

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E062 OF 2023

ELLY ANGULU ABUCHERIAPPELLANT

-VERSUS-

**SHAM BUILDERS CONTRACTORS LIMITED.....
RESPONDENT**

(Being an Appeal from the Chief Magistrate's Court at Bungoma in CMCC No. 293 of 2018 delivered by Hon. G.P. Omondi, Principal Magistrate on 16th May 2023.)

JUDGMENT

1. The Appellant, who was the Plaintiff in the trial court, sued the Respondent via Plaint dated 8th June 2018, seeking the following prayers: -
 - (1) General Damages**
 - (2) Special Damages**
 - (3) Costs of the suit**
 - (4) Interest on (1), (2) and (3) above.**
2. The Plaintiff's case was that on or around 22nd February 2017, the Plaintiff was a pedal cyclist along Bungoma-Kanduyi Road at Elgon View Area when the Defendant's motor vehicle, Registration No. KCE 151L Tata lorry, was negligently and without due care and attention driven by the Defendant, causing an accident in which it knocked the Plaintiff. As a result, the Plaintiff sustained serious personal injuries. He attributed the accident to the Defendant's negligence.

3. The Respondent/Defendant filed an amended statement of defence dated 27th August 2018 in which it denied the contents of the Plaintiff, particularly on negligence and attributed the same to the Plaintiff.
4. The parties agreed to record a consent on liability before the court at 80%:20% in favour of the Plaintiff. Subsequently, the Plaintiff tendered evidence in support of his case as PW1 and adopted his statement dated 27th June 2017 as his evidence-in-chief. He produced the following exhibits:

(a) Discharge Summary (P.Exh 1)

(b) Hospital Invoice for Kshs. 133,288/= (P.Exh 2)

(c) P3 Form - (P.Exh 3)

(d) Police Abstract (P.Exh 4)

(e) Medical report and receipt (P.Exh 5a and 5b)

(f) Demand letter dated 10th may 2017 (P.Exh 6)

5. At the close of the Plaintiff's case, the Defendant produced a receipt for Kshs. 15,000/= and Kshs. 50,000/= (D.Exh 1a and 1b) and then closed its case.
6. Judgment was entered in favour of the Plaintiff as follows: -

Liability at 80:20%

General Damages - Kshs. 200,000/=

Special Damages - Kshs. 2,500/=

Total - Kshs. 202,500/=

Less Liability (20%) - Kshs. 40,500/=

Grand Total - Kshs. 162,000/=

Costs and Interests

7. Aggrieved by this decision, the Appellant filed the present Appeal vide Memorandum of Appeal dated 14th June 2023 raising 5 grounds as follows: -

(1) THAT the learned trial magistrate erred in law and fact in awarding the appellant a sum for general damages which is not comparable to the injuries suffered by the Appellant

(2) THAT the learned trial magistrate erred in law and in fact and failed to award the appellant a sum comparable to the injuries suffered.

(3) THAT the learned trial magistrate erred in law and fact and awarded the appellant a sum low compared to the circumstances.

(4) THAT the learned trial magistrate erred in law and fact and failed to consider the written submissions and authorities by the appellant on damages payable.

(5) THAT the learned trial magistrate after considering the facts before him arrived at a wrong decision in relation to damages payable hence miscarriage of justice.

8. The appellant prays that the appeal be allowed and that the award of general damages made in the lower court be set aside, vacated, or varied. That this Court proceed to assess the damages payable to the appellant and that the

appellant be awarded costs of the appeal. The appeal was admitted for hearing, and parties took directions to address it through written submissions.

THE SUBMISSIONS

9. Counsel for the Appellant argued that the trial court's award of Kshs. 200,000/= for General Damages was too low considering the injuries sustained and that the trial court reached an incorrect decision despite the authorities cited.
10. Counsel cited the cases of Easy Coach Ltd v. Emily Nyangasi, Kisumu HCCA No. 20 of 2015, where the court awarded Kshs. 700,000/=; POA Link Services Co. Ltd & Ano v. Sindani Boaz Bonzemo, Bungoma HCCA No. 17 of 2019, where Riechi J. awarded Kshs. 350,000/=; Onchoka v. Mwangi (2023) KEHC (18505) KLR, where Ongeru J. upheld an award of Kshs. 350,000/=; and Nyakwakwa v. Nyakabeti (2024) KEHC 2024 KLR, where Kshs. 400,000/= was awarded in General Damages. Counsel submitted that an award of Kshs. 500,000/= would be sufficient.
11. The Respondent submitted that the trial magistrate extensively addressed his mind on the Appellant's submissions and the cited cases when quantifying the expected damages, and therefore, he cannot be faulted in how he handled the Appellant's submissions. It was argued that the award of damages is an exercise of judicial discretion and should only be interfered with according to established principles; that the trial magistrate did not err in law or fact in awarding the damages as he did. They urged the court to uphold the quantum of damages

awarded in the sum of Kshs. 200,000/= and dismiss the appeal with costs to the Respondent.

