



**Osienna v Wamalwa (Civil Appeal E160 of 2023)
[2024] KEHC 14208 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E160 OF 2023
RE ABURILI, J
NOVEMBER 14, 2024**

BETWEEN

VINCENT PAUL OTIENO OSIENYA APPELLANT

AND

WINNY BENTAH MACHUMA WAMALWA RESPONDENT

*(An appeal arising out of the Judgment of the Honourable J.N.
Wambilyanga in the Chief Magistrate's Court at Kisumu delivered
on the 14th September 2023 in Kisumu CMCC No. 157 of 2020)*

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a plaint dated 1st April 2020 for general and special damages following a road traffic accident that occurred on the 24th May 2017. The respondent averred in her plaint that on the aforementioned date, she was a lawfully fare paying passenger aboard the appellant's motor tri-cycle registration number KTWA 834F that was travelling from Kisumu Airport to Town Centre. The respondent testified that at the junction of Obote road, the said motor tri-cycle was so carelessly driven that it lost control and over turned in the middle of the road thus causing her severe bodily injuries.
2. The appellant filed a statement of defence dated 21st May 2020 denying the contents of the plaint and further that without prejudice if any accident did occur it was due to the negligence on the part of the plaintiff.
3. In her judgement, the trial magistrate apportioned liability in the ratio of 90:10 against the appellant. The trial magistrate found that the respondent had proved her injuries based on the documents provided by St. Jairus Hospital where the respondent had been treated. She awarded the respondent general damages of Kshs. 600,000 and proven special damages of Kshs. 102,145.



4. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 26th September 2023 raising the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and in fact in awarding general damages of Kshs. 600,000 which award was excessive and not commensurate to the nature of injuries sustained by the plaintiff.
 - b. That the learned trial magistrate erred in law and in fact in holding that the plaintiff sustained fracture of the right clavicle and dislocation of the right shoulder.
 - c. That the learned trial magistrate erred in law and in fact in awarding special damages of Kshs. 102,145 which damages were not specifically proved.
 - d. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case she was deciding.
5. The parties agreed to canvass the appeal by way of written submissions.

The Appellant's Submissions

6. The appellant disputed the fracture of the right clavicle and dislocation of the shoulder joint submitting that on cross examination the respondent admitted that she did not produce an initial x-ray report to prove the same whereas the one produced was dated over 3 weeks after the discharge. The appellant further submitted that the doctor who filled the P3 form emanated from the facility and did not indicate the alleged injuries whereas there was also no evidence of surgery and further treatment confirming management of a fracture or dislocation.
7. It was thus submitted that the Respondent's injuries were soft tissue in nature and therefore, the trial magistrate erred in awarding excessive damages based on a fracture and dislocation that never were.
8. The appellant submitted and urged this Court to disturb the award of Kshs. 600,000 in general damages as the same was so high as to be an erroneous estimate because the Plaintiff sustained soft tissue injuries. The appellant relied on the following cases as cited in Michael Okello v Priscilla Atieno [2021] eKLR:
 - a. George Mugo & another v AKM (minor suing through next friend and mother of A.N.K [2018] where Kemei J awarded Kshs. 90,000/= for similar soft tissue injuries.
 - b. George Kinyanjui T/A Climax Coaches & Another v Hussein Mahad Kuyala [2016] eKLR where the Respondent sustained injuries on his chest, neck, knees and lost two teeth and the High Court on appeal reduced an award of Kshs. 650,000/= to Kshs. 109,890/=; upon a finding that the loss of teeth was unrelated to the accident in question, as the Respondent had sustained soft tissue injuries.
 - c. Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR where Prof Ngugi Joel J reduced general damages for soft tissue injuries from Kshs. 300,000/= to Kshs. 100,000/=.
9. The appellant further relied on the case of PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & another [2018] eKLR, where the Plaintiff in the lower Court had been awarded Kshs. 50,000 for sustaining; a) Cut wound to the forehead, b) Multiple small abrasions to the face, c) Blunt injury to the head leading to loss of consciousness for some time, d) Abrasions to the back, e) Abrasion wounds to the dorsum of the right hand and f) Cut wound to the right leg and on appeal, the award was enhanced to Kshs. 100,000/=.



10. The appellant also relied on the following cases as cited in *Blue Horizon Travel Co Ltd v Kenneth Njoroge* [2020] eKLR:
 - a. *Godwin Ileri v Franklin Gitonga* [2018] eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs. 300,000/= was reduced to Kshs. 90,000/= on appeal.
 - b. *Lamu Bus services & Anor –vs- Caren Adhiambo Okello* (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh. An award of Kshs. 200,000/= was reduced to Kshs. 130,000/= on appeal.
11. In this case, the appellant proposed an award of Kshs. 80,000 to be sufficient general damages for pain, suffering and loss of amenities for the injuries sustained by the respondent. He also prayed for costs of the appeal.

