



REPUBLIC OF KENYA



**Too v Kagema (Civil Appeal E033 of 2019)
[2024] KEHC 12893 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E033 OF 2019
RN NYAKUNDI, J
OCTOBER 25, 2024**

BETWEEN

WILLY TOO APPELLANT

AND

PAUL KAGEMA RESPONDENT

*(Being an appeal from the judgment and decree of Honourable Naomi
Wairimu – (Principle Magistrate) delivered on 26th February, 2019 in Eldoret
CMCC No. E779 of 2017 between PAUL KAGEMA –VS- WILLY TOO)*

JUDGMENT

Representation:

M/s Ngaywa & Kibet Partners LLP

M/s Mwinamo Lugonzo & Co. Advocates

1. The instant appeal is only on quantum as deduced from the Appellant’s Memorandum of Appeal dated 18th March, 2019. At the trial court, the Respondent filed a claim against the appellant seeking general damages, special damages and costs and interests of the suit arising from road accident that occurred on 08.07.2017, wherein it is alleged that the Respondent was lawfully being carried as a pillion passenger on Motorcycle Registration KMDB 465 F along Eldoret-Elgonview Hospital road when the Defendant and or his driver, servant, agent and or employee negligently drove, managed and or controlled Motor Vehicle Registration No. KCH 383K that he caused the aforesaid Motor vehicle to knock down the Motorcycle KMDB 465 F and as a result of which the Plaintiff sustained severe injuries.
2. The appellants in response to the claim denied the manner in which the alleged accident occurred as put by the Respondent. In the alternative, they blamed the Respondent for being negligent.



3. After trial Judgment was delivered on 16/07/2018 and the Appellant was found 100% liable as per the consent recorded and damages assessed as hereunder: -
 - a. General Damages..... Kshs. 600,000/=
 - b. Special Damages..... Kshs. 8,000/=
 - c. Total Kshs. 608,000/=
 - d. Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal only on quantum on (3) grounds: -
 - i. That the Honourable Learned Magistrate erred in law and in fact in awarding general damages to the Respondent amounting to Kshs. 600,000/=.
 - ii. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the Respondent due regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
 - iii. That the Honourable Learned Magistrate erred in law and facts in relying on extraneous evidence in arriving at the decision on the general damages.
5. The appeal was canvassed vide written submissions. The Appellant on 20th April, 2024 filed submissions of even date while the Respondent on 24th April, 2024 of even date.

The Appellant's Submission

6. Learned Counsel Mr. Ngaywa for the Appellant submitted that it is settled principle that comparable injuries should attract comparable awards. He submitted that the decisions cited by the Respondent at the trial court were not comparable. That the authorities relied upon by the Respondent depict serious injuries than those suffered by the Respondent herein.
7. According to learned counsel, the Learned Magistrate did not proffer any justifiable reasoning in support of the determination made in awarding the Respondent Kshs. 600,000/= as general damages as her decision was not supported by any case law as anticipated by law. He urged this court to assess downwards the quantum of general damages that may be awarded to the Respondent amounting to Kshs. 200,000/=. On this, counsel relied on the following authorities:
 - a. Mara Tea factory limited versus Joshua Makworo Onkoba (2021) eKLR.
 - b. *Pascal versus Ouko (Civil Appeal E005 of 2022)* (2023) KEHC
 - c. Justine Nyamweya Ochoki & Another versus Jumaa Karisa Kipingwa (2020) eKLR
 - d. FM (minor suing through mother & next friend MWM) vs JNM & another (2020) eKLR.
8. Learned Counsel in concluding submitted that the Appellant has raised grounds and made out a case that would warrant this Honourable court to interfere with the award of the lower court. He prayed that the Appeal may be allowed.

The Respondent's Submissions

9. Learned Counsel Mr. Mwinamo submitted on both quantum and liability but I shall have the submissions limited to quantum since the instant appeal does not raise any issue on liability. Counsel



started by reminding this court of its role on appeals. He cited the principles set out in the case of *Selle Versus Associated Motor Boat Company Ltd* (1968) E.A 123.

10. On quantum, it was submitted for the Respondent that the learned trial magistrate followed the proper principles in making the award. That from the medical records, the Respondent sustained the following injuries:
 - a. Blunt injury to the head.
 - b. Blunt injury to the neck.
 - c. Blunt injury to the back.
 - d. Blunt injury to the pelvis.
 - e. Blunt injury to both upper limbs.
 - f. Dislocation of the right knee.
 - g. Blunt injury to the left leg.
11. Mr. Mwinamo submitted that in view of the injuries sustained the award of Kshs. 600,000/= as general damages sufficed as just and adequate compensation to the 1st Respondent for the injuries sustained. In support of this he cited the following decisions:
 - a. Irene Egira Nthiga versus Nairobi Bus Union Ltd. (Nairobi HCC No. 2425 of 1990)
 - b. Amrateen D. Shah versus Joseph Mackio Nyangawo (Mombasa HCC No. 228 of 1987)
 - c. Moses Ndumia versus Rebecca Aswa Mwirisha (Eldoret HCCA No. E043 of 2021).

