



**Gathiru v Aspendos Dairy Limited (Civil Appeal 35 of 2020)
[2024] KEHC 14678 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 35 OF 2020
CW GITHUA, J
NOVEMBER 20, 2024**

BETWEEN

ALICE WANJIRU GATHIRU APPELLANT

AND

ASPENDOS DAIRY LIMITED RESPONDENT

JUDGMENT

1. This appeal is against the award of both general and special damages awarded to the appellant by the trial court. The appellant was awarded general damages in the sum of Kshs. 500,000 as compensation for personal injuries sustained in a road accident on 1st June 2017 whose occurrence was blamed on the negligence of the respondent's driver. She was also awarded special damages in the sum of Kshs. 3,750 together with interest and costs of the suit.
2. The court record shows that judgement on liability was entered against the respondent at a 100 % but this finding is not contested on appeal.
3. In her Memorandum of Appeal dated 18th December 2020, the appellant complained that the general damages she was awarded were inordinately low and further faulted the learned trial magistrate for having failed to consider her submissions on both general and special damages.
4. The appeal was canvassed by way of written submissions. In submissions filed on her behalf by Ms. Njeri Mukururi & Company Advocates dated 30th October 2023, the appellant reiterated and expounded on her grounds of appeal and emphasized that given the nature of injuries she sustained and previous awards made for comparable injuries, an award of Kshs. 500,000 was inordinately low. In her view, an award of Kshs. 2,500,000 would have been sufficient compensation for her injuries.
5. Regarding the award for special damages, the appellant submitted that the special damages she had pleaded were supported by evidence which was not disputed; that therefore, this court should set aside



the award of Kshs. 3,750 made by the trial court and substitute it with an award of Kshs. 93,950 which was the amount that was pleaded and proved.

6. The respondent on the other hand submitted that an award of Kshs. 400,000 as general damages would have been adequate compensation for the injuries suffered by the appellant given previous awards for similar injuries and also considering that there was evidence that the injuries had completely healed.
7. On the challenge regarding the award for special damages, the respondent submitted that the claim for medical expenses had not been proved. Further, the respondent claimed that the claims for house help and commuter expenses were fictitious and if awarded would amount to unjust enrichment. It was the respondent's prayer that the same be dismissed.
8. This being a first appeal, it is an appeal on both law and facts. I am fully aware of my duty as the first appellate court which as clearly elucidated by the Court of Appeal in *Abok James Odera T/A A.J Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates (2013) Eklr* is

“.....to re- evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.....”

9. This being an appeal on quantum only, it is important to state at the outset that as a general rule, the award of damages is at the discretion of the trial court. For this reason, an appellate court should be slow to interfere with an award of damages made by the trial court unless it was satisfied that in making the award, the trial court applied wrong legal principles or misapprehended the evidence or considered irrelevant factors or failed to consider relevant ones.
10. An appellate court would also be entitled to disturb an award if it was convinced that the award was either inordinately high or low as to lead to an inference that it must have been based on a wholly erroneous estimate of the damage suffered- See: *Gitobu Imanyara & 2 others versus Attorney General (2016) eKLR*; *Butt v. Khan [1981] KLR 349*.
11. It is trite that in the assessment of general damages for personal injury claims, the approach used is that comparable injuries should as far as possible be compensated by comparable awards. It must however be remembered that no two injuries can be exactly the same and therefore, each case must be decided on its own unique facts - See: *Alphonse Odero Augo V Sinohydro Corporation Limited [2017] KEHC 6744 (KLR)* ; *Stanley Maore V Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR*
12. That said, the assessment of injuries must always be done in light of the injuries sustained in the case under consideration.

In this case, the injuries sustained by the appellant as per paragraph 7 of her plaint were as follows:

- i. Fracture of the right femur;
 - ii. Fracture of the left upper incisor tooth;
 - iii. Bruises on the left side of the face, left eye and left arm.
 - iv. Soft tissue injuries on the right thigh.
13. When assessing general damages in this case, the learned trial magistrate indicated that he had considered the written submissions filed by both parties and made reference to the proposals made by each party. The trial court also properly addressed its mind to the legal principles that ought to



guide a court in undertaking such a task but unfortunately, the learned trial magistrate failed to give any reason for arriving at his decision to award the appellant Kshs. 500,000 in general damages. He did not also indicate whether he had relied on any authority in arriving at his decision. In my view, this was an error on the learned trial magistrate's part because in the absence of reasons, it was impossible for the parties or this court to tell what factors he considered in making the impugned award and whether he exercised his discretion judiciously.

