



REPUBLIC OF KENYA



KENYA LAW
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**Kiautha v Ntarangwi (Civil Appeal E050 of 2021)
[2022] KEHC 10595 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E050 OF 2021
EM MURIITHI, J
JUNE 30, 2022**

BETWEEN

JOSEPH M'MUNJURI KIAUTHA APPELLANT

AND

IRENE GAKII NTARANGWI RESPONDENT

*(Being an appeal from the Judgment of the Hon. T. Gesora
(CM) delivered on 25/3/2021 in Maua CMCC No. 140 of 2016)*

JUDGMENT

Introduction

1. The respondent herein, the plaintiff in the trial court, sued the appellant *vide* a plaint dated October 13, 2016 seeking payment of special damages, general damages, costs of the suit and interest. The respondent pleaded that on or about December 9, 2015 at about 7.00 hours, she was lawfully travelling aboard motor vehicle registration no KBL 494 U Toyota Wish along Thika-Kenol road at Kandara Investments area when the appellant so negligently and carelessly drove the said motor vehicle that he caused the said accident which occasioned her various bodily injuries. The appellant denied the claim through his statement of defence dated September 21, 2020, and blamed the respondent for having wholly occasioned and/or substantially contributed to the accident.

Consent on Liability

2. The parties recorded a consent judgment on liability at the ratio of 10:90 in favour of the respondent against the appellant and upon full hearing on quantum, the trial court awarded general damages of Ksh 2,000,000(less 10% contribution)= Ksh 1,800,000, special damages of Ksh 124,500= 1,924,500 together with costs and interest.



The Appeal

3. On appeal, the appellant vide his memorandum of appeal filed on April 12, 2021 set out 3 grounds of appeal as follows:
 1. That the trial court's award of general damages in the sum of Ksh 2,000,000 was inordinately excessive taking into consideration the injuries sustained by the respondent.
 2. That the trial court's award of general damages in the sum of Ksh 2,000,000 was a wholly erroneous estimate of the damages payable in the circumstances of this matter.
 3. That the judgment of the learned trial magistrate was against the law and weight of evidence on record.
4. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

5. PW1, Irene Gakii Ntarangwi, the respondent herein, and a resident of Laare adopted her statement dated October 13, 2016 as her evidence in chief. She stated that the accident changed her life, and she was also adding weight because she could neither walk for long nor exercise. One of her legs had shortened and her gait had changed, and her dream of becoming a police officer and/or a soldier had been shattered.
6. On cross examination, she stated that she still experienced pain, and Kirua Hospital informed her that the removal of the metal implants would cost Ksh 250,000. She had stopped using crutches but once operated on, she would need to do so.
7. The appellant closed his case without calling any witnesses.

Submissions

8. The appeal was heard by way of written submissions which were filed on November 4, 2021, December 2, 2021 and February 2, 2022 respectively. The appellant reminded the court of the general rule in awarding general damages for pain and suffering that is comparable injuries should attract comparable awards in so far as is possible. He faulted the trial court for making an inordinately high award which was not commensurate with the injuries sustained by the respondent, because no permanent incapacitation was caused. He urged that this court had jurisdiction to disturb the trial court's award as the same consisted an erroneously high estimate as the trial court failed to properly consider the evidence tendered before it in relation to the law. He beseeched the court to allow the appeal, set aside the inordinately high amount of Ksh 2,000,000 and substitute the same with an award of Ksh 450,000. He relied on *Jane Wangui Murage v Dakiangwa Distributors Limited*[2012]eKLR, *Ibrahim Kalema Lewa v Esteel Co. Ltd*[2016]eKLR, *Florence Njoki Mwangi v Peter Chege Mbitiru*(2014)eKLR, *Mwavita Jonathan v Silivia Onunga*[2017]eKLR and *Penina Waitbira Kaburu v LP*[2019]eKLR.
9. The respondent submitted that the factors to be considered in awarding general damages vary with circumstances in each case as was held in *Eric Onyango Okumu v SDV Transami(K) Ltd*[2007]eKLR. She commended the trial court for correctly assessing general damages because the doctor termed her injuries as serious and she could not walk or stand for long hours. She also reminded the court of the well settled principle that awards of general damages must be comparable to what has been awarded in similar cases, for consistency and uniformity purposes. She submitted that no amount of money



could compensate an injured party and money could not bring an injured party close to the state he was in before the injuries. She submitted that her life had forever changed and her career had adversely been affected, as one of her limbs was shorter than the other, and she had to live with that disability for her entire life. She concluded that the amount of general damages awarded to her was adequate and she prayed for the court to uphold the trial court's judgment. She supported her submissions with the cases of *Penina Waithira Kaburu v LP*[2019]eKLR and *Gideon Ndungu Nguribu & another v Michael Njagi Karimi*[2017] eKLR.

