



REPUBLIC OF KENYA



**Waruhiu v Wanjiru (Civil Appeal 15 of 2020)
[2024] KEHC 16742 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 15 OF 2020
NIO ADAGI, J
OCTOBER 14, 2024**

BETWEEN

SUSAN WANJIRU WARUHIU APPELLANT

AND

**ROSE WANJIRU WARIUWA ALIAS ROSE WANJIRU
WARIUHA RESPONDENT**

*(Being an Appeal from the Judgment of Hon. E. N. Angima (RM)
in Mkuruweini PMCC. No. 64 of 2018 delivered on 05/03/2020)*

JUDGMENT

1. By an amended Plaint dated 23/7/2019, the Appellant sued the Respondent claiming damages for personal injuries she sustained following a road traffic accident that occurred on 17/12/2018. The accident occurred when the Respondent, her authorized driver, servant, agent and or employee drove, managed, steered and or controlled motor vehicle registration number KCQ 717Q Honda CRV so negligently and permitted the same to veer off the road and crash into the ATM booth so negligently and permitted the same to violently knock down the as a result of which she sustained serious injuries, loss and harm.
2. The Appellant sustained the following injuries:
 - i. Non-displaced fracture of the left superior pubic rami.
 - ii. Injuries on groin region.
3. The Appellant also prayed for special damages of Kshs.87,980/=.
4. The Respondent opposed the Appellant's suit vide a Statement of Defence dated 19/3/2019.



5. On 21/11/2019, Parties recorded a consent on liability at the rate of 80%:20% for the Appellant against the Respondent.
6. The suit proceeded for hearing and the Appellant adopted her witness statement dated 17/12/2018. At line 6 to 11 the Appellant states that she was admitted for 11 days at Outspan Hospital. She was discharged on a walking crutch which she used for 2 weeks and later used two crutches for 1 month and thereafter one crutch for 1 month. She indicated that she could not walk for long, lifting was a problem as well as standing for a long period. During Examination in chief on page 82 line 5 the Appellant indicated that she still experienced back pains whenever she stands or bends. She further indicated on line 7 that whenever she experienced pain and she would go for physio therapy and take medication.
7. The medical report by Dr. Gachathi Wanjema dated 17/10/2018 was produced by consent gives a detailed analysis on the injuries sustained by the Appellant.
8. The Appellant pleaded Kshs.87,980/= in her amended plaint and produced receipts to the same as PExhibit.10. The receipts are found on page 13 to 18 of the record of appeal.
9. The Respondent opted not to call any witnesses.
10. Parties filed written submissions which the trial court considered. The Appellant prayed for an award of Kshs.2,400,000/= as general damages and Kshs.87,980/= as special damages. She also prayed for costs and interest.
11. The Respondent on the other hand submitted for an award of Ksh.200,000/= as general damages.
12. The learned Magistrate awarded Kshs.250,000/= in general damages for pain, suffering and loss of amenities.
13. On the special damages, the learned Magistrate found that the payment receipts produced as exhibits and noted that the Appellant's medical bills were substantively paid for under an insurance scheme. Kshs.56,961.83 was credited to UAP Insurance Co. Ltd and Kshs.31,650.00 and Ksh.5,450,00 was catered for by Pacific Insurance Brokers. As a result, the Appellant was only awarded Kshs.13,230/= as special damages which the Appellant proved by receipts which were produced as exhibits.
14. Being aggrieved by the said judgment, the Appellant preferred the appeal herein and filed the Memorandum of appeal dated 21/10/2021 in which she has raised 7 grounds as follows:-
 1. The learned trial Magistrate erred in law and in fact in failing to appreciate the gravity of the injuries sustained by the appellant hence awarding damages that are too low in the circumstances.
 2. The trial magistrate erred in law and in fact in awarding the appellant inordinately low general damages at Ksh.250,000/= without regard to the injuries sustained by the appellant.
 3. The learned trial magistrate erred in fact and law in failing to consider the respondent's submissions which offered Ksh.300,000/= as general damages and Ksh.87,980/= as special damages.
 4. The trial magistrate erred in applying wrong principles of assessing damages.
 5. The learned trial magistrate erred in failing to consider submissions by the appellant hence arriving at a wrong decision.
 6. The learned Resident Magistrate erred in law and in fact in holding that the appellant only proved Ksh.13,230/= as special damages against the weight of the evidence.



