



REPUBLIC OF KENYA



**Songor & another v Sang (Civil Appeal E005 of 2023)  
[2024] KEHC 14766 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14766 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL APPEAL E005 OF 2023  
RB NGETICH, J  
NOVEMBER 21, 2024**

**BETWEEN**

**ANDREW SONGOR ..... 1<sup>ST</sup> APPELLANT**

**BARINGO COUNTY GOVERNMENT ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SUSAN SANG ..... RESPONDENT**

*(This appeal emanates from a judgment delivered by Hon. Caroline R.T Ateya on 22<sup>nd</sup> February, 2023 in Kabarnet Civil Suit No. 65 of 2018)*

**JUDGMENT**

1. The Respondent filed suit against the Appellants vide plaint dated the 24<sup>th</sup> July, 2018 seeking general damages, special damages, costs of the suit and interest thereof arising from a road traffic accident which occurred along the Kabarnet-Tenges road on or about 13<sup>th</sup> January, 2017 when Motor Vehicle Registration Number 30CG060A owned by the 2<sup>nd</sup> Appellant and driven negligently by the 1<sup>st</sup> Appellant lost control, veered off the road and hit the trees as result whereof the Respondent sustained injuries.
2. The Respondent blamed the Appellants for the alleged accident and set out particulars of negligence in the Plaint. The Respondent testified and adopted her statement filed on 30<sup>th</sup> July, 2018 and filed submissions dated 2<sup>nd</sup> March, 2021 in support of her case. The Appellants denied the claim but did not call any witnesses.
3. By judgment delivered on 22<sup>nd</sup> February, 2023, Honourable Caroline R.T Ateya (Ms.) Principal Magistrate Kabarnet found the Appellants 100% liable jointly and severally and assessed damages at Kshs. 1, 132,610/= plus costs and interests be paid to the Respondent as Damages.



4. The appellant being aggrieved and dissatisfied with the said judgement filed memorandum of appeal dated 22<sup>nd</sup> March, 2024 on the following grounds: -
  - i. That the Honorable Learned Magistrate erred in law and in fact in finding that the Plaintiff was entitled to general damages of Kshs. 1,000,000/= that was inordinately too high in view of the injuries suffered by the Plaintiff.
  - ii. That the Honorable Learned Magistrate erred in law and in fact by failing to consider the Defendant's submissions on quantum.
  - iii. That the Honorable Learned Magistrate erred in law and in fact in failing to consider conventional award for general damages in cases of similar injuries.
  - iv. That the Honorable Learned Magistrate erred in law and in fact in making an award for special damages of Kenya shillings One hundred and thirty-two thousand, six hundred and ten (Kshs. 132, 610/=) that had not been pleaded and strictly proved by the Plaintiff.
5. The Appellant is seeking the following prayers: -
  - a. That the appeal be allowed and the entire judgement be set aside.
  - b. That this Honorable Court be pleased to assess downwards the quantum of damages for pain and suffering.
  - c. That this Honorable Court be pleased to assess downwards the quantum of special damages.
  - d. That the Respondent do pay the costs of this appeal.
  - e. That such further relief as may appear just to the Honourable Court.
6. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

7. The appellant submitted that the Respondent sustained fracture of right humerus and bruises on the legs and award of kshs 1,000,000 was inordinately high on ground that as per Dr. Kiamba, the injuries had healed but the plaintiff was still experiencing pain in the hand and would require about 100,000/= to remove the metal plate. They relied on the case of Janet Opiyo & anor vs Stephen Tuwei Eldoret HCCA 77 of 2007, where more severe injuries were sustained by the Respondent herein and the case of Said Abdullahi & another v Mice Wanjira [2016] eKLR in which an award of Kshs. 300,000/= was made on appeal to a plaintiff who sustained a fracture of the right humerus bone and degree of permanent incapacity at 10%.
8. The appellant further relied on the case of *Maina Onesmus v Charles Wanjobi Githome [2019] eKLR Civil Appeal 3 of 2018* in which the High Court revised the Trial Court's award of Kshs. 600,000/= to Kshs. 350,000/= where the Respondent suffered a fracture of the midshaft humerus, a fracture of the condyles, a fracture of the shoulder gird and pain and psychological trauma. The appellant prayed that the award be revised downwards to Kshs. 300, 000/=.
9. In respect to award of kshs. 132, 610/= as special damages, the appellant submit that it is trite law that special damages should be specifically pleaded and proven but the Respondent pleaded for special damages of Kshs. 128, 210/= and produced receipts amounting to Kshs. 128, 210/= which ought to have been awarded but the trial magistrate awarded Kshs. 132, 610/= which had neither been pleaded



nor proven and submit that parties are bound by their pleadings and urged this court to revise special damages downwards to Kshs. 128, 210/=and prayed for costs of the appeal.

