



REPUBLIC OF KENYA



KENYA LAW
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**Ogise v Gofwa (Civil Appeal 006 of 2024)
[2024] KEHC 16976 (KLR) (21 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 006 OF 2024
F WANGARI, J
OCTOBER 21, 2024**

BETWEEN

ROBERT OMBATI OGISE APPELLANT

AND

SAIDI FUADI GOFWA RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment of Hon. Gatambia Ndungu, Resident Magistrate/ Adjudicator delivered on 15/12/2023 in Mombasa SCCC No. E232 of 2023. The Appeal is on quantum only.
2. The Statement of Claim dated 24/04/2023 claimed damages for an accident that occurred on 31/12/2022 involving Motor Vehicle Registration Number KDA 522K (though erroneously stated as KBK 158Y as confirmed by the pleadings and supporting documents) owned by the Defendant/ Respondent and driven by his agent/ driver, while the Claimant/ Appellant was walking on the pedestrian lane along Likoni Ukunda/ Ferry Road, Mombasa.
3. It was pleaded that the Respondent's driver carelessly drove the said motor vehicle and hit the Respondent resulting to serious injuries sustained by the Appellant and 8% permanent disability.
4. The Trial Court heard the parties and proceeded to render judgement on 15/12/2023. In the Judgement, the Court found 100% liability against the Appellant. Kshs. 250,000 was awarded as General Damages for pain and suffering, with special damages of Kshs. 27,000.
5. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.



Submissions on quantum

6. In the trial court, the Appellant in his submissions sought for Kshs. 800,000 as General Damages for pain and suffering. He relied on the case of Odinga Jackton Ouma v Maureen Achieng Oera (2026) eKLR and Hussien Abdi Hashi v Hassan Noor (2004) eKLR.
7. On the other hand, the Respondent relied on the case of West Keya Sugar Co. Ltd v David Luka Shirandula [2017] eKLR in proposing an award of Kshs. 180,000 as General Damages.
8. Upon filing this appeal, this court directed that the appeal be disposed of by way of written submissions and both parties complied by filing of rival submissions. The Appellant filed submissions dated 07/05/2024 submitted that the trial court's award of Kshs. 250,000 as General Damages was too low as the severity of the injuries was not taken into account.
9. The Appellant relied on George Kinyanjui t/a Climax Coaches & Ano v Hassan Musa Agoi (2016) eKLR, Gabriel Kariuki Kigathi & Ano v Monica Wangui Wangechi (2016) eKLR and Mwavita Jonathan v Silvia Onunga Civil Appeal No. 17 of 2017 where the Courts awarded Kshs. 400,000 for injuries similar to that of the Appellant. It was submitted that an award of Ksh. 500,000 would be sufficient compensation for the injuries suffered.
10. The Respondent in his submissions dated 25/05/2024 submitted that the trial magistrate did not err by awarding Kshs. 250,000 as General Damages, as the same was sufficient and adequate compensation. In addition to the cases relied on at the Small Claims Court, he further relied on the case of Elizabeth Wanjira Ngure & Ano. v Nyaka Agencies Ltd & Ano (2008) eKLR, John G. Mbuthia v Stephen Muiruri Njenga (2008) eKLR, and Telkom K. Limited v Stephen Ndolo Owango (2007) eKLR where Kshs. 100,000 was General Damages for similar injuries.

Analysis

11. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
12. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
13. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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...”



Quantum

14. The Appellant submitted that an award of Kshs. 250,000 was too low for general damages for pain and suffering as commensurate compensation in the circumstances of this case was at Kshs. 500,000/=.
15. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.”
16. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.
17. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another* Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.
18. There is no dispute that the Respondent suffered the injuries as pleaded. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages.
19. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
20. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
 1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 2. The award should be commensurable with the injuries sustained.
 3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 5. The awards should not be inordinately low or high.
21. Having taken into consideration the cases relied on by the parties, the cases relied on by the Respondent were for compensation for soft tissue injuries. The Appellant in addition to soft tissue injuries suffered fractures of the ribs, puncture of the lung with reduced air entry, loose lower tooth and with a permanent disability of 8%.



22. From the nature of injuries sustained, and considering the loss of value for money, I find that an award of Kshs. 400,000 in General Damages would be adequate compensation based on comparable authorities cited by the parties. (See the case of Easy Coach Bus Limited v Mary Adhiambo Okuru, HCCA No. 68 of 2015 [2020] where Kshs. 300,000 was awarded for similar injuries). The appeal on General Damages is partially successful.
23. On costs, I consider that the appeal was partially successful. Litigation must come to an end, and no further proceedings need to be entertained. I hereby exercise the discretion of the court and order that each party shall do bear its own costs.

Determination

24. In the upshot, I make the following orders: -
 - a. The Appeal succeeds to the extent that the General Damages award of Kshs. 250,000 is hereby set aside and substituted with an award of Kshs. 400,000.
 - b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 21ST DAY OF OCTOBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

Okoko Advocate h/b for Kihoro Advocate for the Appellant

Ndolo Advocate for the Respondent

Brian, Court Assistant

