



REPUBLIC OF KENYA



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**Ooga v Nyakundi (Civil Appeal 17 of 2021)
[2024] KEHC 405 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 17 OF 2021
PN GICHOHI, J
JANUARY 25, 2024**

BETWEEN

EMMANUEL OOGA APPELLANT

AND

FRED NYAKUNDI RESPONDENT

(Being an appeal arising from the judgment and decree of Hon P.K Mutai, Senior Resident Magistrate dated and delivered on 3rd February 2021, in Kisii CMCC No. 33 of 2020-Fred Nyakundi v Emmanuel Ooga)

JUDGMENT

1. This judgment is in regard to an appeal by the Appellant against judgment on quantum only in Kisii CMCC No. 33 of 2020-Fred Nyakundi v Emmanuel Ooga as parties had recorded a consent on liability in the ratio of 75:25 in favour of the Plaintiff (herein referred to as the Respondent) against the Defendant (herein referred to as the Appellant).
2. According to the Complaint dated 22nd January 2020, the Respondent pleaded that he sustained:-Abrasions to the scalp.Abrasions to the shoulder.Contusion and abrasions to the right lumbar.Contusion to the right leg with consequent fracture of the right tibia/fibula bones.
3. The medical report by Daniel Nyameino dated 11th December 2019 produced as Pexh. 6 (a) confirmed those injuries. The 2nd Medical report by Dr. J.A.S Kumenda put in by consent of parties reflects the same injuries.
4. At the conclusion of the case, parties filed submissions whereupon the Respondent proposed a sum of Kshs1,500,000/= as general damages while the Appellant proposed an award of Kshs400,000/=. Each of them supported his proposal with authorities. The trial court then rendered its judgment



on 3rd December 2021 where the Respondent was awarded Kshs800,000/- as general damages and Kshs18,600/= as special damages. He was also awarded costs and interest.

5. Aggrieved, the Respondent preferred this Appeal on quantum only vide a Memorandum of Appeal dated 1st March 2021 on the following three (3) grounds:-
 1. That the learned trial magistrate erred in law and fact in awarding the respondent the sum of Kshs800,000 as general damages, on 100% basis but which sum was inordinate and manifestly excessive in the circumstances of the suit as to amount to erroneous estimate.
 2. The learned trial magistrate erred in law and in fact in applying wrong principles and ignoring the proper principles in assessing damages, hence awarded the respondent the sum of Kshs800,000 as general damages on a 100% basis which amount was manifestly excessive.
 3. The learned trial magistrate erred in law and fact in awarding the respondent the sum of Kshs18,600 as special damages, on a 100% basis but which amount was never proven at all by the evidence which the respondent led during the hearing of the respondent's case.
6. Pursuant to directions taken before this Court, parties filed submissions as a mode of disposal of this Appeal. The Appellant filed submissions dated 6th June 2022 whereas the Respondent filed his dated 15th July 2022.

Appellant's Submissions

7. Through the firm of Okong'o Wandago & Co. Advocates, the Appellant relied on several cases including *Edwin Julius Muriuki & another v George Kithinji Mwiandi* [2014]eKLR, *John Njenga Maina v Humphrey Kinyua Rukeria* [2016] eKLR and *Christopher Njoroge Ngugi & Stella Kathure Cosmas Kithusi Nzioka* [2018]eKLR and submitted that even where the awards of Kshs700,000, Kshs,800,000/- or Kshs1,000,000/= was awarded, the degree of permanent disability was as high as between 30 % and 200%.
8. He therefore submitted that going by the above authorities and the injuries sustained by the Respondent herein, an award of Kshs450,000/= would be reasonably comparable to contemporary awards.

Respondents' Submissions

9. On his part and through the firm of T.O. Nyangosi & Co. Advocates, the Respondent submitted that award of general damages is within the discretion of the trial court and that the appellate court should not be quick to interfere with that discretion unless the award is inordinately high or low so as to represent an entirely erroneous estimate or the trial court proceeded on wrong principles or misapprehended evidence in some material aspect.
10. The Respondent submitted that the trial court analysed the authorities cited by both parties and made a fair determination. And therefore, the award was not excessive to warrant interference by this Court.

