



**Owuor v Catch Security Links Limited (Civil Appeal E042 of 2023)
[2024] KEHC 16972 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E042 OF 2023
F WANGARI, J
DECEMBER 6, 2024**

BETWEEN

EMMA ATIENO OWUOR APPELLANT

AND

CATCH SECURITY LINKS LIMITED RESPONDENT

*(Appeal from the Judgment and Decree of Hon. Viola Muthoni
delivered on 21/02/2024 in Mombasa SCCC No. E569 of 2023)*

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Viola Muthoni delivered on 21/02/2024 in Mombasa SCCC No. E569 of 2023. The Appeal is on quantum and liability.
2. Through the Statement of Claim dated 13/10/2023, the Respondent claimed general and special damages as a result of injuries as a result of a dog bite wound which occurred on 05/07/2023. It was averred that the Claimant/ Appellant was walking in Wayani area when she was attacked and bitted by the Respondent's dog out of negligence and carelessness of the Respondent.
3. In their Response to Statement of Claim dated 21/11/2023 the Respondent blamed the Claimant for the injuries due to her negligence by trespassing on the land that was guarded by dogs despite the warning issued. It was further averred that the Claimant did not suffer bite wounds but small scratch with no bleeding. The Respondent prayed that the claim be dismissed with cost.
4. The Trial Court heard the parties and proceeded to render judgement on 21/02/2024. In the Judgement, the Court entered liability at 30% liability against the Appellant and 70% against the Respondent. Kshs. 70,000 was awarded as General Damages for pain and suffering, and Kshs. 3,500 as Special Damages less 30% contributory negligence.



5. Aggrieved by the finding of the Trial Court, the Claimant/Appellant lodged a Memorandum of Appeal hence this Appeal. The appeal was on quantum and liability. The General Damages were said to be inordinately too low while the court was faulted in finding the Appellant to have contributed to the negligence.
6. The Respondent filed a Cross-Appeal faulted the trial court by awarding the Claimant General and Special Damages, and further finding the Respondent 70% liable for the dog attack incidence, yet the Claimant was 100% liable for the incidence. It was prayed that the appeal be dismissed and the cross appeal be allowed.

Submissions

7. Upon filing this appeal, this court directed that the appeal be disposed of by way of written submissions and both parties complied by filing of rival submissions. The Appellant filed submissions dated 29/07/2024 submitted that the trial court's award of Kshs. 70,000 as General Damages was inordinately low and should be enhanced to Kshs. 250,000. It was further submitted that the Respondent should be held 100% liable for the incidence, and with costs to the Appellant. She cited authorities in support of the claim of Kshs. 250,000 as General Damage⁶.
8. The Respondent in the submissions dated 26/09/2024 stated that the trial court failed in awarding General and Special damages to the Claimant, and finding the Respondent liable, yet it was the Appellant who had trespassed into the premises which was guarded by the Respondent, despite the warnings that the premises was guarded by dogs.
9. It was averred that despite the Appellant's negligence, the Respondent took her to hospital and catered for the expenses incurred on humanitarian grounds, only for the Appellant to take advantage and started extorting money from the Respondent. He prayed that the appeal be dismissed with costs.
10. Since the law requires that there be submissions on quantum, it was submitted that Kshs. 15,00 would have been adequate compensation since only minor injuries were sustained. The Respondent relied on the cited cases in support of the award proposed.

Analysis

11. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see *Peters vs Sunday Post Limited* [1958] EA 424 and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)

Liability

12. The trial court apportioned liability on 30:70 basis as against the Respondent. From the evidence on record, the premises was not fenced as the public had vandalized the fence. The Respondent owed the road users the duty of care. It is also on record that members of public used the road in the premises frequently. The Appellant would even sell porridge to the guards employed by the Respondent. She also had a duty to ensure that she was safe having known that the premises was guarded by dogs.
13. I have perused through the finding of the trial court on liability. I find no reason to interfere with the finding of the trial magistrate and the apportionment on liability is upheld.



Quantum

14. The Appellant submitted that an award of Kshs. 70,000 was too low for general damages for pain and suffering as commensurate compensation in the circumstances of this case. On the other hand, the Respondent averred that the suit ought to have been dismissed with costs, and hence the cross-appeal should be allowed.
15. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”
16. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.
17. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another* Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.
18. There is no dispute that the Respondent suffered the injuries as pleaded. In assessing injuries, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages.
19. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
20. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
 - 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) The awards should not be inordinately low or high.
21. The Appellant suffered dog bite wounds and not scratches as alleged by the Respondent. The bite was said to be minor with no bleeding. I find the award of Kshs. 70,000 by the trial is adequate and sufficient. The award shall not be interfered with.



22. On the issue of costs, the award is discretionary. The trial court specifically pronounced itself on the same, that each party do bear its own costs. Both parties having been held liable for the incidence, the trial court was right in directing that each party bears its own costs.

Determination

23. In the upshot, I make the following orders: -

- a. The Appeal and the Cross-Appeal have got no merits and they are both dismissed.
- b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 6TH DAY OF DECEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

M/S Nyanja Advocate h/b for Mung'oma Advocate for the Appellant

M/S Kerubo Advocate h/b for Bosire Advocate for the Respondent

Brian, Court Assistant