### **Respondent's Submission**

10. The Respondent submits that the only issue for determination is on award of damages and it is not in dispute that the Appellants are 100% liable jointly and severally for the accident and Appellants have not appealed on the finding on liability.
11. The appellants submit that the assessment of general damages is at the discretion of the trial court and the appellate court can only interfere where the trial court took into account an irrelevant factor or left out a relevant factor or where the award was too high or too low as to amount to an erroneous estimate or that the assessment was based on no evidence. They relied on the case of Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR where the Court of Appeal listed the circumstances under which an appellate court can interfere with an award of damages and in the case of Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR where the court stated as follows:

“It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance.”
12. The Respondent submit that it is not in dispute that the Respondent sustained serious bodily injuries being fracture of the right humerus and bruises on the legs and the Respondent underwent a major surgical operation involving open reduction and internal fixation of plate. The Respondent has not yet healed and she needs to undergo further medical operations to remove the plate.
13. They submit that the award of Kshs. 1, 000,000/= as general damages by the trial court was fair and reasonable. That the trial court computed the award based on [Janet Opiyo & Another V Stephen Tuwei \[2012\] eKLR - Civil Appeal 77 Of 2007](#) where the Plaintiff sustained similar injuries and the Court awarded general damages of Kshs. 600,000/= on 12<sup>th</sup> June, 2007 and submit that the trial court was justified in awarding Kshs. 1,000,000/= considering the effect of inflation and as such the trial court was within its discretion.
14. In respect to special damages, the Respondent submit that he specifically pleaded and proved special damages in the sum of Kshs. 128,210/= in the trial; that he produced receipts and treatment chits from Baringo County Referral Hospital and a discharge summary from Provincial General Hospital-Annex plus medical report from Dr. Kiamba which are sufficient proof that she was injured and treated.
15. In conclusion, the Respondent submit that the Appellants have failed to demonstrate to this Honourable Court how the Honourable Learned Magistrate erred in law and fact by failing to consider their submissions on quantum. Further that the case of Eldoret HCCA 113 OF 2006; Luka Osoro & Anor -vs Daniel. K. Cheruiyot was decided in 2006 which is 18 years ago and therefore an authority which is clearly not comparable with the current economic realities, trends of inflation and passage of time. That the trial court considered all facts and law including authorities presented by both parties in their submissions before awarding damages totaling to Kshs. 1,132,610/= and thus the amount awarded is not excessive to warrant this Honourable Court to interfere with it. He urged this Court to find that this appeal lacks merit and dismiss with costs and interests to the Respondent both in the Trial Court and in this court.



## Analysis and Determination

16. I have considered the issues raised in this appeal. The parties are in agreement that the only issue for the determination is assessment of the damages awarded to the Respondent. This being a first appellate court, the principles that govern the first appellate court were set out in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 where the court stated as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

17. Further, in the case of *Catholic Diocese of Kisumu v Tete* [2004] eKLR the Court of Appeal identified the circumstances under which an appellate court can interfere with an award of damages as follows:

“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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”

18. And in the case of *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457, the Court of Appeal stated that:

“This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:

- (a) proceeded on a wrong principle; or
- (b) Misapprehended the evidence in some material respect.”

19. From the foregoing, this court has a duty to re- analyze evidence adduced before the trial court and arrive at its own independent conclusion. However, unlike the trial court, the appellate court did not get the advantage of observing the demeanor of witness and will therefore give due allowance in that respect.

20. The appellant is challenging the award of kshs 1,000,000 under general damages on the ground that it is inordinately high and award under special damages on ground that the amount pleaded was Kshs. 128,210/= and amount awarded was 132, 610/= and their argument is that parties are bound by their pleadings.



21. The principles governing compensation for personal injury are principally three-fold as set out hereunder:-
- a. Compensation for personal injury suffered, so far as money can do so, to restore the plaintiff to his position before the accident but money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”
  - b. Comparative awards for comparative injury. *Kigaragari v. Aya* (1985) KLR 273 where the Court of Appeal (Hancox, Nyarangi, JJA. and Platt, Ag. JA) it was held that in awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.”
  - c. Compensation figures should not to be so high as to threaten the economy. In the case of *Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] eKLR where Kneller JA held that the high court is only entitled to increase damages if it is so inordinately low it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge proceeded on a wrong principle or misapprehended the evidence in some material respect.”
22. I have compared the injuries sustained by the Respondent with injuries suffered by victims in the authorities and lapse of time from the time the said authorities were decided and considering the rate of inflation and the fact that the Respondent is yet to go through surgical process of removal of metal plate, I am of the view the award by the trial court is not inordinately high as submitted by the appellant. The award under general damages is reasonable considering the injuries sustained by the respondent and the resulting effect of the injuries.
23. In respect to special damages of Kshs.132, 610/=, I note from pleadings that the Respondent pleaded for special damages of Kshs. 128, 210/=. The Respondent in her testimony in court produced documents/ receipts amounting to Kshs.132,610 which was awarded by the trial court. There is no indication that the prayer for special damages was amended to reflect the total amount in receipts produced in court. It is trite law that parties are bound by their pleadings. The trial court erred in awarding kshs 132,610 instead of the pleaded amount of kshs 128,610. I will therefore interfere with award under special damages and award the pleaded amount of kshs 128,610.

**Final Orders: -**

1. Appeal partly succeeds.
2. Award under general damages to remain as assessed by the trial court.
3. Award under special damages reduced to kshs 128,610.
4. Costs of the lower court to the Respondent.
5. Each party to bear own costs of appeal.



**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 21<sup>ST</sup> DAY  
OF NOVEMBER 2024.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of

CA Elvis

Mr.Mbiyu for Respondent

ms. Musyoka for Appellant.

