



REPUBLIC OF KENYA



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**Kirimi v Mugambi (Civil Appeal E111 of 2022)
[2024] KEHC 3781 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E111 OF 2022
EM MURIITHI, J
MARCH 20, 2024**

BETWEEN

GIDEON MUTAI KIRIMI APPELLANT

AND

ALEX MUGAMBI RESPONDENT

*(Being an appeal from the judgment delivered by Hon. M. A
Odbiambo (RM) on 22/4/2022 at Meru CMCC No. E55 of 2020)*

JUDGMENT

1. By a plaint dated 23/10/2020, the Respondent sued the Appellant seeking general damages for pain and suffering, special damages and costs of the suit plus interest. He pleaded that on or about 18/4/2020, he was a lawful pedestrian along Cathedral – Prison Bypass when the Appellant so negligently drove, managed and/or controlled motor vehicle registration No. KBF 290 R Toyota NZE that it lost control, veered of its rightful lane and knocked him down thus occasioning him serious injuries.
2. The Appellant denied the claim by his defence dated 12/4/2021 and prayed for the Respondent’s suit to be dismissed.
3. Upon full hearing of the case, the trial court found the Appellant to have 100% liable and awarded general damages of Ksh. 1,200,000 and special damages of Ksh. 20,550 totaling to Ksh. 1,220,550 together with costs and interest.

The Appeal

4. On appeal, the Appellant filed his memorandum of appeal on 19/8/2022 raising 5 grounds as follows:



1. The learned trial magistrate erred in law and misdirected herself when he failed to consider the Appellants submissions on both points of law and facts.
2. The learned trial magistrate erred in law and fact in finding that the Respondent was entitled to general damages of Kshs. 1,200,000/=, special damages of Kshs. 20,550/= plus cost and interests of the suit for the injuries suffered which award is exorbitantly high based on the injuries sustained.
3. The learned trial magistrate erred and misdirected herself as to the exact nature of the Respondent's injuries and therefore erred in law in her assessment of damages awardable to the Respondent which was manifestly excessive.
4. The learned trial magistrate erred in law and fact in failing to consider the defendant's evidence on injuries sustained, submissions and authorities on the award for such injuries.
5. The learned trial magistrate erred in law and fact in unduly disregarding the judicial authorities cited by the Appellants which are related to the injuries and the evidence adduced in trial.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

Evidence

6. PW1 PC Robert Tomno attached at Meru Police Station testified that, "On 18/4/2020 our officer received a report of road traffic accident. The accident occurred along cathedral-makutano bypass. The time of the accident was 10.45 am. The vehicle was KBF 290 R Toyota corolla which was being driven by unknown driver. It was from Makutano-Meru town. On reaching location of the accident the vehicle attempted to overtake another vehicle. The driver lost control and knocked pedestrian Alex Mugambi who was walking on right side as you face Meru. The driver abandoned the vehicle. The pedestrian sustained injuries. The scene was visited PC Haji who has since been transferred. Accident was booked vide OB 5/18/4/2020. On 31/8/2020 I recorded statement of Alex (plaintiff). I issued him with a P3 form which was filled at Meru Teaching and Referral Hospital on 4/9/2020. The nature of injury was grievous harm. I have a p3 form in court. On 16/9/2021 a police abstract was issued to plaintiff. PC Chacha filled the same. I am familiar with his handwriting. The driver was to blame for the accident. PExb 1 – Police abstract."
7. On cross examination, he stated that, "The plaintiff is Alex Mugambi. He is a pedestrian. I have OB in court. I do not have sketch plan. I was not an eye witness. Investigating Officer PC Lasi was transferred. The vehicle left its path and veered off to the pedestrian path. The victim was knocked from behind. The driver ran away after the accident. The driver was to be blamed for the accident. The case is for pending under investigations."
8. PW2 Alex Mugambi, an electrical engineering student at Meru Polytechnic and the Respondent herein testified that, "On 18/4/2020 I was from Makutano-Meru town along the bypass Meru-Makutano next to general hospital. I was on foot. I was on the right side. There is a vehicle that knocked me from behind. I sustained fracture on the left hand. It was fitted with a metal plate. I had a fracture on the neck and had injuries on the head and legs. I was treated at Meru teaching and referral hospital. I stayed in hospital for 3 weeks. I was admitted on 18/4/2020 to 16.5.2020. The metal implant was removed at



