



REPUBLIC OF KENYA



KENYA LAW
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**Pamba v Karuga (Civil Appeal 19 of 2023)
[2024] KEHC 682 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 19 OF 2023**

DK KEMEL, J

JANUARY 31, 2024

BETWEEN

EMMANUEL KHISA PAMBA APPELLANT

AND

SAMMY NJENGA KARUGA RESPONDENT

JUDGMENT

1. The appellant lodged his appeal dated 20th March 2023 against the award of damages vide the judgment of Hon. Getenga (Rm) delivered on 21.2.2023 wherein she awarded Kshs 400, 000/ as general damages and Kshs 31, 000/ as special damages.
2. The Appellant was the Plaintiff before the trial Court and had pleaded that he was injured following a road traffic accident that occurred on or about 22nd February 2021. The accident occurred while he was riding a motorcycle along Moi Avenue near Khetias Crossroads when the Defendant (Respondent herein) by himself, his agent and/or servant so negligently drove and/or managed motor vehicle registration number KAV 336F that it lost control and knocked the Plaintiff that he sustained severe physical injuries.
3. The issue of liability was settled by consent in the ratio of 20:80 in favour of the Appellant. After conducting a hearing, the trial magistrate in her judgment dated 21.2.223 awarded the Appellant Kshs. 431,000/= for general and special damages.
4. Aggrieved by the judgment, the Appellant filed a memorandum of appeal dated 20th March 2023 on 21st March 2023. The appeal is mainly on the trial court's finding on quantum. The grounds of appeal are that: -
 - i. The learned trial magistrate erred in law and fact in finding that the Plaintiff was entitled to general damages of Kshs. 400,000/= which was too low in view of the injuries suffered.



- ii. The learned trial magistrate erred in law and fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very low.
 - iii. The learned trial magistrate erred in law and fact by not awarding special damages in form of future expenses though pleaded and proved.
 - iv. The learned trial magistrate erred in law and fact when making her award by failing to consider the passage of time and the prevailing incidences of inflation.
5. The Appellant prayed for this Court to allow his appeal, set aside the judgement and decree of the subordinate Court and reassess the general and special damages payable to the Plaintiff, and that the Costs of this appeal be awarded.
 6. At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. This being the first appeal, I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123. Only the Appellant filed written submissions.
 7. Counsel for the Appellant submitted that the Appellant sustained the following injuries: blunt injury to the chest; bruises on both upper limbs; bruises on the left leg; fracture of the right tibia/fibula (open) and blunt injury to the abdomen. Counsel submitted that as per the medical report of Dr. Joseph Sokobe dated 18th March 2021 the doctor opined that the Appellant sustained both soft and fracture tissue injuries which he is yet to recover from and that he required further treatment (open reduction and internal fixation) at an estimated cost of Kshs. 150,000/=. According to Counsel, the Appellant pleaded future medical expenses but the trial Court did not award the same. Counsel in the lower Court relied on the cases of *Charles Mwanja & Another vs Batty Hassan* (suing through his grandmother and next friend Safiria Aly Swigila) Machakos HCA No. 106 of 2003; *Abdul Gafoor Kana vs Jacob Wafula Singoro Bungoma* HCA No. E050 of 2022.
 8. In an appeal against assessment of damages, an appellate Court must be careful not to interfere with the trial Court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, 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 the damage.”
 9. As held by the trial Court, no two cases are exactly alike as was held by the Court of Appeal in *Simon Taveta vs Mercy Njeru* (2014) eKLR. Therefore, it is essential for the Court to make an award which is reasonable and commensurate with the extent of injuries sustained by the claimant.
 10. At the trial Court, the Appellant prayed for Kshs.1, 500,000/= as general damages; Kshs. 150,000/= for future medical expenses and special damages while the Respondent was of the opinion that an award of Kshs.300,000/= would be adequate compensation. Each party cited authorities in support of their proposal.



11. The Appellant suffered soft tissue injuries. I have perused the authorities cited by both parties at the trial Court. One such case is Harun Muyoma Boge vs Daniel Agulo (2015) eKLR where the Claimant suffered blunt chest injuries; cut wound right wrist; deep cut wound on the right foot; fracture right tibia and fibula and soft tissue injuries. The high Court set aside the award of Kshs. 150,000/= as general damages and substituted the award with Kshs. 300,000/=. In that case, judgement was rendered in 2015 and in the appeal before me the accident occurred in 2021. Bearing in mind the current inflation, i set aside the award of the learned trial magistrate and substitute it with an award of Kshs.800, 000/= as the same is reasonable in the circumstances.
12. On the issue of future medical expenses, i find that the same are in the nature of special damages, which have to be pleaded and proved. I find that though the need for future medical expenses was also supported by medical evidence, the same were not proved accordingly. The medical report was specific with the exact amount the Appellant would require for the future treatment but the Appellant failed to plead the same in his Plaintiff. A perusal of the plaint dated 30.6.2021 reveals that the claim for the future medical expenses was made vide paragraph 7 thereof but the same were not captured in paragraph 11 on the prayers. It is obvious that the Appellant in failing to disclose the sum of Kshs 150, 000/ was to avoid payment of court filing fees. The appellant should now not complain about the same not having been awarded. I find no reason to interfere with the decision of the trial court which I hereby uphold.
13. On special damages, it is noted that the Appellant pleaded Kshs. 31,000/= and the same was duly proved by the availed receipts. I thereby uphold the award of the trial Court.
14. In Butt V Khan [1978] eKLR, the court stated as follows: “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
15. In the result, the appeal partially succeeds. The award of general damages of Kshs 400, 000/ is hereby set aside and substituted with an award of Kshs 800, 000/. The other items on liability and special damages shall remain intact. The appellant shall have half costs of the appeal and full costs in the lower court.

It is hereby ordered.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024.

D. KEMEI

JUDGE

In the presence of:

No appearance for Appellant

Moganga for Respondent

Kizito Court Assistant