7. The learned Magistrate erred in disregarding the submissions on record and especially the appellant's.
15. The Appellant seeks for the following orders: -
- (i) That the appeal herein be allowed,
 - (ii) That the judgment on general and special damages be set aside and this court do assess the same a fresh.
 - (iii) That costs be granted to the appellant.

Analysis and Determination

16. Parties proposed to dispose of the appeal by way of submissions. The Appellant has filed her submissions dated 29/2/2023. I have not seen the Respondent's submissions even on the Court Tracking System.
17. The duty of this court as the first appellate court is to reconsider the evidence, assess it and make own conclusions on the evidence, subject to the cardinal fact that the court did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing witnesses and leave room for that (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384).
18. I have considered the grounds of appeal, the pleadings in the lower court, the evidence adduced before the trial court, the written submissions filed by counsel for the Appellant in the absence of the Respondent's submissions and the authorities cited.
19. Two major issues that stand out for consideration in this appeal are:
- i. Whether the award of Ksh.250,000/= general damages was inordinately low.
 - ii. Whether the award of Ksh.13,230/= special damages was justified.

I. Whether the award of Ksh.250,000/= general damages was inordinately low.

20. The Appellant pleaded that she sustained; non-displaced fracture of the left superior pubic rami and injuries on groin region.
21. The physical findings in the Medical Report dated 17/10/2018 by Dr. Gachathi Wanjema produced in evidence by consent of the Parties included tenderness on the lower back and left groin region. X-rays were taken which showed small non-displaced fracture of the left superior pubic rami. Gradual rehabilitation to sitting, standing and finally to crutch assisted ambulation. Was later discharged for continued bedrest at home and later clinic follow up. At the time of examination on clinic follow up, she was off the crutch and was fully ambulating though with mild lower back and groin pains.
22. The Appellant submits that the trial court in assessing general damages at Ksh.250,000/= failed to put reliance on the seriousness of the injuries sustained by the Appellant as well as the submissions by the Appellant. The award of Ksh.250,000/= was inordinately too low. The Appellant had submitted for Ksh.2,400,000/=.
23. The Respondent in her submissions relied on two authorities as per page 60 of the record of appeal, *Chebut Tea Factory v Amos N. Mukokha* (2011) eKLR where the court awarded Ksh.350,000/= and *Haron Cheron v Eastern Produce (K) Limited* (2014) eKLR where the court awarded Ksh.350,000/=. That in both decisions, the court awarded the Plaintiff a sum higher than the award herein. Both



decisions were made over 6years ago before the decision herein was made and taking into consideration inflation rate.

24. Regarding quantum, it was held in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 that:

“An appellate court will not disturb an award of 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”.

25. In the case of *Maraga V Musila* (1984) 1 KLR 251, where the Court of Appeal when addressing its mind to this issue expressed itself thus;

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles”.

26. I have considered that in assessing general damages in this case, the learned trial relied on the degree of injury which was assessed as “Harm” and from the PExhs the Plaintiff was stable. The learned Magistrate did not appreciate the fact that the Appellant was admitted for 11 days at Outspan Hospital. She was discharged on a walking crutch which she used for 2 weeks and later used two crutches for 1 month and thereafter one crutch for 1 month. She indicated that she could not walk for long, lifting was a problem as well as standing for a long period. During Examination in chief on page 82 line 5 the Appellant indicated that she still experienced back pains whenever she stands or bends.

27. The Doctor confirmed that at the time of examination on clinic follow up, the Appellant was off the crutch and was fully ambulating though with mild lower back and groin pains. Although she must have endured a great deal of pain in the period of morbidity, the Appellant appears to have sufficiently recovered from her injuries with no attendant sequela save for the groin pains.

28. From a reading of the trial court’s judgment, there is little reasoning demonstrating how it arrived at the award of Kshs.250,000/= in general damages for the injuries sustained by the Appellant. No reference was made to authorities cited by the parties before it. It thus appears from my own review of the material presented before the trial court and comparisons with authorities cited on this appeal, that the Appellant’s complaint in that regard is merited and this court does feel justified to interfere especially in view of the extent of the injury and medical evidence placed before the trial court.

29. I think the trial magistrate overlooked these facts hence I hold that the award was inordinately low and did not reflect the extent of the injuries sustained by the Appellant.