The Respondent's Submissions

12. The respondent submitted that she proved her case on a balance of probabilities as required in civil cases. The respondent further submitted that from the medical documents produced as exhibits during the trial, she sustained; Fracture of the right clavicle; Dislocation of the right shoulder joint, swollen right shoulder and a degloving wound on the right hand exposing the tendons.
13. The respondent relied on the cases of:
 - a. *Lawrence Wairimu Wanyoike & Another v Joseph Letting Eldoret H.C.C.A No. 2 of 2020* where the court upheld the lower court award of Kshs. 800,000 in general damages for pain and suffering and loss of amenities for injuries which were allegedly comparable to the ones suffered by the respondent herein specifically, a fracture of the right clavicle.
 - b. *Jaldessa Diba T/A Dikus Transporters & Another v Joseph Mbithi Isika Machakos H.C.C.A No. 96 of 2011* where the court awarded the plaintiff Kshs. 350,000 in general damages for injuries involving dislocation of the right shoulder joint as well as other soft tissue injuries.
 - c. *Francis Ochieng v Gabriel Ongele Ogolla & Another Migori H.C.C.A No. 23 of 2015* where the judge awarded the plaintiffs Kshs. 350,000 in general damages for injuries involving dislocation of the left shoulder.

Taking into consideration the aforementioned authorities, it was submitted that the trial court's award of Kshs. 600,000 in general damages was reasonable and not overly excessive.
14. On special damages, it was submitted that the respondent incurred, pleaded and proved the special damages claimed and awarded.
15. The respondent thus urged this court to dismiss the instant appeal on quantum with costs and interest both in the lower court and in this appeal.

Analysis and Determination

16. This appeal is against quantum only and it being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due



allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“[A]n appeal to this Court from a trial by the High 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 allowances in this respect.”

17. Having considered the grounds of appeal and the submission in favour of and against the appeal, I find the only issue for determination to be whether the quantum for general damages awarded by the trial court was manifestly excessive.
18. It is now a settled principle of law that an appellate court would not easily interfere with the trial courts’ discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding. As stated by the Court of Appeal in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia* (1985) 1 KAR 727:

“... the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages...”
19. The same Court in *Odinga Jackton Ouma v Moureen Achieng Odera* [2016] eKLR stated that-“comparable injuries should attract comparable awards”.
20. The contest on quantum of damages is with regard to the injuries suffered by the Respondent in the material accident. According to the Appellant, the injuries that were sustained by the Respondent based on the initial treatment notes were in the nature of soft tissue injuries. The respondent on her part has argued that her medical evidence on record confirmed that he sustained fracture of the clavicle and other multiple injuries. This issue is crucial and must therefore be determined first as the amount of damages to be awarded must wholly depend on the injuries sustained.
21. In the respondent’s plaint dated 1st April, 2020, it was pleaded that she sustained the following injuries:
 - a. Fractures of the right clavicle
 - b. Dislocation of the right shoulder joint
 - c. Swollen right shoulder
 - d. Degloving wound on the right hand exposing tendons
22. The treatment notes from St. Jairus Hospital indicated that the respondent was admitted on the 24th May 2017 and discharged on the 1st June 2017 and that the injuries that she sustained in the road traffic accident, for which she was being treated as an in-patient were injuries to the right shoulder and that an x-ray had to be done. The respondent also produced an x-ray report stamped by St. Jairus Hospital taken on the 10th July 2017 that showed that the respondent had sustained a fracture of the right clavicle and dislocation of the shoulder joint.
23. The injuries pleaded match with those stated in the P3 form that was filed on the 9.6.2017.



24. It is clear therefore from the treatment notes and the P3 form that the Respondent sustained a fracture of the right clavicle and other injuries which are soft tissue injuries in nature.
25. The Appellant has principally claimed that the respondent did not sustain a fracture but soft tissue injuries only. Based on that belief he is of the view that the award on general damages were excessive.
26. In support of his defence, the appellant relied on the medical report prepared by Dr. Jenipher Kahuthu dated 27th August 2020, more than three years after the accident had occurred. In DW1's testimony, Dr. Steve Ochieng testified that normally, a fracture heals in 6 – 8 months and that the examination by Dr. Kahuthu was carried out 3 years after the fracture had already healed.
27. DW2, Dr. Javan Kiako also testified that he x-rayed the respondent three years after the accident and that he relied on x-rays presented by Directline Insurance, the appellant's insurer and not the respondent.
28. The evidence on record is clear on the injuries sustained by the Respondent. I do not find any exaggeration. From the authorities cited by the parties both in the lower court and in this appeal, I have no reason to interfere with the finding by the learned trial magistrate. I find the award to be within the range of damages awarded for similar injuries.
29. Consequently, I uphold the award of Kshs. 600,000/- as general damages awarded by the trial court, less 10% contribution as apportioned.
30. Turning to the issue of special damages, it is trite that they must be specifically pleaded and strictly proven. The respondent herein pleaded for special damages of Kshs. 102,145 and produced a receipt for the same amount from St. Jairus Hospital and that was dated 1st June 2017. I have no reason to interfere with the finding by the trial magistrate in awarding special damages which were pleaded and proved.
31. Accordingly, I find no merit in this appeal which I hereby dismiss with accosts assessed at Kshs 30,000 to the respondent payable within 60 days of today and in default, the respondent shall be at liberty to execute for recovery.
32. I further order for the release of the balance of security for the due performance of decree as deposited in the joint interest earning account held by both parties' counsel to this appeal, the law firms of Kimondo Gachoka & Company Advocates and Geoffrey O. Okoth & Co Advocates, vide the order of this court made on 5/2/2024, to the law firm of Geoffrey O. Okoth & Company Advocates for onward transmission to the respondent/plaintiff.
33. Save for the recovery of the already assessed costs, this file is closed.
34. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 14TH DAY OF NOVEMBER, 2024

R.E. ABURILI
JUDGE

