



**Wachira & another v Gechore & another (Civil Appeal E033 & E032 of 2023
(Consolidated)) [2024] KEHC 1814 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E033 & E032 OF 2023 (CONSOLIDATED)
LM NJUGUNA, J
FEBRUARY 28, 2024**

BETWEEN

PATRICK WACHIRA 1ST APPELLANT

PETER MWAURA NYAMBURA 2ND APPELLANT

AND

DENNIS OBIRI GECHORE 1ST RESPONDENT

BANCY SYOMBUA KIMANZI 2ND RESPONDENT

*(Appeal from the Judgment of Hon. L. Ambasi CM in Chief
Magistrate's Court Embu Civil Cases Numbers 58 & 59 of 2020)*

JUDGMENT

1. These are appeals arising from the abovementioned decisions of the trial court filed vide memorandum of appeal dated 26th June 2023 seeking orders that the appeals be allowed with costs and the award of general damages be set aside and substituted with a reasonable award. The appeals are premised on grounds that:
 - a. The trial court award of general damages in the sum of Kshs.500,000/= in the case of the 1st respondent and Kshs. 1,000,000/= in the case of the 2nd respondent, are inordinately excessive considering the nature of the injuries sustained by the respondent, thus amounting to an erroneous estimate of the damages awardable in the circumstances; and
 - b. The award of damages is against the law and the weight of the evidence on record.
2. Vide complaints dated 22nd June 2020, the plaintiffs/respondents sought judgment against the defendants/appellants for special damages of Kshs.3,550/= each, general damages, costs and interests. It was their case that on 27th April 2020, the 1st respondent was lawfully riding while the 2nd respondent was a pillion



passenger on motor cycle registration number KMEZ 254Z along Kirimari Shell-Dallas Road at the feeder junction area when the motor vehicle registration number KCF 958C Toyota S. Wagon was so negligently, recklessly and/or carelessly driven at high speed without any due care, regard or attention by the 1st appellant or his authorized driver, servant or agent that he diverted abruptly and caused the vehicle to lose control and hit the named motor cycle, causing a road traffic accident. The respondents sustained serious injuries thereof. Consequently, the respondents have suffered loss and pain.

3. The appellants filed a statement of defense denying the averments made in the plaint and attributed contributory negligence to the respondents.
4. In the case of the 1st plaintiff/respondent Embu CMCC No. 59 of 2020, the parties entered a consent on the documents that were to be produced as evidence and the liability ratio of 80%:20% in favour of the 1st plaintiff/respondent. According to the medical examination report, the 1st plaintiff/respondent suffered mouth injuries, blunt soft tissue injuries of the neck and blunt soft tissue injuries with bruises and swelling of the right hand and fingers. For these, the court awarded special damages as pleaded, Kshs.30,000/= as future medical expenses and Kshs.500,000/= as general damages.
5. In the case of the 2nd plaintiff/respondent, the parties also agreed on the documents to be produced and a liability ratio of 80%:20% in favour of the 2nd plaintiff/respondent. The injuries suffered by the 2nd plaintiff/respondent were severe head injuries, brain oedema, concussions and loss of consciousness and blunt soft tissue injuries on the left shoulder, right thumb and lower back. The trial court awarded special damages as pleaded and general damages of Kshs.1,000,000/=
6. This appeal was canvassed by way of written submissions.
7. The appellants jointly submitted that the general damages awarded by the trial court in both cases were excessive and should be reviewed. They relied on the cases of Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR and Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47. That in the case of the 1st respondent, an award of Kshs.200,000/= is sufficient and they referred to the decisions in the cases of FM (minor suing through Mother and next friend MWM) v. JNM & Another [2020] eKLR, Daniel Gatana Ndungu & Another v Harrison Angore Katana [2020] eKLR, Francis Omari Ogaro v JAO (suing through the mother and next friend and father of GOD) [2021] eKLR and Wahinya v Lucheveleli (Civil Appeal E045 of 2021) [2022] KEHC 13762 (KLR) where the court awarded general damages for similar injuries between Kshs.100,000/= and Kshs.200,000/=.
8. In the case of the 2nd respondent, it was their submission that an award of Kshs.600,000/= would suffice and they placed reliance on the cases of Elizabeth Wamboi Gachoni v Bernard Ouma Owuor [2019] eKLR where the court awarded Kshs.300,000/= and Francis Ndungu Wambui & 2 others v Benson Gichure Maina [2019] eKLR where the court awarded Kshs.600,000/=.
9. On their part, the respondents jointly submitted that the awards for general damages as awarded by the trial court are commensurate to the injuries sustained and that the same are discretionary. Reliance was placed on the cases of United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd. [1985] eKLR, Nina Mweu T/A Sassma Farm v Muus Kenya Limited & Another [2015] eKLR and Mbogo v. Shah & Another [1968] EA 93 as cited in the case of Caroline Elsa Anne Sturdy v John Greaves Hilder [1984] eKLR. it was their argument that the awards are correctly awarded and should be upheld.
10. I have considered the grounds of appeal, arguments by parties and trial court records herein and in my view, the issue for determination in both appeals is whether the general damages awarded by the trial court are inordinately high.



