



**Kosombei & another v Owino (Civil Appeal E023 of 2022)  
[2024] KEHC 6385 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6385 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E023 OF 2022**

**RL KORIR, J**

**MAY 30, 2024**

**BETWEEN**

**JACKSON KOSOMBEI ..... 1<sup>ST</sup> APPELLANT**

**EDWIN CHEBURES RONO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MERCY CHEPKOECH OWINO ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Senior Resident Magistrate,  
Omwange J. at the Magistrate's Court at Sotik, Civil Suit Number 55 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 an occupant.
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. 60 of 2020 (now Bomet High Court Civil Appeal Number E026 of 2022) and the present one Sotik PMCC No. 55 of 2020 (now Bomet High Court Civil Appeal Number E023 of 2022) sued the Appellants for injuries sustained in an accident in which all four Respondents were occupants in Motor Vehicle Registration Number KBZ 117Y.
3. Originally, the present 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 November 16, 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 April 26, 2022, the trial court awarded Kshs 250,250/= 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 May 26, 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. See *Selle & another vs Associated Motor Boat Co. Ltd and others* (1968) EA 123.

### **The Plaintiff's/Respondent's case.**

8. Through her Complaint dated 10th 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. Bruises on the chest.
  - II. Bruises on the right knee.
  - III. Bruises on the left knee.
  - IV. Chest contusion.
  - V. Blunt trauma to the neck.
11. The respondent prayed for special and general damages against the appellants.

#### **The Appellants'/Defendants' Case.**

12. Through their statement of Defence dated October 13, 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, the parties entered a Consent on liability and its Judgement, the trial court made a final award of Kshs 250,250/= to the Plaintiff.
14. On 11th May 2023, this court directed that the Appeal be heard by way of written submissions.

#### **The Respondent's Submissions.**

15. Through her submissions dated November 10, 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 v Patrick Nyasinga Ameyia* (2021) eKLR where the courts awarded Kshs 300,000/= and Kshs 350,000/= respectively for similar soft tissue injuries.
16. 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 ISO (minor suing through his next friend and mother JN)* (2018) eKLR.
17. 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.
18. 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.
19. The Appellants failed to file their written submissions despite being granted a chance to do so.
20. I have perused and considered the record of appeal dated March 1, 2023 and the Respondent's written submissions dated November 10, 2023. The only issue for my determination was whether the quantum was inordinately high.

#### **Quantum**

21. As per the Plaint, the Respondent suffered the following injuries:-



- I. Bruises on the chest.
  - II. Bruises on the right knee.
  - III. Bruises on the left knee.
  - IV. Chest contusion.
  - V. Blunt trauma to the neck.
22. On record is the Medical Report by Dr. Peter Morebu dated July 15, 2020. The Report confirms the injuries listed in the Complaint. 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.
  23. It was a ground of the Appeal that the trial court unjustly delivered Judgement before the Respondent could undergo a second medical examination. I have noted a Consent dated 13th January 2022 to arrest the Judgement pending the second medical examination which was scheduled to take place on January 20, 2022. The Appellants further filed a Notice of Motion Application dated February 25, 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 April 26, 2022.
  24. As indicated earlier, Judgement was delivered on April 26, 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.
  25. The only evidence left for the court's determination was the Medical Report dated July 15, 2020 by Dr. Peter Morebu, evidence which I have found confirmed the injuries sustained by the Respondent.
  26. 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. In *Butt vs. Khan* (1977) 1 KLR the Court of Appeal held as follows: -

“ An appellate court will not disturb an award for damages unless it is 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”.
  27. As earlier stated, the Respondent asked this court to uphold the award of Kshs 350,000/= as it represented a fair award.
  28. 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.
  29. The Respondent suffered injuries that were soft tissue in nature. I have found the following cases quite helpful in terms of comparison:-
    - I. In *Francis Omari Ogaro vs JAO (minor suing through next friend and father GOD)* (2021) eKLR an award of Kshs 180,00.00 was given for multiple cut wounds on the right lower limb, bruises on the right lower limb, bruises on both elbows, bruises on the right iliac region, bruises on the frontal region, bruises on the temporal region, lacerations on the frontal region, cut wounds



on the left iliac region, cut wounds on the frontal region, cut wounds on the temporal region and blunt trauma to the abdomen.

- II. 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
  - III. 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/-
  - 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/=.
30. 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/=.
31. With regards to the Special Damages, the Respondent particularized them as follows:-  
Medical Report Kshs 6,500/=  
Copy of records Kshs 550/=
32. It is trite law that Special Damages ought to be specifically pleaded and proved. 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 own costs in this appeal while costs of the suit remain as awarded by the trial court.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30<sup>TH</sup> 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)

