



REPUBLIC OF KENYA



**Kosombei & another v Adika (Civil Appeal E025 of 2022)
[2024] KEHC 6438 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E025 OF 2022**

**RL KORIR, J
MAY 30, 2024**

BETWEEN

JACKSON KOSOMBEI 1ST APPELLANT

EDWIN CHEBURES RONO 2ND APPELLANT

AND

ANASTACIA ADIKA RESPONDENT

*(Being an Appeal from the Judgment of the Senior Resident Magistrate,
Omwange J. at the Magistrate's Court at Sotik, Civil Suit Number 59 of 2020)*

JUDGMENT

Background

1. The Respondent (then Plaintiff) sued the Appellants (then Defendants) for General and Special Damages that arose from a road traffic accident involving Motor Vehicle Registration Number KBM 198D (driven by the 1st Appellant and owned by the 2nd Appellant) and Motor Vehicle Registration Number KBZ 117Y in which the Respondent was a passenger.
2. This Appeal file is one of four sister Appeal files where the Respondents (then Plaintiffs) in Sotik PMCC No. 55 of 2020 (now Bomet High Court Civil Appeal Number E023 of 2022), Sotik PMCC No. 56 of 2020 (now Bomet High Court Civil Appeal Number E024 of 2022), Sotik PMCC No. 60 of 2020 (now Bomet High Court Civil Appeal Number E026 of 2022) and the present one Sotik PMCC No. 59 of 2020 (now Bomet High Court Civil Appeal Number E025 of 2022) sued the Appellants for injuries sustained in an accident in which all four Respondents were passengers in Motor Vehicle Registration Number KBZ 117Y.
3. Initially, Sotik PMCC No. 55 of 2020 (now Bomet High Court Civil Appeal Number E023 of 2022) had been chosen as test suit which would be used to determine the liability in the other three



aforementioned matters. However on 11th May 2021, counsels for both parties agreed to have the test suit changed to the present suit Sotik PMCC Number 59 of 2020 (being the present Bomet High Court Civil Appeal Number E025 of 2022).

4. On 16th November 2021, a consent on liability was recorded in the ratio of 70:30 in favour of the Respondent (then Plaintiff). The parties produced exhibits by consent and then submitted on quantum.
5. In its Judgment delivered on 26th April 2022, the trial court awarded Kshs 249,550/= as General and Special Damages to the Respondent (then Plaintiff).

The Appeal

6. Being aggrieved with the Judgment of the trial court, the Appellants filed their Memorandum of Appeal dated 26th May 2022 and relied on the following grounds:-
 - i. That the learned trial Magistrate erred in law and in fact by making an award of Kshs 350,000/= on general damages for pain and suffering which award was manifestly excessive and inordinately high as to constitute an erroneous estimate of damages altogether.
 - ii. That the learned trial Magistrate erred in law and fact in failing to judiciously analyze the Appellants' submissions and authorities cited therein hence arriving at an erroneous award on damages That was manifestly unjust and in total disregard of the said Appellants' submissions.
 - iii. That the learned trial Magistrate erred in law and fact by making an award of Kshs 350,000/= as general damages for pain and suffering which award was based on misapprehension of the medical evidence at hand resulting into a miscarriage of justice.
 - iv. That the Appellant shall upon receipt of the typed proceedings file a supplementary Memorandum of Appeal to include other grounds and reasons that may become apparent herein.
7. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. See *Peters v Sunday Post Ltd* (1958) EA 424.

The Plaintiff's/Respondent's case.

8. Through her Complaint dated 14th August 2020, the Respondent stated that on 23rd December 2019 while aboard Motor Vehicle Registration Number KBZ 117Y, she was involved in a road traffic accident along Cheborgei-Roret road when Motor Vehicle Registration Number KBM 198D was carelessly driven and collided with Motor Vehicle Registration Number KBZ 117Y which she was aboard. That Motor Vehicle Registration Number KBM 198D was driven by the 1st Appellant and was registered in the name of the 2nd Appellant.
9. It was the Respondent's case that the 1st Appellant was negligent in causing the accident. The particulars of the negligence were stated in paragraph 5 of the Complaint.
10. That as a result of the accident the Respondent suffered the following injuries:-
 - i. Laceration on the left leg.
 - ii. Bruises on the right leg.
 - iii. Bruises on the right hip.



- iv. Blunt trauma on the right hip.
 - v. Blunt trauma to the neck.
 - vi. Blunt trauma to the back.
11. The Respondent prayed for Special and General Damages against the Appellants.

The Appellants'/Defendants' Case.

12. Through their statement of Defence dated 13th October 2020, the Appellants denied the manner of the occurrence of the accident as described by the Respondent. They contended that the accident was caused by the negligence and careless driving of Motor Vehicle Registration Number KBZ 117Y. The particulars of the negligence were listed in paragraph 5 of the Defence.
13. As already stated, parties agreed on apportionment of liability and the trial court delivered its Judgement as aforesaid prompting the present Appeal.
14. On 11th May 2023, this court directed that the Appeal be heard by way of written submissions.

The Appellants' submissions.

15. In their submissions dated 30th June 2023, the Appellants submitted that the award of Kshs 350,000/= awarded as General Damages were inordinately high. That going by the Medical Report by Dr. Morebu, the Respondent did not suffer any incapacitation. It was their further submission that the Medical Report by Dr. Adegu stated that the injuries were soft tissue in nature and that the Respondent did not suffer any incapacitation.
16. It was the Appellants' submission that an award of Kshs 80,000/- would be sufficient. They relied on Francis Omari Ogaro vs JAO (a minor suing through next friend and father God (2021) eKLR and *Rege vs LA (minor suing through her father and next friend GAA) (Civil Appeal E111 of 2021)* (2022) KEHC 16634 (KLR) where the courts awarded Kshs 180,000/= and Kshs 80,000/= respectively for similar soft tissue injuries.