Analysis and Determination

10. The sole issue for determination from the grounds of appeal is whether the award of general damages of Ksh 2,000,000 was inordinately high in view of the injuries suffered by the respondent and the evidence on record.
11. The principles under which the appellate court can interfere with the findings of fact by the trial court on quantum were laid out by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete*[2004] eKLR (Tunoi, O'Kubasu & Githinji JJ A) in reiterating what had earlier been held in *Kitavi v Coast Bottlers Limited* [1985]KLR 470(Kneller JA) where it was stated as follows: -

“It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the 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 or 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.”
12. The appellant contends that the award of general damages of Ksh 2,000,000 was excessive because it was not proportionate to the injuries sustained by the respondent. Dr Njeru C M, in his medical report dated August 18, 2016 enumerated the injuries sustained by the respondent to be bruises on the right upper arm and right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and a mid shaft femur fracture. The doctor concluded that, “Miss Gakii suffered grievous harm post the accident, injuries which left her with both anatomical and functional defects. Indeed her normal career progression was interfered with for a duration of 6 months.” In his medical report, the doctor, who is an expert in the medical field, did not refer to any metal implants which needed to be removed in future, which is why he did not assess the respondent's incapacitation. According to the doctor, the respondent would be able to resume her normal daily routine after 6 months from July 2016. That in essence meant that the respondent, in the doctor's opinion, would have fully recovered in November 2016.
13. With that background in mind, this court finds that the award of general damages of Ksh 2,000,000 was excessive in the circumstances. It is not disputed that following the accident, the respondent was first admitted at Thika level 5 hospital on December 9, 2015 before she was transferred to Mid-hill nursing home on December 17, 2015 where she was discharged on December 22, 2015, and this court empathizes with her for the pain and suffering she endured. However, the respondent's injuries, having been majorly soft tissue in nature, save for the mid shaft femur fracture, the award of general damages of Ksh 2,000,000 was inordinately high.



14. It is settled law that comparable injuries should attract comparable damages. Kneller JA in *Kitavi v Coast Bottlers Ltd* (Supra) had this to say:-

“It is now settled law that what the appellant was entitled to was a reasonable compensation assessed with moderation and conformity with the general method of approach, local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency but awards will very much depend on the facts of each case and any attempt to standardize “or rigidly” classify them will be in vain and wrong...”
15. Several recent awards exemplify this policy. In *Lynn Kambua Enterprises v Edith Vaati Simon Kasika* [2021] eKLR (Odunga J) upheld an award of general damages of Ksh 350,000 for a claimant who suffered a fracture of the left clavicle and blunt soft tissue injuries.
16. In *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR (C Meoli J) reviewed an award of general damages from Ksh 1,400,000 to Ksh 800,000 for a single fracture to the femur which had since healed.
17. In *Lilian Wanja v Cyprian Mugendi Igonga & 2 Others* [2016] eKLR (A Mabeya J) reviewed an award of general damages from Ksh 200,000 to Ksh 500,000 for a claimant who sustained a fracture of the pelvis, dislocation of the hip and multiple soft tissue injuries.
18. The court also notes the case of *Penina Waithira Kaburu v LP* (2019) eKLR which was relied on by the trial court. In that case, (Ngaah Jairus J) upheld an award of general damages of Ksh 2,000,000 for the claimant who suffered multiples fractures on the pelvis, injuries on the urethra and bruises on the legs. The injuries in the Penina Waithira case were, in my respectful view, more serious than those suffered by the respondent in this case. In this case, the only serious injury suffered by the respondent was a single fracture to the mid shaft femur, with the rest of the injuries being soft tissue in nature. Despite the doctor’s opinion that the respondent’s right knee pains and swelling during cold seasons was suggestive of post-traumatic arthritis, the award of general damages of Ksh 2,000,000 was manifestly excessive.
19. The respondent during cross examination stated, “I stopped using crutches but once operated on I will need to do so.” The fact that the respondent was walking without the aid of crutches was evidence of healing on her road to complete recovery. The court finds that the respondent’s assertion that her dream to become a police officer and/or a soldier was shattered is a bare statement which is not supported by any cogent evidence of interrupted police or martial training.

Orders

20. Having found that the award of general damages of Ksh 2,000,000 was an erroneous estimate of the pain suffered by the respondent, this court considers that an award of Ksh 800,000 would be adequate compensation and comparable to the award in like injury in Pestony Limited case.
21. Accordingly, for the reason set out above, the court, finds merit in the appeal and it is allowed.
22. The court hereby sets aside the trial court’s award of general damages of Ksh 2,000,000 and substitutes therefor an award of general damages of Ksh 800,000.
23. Costs in the cause.
24. Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JUNE, 2022.

EDWARD M. MURIITHI



JUDGE

Appearances:

M/S Mithega & Kariuki Advocates for the Appellant.

M/S Mutembei & Kimathi Advocates for the Respondent/Applicant.

