



**Gitonga v Mutuma (Civil Appeal E188 of 2023)
[2024] KEHC 13868 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E188 OF 2023
CJ KENDAGOR, J
NOVEMBER 6, 2024**

BETWEEN

KENNETH GITONGA APPELLANT

AND

JAMES MUTUMA RESPONDENT

JUDGMENT

1. On 8th January 2022, the Respondent was knocked down by the Appellant’s motor vehicle Registration no KCD 238Z as a result of which the Respondent sustained grievous bodily injuries. The Respondent sued the Appellant vide Civil Case No E110 of 2022 in which he sought special damages of Kshs.20,500/= as well as general damages. In the Plaint, the Respondent claimed that he suffered the following injuries; multiple bruises on the forehead and scalp, left shoulder tenderness, left elbow wound, swollen left index finger, multiple bruises, right knee and leg, right knee pain, and fracture of the left femoral epicondyle.
2. The Appellant filed a Statement of Defense in which he denied the occurrence of the accident and liability. However, before the matter in Court could be heard, the parties entered in consent on issue of liability and the same was adopted by the Court. The consent read; “By consent liability be apportioned as 80:20 in favor of the [Respondent]. The [Respondent] to go for re-examination by defense Doctor and the [Appellant] be at liberty to file the report alongside the submissions on quantum.” The parties filed submissions on the issue of quantum.
3. The Court delivered the judgment on 5th October 2023, in which it awarded the Respondents Special Damages of Kshs.20,000/= and General Damages of Kshs. 1,200,000/- (Subject to deduction of his 20% contribution). In total, it awarded the Respondents Kshs.980,000/=. It also gave him costs of the suit and interest.



4. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 3rd November, 2023. He listed 5 grounds of appeal which are as follows;
 - a. That the learned trial magistrate erred in law and in fact by awarding Kshs.1,200,000/= in general damages for pain and suffering, which was inordinately high as to constitute a miscarriage of justice in the circumstances of the case.
 - b. That the learned trial magistrate erred in law and fact by awarding Kshs.20,000/= in special damages that were not strictly proved so as to constitute a miscarriage of justice in the circumstances of the case.
 - c. That the learned trial magistrate erred in fact and in law in failing to consider the Appellant's documents that were filed and produced in Court.
 - d. The learned trial magistrate erred in law and fact in failing to consider the submissions made by the Appellant on quantum and the legal authorities provided thereof, hence arriving at an erroneous decision.
 - e. The learned trial magistrate's judgment as a whole is not supported by the evidence tendered in Court by the parties and the relevant legal principles.
5. He requested the Court to allow the Appeal. He also requested the Court to proceed and set aside the award on general damages and special damages on Maua CMCC No E110 of 2022 and reduce the same in terms of Appellant's submissions.
6. The Appeal was canvassed by way of written submissions. The Respondents filed their written submissions but the Appellants did not file, despite being given the opportunity to file.

The Respondent's Written Submissions

7. The Respondent submitted that there are no reasons to disturb the judgment of the lower Court or to alter the damages awarded. He argued that the award of Kshs.1,200,000/= as General Damages was reasonable in the circumstances. He submitted that the award should not be reduced because the accident had a great impact on the plaintiff's life and has rendered him economically poor. He argued that he experiences difficulties in walking and that it has hindered him from going about his manual jobs which he used to engage in before the accident.
8. He also defended the lower Court's award of special damages of Kshs.20,500/=. He submitted that the same should not be disturbed because they were well proved at the lower Court by production of receipts. He urged this Court to dismiss the Appellant's Appeal and uphold the trial Court's judgment.

Issues for Determination

9. I have studied the Appellant's Grounds of Appeal and the Respondent's submissions and I find that there is only one issue for determination;
 - a. Whether the trial court's assessment of quantum of damages was excessive in the circumstance.
10. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. 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..."

Whether the trial court's assessment of quantum of damages was excessive in the circumstance