The Respondent's Submissions.

17. Through her submissions dated 12th September 2023, the Respondent submitted that the award of Kshs 350,000/= as General Damages was fair and that the trial court had applied the correct principles in assessing the damages. She relied on the case of *Kabutia & another vs PK (suing as the Guardian and Next Friend of DM- Minor) (Civil Appeal E025 of 2022)* (2023) (30th January 2023) (Judgement) and Veronicah Mkanjala Mnyapara vs Patrick Nyasinga Ameyia (2021) eKLR where the courts awarded Kshs 300,000/= and Kshs 350,000/= respectively for similar soft tissue injuries.
18. It was the Respondent's submission that her evidence on the injuries she suffered was not controverted. It was her further submission that the Appellants had to demonstrate that the trial court assessed the damages based on wrong principles. That such awards are assessed in conformity with previously decided cases to secure uniformity. She relied on Telkom Orange Kenya Limited vs I S O (minor suing through his next friend and mother J N) (2018) eKLR.
19. The Respondent submitted that she tendered evidence on special damages in form of receipts and the same was not contested. She prayed that the award of Kshs 6,500/= as special damages be maintained.



20. I have perused and considered the Record of Appeal dated 1st March 2023, the Appellants' written submissions dated 30th June 2023 and the Respondent's written submissions dated 12th September 2023. The only issue for my determination was whether the quantum was inordinately high.

Quantum

21. As per the Complaint, the Respondent suffered the following injuries:-
- i. Laceration on the left leg.
 - ii. Bruises on the right leg.
 - iii. Bruises on the right hip.
 - iv. Blunt trauma on the right hip.
 - v. Blunt trauma to the neck.
 - vi. Blunt trauma to the back.
22. On record are two Medical Reports. The 1st Medical Report by Dr. Peter Morebu dated 15th July 2020 was produced by the Respondent. The Report confirms the injuries listed in the Complaint. The 2nd Medical Report by Dr. William Adegu dated 14th March 2021 was produced by the Appellants. This Report also confirmed the injuries sustained by the Respondent as listed in the Complaint. I have considered both Reports and I am satisfied that the Reports disclosed the injuries sustained by the Respondent as the same ones contained in the Complaint.
23. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there had been a miscarriage of justice.
24. In the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko (2006) eKLR*, the Court of Appeal stated that:-
- “It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H. West & Son Ltd vs. Shephard [1964]AC 326* at page 353- ‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.’”
25. As earlier stated, the Appellants submitted that the award of Kshs 350,000/= as general damages was inordinately high and they proposed an award of Kshs 80,000/=. On the other hand, the Respondent asked this court to uphold the award of Kshs 350,000/= as it represented a fair award.



26. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards.
27. The Respondent suffered injuries that were soft tissue in nature. I have found the following cases quite helpful in terms of comparison:-
- i. In Daniel Gatana Ndungu & another vs Harrison Angore Katana (2020) eKLR the Respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000/- on general damages and substituted it with an award of Kshs 140,000/-
 - ii. In Justine Nyamweya Ochoki & another vs Juma Karisa Kipingwa (2020) eKLR, the Respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was awarded Kshs 300,000/=. On appeal Nyakundi J. set aside that amount and awarded Kshs 150,000/=.
 - iii. In John Wambua vs Mathew Makau Mwololo & another (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000/= and this was affirmed by the High Court.
 - iv. In HB (minor suing through mother & next friend DKM) vs Jasper Nchonga Magari & another (2021) eKLR the court upheld the lower court award of Kshs. 60,000/= for blunt injury to the head, neck, thorax, abdomen and limbs.
28. I have considered the authorities above and the nature of the injuries suffered by the Respondent and I find that the Kshs 350,000/= awarded as General Damages by the trial court was excessive. Taking my cue from the aforementioned authorities and taking into consideration the inflationary trends, I hereby set aside the award of Kshs 350,000/= as General Damages and substitute it with Kshs 170,000/=.
29. With regards to the Special Damages, the Respondent particularized them as follows:-
- Medical Report Kshs 6,500/=
- Copy of records Kshs 550/=
30. It is trite law that Special Damages ought to be specifically pleaded and proved. In Caltex Oil (Kenya) Limited v Rono Limited (2016) eKLR, the Court of Appeal held that:-
- “.....If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.”
31. The Respondent produced the receipt for the Medical Report for the amount of Kshs 6,500/= and the receipt for the Motor Vehicle Search for the amount of Kshs 550/=. I am satisfied that the Respondent proved that she had incurred Kshs 7,050/= as Special Damages.
32. The final computation is as below:-

General Damages Kshs 170,000/=

Less 30% liability Kshs 51,000/=



Kshs 119,000/=

Add Special damages Kshs 7,050/=

TOTAL Kshs 126,050/=.

33. In the final analysis, the trial court's award of Kshs 249,550/= is substituted with Kshs 126,050/=.
34. In the end, the Memorandum of Appeal dated 26th May 2022 is merited as the damages awarded to the Respondent is reduced to Kshs 126,050/=.
35. Each party shall bear their costs on the Appeal while costs of the suit remain as awarded by the trial court.
36. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr Ondumo for the Appellants, Ms Chepkorir for the Respondent and Siele(Court Assistant)