14. That said, on my part, I have considered the injuries sustained by the appellant in this case together with the rival submissions made on behalf of the parties and the authorities relied upon in support of their respective proposals. I find that the appellant suffered skeletal and soft tissue injuries the dominant one being a fracture on her right femur which according to the medical report by Dr. Maina Ruga, the respondent's doctor, left her slightly deformed. The report shows that the fracture united but with a shortening of the right lower limb making her walk with a limp.
15. The undisputed evidence on record also reveals that prior to her examination by Dr. Mwangi and Dr. Maina Ruga, the appellant had been admitted at both the Murang'a District Hospital and the PCEA Kikuyu Hospital for about 16 days. She underwent surgery to fix the fracture and at the time of her examination by both doctors, the I. M nail used to treat the fracture was still in situ. From this evidence, it is clear that the appellant underwent immense pain and suffering in her journey of healing for which she was entitled to adequate compensation.
16. In my view, the injuries sustained by the plaintiff's in the authorities cited by both parties namely, Erick Ratemo V Joash Nyakweba Ratemo (2018) eKLR; Keter Kimtai & another V Christopher Kamau Kiruki, Civil Appeal no. 651 of 2016 and Nicodemus Osoro & Another V Jane Gwatiri (2019) eKLR were not similar or comparable to those sustained by the appellant in this case. The injuries sustained by the plaintiff in Erick Ratemo V Joash Nyakweba Ratemo (Supra) cited by the respondent were less severe. Other than having sustained a fracture on the right femur, the injuries suffered by the claimants in Keter Kimtai & another V Christopher Kamau Kiruki and Nicodemus Osoro & Another V Jane Gwatiri (Supra) cited by the appellant were basically different and more serious.
17. Having found as I have above, I find that an award of Kshs. 500,000 for the nature of injuries the appellant sustained for which she had to undergo a surgical procedure and which healed with a slight deformity of a shortened leg was inordinately low as to be an erroneous estimate of the damage suffered. In my view, taking into account the time when the impugned award was made, I think a sum of 800,000 would have been fair and sufficient compensation for the appellant's pain and suffering.
Consequently, I hereby set aside the trial court's award of Kshs. 500,000 and substitute it with an award of Kshs. 800,000.
18. Turning now to the contest on the award of special damages, the law is that special damages must not only be pleaded but must also be specifically proved.
19. As stated by the Court of Appeal in Doinyo Lessos Creameries Ltd V Elizabeth Angira Chaka [2019] KECA 1046 (KLR);

“A claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity.

The court went further to quote with approval Lord Goddard, CJ's statement in the case of Senham Carler Vs. Hyde Park Limited [1948] 64 JLR 177 when he stated as follows;



“... Plaintiffs must understand that if they bring a document for damages, it is not enough to write particulars and so to speak, throw them at the Court saying this is what I have lost, I ask you to give these damages they have to be proved”.

20. In this case, the appellant pleaded special damages made up as follows;

Police abstract..... Kshs. 200

Househelp expenses Kshs. 54,000

Commuter Expenses Kshs. 36,200

Medical report.....Kshs. 3,000

Copy of records..... Kshs. 550

21. In support of her claim for commuter and house help expenses, the appellant exhibited numerous copies of petty cash vouchers which only bore her name. As the learned trial magistrate correctly stated, the petty cash vouchers as far as the claim for house help expenses were concerned, did not show who allegedly received the payment, if at all. The recipients were not called as witnesses to confirm receipt of the monies as alleged.

22. It is also quite interesting to note that the same petty cash vouchers which were apparently issued by the appellant herself were also used as proof of payment of commuter expenses. No receipts issued to the appellant by a transport operator were exhibited as proof of this claim.

23. In view of the above, I wholly agree with the trial court that the appellant failed to specifically prove her claim for both house help and commuter expenses. This therefore only left the claim for cost of the police abstract, medical report and copy of records as the only costs which were pleaded and proved. The said costs amounted to Kshs. 3,750 which is the amount that was awarded to the appellant.

24. In the premises, I have no reason to fault the learned trial magistrate for this award because as demonstrated above, this was the only amount that was specifically claimed and proved as required by the law.

25. For the foregoing reasons, the appeal partially succeeds to the extent that the award of general damages by the lower court is set aside and substituted with an award of Ksh. 800,000. The award shall attract interest at court rates from date of judgement by the trial court until payment in full.

The appeal against the trial court's award of special damages fails. The award by the trial court of Kshs. 3,750 is hereby confirmed. Interest on the amount will accrue at court rates from the date suit was filed until payment in full.

26. Costs follow the event but are awarded at the court's discretion. Since the appeal has partially succeeded, each party shall bear its own cost of the appeal. The appellant's costs in the lower court shall however be borne by the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 20TH DAY OF NOVEMBER 2024.

HON. C.W. GITHUA

JUDGE

In the presence of :

Ms. Kariuki for the respondent



No appearance for the Appellant
Ms. Susan Waiganjo Court Assistant