Nairobi Womens Meru. I was admitted for 5 days. I was then discharged. I was to attend checkups at Muthaara Sub-county hospital. I am yet to heal. I cannot lift anything using my hand. I was given P3 form treatment notes and receipts. PMFI 2 – medical report. PEXB 1 – PEXB 7 as per list of documents dated 23/10/2020. I am praying for reliefs as per my plaint and cost of plaint. I would also pray for special damages. The Doctor told me that the metal plate will be a part of me. It will not be removed.”

9. On cross examination, he stated that, “Accident occurred in the morning I do not know the exact time. I was hit from behind. I do not have an eye witness. I sustained injuries on the left hand. I was facing Meru town when I was hit. I have documents as proof that I have a metal plate. The metal plate will not be removed. There is no cost for removal of the plate. I am doing well but I have not recovered. I am in school. I am still on medication. The drugs are a not prescriptions.”
10. PW3 Dr Omuro Adan, a medical officer produced the Respondent’s medical report dated 10/9/2020 which had been filled by his colleague Dr Gitora. He testified that, “The patient sustained injuries. As per report dated 10/9/2020. The clavicle is above the shoulder. He had injuries on the head, chest, neck, right and left knee. The patient has not fully recovered. He has difficult lifting heavy object. He also complained of neck pains. We did an examination. X-ray showed a plate on the left arm. He was also in pain. The degree of injury was 35%. The patient may have PTSD and delayed union and recurrent fracture. Pexb 2 – medical report.”
11. On cross examination, he stated that, “My number is A10748. I did not examine the patient. The same is based on practicality. He could not lift items above five Kgs. He was examined 5 months after the accident. If we examined him today there might to be improvement. There is guidelines on assessing degree of disability. Degree of disability was 35%. The same is not likely to change due to permanent complication. Non union of fracture means that the 2 fragments do not attach or unite. The person will remain with a permanent fracture.”
12. The Appellant closed his case without calling any witnesses.

Submissions

13. The Appellant urges that the award of general damages was inordinately high considering the injuries the Respondent sustained were soft tissue in nature. He submits that the sum of Ksh. 500,000 will be reasonable and sufficient compensation, and cites Power Lighting Company Limited & Anor v Zakayo Saitoti Naingola & Anor (2008) eKLR, Alphonza Wothaya Warutu & Anor v Joseph Muema (2017) eKLR, Logistics Solutions Ltd v Steere Mavu Mwambela (2021) eKLR and Maina Onesmus v Chrales Wanjohi Githome (2019) eKLR. He prays for his appeal to be allowed with costs.
14. The Respondent cites Catholic Diocese of Kisumu v Tete (2004) eKLR and Sila Tiren & another v Simon Ombati Omiambo (2014) eKLR on the circumstances under which an appellate court can interfere with an award of damages. He urges that he produced various receipts in support of his claim for special damages totaling to Ksh. 267,346, but the trial court nevertheless misdirected itself in awarding only Ksh. 20,550. He urges that he proved all the injuries he sustained by unchallenged evidence and thus the award of Ksh. 1,200,000 was factually appropriate and legally sound. He prays for the appeal to be dismissed with costs.

Analysis and Determination

15. From the grounds of appeal, the 2 issues that isolate themselves for determination are whether the award of general damages of Ksh. 1,200,000 was exorbitant and whether the Appellant’s submissions and authorities were considered.