11. I find it prudent to first establish the nature of injuries sustained by the Respondent from the accident, so that I can determine whether damages awarded were fair and reasonable.
12. The Parties are in agreement on the nature of the injuries sustained by the Respondent. In his plaint dated 22nd April 2022, the Respondent outlined the injuries as follows;
 - i. Multiple bruises on the forehead and scalp,
 - ii. Left shoulder tenderness,
 - iii. Left elbow wound,
 - iv. Swollen left index finger,
 - v. Multiple bruises, right knee and leg,
 - vi. Right knee pain, and
 - vii. Fracture of the left femoral epicondyle.
13. All these injuries were contained in a medical report written by Dr. Mwititi dated 20th January, 2022. In addition, the Appellant's did a second medical examination on the Respondent on 7th August, 2023. The second report was done by Dr. P.M. Wambugu, who identified two types of injuries sustained by the Respondent. They were chip fracture left femoral lateral epicondyle and scalp bruises.
14. The parties also adduced evidence on the effects of these injuries to the Respondent's lifestyle and means of livelihood. The first medical report indicated that the Respondent had several body aches and difficulty in walking. It also noted that at the time of the examination, the Respondent was not in position to continue with his manual jobs and that the accident had rendered him economically poor.
15. The second medical report indicated that the Respondent did not suffer total permanent incapacitation and that no further complications are envisaged. He also noted that the Respondent had since fully recovered from the skeletal and soft tissue injuries he had sustained in the injuries. I note that the second medical report was conducted 1 year, 7 months after the first medical report. I also note that the parties did not dispute the contents of the two medical reports.
16. In arriving at my decision on whether I should review or interfere with the quantum of damages, I am guided by Court of Appeal's decision in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55. In the case, the Court held that an Appellate Court should exercise caution and restraint where it has been called upon to review the trial Court's award of damages. It stated:-

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial Court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some



relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

17. Similarly, this Court appreciates the observations of the Court of Appeal in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, where the Court outlined the exceptional circumstances on which an appellate court can interfere with the award of damages. The Court said:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

18. Based on the above authorities, it appears to this Court that an Appellate Court can interfere with an award of damages if the same is a wholly erroneous estimate of the damage suffered by being so inordinately high or low.

19. The Courts have gone ahead and established parameters that should help a Court determine whether a particular award of damages is an erroneous estimate of the damage suffered. In *Charles Oriwo Odeyo vs. Apollo Justus Andabwa & Another* [2017] eKLR, the court held:-

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. Similarly, in the case of *Penina Waithira Kaburu v LP* [2019] eKLR, the Court should guide a court in arriving at the correct estimate of quantum of damages. It held:-

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”

20. Based on the above authorities, one principle runs across: The principle that generally, the Courts should make similar awards for persons who have suffered similar injuries. The principle calls upon the court to conduct a comparative analysis of injuries sustained and the extent of the awards made for similar injuries in previous decisions.

21. The Respondent suffered the following injuries; Multiple bruises on the forehead and scalp, left shoulder tenderness, left elbow wound, swollen left index finger, multiple bruises, right knee and leg, right knee pain, and fracture of the left femoral epicondyle. In addition, he was in pain, he had



difficulties in walking, and he could not continue with his manual jobs. The 2nd medical report, done 1 year and 7 months after the 1st report confirmed that he had undergone full recovery on the skeletal and soft tissue injuries identified by the 1st report. It also showed that there was no total permanent incapacitation and no further complications are envisaged.

22. The Court looked at how previous Courts assessed damages in cases where the party suffered similar injuries to those sustained by the Respondent. This case bears striking similarities with the case of Lawrence Wairimu Wainyoike & another v Joseph Letting [2021] eKLR, where the Court awarded a party Kshs.800,000/= for general damages. In the case, the parties agreed on liability and apportioned it at 80:20 in favor of the Claimant, there was no permanent disability, the Plaintiff suffered one fracture on the left clavicle and the rest were soft issue injuries. The current case has exactly similar facts; parties apportioned liability at 80:20, there is no permanent disability, the Respondent suffered one fracture, and the rest were soft tissue injuries.
23. The facts of this case are also similar to that of Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Adano Isacko [2019] eKLR, where the Court awarded the party Kshs.700,000/= as general damages. In the case, the parties had agreed on liability and settled it at 80:20, the party suffered a fracture of the clavicle, and there was no permanent incapacity. These facts are similar to those of the current case. I note that this case was decided 5 years ago, and I have factored the issue of inflation.
24. Considering the injuries sustained by the Respondent and particularly the fact that the Respondent had fully recovered and suffered no permanent disability, I find the sum of Kshs. 1,200,000/= excessive. I think a sum of Kshs. 800,000/= would keep the award within the margin of prevailing awards. Consequently, I allow the appeal to the extent that I set aside the lower Court's judgment awarding the respondent Kshs.1,200,000/= as general damages and substitute the same with an award of Kshs.800,000/=, subject to 20% contributory negligence. The sum shall accrue interest at Court rates from the date of judgment before the trial Court.
25. I find no reason to interfere with the trial Court's award of special damages.
26. The Respondent shall bear the Appellant's costs assessed at Kshs.50,000/=.
27. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 6TH DAY OF NOVEMBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Ms. Beryl

No attendance for the Appellant

Ms. Asuma Advocate holding brief for Mutembei Advocate for the Respondent

