



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E033 OF 2024

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

VERSUS

ANTHONY NDIRANGU GACHIGI.....RESPONDENT
(Being an Appeal from the Judgment of Honorable S.M Nyaga (P.M) delivered on the 14/3/2024 at Baricho PMCC No. E083 of 2023)

JUDGMENT

- [1] By Plaint dated 30/5/2023, the Respondent sued the Appellants seeking general damages, special damages of Ksh.58,790 and costs of the suit plus interest. The Respondent pleaded that on or about 18/6/2022, he was a lawful passenger aboard motor vehicle registration No. KCS 459 J along Karatina - Sagana road at Kibirigwi 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 he was travelling in, as a result of which he 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. 800,000 for pain and suffering, Ksh. 100,000 for future medical expenses and special damages of Ksh. 50,315 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. 550,000 as general damages would suffice, and cite **Tabro Transporters Ltd v Absalom Dova Lumbasi (2015) eKLR, Samuel Kipkemoi Kirui v Ibrahim Shero Hussein (2016) eKLR, Wanjohi v M'Alaine (Civil Appeal E155 of 2021) [2023] KEHC 2496 (KLR) (23 March 2023) (Judgment), Jitan Nagra v Abidnego Nyandusi Oigo [2018] KEHC 3078 (KLR) and Mbae (Suing as the Legal Representative of the Estate of Koome Mbae) v Kinya (Civil Appeal E018 of 2022) [2024] KEHC 2285 (KLR) (6 March 2024) (Judgment)**. 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 that the award of Ksh. 800,000 was justified bearing in mind the serious nature of the injuries he suffered, the length of admission in hospital, the permanent incapacity and the incidence of inflation and cites **Charles Wangicho Ndungu & another v Gabriel Wahinya Munene (Civil Appeal 31 of 2020) [2022] KEHC 3023 (KLR) (21 April 2022) (Judgment), Kihara & another v Mutuku (Civil Appeal 27 of 2018) [2022] KEHC 15626 (KLR) (17 November 2022) (Judgment) and Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] KEHC 9802 (KLR)**.

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 fractures of the left femur bone, injuries of the left eye, facial and scalp bruises, blunt soft tissue injuries of the anterior chest and left thigh. On examining the Respondent, the doctor noted that, he had scars on the face and on the scalp, some tenderness on the anterior chest, surgical scar on the left thigh, a palpable internally fixated orthopedic implant in SITU at the left femur, was mobile by help of crutches and the left leg was shorter than the right by 2 inches.

[12] The doctor opined that the Respondent suffered a fractured bone of the left thigh and multiple soft tissue injuries. The doctor observed that, ***“The shortening of the left leg is assessed at 6% Permanent Functional Impairment. He is on medication and physiotherapy. The internally fixated implant will require surgical removal. The cost of the procedure is estimated at kshs. 100,000. The affected bone will certainly suffer early osteoarthritis. Osteoarthritis causes chronic pain that requires use of medication [analgesics, calcium supplements etc] and physiotherapy.”***

[13] The Respondent was equally examined by the Appellant’s doctor, Dr. P. M Wambugu on 3/11/2023 who noted that the metal implants were still in situ. In the doctor’s considered opinion the Respondent, ***“sustained skeletal and soft tissue injuries from which he has since made adequate recovery. The fracture femur has united and the metal implants maybe selectively removed after one year at an estimated all inclusive cost of ksh. 95,000/= in a medium cost private hospital. There is residual left knee joint stiffness coupled with wasting of the quadriceps. I do not hesitate to award him 8% as the degree of permanent incapacitation.”***

- [14] The injuries sustained by the Respondent were mainly soft tissue in nature, save for the single fracture of the left femur. In the circumstances of this case, the award of Ksh. 800,000 by the trial court was manifestly excessive, particularly because the Respondent had substantially recovered and the fracture reunited. There is therefore justification for interference by this court.
- [15] In awarding Ksh. 800,000, the trial court relied on ***Kiara v Mutuku [2022] KEHC 15626 (KLR)***, where the claimant in that case sustained blunt injuries to the chest, blunt injuries left thigh which developed into ecchymosis, bruises on forearms and fracture of the right femur. While the injuries in the cited case and the case at hand appear comparable, the claimant in that case suffered a permanent incapacity of 12%.
- [16] This court is thus persuaded that an award of general damages of Ksh. 600,000 would sufficiently compensate the Respondent for the pain he suffered, taking into account the prevailing inflationary trends and other imponderables.
- [17] The estimated cost of removal of the implants of Ksh. 100,000 was not meaningfully challenged, and thus it was properly awarded.

Consideration of the Appellants' submissions

- [18] The Appellants fault the trial court for disregarding their submissions and authorities. That fault is misconceived because submissions merely guide the court, and cannot take the place of pleadings. Consequently, the failure to expressly consider them cannot in itself be a basis to overturn a trial court's decision, as was aptly put by the Court (*Patrick J.O Otieno J.*) in ***Charles Mutuma M'kanake v Diocese of Meru Trustees Registered [2021] eKLR*** thus:
- "This court takes the view and position that such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision."*
- [19] The fact that the trial court was not persuaded by the submissions of the Appellants together with the authorities they cited does not imply that they were disregarded.

ORDERS

- [20] Accordingly, for the reasons set out above, the Court finds that the Appellants' appeal is merited and it is allowed in the following terms:
1. The trial court's award of general damages of Ksh.800,000 is set aside and substituted with Ksh.600,000.
 2. The other awards remain unchanged.
 3. There shall be no order as to costs.

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.