



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Mageka (Civil Appeal 102 of 2021)
[2024] KEHC 440 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 102 OF 2021
PN GICHOHI, J
JANUARY 25, 2024**

BETWEEN

SAMMY NJUGUNA APPELLANT

AND

SHEILA BITENGO MAGEKA RESPONDENT

*(An Appeal from the Judgement and Decree of Hon. P.K. Mutai (SRM)
dated 14th June 2021 in the original KISII CMCC No. 158 of 2020)*

JUDGMENT

1. The background of this Appeal is that Sheila Bitengo Mageka (the Respondent herein) sued Sammy Njuguna (the Appellant herein) in Kisii CMCC No. 158 of 2020- Sheila Bitengo Mageka v Sammy Njuguna vide a plaint dated 05/03/2020.
2. The Respondent pleaded that the Appellant was the registered owner of motor vehicle registration number KCV 066Z. She pleaded that or about 07/02/2020, she was lawfully walking along the verge of the Kisii – Kisumu Road when at Nyakoe area , the Appellant’s driver, servant or agent of the suit motor vehicle drove the same so carelessly, negligently and/or recklessly that he permitted the same to violently knock down the Respondent and as a consequence, she sustained injuries and suffered loss and damage. She pleaded that the Appellant is either personally or vicariously liable for the tortuous acts of the driver, servant or agent.
3. The Respondent particularised the injuries and special damages and prayed for judgment against the Appellant for general damages, special damages, costs and interest.
4. In his defence, the Appellant denied the alleged accident and the particulars of negligence attributed to him. He further denied the particulars of injuries and special damages and lastly averred that he would rely on the doctrine of res ipsa loquitor, the Highway Code, the Provisions of the [Traffic Act](#)



and the Principle of *volenti non fit injuria*. He therefore urged the court to dismiss the Respondent's suit with costs.

5. The Respondent was the only witness for her case while the Appellant did not call any witness but the court record shows that the parties entered into a consent on liability in the ratio of 70:30 in favour of the Respondent. The parties filed submission and the trial court ultimately rendered its judgment on 14th June 2021 where it awarded the Respondent a sum of Kshs. 450,000/= as general damages, special damages of Kshs. 7,040/= , cost and interest.
6. Aggrieved, the Appellant preferred this Appeal. In his opening statement of the Memorandum of Appeal dated 27th August 2021, he stated that he was dissatisfied with the judgment and decree dated and delivered on 14th day of June 2021. He then stated that he preferred an appeal to High Court against the quantum of damages on the following seven (7) grounds :-
 1. The court erred in law when it entered judgment in favour of the Respondent whereas the same failed to prove her claim to the required standard.
 2. The judgment was entered in error as the Appellant has since discovered that the claim was not genuine and application for adduction of additional evidence shall be made at the opportune time.
 3. The learned trial magistrate misdirected himself in law by making an award of both general and special damages , which were not proved to the requisite standard in law, which award was equally excessive.
 4. The learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on and authorities in support thereof.
 5. The learned trial magistrate misapprehended the principles applicable on computation of damages thus occasioning miscarriage of justice.
 6. The learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record thus reaching an erroneous decision.
 7. The learned trial magistrate erred in law in failing to subject the costs of the suit to contribution.
 7. The Appellant therefore urged the Court :-
 - a. To allow the appeal, set aside, and /or vary the trial court's judgment and decree.
 - b. To revisit, re-assess and /or review the issue of liability and quantum of damages which is reasonable in the circumstances.
 - c. To award the Appellant costs of the Appeal and costs incurred in the trail court.
8. Both parties complied with directions issued by the Court that the Appeal be canvassed by way of written submissions. Through the firm of O.M.Otieno & Co. Advocates, the Appellant filed his on 18th September 2022 while the Respondent's submissions were filed on 27th October 2022 through the firm of M/S T.O.Nyangosi & Co. Advocates. From those submissions, this Court notes that both parties are in agreement that the issue in the Appeal is on quantum only since liability was settled by consent.
9. In the circumstances, this Court is satisfied that having entered into a consent on liability, any ground of appeal leaning towards liability is an afterthought , inconsequential and disallowed.



