



REPUBLIC OF KENYA



**Gathenya & another v Gathieki (Civil Appeal 15 of 2021)
[2024] KEHC 6038 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 15 OF 2021**

J WAKIAGA, J

MAY 29, 2024

BETWEEN

LUCY WANJIKU GATHENYA 1ST APPELLANT

WILFRED MBUA WAIRIMU 2ND APPELLANT

AND

LUCY NJERI MUTHII GATHIEKI RESPONDENT

*(Being an appeal from the judgement and decree of Hon.
E.M. Nyagah SPM in Muranga CMCC NO 231 of 2016)*

JUDGMENT

1. By a plaint dated 22nd July 2016, the Respondent sued the Appellant for general and special damages arising out of a road traffic accident on the 29th January 2016, while the same was travelling as a fare paying passenger in motor vehicle registration number KBR 692 M along Muranga Kenol Road, the Appellant's driver so negligently and carelessly drove the said motor vehicle that it lost control and rammed onto motor vehicle registration number KBC 640S as a result occasioning severer injuries to the Respondent.
2. By a statement of defence dated 16th March 2017, the Appellant denied the occurrence of the accident, that the Respondent was traveling as alleged, the particulars of negligence and subsequent injuries.
3. The parties by consent agreed on liability at 20% : 80% in favour of the Respondent and agreed on the assessment of general and special damages by way of written submission.
4. By a judgement therein delivered on 30th April 2021, the Court made the following award:
 - a. General damages Kshs 2,500,000
 - b. Special damages Kshs 473,815



- c. Future medical expenses Kshs 130,000
 - d. Less 20% contribution
5. Being aggrieved by the said determination, the Appellant filed this appeal and raised the following grounds:
- a. The general damages awarded were manifestly excessive.
 - b. The Court did not consider the medical report on record and therefore arrived at an award that was so erroneous.
 - c. The Court did not consider the Appellant submissions.
 - d. The trial Court awarded special damages for sums which were paid by the Respondent's insurer.

Submissions

6. Directions were issued on the disposal of the appeal by way of written submissions. On behalf of the Appellant, it was submitted that the medical report listed the Appellant's injuries as fracture of the maxillae, nasal bone and midline of the lower jaw, fracture distal end of right radius, fracture of left femur and soft tissue injuries, without any permanent incapacitation. It was contended that similar injuries should attract similar wards as was stated in the case of; *Odinga Jacktone Ouma v Maureen Achieng Odera* [2016] eKLR.
7. It was contended that an award of Kshs 600,000 would have been adequate to compensate the Respondent, in support reliance was placed on: *Patrick Marianya v Ronald Ondicho Mose* [2021] eKLR where the award was reduced to Kshs 450,000 from Kshs 800,000 and *Aluminium Renovation & another v Stephen Mutuku Musyoka*[2020] eKLR, where the Court assessed general damages of Kshs 500,000 together with special damages paid by the insurance company of Kshs 463,065 paid by the insurers.
8. It was contended that the only amount due to the Plaintiff was the sum of Kenya shillings 10,050.
9. On behalf of the Respondent, it was submitted on the principles set out in *Gitobu Imanyara & 2 others v AG* [2016] the appellate Court should not interfere with the lower Court's findings, merely on the grounds, had it been the trial Court it would have arrived at a different award.
10. It was stated that the trial Court considered the medical report which was before her and that the award was not high. On special damages, it was submitted that the money paid by the insurance company was accrued on the strength of the premiums paid by the Respondent, in support of which the case of *Leli Chaka Ngoro v Maree Ahmed & another* [2017] eKLR, where the Court held that the doctrine of subrogation did not apply to personal accident claim.
11. This being a first appeal the Court is under a duty to re-evaluate the evidence tendered before the lower Court and to come to its own determination thereon. In this cause the trial proceeded by way of written submissions, which I have looked at.

Determination

12. The only issue for determination is whether the award herein was on the higher side so as to be interfered with by this Court on appeal. The injuries sustained by the Respondent were not disputed.



As per the medical report of Dr. Wokobi, the Respondent sustained fracture of the maxillae (facial bone) fracture of the nasal bone and fracture of the midline of the lower jaw.

13. To enable the Court arrive at as determination herein, I have looked at the following comparable awards:
 - a. *Specialized Aluminium Renovators limited & another v Stephen Mutuku Musyoka* [2021] eKLR where the Court on appeal assessed general damages at the sum of Kshs 500,000 to the Plaintiff who sustained fracture of the frontal nasal bones, fracture of the right orbit and frontal lobe haemorrhage.
 - b. *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna* [2022] eKLR where on appeal general damages were assessed at Kshs 500,000.
14. A look at the above comparative awards clearly confirm that the award by the trial Court was excessive and is amenable to be interfered with by this Court on appeal which I hereby do.
15. In exercising my powers as a first Appellant Court and having taken into account the injuries sustained by the Respondent, I am of the considered view and hold that an award of Kshs 800,000 would be an appropriate award in general damages which I hereby award.
16. I found no fault with the other awards which I hereby confirm and make the following final award.
 - (a) Liability 20%:80% by consent.
 - (b) General damages Kshs 800,000
 - (c) Special damages Kshs 473,815
 - (c) Future medical expenses Kshs 130,000Total Kshs 1,403,815
Less 20% Kshs 280,763
Grand total Kshs 1,123,052
17. The Appellant is entitled to the cost of this appeal while the Respondent to the cost at the Lower Court.

DATED SIGNED AND DELIVERED AT MURANGA THIS 29th DAY OF MAY 2024

J. WAKIAGA

JUDGE

In the presence of :

No appearance by the Parties

Jackline - Court Assistant

