The appellate court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”

19. I have perused the documents that the respondent tendered, as exhibits at the hearing, namely; P3 Form (PEXh1), the treatment Notes (PEXh2) and the subsequent medical report prepared by Dr. Morebu (PEXh 5a). The said documents reveal that the respondent suffered the following injuries: -

- a. Right sub-conjunctival haemorrhage
- b. Deep cut wound to the face
- c. Deep cut wound to the right leg
- d. Deep cut wound to the left leg
- e. Chest contusion
- f. Bruises on the neck
- g. Bruises on the right elbow
- h. Blunt trauma on the lower back
- i. Blunt trauma on the right elbow



- j. Blunt trauma on the right knee
 - k. Loss of one tooth
20. It is trite that award of damages is an exercise of discretion by a court. Courts have however held that comparable injuries should as far as possible be compensated by comparable awards (see *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR and Court of Appeal in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR).
21. I have considered the injuries that the respondent sustained in the accident alongside the following authorities where the claimants suffered almost similar injuries as the respondent herein: -
- a. In *Maore v Mwenda* [2004] eKLR, the respondent suffered injuries to the right shoulder, the chest, the back and the left leg with hematoma. The Court of Appeal allowed the appeal and entered judgment for Kes 100,000/= reducing the award from Kes 300,000/=.
 - b. In *John Wambua v Mathew Makau Mwalolo & another* [2020] eKLR the plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe, the High Court on appeal affirmed the award of Ksh. 120,000/=.
 - c. In *Jyoti Structures Limited & another v Truphena Chepkoech Too & another* [2020] eKLR the respondent sustained blunt injury to the head, neck, chest, back, both thighs and was awarded general damages of Kes 250,000/= by the trial court assessed. On appeal, it was substituted with an award of Kes 125,000/=.
 - d. In *Dickson Ndungu Kirembe v Theresia Atieno & 4 others* [2014] eKLR the High Court reviewed an award of Kes 255,000/= to Kes 127,500/= for soft tissue injuries which produced no complications
 - e. In *George Kinyanjui T/A Climax Coaches & another v Hussein Mahad Kuyala* [2016] eKLR the respondent sustained injuries on the chest, neck, knees and lost two teeth. On appeal, the High Court reduced the award of Kes 650,000/= to Kes 109,890/= upon a finding that the loss of teeth was unrelated to the accident in question, as the Respondent had sustained soft tissues.
22. In the instant case, I note that the respondent suffered multiple soft tissue injuries that included loss of one tooth. I also note that inflationary trends have lowered the value of the Kenya shilling from the time the decisions in the above cited cases were rendered. It is my finding that the award of Kes 250,000/= was not excessive and I therefore uphold it.
23. Lastly, I have perused the trial record and noted that the Respondent sought special damages in the sum of Kes 20,010/=. He produced receipts confirming that he incurred the said costs. It is trite that special damages must be specifically pleaded and proved. Since the appellant did not contest the award of special damages, I uphold the trial court's award of Kes 20,020/= under this heading.
24. In conclusion, I find that the instant appeal is not merited and I therefore dismiss it with costs to the respondent.
25. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 5TH DAY OF OCTOBER 2023.**

W. A. OKWANY

JUDGE