10. So, on quantum, the Appellant restated the injuries sustained by the Respondent and submitted that the second medical report by Dr. J.A.S Kumenda affirmed that the said injuries had healed well without permanent disability. He relied on the cases of *Daniel Otieno Owino & Another vs Elizabeth Atieno Owour* [2020] eKLR and *Mwavita Jonathan vs Silvia Onunga* [2017] eKLR which he had relied on before the trial court and submitted that an award of Kshs. 400,000/= for the injuries sustained would suffice.
11. On his part, the Respondent cited the principles under which an appellate court can interfere with the amount of general damages and submitted that the Respondent had sought an award of Kshs. 1,500,000/= before the lower court.
12. While relying on the case of *Dennis Matagaro vs NKO (Minor suing through next friend and father WOO)* [2021] eKLR and *Third Engineering Bureau China Construction Group Limited vs Edwin Kinanga Atuya* [2021] eKLR, the Respondent submitted that an award of Kshs. 450,000/= by the trial court was not inordinately high to warrant interference by this Court. He therefore urged the Court to dismiss the Appeal with cost.
13. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify as was held in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
14. Parties have aptly captured the principles to guide this Court where a party challenges the award by the trial court. Indeed, the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR held that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless those findings were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law.
15. The issue for determination is therefore clear. It is whether this Court should interfere with the trial courts discretion in arriving at the impugned award of general damages. According to the plaint, the medical reports from the Kisii Level Six Hospital, the P3 Form and the medical report from Dr. Daniel Nyamieno and the second medical examination report from Dr. Kumenda the respondent's injuries which were classified as grievous harm were: -
 - a. Cut wound to the head.
 - b. Whiplash injury to the neck.
 - c. Chest contusions/blunt chest injury.
 - d. Right shoulder joint dislocation.
 - e. Laceration of the right knee region.
 - f. Fracture of the right tibia fibula.
16. It is settled law that in awarding damages, the Court should be guided by comparable awards for comparable injuries bearing in mind that no injuries can be exactly the same. This Court is therefore guided by the the case of *Stanley Maore vs Geoffrey Mwenda* (2004) eKLR where the Court of Appeal had this to say: -

“...Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general



approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

17. In the case of *Francis Ndungu Wambui & 2 others v VK (A Minor suing through next friend and mother MCWK)* [2019] eKLR relied on by the Respondent before the trial court, the Respondent therein had sustained soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more 30 minutes after the accident. It was also noted due to the severity of the fracture he is at risk of secondary stress fractures on the same site. High Court upheld the trial court’s award of Kshs. 1,000,000/=. These injuries were more serious than those sustained by the Respondent in the present Appeal.
18. In the case of Dennis Matagaro (supra) , relied on by the Respondent herein, the Respondent had sustained mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the left tibia and fibula. High Court upheld the trial court’s award of Kshs. 700,000/= as general damages . These injuries and award are not comparable to the injuries in the present appeal.
19. In Third Engineering Bureau China Construction Group Limited [supra], the Respondent sustained bruises on the scalp, hands and right leg, compound left tibia fracture and compound left fibula fracture. High Court set aside the lower court’s award of Kshs. 800,000/= and substituted it with an award of Kshs. 500,000/=. These were more serious injuries than in the present Appeal.
20. In the case of Daniel Otieno Owino & another (supra) relied on by the Appellate, the Respondent had sustained head injuries with cut wounds, chest injuries, injuries to the right leg with cut wounds and a fracture, injuries to the left lower leg ankle joint and injuries on the left thigh. In its judgment delivered in May 2020, High Court reduced the award of Kshs. 600,000/= by the lower court to Kshs. 400,000/=.
21. Looking at the case of *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR relied on by the trial court, the Appellant sustained blunt chest injuries, cut would right wrist, deep cut would on the right foot and fracture of the tibia. He was awarded Kshs. 300,000/= as general damages in year 2025. These injuries are more comparable.
22. In the circumstances , and putting all factors including inflation, this Court is satisfied that the trial court was well guided by the principles for consideration in awarding the sum of Kshs. 450,000/=. There is no reason to disturb the same.
23. As regards the Appellant’s contention that the trial court failed to subject costs of the suit to contribution (apportionment of liability), neither the Appellant nor the Respondent submitted on the same. Be that as it may, this Court is of considered view that just like special damages, costs of the suit should not be subjected to apportionment liability.
24. In conclusion, this Appeal is dismissed with costs to the Respondent

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 25TH DAY JANUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

N/A for Respondent



Laureen Njiru / Aphline , Court Assistant