Analysis & Determination

12. The instant appeal is evidently on quantum only as liability has not been cited in the Appeal. To this end, this court is mandated to apply the principles set out in the cases of *Selle and another vs Associated Motor Board Company ltd* (1968) and *Mbogo and another versus Shah* (1968) EA 93.
13. In the cited decisions and many others, the courts are consistent that in evaluating and scrutinizing the appeal, certain guidelines remain constant. First and foremost, an appeals court as the one I sit in, should bear in mind that it has neither seen nor heard the witnesses. This is an advantage only accorded to the trial court. Why is this important? There is the aspect of evaluating the truthfulness, reliability and correctness of the viva voce evidence tested through the tools provided in the *Evidence Act*. The conclusion drawn by a trial court on the demeanour of a witness carries weight in establishing proof of existence or non-existence of a fact in issue for a party to secure judgment against the adversary. In the second limb, in judicial decision making exercise of discretion plays a critical role and for an appellate court to impeach that discretion, there are clear principles which have been set out by the Court of Appeal in the case of *Kenya Bus Services Limited vs Jane Karambu Gituma* Civil Appeal Case No. 241 of 2000 thus:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately



high or low so as to represent a wholly erroneous estimate of the damages.” See also *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR*

14. In terms of compensation in Road Traffic Accidents claims, the main and significant limb is that of General damages. It is expected that the trial court would appreciate by way of evidence:

- a. Severity of the initial injury;
- b. Period taken to recover from any symptoms
- c. The extent of any continuing symptoms which manifest post the accident or injury
- d. Whether a substantial recovery has taken place at the time of the claim and assessment of damages or it will take place in the short or medium term level
- e. Whether the injury or injuries did interfere with the quality of life and leisure activities of the claimant and finally but not least, the impact if any on the education, occupation or work activities of the Claimant and the issue of prognosis to include any future vulnerability is also a component associated with assessment of damages.

15. It is in this respect the court in the persuasive case of *West (H) & Son Ltd (1964) A.C. 326* at page 341 spoke as follows:

“I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”

16. Additionally, in the case of *Kigaragari v Aya [1985] eKLR*, Nyarangi J. as he was then stated thus:

“I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

17. Facts and circumstances are unique from case to case. In making a just and fair determination, this court as well as the trial court is limited to the evidence adduced and the pleading as well as customary rules and principles set in the past. In the instant case the Respondent pleaded the following injuries:

- a. Blunt injury to the head.
- b. Blunt injury to the neck.
- c. Blunt injury to the back.
- d. Blunt injury to the pelvis.
- e. Blunt injury to both upper limbs.



- f. Dislocation of the right knee.
 - g. Blunt injury to the left leg.
18. The injuries as pleaded can be confirmed from the medical report dated 7th July, 2017. In such cases, the trial court can only exercise discretion by analyzing the injuries vis-à-vis past awards to similar injuries. The materiality of the injuries suffered may appear to carry the same characteristics but the depth of the physical harm, mental anguish, psychological trauma, loss of amenities largely will vary from one claim to another. There is no doubt that trial courts can face a dilemma in such cases weighing one factor after another to arrive at a specific award.
 19. For that reason, an appeals court must adhere to the principles laid in *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR* and *Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000*.
 20. Comparatively, few instances occur where appellate courts reverse judgements secured in favour of the claimant or in our case the Respondent solely on the ground of erroneous error on the so called measures of damages. For this court to address this appeal in perspective, the question of award of damages as being excessive, it is prudent to look at the recent decisions on the same facts to establish whether the matter of excessiveness of damages as raised by the Appellant holds any weight.
 21. I have read through the following decisions which will help me arrive at a fair determination:
 22. In *Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR* the respondent sustained bruises on the scalp, bruises on the neck, bruises on the abdomen, bruises on the lower back, cut wound on the left thumb, cut wound on the left palm, subluxation of the left shoulder joint, fractured 3rd and 9th ribs and cut wound on the left foot near the ankle joint. The court set aside the finding by the subordinate court that awarded Kshs 586,140/- on general damages and substituted it with an award of Kshs 364,140/-
 23. In *Bildad Onditi & Another v Rashid M. Rateng [2013] eKLR* the plaintiff sustained injuries involving posterior dislocation of the right hip and soft tissue injuries. He was admitted in hospital for 9 days and complained of tenderness on the right hip area and restriction of movement. He was awarded Kshs. 350,000 in 2011.
 24. In *Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR* where the plaintiff sustained: bruises on the scalp; bruises on the neck; bruises on the abdomen; bruises on the lower back; cut wound on the left thumb; cut wound on the left palm; and subluxation of the left shoulder joint. The court awarded Kshs. 400,000/= as general damages.
 25. In *Samwel Martin Njoroge Kamunyu v Mildred Okweya Barasa [2020] eKLR* where the plaintiff sustained: two deep cut wounds on the forehead horizontally; bruises and lacerations on the right cheek; blunt injury to the shoulder and chest; blunt injury to the pelvis; deep cut wounds on right and left legs. The High Court awarded of Kshs. 300,000/= as general damages.
 26. I have considered the evidence as adduced by the Respondent and the injuries as pleaded and my duty is to evaluate whether the award at the trial court falls within a range that is fair and reasonable going by the recent awards where comparable damages are involved. There is enough evidence in the case to support a fair and proportionate award for the soft tissue injuries suffered by the Respondent. This court therefore exercises appellate jurisdiction and discretion to review the trial court’s findings of facts culminating into the award which so satisfactorily by the injuries suffered by the Respondent at no prognosis of a permanent disability or any expectation of post-medical treatment.



27. To this end, Kshs. 600,000/= awarded as general damages as calculated by the trial court is hereby set aside to a lesser award of Kshs. 300,000/=. This is in conformity with the cited cases Samwel Martin Njoroge Kamunyu v Mildred Okweya Barasa (supra), Blue Horizon Travel Co Ltd v Kenneth Njoroge (supra) and Bildad Onditi & Another v Rashid M. Rateng (Supra).
28. As to the Special damages, the Appellant has not challenged the same and therefore it remains undisturbed.
29. In the final calculation, the summation of the General and Special Damages awarded is Kshs 308,000/=
30. The costs shall be shared by each party.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 25TH DAY OF OCTOBER 2024.

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R. NYAKUNDI
JUDGE