30. Being guided by the decision *Kungu & another v Chepkwony* (Civil Appeal E149 of 2021) [2023] KEHC 21496 (KLR) (Civ) (28 July 2023) (Judgment)where the appellate court in disturbing by reducing the trial court’s award of general damages from Kshs.1,800,000/= to Kshs.1,200,000/= where the Plaintiff sustained a non-displaced fracture pelvis involving the right superior pubic ramus, observed that:

“Although he must have endured a great deal of pain in the period of morbidity, the Respondent appears to have sufficiently recovered from his injuries with no attendant



sequela. Comparing these injuries with those in the above cases, adjusting for severity and inflationary trends, the Court is persuaded that an award of Kes. 1,200,000/- is adequate as general damages for pain and suffering.

Comparing the Appellant's injuries with those in the above case, adjusting for severity and inflationary trends, the Court is persuaded that an award of Kshs.900,000/= is adequate as general damages for pain and suffering.

II. Whether the award of Ksh.13,230/= Special damages was justified.

31. The Appellant pleaded Ksh.87,980/= and proved the same by production of receipts.
32. The Respondent in her submissions submitted that the Appellant to be awarded the pleaded special damages of Ksh.87,980/ which she provided receipts to substantiate the same but subject to contribution.
33. On the special damages, the learned Magistrate found that the payment receipts produced as exhibits and noted that the Appellant's medical bills were substantively paid for under an insurance scheme. Kshs.56,961.83 and Ksh.31,650.00 was credited to UAP Insurance Co. Ltd and Ksh.5,450,00 was catered for by Pacific Insurance Brokers. As a result, the Appellant was only awarded Kshs.13,230/= as special damages which the Appellant proved to have personally paid by receipts which were produced as exhibits.
34. The learned Magistrate cited High Court Civil Case No. 112 of 2014 *Jeremiah Watab Barasa v The Director General National Youth Services & 2 Others* where the court only awarded special damages, the amount that the Plaintiff raised. This safeguards against litigants unjustly enriching themselves. Unfortunately, this court has been unable to retrieve the cited case for ease of reference as the learned Magistrate did not state which particular high court made the decision for easy of retrieval of the same. The case is unreported.
35. The payments that were made by the two insurance companies were not awarded to the Applicant and hence the issue as to whether only the award of Ksh.13,230/= as special damages were justified.
36. In the case of *Leli Chaka Ngoro v Maree Ahmed & S.M. Lardhib* [2017] eKLR, the court held that:-

“My finding on this issue is that personal accident claims are not affected by the doctrine of subrogation. The doctrine of subrogation applies to indemnity insurance claims. In cases of indemnity, the insured loss is premeditated and can be computed up to the last cent. In personal accident claims, one cannot compute the extent of the suffered injuries. A lost limb cannot be replaced by an artificial one irrespective of the latter's costs. If an accident victim can recover payment out of a personal accident policy, that is an added advantage which should not benefit the tortfeasor.

With regard to the issue of double payment, I am satisfied that the recovery of the special damages from the respondents would not amount to double payment. Assuming the respondents came to know about the settlement of the bills after they had paid the appellant, could the respondents claim the money from the appellant or his insurer. My answer to this is “No”. This is because the respondents are not party to that arrangement between the appellant and his insurer. The respondents are simply liable to satisfy the amount of damages suffered by the appellant. This does not amount to double compensation”.



37. In the case of *George White v Jubits Corporation* (*supra*), it was observed: -

“The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor.”

“The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a “double recovery.” The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits.”

38. I do find that that the doctrine of subrogation does not apply to personal accident claims.

39. There is no dispute that the Appellant pleaded and proved the special damages by receipts which she produced as exhibits a fact which the Respondent in her submissions prayed that it be allowed subject to contribution.

40. I do find that the trial court erred in law by not awarding the Appellant the Ksh.31,650.00 that was credited to UAP Insurance Co. Ltd and Ksh.5,450,00 that was catered for by Pacific Insurance Brokers.

41. I have to also clarify that the special damages ought not be subjected to contribution being guided by the holding in *Hashim Mohamed Said & another v Lawrence Kibor Tuwei* [2018] eKLR where the court stated that special damages should not be subjected to the apportionment.

Accordingly;

1. This appeal is hereby allowed.
2. Liability apportioned by consent at 20:80 as against the Respondent. Appellant to shoulder 20% liability and Respondent 80% liability.
3. Damages awarded as hereunder: -
 - i. General damages Kshs.900,000/= less 20% (Kshs.720,000/=).
 - ii. Special damages proved Kshs.107,291.83/=.
 - iii. Costs and interest for trial court and appeal to be paid by the Respondent to the Appellant.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH OCTOBER 2024

NOEL I. ADAGI

JUDGE

