



**Kosombei & another v BOO (Suing Through His Mother and Next Friend MCO)
(Civil Appeal E026 of 2022) [2024] KEHC 6439 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E026 OF 2022**

RL KORIR, J

MAY 30, 2024

BETWEEN

JACKSON KOSOMBEI 1ST APPELLANT

EDWIN CHEBURES RONO 2ND APPELLANT

AND

**BOO (SUING THROUGH HIS MOTHER AND NEXT FRIEND
MCO) RESPONDENT**

*((Being an Appeal from the Judgment of the Senior Resident Magistrate,
Omwangi J. at the Magistrate's Court at Sotik, Civil Suit Number 60 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. 56 of 2020 (now Bomet High Court Civil Appeal Number E024 of 2022), Sotik PMCC No. 59 of 2020 (now Bomet High Court Civil Appeal Number E025 of 2022), Sotik PMCC No. 55 of 2020 (now Bomet High Court Civil Appeal Number E023 of 2022) and the present one Sotik PMCC No. 60 of 2020 (now Bomet High Court Civil Appeal Number E026 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, the suit 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 Sotik PMCC Number E025 of 2022 (now Bomet High Court Civil Appeal Number E025 of 2022).
4. On 16th November 2021, in the test suit being Sotik PMCC Number E025 of 2022 (now Appeal being Bomet High Court Civil Appeal Number E025 of 2022), a consent on liability was recorded in the ratio of 70:30 in favour of the Respondent (then Plaintiff).
5. In its Judgment delivered on 26th April 2022, the trial court awarded Kshs 250,250/= as General and Special Damages to the Respondent (then Plaintiff).
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 learned trial Magistrate erred in law and fact by delivering Judgement on quantum prior to the Respondent undergoing 2nd Medical Examination as had been ordered by the court hence denying the Appellants the benefit of adducing medical evidence a decision that was manifestly unjust and resulted into a miscarriage of justice.
 - V. 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.

The Plaintiff's/Respondent's case.

8. Through his Plaint dated 14th August 2020, the Respondent stated that on 23rd December 2019 while aboard Motor Vehicle Registration Number KBZ 117Y, he 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 he 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 Plaint.
10. That as a result of the accident the Respondent suffered the following injuries:-



- I. Bruises on the anterior chest wall.
 - II. Bruises on the anterior abdominal wall.
 - III. Chest contusion.
 - IV. Blunt trauma to the abdomen.
 - V. Head injury.
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. On 11th May 2023, this court directed that the Appeal be heard by way of written submissions.

The Respondent's Submissions.

14. Through her submissions dated 10th November 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 *Veronichah Mkanjala Mnyapara vs Patrick Nyasinga Amenya* (2021) eKLR where the courts awarded Kshs 300,000/= and Kshs 350,000/= respectively for similar soft tissue injuries.
15. It was the Respondent's submission that the Appellants had to demonstrate that the trial court assessed the damages based on wrong principles. That it was desirable for comparable injuries to be compensated by comparable awards. She relied on *Telkom Orange Kenya Limited vs I S O (minor suing through his next friend and mother J N)* (2018) eKLR.
16. The Respondent submitted that for this court to interfere with the award by the trial court, the Appellants had to show that the trial court in assessing the damages took into consideration an irrelevant factor. That no error could be detected to warrant this court's interference with the trial court's award.
17. 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 7,050/= as special damages be maintained.
18. The Appellants failed to file their written submissions despite being granted a chance to do so.
19. I have perused and considered the Record of Appeal dated 1st March 2023 and the Respondent's written submissions dated 10th November 2023. The only issue for my determination was whether the quantum was inordinately high.

Quantum

20. As per the Plaintiff, the Respondent suffered the following injuries:-
- I. Bruises on the anterior chest wall.
 - II. Bruises on the anterior abdominal wall.



- III. Chest contusion.
 - IV. Blunt trauma to the abdomen.
 - V. Head injury.
21. On record is the Medical Report by Dr. Peter Morebu dated 15th July 2020. The Report confirms the injuries listed in the Plaint. The Report also stated that at the time of the examination, the Respondent was in fair general condition and required analgesics to manage the pain.
 22. It was a ground of the Appeal that the trial court unjustly delivered Judgement before the Respondent could undergo a second medical examination. The Appellants filed a Notice of Motion Application dated 25th February 2022 which sought arresting of the Judgement pending the Respondent's second medical examination. On 8th March 2022, the trial court allowed the said Application and set down the matter for Judgement on 26th April 2022.
 23. As indicated earlier, Judgement was delivered on 26th April 2022. The Appellants had been given a chance to avail the Respondent for a second medical examination and they had approximately a month to file the second Medical Report before the trial court delivered its Judgement but they failed to do so. It is my finding that this ground of appeal does not hold water and I accordingly dismiss it.
 24. The only evidence left for the court's determination was the Medical Report date 15th July 2020 by Dr. Peter Morebu, evidence which I have found confirmed the injuries sustained by the Respondent.
 25. 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 has been a miscarriage of justice.
 26. As earlier stated, the Respondent asked this court to uphold the award of Kshs 350,000/= as it represented a fair award.
 27. 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.
 28. The Respondent suffered injuries that were soft tissue in nature. I have found the following cases quite helpful in terms of comparison:-
 - I. In HB (minor suing through mother & next friend DKM) vs Jasper Nchonga Magari & another (2021) eKLR where Nyakundi J upheld the lower court award of Kshs. 60,000/= for blunt injury to the head, neck, thorax, abdomen and limbs.
 - II. In Ephraim Wagura Muthui 2 others vs Toyota Kenya Limited & 2 others (2019) eKLR where Majanja J set aside the lower court award of Kshs. 55,000/= for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000/=.
 - III. In George Mugo & another vs A K M (Minor suing through next friend and mother of A M K (2018) eKLR the respondent was awarded Kshs 90,000/= as general damages for blunt injury left shoulder, blunt chest injury interior, bruises of left wrist region and blunt injury left arm
 - IV. In Justine Nyamweya Ochoki & another vs Jumaa 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/=.

29. 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/=.
30. With regards to the Special Damages, the Respondent particularized them as follows:-
Medical Report Kshs 6,500/=
Copy of records Kshs 550/=
31. It is trite law that Special Damages ought to be specifically pleaded and proved. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* (1992) KLR 177 stated that:-
“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
32. 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.
33. 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/=.
34. In the final analysis, the trial court’s award of Kshs 250,250/= is substituted with Kshs 126,050/=.
35. In the end, the Memorandum of Appeal dated 26th May 2022 is merited as the damages awarded to the Respondent is Kshs 126,050/=.
36. Each party shall bear their costs in this Appeal and the costs in the suit shall remain as awarded by the trial court.
37. 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 Ondimo for the Appellants, Ms Chepkorir for the Respondent and Siele(Court Assistant)