11. The role of this court is to re-examine the evidence adduced at trial and make a finding as was held in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123. At trial, the parties agreed to have documentary evidence produced without summoning the makers of the same. They also agreed on a liability ratio of 80%:20% in favour of the respondents and the only issue left to be determined by the trial magistrate was quantum. In this appeal, the only issue of contention is the award of general damages in both cases.
12. According to the medical examination report produced, the 1st respondent suffered mouth injuries, blunt soft tissue injuries of the neck and blunt soft tissue injuries with bruises and swelling of the right hand and fingers while the 2nd respondent suffered brain oedema, concussions and loss of consciousness and blunt soft tissue injuries on the left shoulder, right thumb and lower back. The trial magistrate was guided by the case of *Patrick Muriithi Mukuha v Edwin Warui Munene & 5 Others* [2005] eKLR. In the case of the 2nd respondent, she had suggested an award of Kshs.1,200,000/= but the court awarded Kshs.1,000,000/=.
13. The trial court's award of damages may be interfered with by an appellate court when the same are found to be inordinately high or low. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR where it was held thus:

“...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.’”
14. In the case of the 1st respondent, she suffered mouth injuries, blunt soft tissue injuries of the neck and blunt soft tissue injuries with bruises and swelling of the right hand and fingers. In the case of *Blue Horizon Travel Co Ltd v Kenneth Njoroge* [2020] eKLR the court awarded Kshs.400,000/= for similar injuries. In the case of *Anthony Nyamwaya v Jackline Moraa Nyandemo* [2022] eKLR the court upheld an award of Kshs.250,000/= for rugged cut wounds on the temporal region of the head, tenderness on the neck, tenderness on the anterior chest, tenderness on the lower back, tenderness on the shoulders, swelling and tenderness on the right hand, bruises on right index finger, swelling and tenderness and bruises on both legs.
15. I have also considered the cases of *FM (minor suing through Mother and next friend MWM) v JNM & Another* [2020] eKLR, *Daniel Gatana Ndungu & Another v. Harrison Angore Katana* (2020) eKLR, *Francis Omari Ogaro v JAO* (suing through the mother and next friend and father of GOD) [2021] eKLR and *Wahinya v Lucheveleli* (Civil Appeal E045 of [2021] [2022] KEHC 13762 (KLR) as relied upon by the appellants and find that they are persuasive in determining the 1st respondent's case. In my view, an award of Kshs.300,000/= is modest in the circumstances.



16. In the case of the 2nd respondent, the injuries suffered were brain oedema, concussions and loss of consciousness and blunt soft tissue injuries on the left shoulder, right thumb and lower back. In the case of *Edwin Masese Onsando v Teresa Gesare Masese* [2019] eKLR the plaintiff had suffered Head injury due to brain concussion and lost conscious for more the 12 hours, injury to the right kidney following blunt trauma to the abdomen, blunt trauma to the back, contusion on the head leading to massive hematoma formation. The court found that an award of Kshs.500,000/= was excessive and substituted the same with an award of Kshs.200,000/=.
17. In the case of *Dickson Ndungu Kirembe v Theresia Atieno & 4 Others* [2014] eKLR the High Court reviewed downwards an award of Kshs.255,000/= to Kshs.127,500= for soft tissue injuries which produced no complications. In the case of *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd* [2015] eKLR the Court of Appeal revised downwards an award by the High Court of Kshs.700,000/= to Kshs.150,000/= for injuries to the left elbow, pelvic region, lower back and left knee.
18. The appellants relied on the cases of *Elizabeth Wamboi Gachoni v. Bernard Ouma Owuor* (2019) eKLR where the plaintiff sustained injuries on the head and back, he suffered deep cut wound leaving keloids, two deep lateral cuts on the neck leaving keloids, multiple bruises on the chest and chest injuries, cut wound on the buttocks, deep bruises on the left hand and he lost consciousness and the court awarded Kshs.300,000/=. They also relied on the case of *Francis Ndungu Wambui & 2 others v Benson Gichure Maina* [2019] eKLR where the court reduced an award of Kshs.1,000,000/= to Kshs.600,000/= for a fracture of the right femur which was fixed by metal plates and soft tissue injuries. Therefore, in the case of the 2nd respondent, with reference to previously decided cases, I find that an award of Kshs.500,000/= would suffice as general damages for pain and suffering.
19. In my decision, I am conscious of the circumstances of the cases, the nature of injuries and economic inflation and have factored the same into my findings. I am guided by the Court of Appeal in the case of *Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998* [1998] eKLR where it was held that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”
20. In the end, having considered the submissions of the parties and the relevant laws, I find that the appeals succeed with orders as follows:
 - a. Liability ratio is upheld at 80%:20% in favour of the respondents in both appeals;
 - b. In Civil Appeal Number 33 of 2023, the awards are as follows;
 - i. General damages for Pain and suffering Kshs.300,000/=
 - ii. Special Damages Kshs.3,550/=
 - iii. Future medical expenses Kshs.30,000/=
 - c. In Civil Appeal Number 32 of 2023, the awards are as follows:
 - i. General damages for Pain and suffering Kshs.500,000/=
 - ii. Special Damages Kshs.3,550/=



- d. The appellants to pay the respondents general damages with interests at court rates from the date of this judgment until payment in full;
- e. Special damages to accrue interests at court rates from the date of filing the complaints until payment in full;
- f. Costs of the trial court in both Embu CMCC No. 58 of 2020 and Embu CMCC No. 59 of 2020 awarded to the respondents with interest at court rates; and
- g. Each party to bear its own costs of appeal.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the 1st Appellant

.....for the 2nd Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