Special Damages

16. The Respondent contends that he expended a total of Ksh. 267,346, but the trial court erroneously awarded only Ksh. 20,550.
17. The court takes cognizance of the various receipts on record majority of which are illegible, and finds that the special damages proved by legible receipts amount to Ksh. 32,386.50.

General Damages

18. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470)”

19. The trial court awarded the Respondent general damages of Ksh. 1,200,000, which the Appellant contends is inordinately high. The injuries sustained by the Respondent are particularized in the plaint as a left mid shaft clavicular fracture, a left mid shaft humeral fracture, blunt trauma to the head with bruises on the forehead and occipital region, blunt chest trauma, blunt trauma on the neck and a bruise on anterior aspect of right knee, an abrasion injury approximately 5 cm in diameter on the anterior aspect of the left knee.
20. The Respondent testified that, “I sustained fracture on the left hand. It was fitted with a metal plate. I had a fracture on the neck and had injuries on the head and legs. I was treated at Meru teaching and referral hospital. I stayed in hospital for 3 weeks. I was admitted on 18/4/2020 to 16.5.2020. The metal implant was removed at Nairobi Womens Meru. I was admitted for 5 days. I was then discharged. I was to attend checkups at Muthaara Sub-county hospital. I am yet to heal. I cannot lift anything using my hand...The Doctor told me that the metal plate will be a part of me. It will not be removed.” That evidence was not meaningfully challenged during cross examination.
21. PW3 testified that when the Respondent was examined 5 months after the accident, “The patient has not fully recovered. He has difficult lifting heavy object. He also complained of neck pains. We did an examination. X-ray showed a plate on the left arm. He was also in pain. The degree of injury was 35%. The patient may have PTSD and delayed union and recurrent fracture.” He stated on cross examination that, “Non union of fracture means that the 2 fragments do not attach or unite. The person will remain with a permanent fracture.”
22. It is clear from the evidence on record that the Respondent sustained 2 fractures and soft tissue injuries.
23. In justifying the award of general damages of Ksh. 1,200,000, the trial court relied on *Judy Ngochi v Kamakia Ele Selelo Ledamoi* (2019) eKLR where the claimant sustained lacerations of the little finger, blunt injury to the right arm, fracture of the right humerus, blunt injury to the left shoulder,



fracture of the left clavicle and chip fracture of the right acromion. Those injuries, with respect, are not comparable to the injuries sustained by the Respondent herein, to attract comparable damages.

24. This court finds that the award of general damages of Ksh.1,200,000, was inordinately high that it represented an entirely erroneous estimate of the pain suffered by the Respondent.
25. This court in *Kiliungu v Kananga alias Jeremiah Kirema* (Civil Appeal E174 of 2022) [2023] KEHC 27212 (KLR) (20 December 2023) (Judgment), substituted an award of Ksh. 1,800,000 with Ksh. 900,000 for a claimant who sustained loss of consciousness, depressed left sided parietal skull fracture, linear un-displaced second vertebrae (cervical) fracture, liver injury with a capsular hematoma and pains over the chest and lower limbs. In arriving at that figure, this court in *Kiliungu v Kananga alias Jeremiah Kirema* (Supra), took into account the injuries sustained by the Claimant, the authorities cited, the age of the authorities, inflationary trends, the absence of resultant permanent incapacitation and the compensatory purpose of the award as opposed to enrichment of the Claimant.
26. This court finds that the trial court duly considered the submissions on record before reaching the decision it did.

Orders

27. Accordingly, for the reasons set out above, the Court finds merit in the appeal and it is allowed in the following terms:
 1. The trial court's award of general damages of Ksh.1,200,000 is hereby set aside and substituted with an award of Ksh.900,000.
 2. The award of special damages of Ksh.20,550 is set aside and substituted with an award of Ksh.32,386.50.
 3. The Respondent has costs of the suit in the trial court together with interest at court rates until payment in full.
 4. The Appellant shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 20TH DAY OF MARCH, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Mugo for the Appellant.

Mr. Kaimba for the Respondent.