ANALYSIS AND DETERMINATION

12. As this is a first appellate court, am guided by the decision in **Sembuya vs. Alports Services Uganda Limited [1999] LLR 109 (SCU)**, where Tsekooko JSC said at 11: -

A first Appellate court is expected to scrutinise and make an assessment of the evidence)

13. I have reviewed the lower court proceedings in the trial record, the grounds of appeal, and the submissions concerning the law. The only matter for my determination is quantum.

14. It is trite that the assessment of damages in a civil suit is a reserve of the trial court's discretion and cannot be easily interfered with unless there are well laid out reasons for the same. In **Kenya Revenue Authority & 2 Others vs. Darasa Investments Limited [2018] eKLR**, the Court of Appeal held thus:-

“.....whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR. The Court ought not to interfere with the exercise of such unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge

was clearly wrong in the exercise of discretion and occasioned injustice.”

15. Similarly, in **Kivati vs. Coastal Bottlers Ltd, Civil Appeal No. 69 of 1984**, the principles established for interfering with an assessment of damages by a trial court were outlined as follows: -

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”

16. From paragraph 4 of the Plaint, the Appellant listed the following injuries, which I have verified from the P3 Form as follows: -

- a) Blunt injury to the right parietal region, with foreign body in situ.
- b) Blunt injury to the chest.
- c) Friction burns to the back, lumbar sacral region.
- d) Friction burns to the buttocks, glutes
- e) Abrasion wounds to the right arm
- f) Friction burns to the right thigh
- g) Friction burns to the right shin
- h) Severe blunt injury to the right hip
- i) Severe blunt injury to the right wrist

17. It is well known that similar injuries should attract similar awards. I note that the medical report dated 27th June 2017 by Dr. Cleophas Kubasu stated that the Appellant’s

wounds were healing with scarring and that the injuries were severe soft tissue injuries that could be classified as harm. Therefore, I have considered other cases where the claimants also sustained soft tissue injuries that were healing, similar to the Appellant's, as follows: -

- (a) In **Lucy Ntibuka vs. Bernard Mutwiri & others [2007] eKLR** the court awarded Kshs. 500,000/= for a plaintiff who suffered head injuries, lacerations on the lateral side of the right eye and lacerations and cut wound on the left arm (elbow) was awarded.
- (b) In **Catherine Wanjiru Kingori & 3 others vs. Gibson Theuri Gichubi [2005] eKLR** the court awarded Kshs 100,000/= where one of the claimants suffered injury on the back and Kshs. 350,000/= to the 3rd plaintiff who suffered multiple soft tissue injuries, injury on the left elbow joint, and injuries on both ankles.
- (c) In **Gatingu vs. Mungai (Civil Appeal E010 of 2020) [2023] KEHC 20511 (KLR)**, the High Court reduced an award of Kshs. 800,000/= to Kshs 300,000/= where the claimant had sustained a blunt injury to the left side of the head, friction injuries to both knees and bruises on the dorsal aspect of both hands.
- (d) In **Francis Omari Ogaro vs. JAO (minor suing through next friend and father of GOD) [2021] eKLR** an award of Kshs. 180,000/= was made for the

multiple cut wounds on the right lower limb, bruises on the right lower limb, bruises on both elbows, bruises on the right iliac region, bruises on the frontal region, bruises on the temporal region, lacerations on the frontal region, cut wounds on the left iliac region, cut wounds on the frontal region, cut wounds on the temporal region and blunt trauma to the abdomen.

18. Based on the authorities cited above, I agree with the Respondent's submissions that the award by the trial court was fair and just under the circumstances and should not be interfered with. Consequently, I uphold it. The award for special damages will also remain undisturbed.
19. The only consideration I take into account is the calculation of contributory negligence based on the issue of liability. I note that the parties agreed at 80:20% in favour of the Plaintiff/Appellant. The trial court calculated this based on the total of both General Damages and Special Damages. In my opinion, however, it should have been calculated solely for the General Damages.
20. I find that the appeal on quantum lacks merit and dismiss it. However, I set aside the computation of the award by the trial court and recalculate it as follows:

Liability at 80:20%

General Damages - Kshs. 200,000/=

Less Liability (20%) - Kshs. 40,000/=

Total - Kshs. 160,000/=

Add Special Damages - Kshs. 2,500/=

Grand Total - Kshs. 162,500/=

Costs and Interests

21. There shall be no orders as to costs. Orders accordingly.

**Dated, signed and delivered in Bungoma on this 13th
Day of March 2026.**

R. OUGO

JUDGE

In the presence of:

Mr. Onkangi For the Appellant

Mr. Okaka For the Respondent

Wilkister - C/A

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