



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E031 OF 2024

PELTON TRANSPORTERS LIMITED.....1ST APPELLANT
ZEPHANIAHS SAUL OSANYU.....2ND APPELLANT

VERSUS

BEATRICE WAMBUGU GITURU.....RESPONDENT

(Being an Appeal from the Judgment of Honorable S.M Nyaga (P.M) delivered on the 14/3/2024 at Baricho PMCC No. E086 of 2023)

JUDGMENT

- [1] By a plaint dated 14/2/2023, the Respondent sued the Appellants seeking general damages, special damages of Ksh. 81,295 and costs of the suit plus interest. The Respondent pleaded that on or about 18/6/2022, she was a lawful passenger aboard motor vehicle registration No. KCS 459 J along Karatina - Sagana road at Kibirigwa area, when the Appellants, their driver, servant and/or agent so negligently drove, managed and controlled Motor Vehicle Registration No. KBC 481 M that it rammed into the vehicle she was travelling in, as a result of which she sustained injuries.
- [2] The Appellants denied the claim vide their statement of defence dated 10/7/2023 and prayed for the Respondent's suit to be dismissed with costs.
- [3] The parties recorded a consent judgment on liability at the ratio of 10:90 in favour of the Respondent against the Appellants, and upon full hearing on quantum, the trial court awarded Ksh. 1,600,000 for pain and suffering, Ksh. 165,000 for future medical expenses and special damages of Ksh. 290,845 together with costs and interest.

The appeal

[4] On appeal, the Appellants vide their memorandum of appeal dated 8/4/2024 set out 6 grounds as follows:

1. *The learned trial Magistrate erred in law and fact by awarding excessive damages in quantum against the appellant.*
2. *The learned trial Magistrate erred in law and fact by overlooking overwhelming and compelling evidence rendered by the Appellant.*
3. *The learned trial Magistrate erred in law and fact in failing to analyse exculpatory matters that were before the court before it arrived at the eventual determination.*
4. *The learned trial Magistrate erred in law and fact in reaching a determination that was marred by a series of errors of fact.*
5. *The learned trial Magistrate erred in law fact by failing to consider the submissions by the Defendants.*
6. *The learned trial magistrate erred in law and fact by reaching a determination that was mainly influenced by bias.*

Duty of the Court

[5] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

[6] The case was heard by way of written submissions and the Respondent's documents produced by consent.

Submissions on the Appeal

[7] The Appellants urge that a sum of Ksh. 600,000 as general damages would suffice, and cite *Catherine Gatwiri v Peter Mwenda Karasi (2018) eKLR, Julius Kailikia & another v Taricisio Gituma Mithiringi & another (2021) eKLR, DKM v Mwangangi (Civil Appeal 65 of 2021) [2023] KEHC 18105 (KLR) (29 May 2023) (Judgment), Eston Mwirigi Ndege & another v Joseph Macharia Kawira [2019] KEHC 231 (KLR) and Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] KEHC 4895 (KLR)*. They cite *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR), Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212 and*

Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] KECA 137 (KLR) on the duty of the first appellate court.

- [8] The Respondent urges the court to enhance the award of Ksh. 1,600,000 to Ksh. 2,300,000 bearing in mind the multiple major fractures and resultant incapacity, and cites *Ndolo & 2 others v John & 2 others (Civil Appeal E136, E129 & E073 of 2021 (Consolidated)) [2023] KEHC 3643 (KLR) (2 May 2023) (Judgment)*.

Analysis and determination

- [9] From the grounds of appeal as framed, the twin issues for determination are whether the awards were excessive and whether the Appellants’ submissions were considered.

Excessive damages

- [10] This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA) [2020] eKLR* as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v. British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking in some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”

- [11] The injuries sustained by the Respondent are particularized in the medical report of Dr. P.K Mwangi dated 12/9/2022 as a fracture of the right clavicle bone, a fracture of the right humerus bone, a fracture of the left femur bone, blunt soft tissue injuries of the anterior chest,

blunt soft tissue injuries of the right upper arm and blunt soft tissue injuries of the left femur. On examining the Respondent, the doctor noted that, there was a deformity at the right clavicle, internally fixated orthopedic implant at the right clavicle, some tenderness of the anterior abdomen, surgical scar at the right upper arm, a palpable internally fixated orthopedic implant on the right humerus bone, surgical scar at the left upper thigh, palpable internally fixated orthopedic implant at the left femur bone, the left leg was shorter by 3 inches, and due to the implant, there was loss of mobility of the left lower limb.

[12] The doctor opined that the Respondent suffered very severe physical pain, emotional and social stress, and could still not walk without the use of flames. The permanent impairment was assessed at 15% due to shortening of the limb and the estimated cost of the surgical removal of the internally fixated orthopedic implants was Ksh. 200,000. The doctor opined that, ***“The affected bone will certainly suffer early osteoarthritis. Osteoarthritis causes chronic pain that requires use of medication [analgesics, calcium supplements etc] and physiotherapy.”***

[13] When Dr. P.M Wambugu examined the Respondent on 3/11/2023, he estimated the cost of implant removal at Ksh. 130,000 and assessed the degree of permanent incapacity at 18%.

[14] The Respondent was equally examined by Dr. W.M Wokabi on 30/10/2024 who assessed the demonstrable impairment at 55% and estimated the surgical removal of the metal implants at Ksh. 150,000.

[15] The Respondent was admitted at Karatina Sub-County Hospital from 18/6/2022 to 20/6/2022. She was subsequently admitted at Kerugoya County Hospital from 20/6/2022 to 5/7/2022. She was thereafter admitted at Afya Bora Hospital from 5/7/2022 to 19/7/2022, and later at Afya Bora Hospital Annex from 19/7/2022 to 21/7/2022.

[16] Undoubtedly, the Respondent sustained severe injuries to wit 3 fractures of the right humerus, right collar bone and left femur and blunt soft tissues injuries. In the circumstances of this case, the award of Ksh. 1,600,000 by the trial court was reasonable in view of the prolonged hospitalization and the ensuing permanent incapacity.

[17] The estimated cost of removal of the implants of Ksh. 165,000 was not meaningfully challenged, and thus it was properly awarded. The special damages of Ksh. 290,845 were specifically pleaded and strictly proved. There is therefore no justification for interference by this court.

Consideration of the Appellants' submissions

[18] The Appellants' complaint that the trial court for disregarding their submissions and authorities is misconceived because submissions merely guide the court and they cannot take the place of pleadings or evidence and the Court is required to make its decision upon considering the law and facts of the particular case. In addition, a first appellate court is not bound by the conclusions of the trial court and it is required to re-evaluate the evidence on the law afresh. See *Selle*, supra.

ORDERS

[19] Accordingly, for the reasons set out above, the Court finds the Appellants' appeal to be without merit and it is dismissed.

[20] The appellant shall pay the costs of the appeal to the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Situma for Mr. Busiega for the Appellant.

Mrs. Waweru for the Respondent.