Determination

11. This Court has considered the submissions herein. It is settled law that comparable injuries should as far as possible attract comparable awards. It is also settled that an award of general damages is



discretionary and the Appellate court should be slow to interfere with such discretion. Indeed, the Court of Appeal in *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR held:-

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘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.’

12. It is noted that these submissions are a replica of the submissions in the lower court where the Appellant submitted that Kshs450,000 would be reasonably proportionate award for general damages. In doing so, he still citing the same authorities he has cited in this Appeal but did not attach copies of the said case law.
13. On his part, the Respondent had sought a sum of Kshs1,500,000/= as general damages while relying on the case of *Francis Ndungu Wambui & 2 others v V.K (A minor suing through next friend and mother MCWK)*[2019]eKLR. In that case, the Respondent sustained soft tissue injuries to the upper limbs, compound fracture of the distal tibia fibula shaft as well as loss of consciousness for more than 30 minutes after the ecalcidene and that, due to the severity of the fractures, he had the risk of secondary stress fractures on the same site. On Appeal, High Court did disturb the award of Kshs1,000,000/= by the lower court.
14. In its judgment, the trial court held:-

“The Defendant cited several authorities. However, none was attached to the submissions. The most relevant authority cited by the Defendant is the case of *John Njenga Maina v Humphrey Kinyua Rukeria* [2016] eKLR. The plaintiff sustained compound fracture of the right tibia and fibula, fracture of the distal 1/3 of the left tibia and fibula, laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss. He was awarded Kshs750,000,000 as general damages. I find this case relevant as well as the case cited by the plaintiff.

Taking into account injuries sustained, comparable awards and inflation, I award the plaintiff Ksh. 800,000/= as general damages.”

15. Even though the Appellant had not attached the submissions, he had stated the injuries sustained by the plaintiffs therein. He has now attached the said authorities in the submissions in support of the Appeal. It is clear that the trial magistrate was properly guided by the law and facts before arriving at the impugned award. This Court finds no reason to interfere with that award.
16. It is noted that though the Appellant’s states in ground 3 of the Memorandum of Appeal that the special damages of Kshs18,600/- awarded by the trial court were not proved at all, the parties did not



submit on the same. Further, they did not submit on the issue raised in the Memorandum of Appeal that as per the judgment, both general and special damages were at 100% .

17. Be that as it may, it is noted that in paragraph 21, 22, 23 and 24 of his submissions dated 19/1/2021 before the trial court, the Appellant submitted in regard to special damages:-

- “ 21. We concede the Kshs200/- claimed as costs of obtaining a Police Abstract.
22. We concede the Kshs500/- claimed as costs of obtaining motor vehicle search.
23. We concede the Kshs6,500/- claimed as fees for a Medical Report regarding the Plaintiff.
24. We would concede the Kshs112,400/- claimed as costs of treatment , on evidence.”

18. It is trite law that special damages must be specifically pleaded and strictly proved. These sums were pleaded in the plaint. The proceedings before the trial court confirms that the Respondent (Plaintiff therein) who testified as PW1 produced the receipts for Kshs18,600/=. In its judgment, the trial court held:-

“Special damages must be specifically pleaded and strictly proved. Receipts for Kshs25,000/- were produced. I award plaintiff Kshs18,600 as special damages for the amount specifically pleaded and proved.”

19. From the foregoing, this Court finds no basis for challenging the award of Kshs18,600/- as special damages.

20. The last issue raised by the Appellant is that though there was a consent on liability at 75:25 in favour of the Plaintiff as against the Defendant, the award on both general damages and special damages were not subjected to liability. It is clear that even though the trial court acknowledged the consent at the opening statement of the judgment, there is no indication as to whether any of the two awards was subjected to liability.

21. Though general damages should have been subjected to liability, this Court is in agreement with the holding by High Court in *Hashim Mohamed Said & another v Lawrence Kibor Tuwei* [2018]eKLR and *Swalle C. Kariuki & another v Violet Owiso Okuyu* [2020]eKLR that by their very nature, special damages should not be subjected to apportionment.

22. In conclusion:-

1. The Appeal only succeeds in that the award of Kshs800,000/= as general damages be and hereby subjected to 25 % liability making it an award of Ksh. 600,000/= plus being special damages of Kshs18,600/= together with costs and interest from the date of judgment of the lower court.
2. Each party to bear the costs of this Appeal.

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

