



REPUBLIC OF KENYA



KENYA LAW
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**Gikundi & another v Mwithalie (Civil Appeal E092 of 2022)
[2024] KEHC 415 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E092 OF 2022
EM MURIITHI, J
JANUARY 23, 2024**

BETWEEN

JAMES GIKUNDI 1ST APPELLANT

MUSTAPHA MUHAMMED AHMED T/A VANGA EXPRESS ... 2ND APPELLANT

AND

PATRICK KABERIA MWITHALIE RESPONDENT

*(Being an appeal from the judgment delivered by Hon. Tito
Gesora (CM) on 14/6/2022 at Maua CMCC No. 177 of 2016)*

JUDGMENT

1. By an amended plaint dated 18/10/2019, the Respondent sued the Appellants seeking general damages for pain and suffering, special damages and cost of this suit and interest. He pleaded that on or about 8/11/2016, he was a lawful passenger aboard Motor Vehicle Registration No. KCE 171 S Scania Bus travelling along Kenol-Sagana road near Shell area, when the 1st Appellant in the course of his employment by the 2nd Appellant so carelessly, recklessly and negligently drove it that it collided with another, as result of which he suffered severe bodily injuries.
2. The Appellants denied the claim by their statement of defence dated 2/2/2017 and prayed for the Respondent's suit to be dismissed.
3. Upon full hearing of the case, the trial court found the Appellants to have been 100% liable and awarded general damages of Ksh. 2,000,000, special damages of Ksh. 10,000 = Ksh. 2,010,000 plus costs and interest.

The Appeal

4. On appeal, the Appellants filed their memorandum of appeal raising 6 grounds as follows:



1. The learned magistrate erred in law and fact in awarding the Respondent 100% liability as against the Appellants; Kshs. 2,000,000 as general damages, and Kshs. 10,000 for special damages which amount was exorbitantly high in the circumstances and injuries suffered by the respondent.
2. The learned magistrate erred in law and fact in holding that the Respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
3. The learned magistrate erred in law and fact when he failed to consider the appellant's evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondent.
4. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
5. The learned magistrate erred in law and fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
6. The learned magistrate erred in law and fact in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff."

Duty of the Court

5. On a first appeal, the court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] EA 123).

Evidence

6. PW1 Patrick Kaberia Mwithalie, a car dealer and the Respondent herein adopted his witness statement dated 20/12/2016 as his evidence in chief and produced a list of documents filed therewith as exhibits 1 to 7. He went on to state that, "I was travelling from Voi to Meru. The accident was at Kenol along Nairobi Makuyu road. I was a passenger. I was injured. I cannot travel at night. I developed phobia. When it's cold I can't hold with my right hand. I blame the driver he was speeding. I seek damages and costs."
7. The Appellants and their counsel were absent, with notice, when the Respondent testified, and therefore there was no cross examination.

Submissions

8. The Appellants urge that there was no evidence adduced as to the circumstances that would otherwise render them liable for the accident, and cite *Benter Atieno Obonyo v Anne Nganga & another* (2021) eKLR. They urge that since the only major injuries allegedly sustained by the Respondent are the fractures, the general damages of Ksh.2,000,000 ought to be considerably reduced to Ksh.450,000 and cite *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* (2013) eKLR, *Kigaraari v Aya* (1982-88) 1 KAR 768, *Jitan Nagra v Abidnego Nyandusi Oigo* (2018) eKLR, *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* (2019) eKLR, *DG (Minor suing through her next friend MOR) v Richard Otieno Onyisi* (2021) eKLR and *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* (2019) eKLR. They fault the trial court for failing to consider



that comparable injuries should be compensated by similar awards and urge the court to allow the appeal with costs.

9. The Respondent urges that since he was neither a driver, co-driver nor a conductor of the accident motor vehicle, no contributory negligence is attributable to him, and cites *Masembe v Sugar Corporation and Another* (2002) 2 EA 434, *Susan Kanini Mwangangi & another v Patrick Mbiti Kavita* (2019) eKLR and *Polytanks Limited v Everlyne Wanza Musau & others* (2020) eKLR. He urges that the award of Ksh. 2,000,000 was reasonable considering his life long scarring injuries and the prevailing economic hardships, and cites *Butt v Khan* (1978) eKLR, *West (H) and Sons Ltd v Shepherd* (1964) AC 326, *Zipporah Nangila v Eldoret Express Limited & 2 others* (2016) eKLR, *Frankline Chilibasi Spii v Kirangi Liston* (2017) eKLR, *China Road and Bridge Corporation (Kenya) v Job Mburu Ndungu* (2021) eKLR and *Multiple Hauliers (E.A) Limited v Onesmus Kyalo Munuue & another* (2021) eKLR.

Analysis and Determination

10. From the grounds of appeal and the cross appeal, the 2 issues that isolate themselves for determination are whether the Respondent proved his case on a balance of probabilities, whether the award of general damages of Ksh. 2,000,000 was exorbitant and whether the Appellants' submissions and authorities were considered.

Proof of the case

11. The evidence on record is that the Respondent was travelling aboard the accident motor vehicle which was being driven by the 1st Appellant, when the accident occurred. The Respondent recorded in his statement which he adopted as his evidence in chief that, "I am the plaintiff herein and was travelling in Motor Vehicle Registration No. KCE 171 S Bus Scania as a passenger when the 1st defendant drove so carelessly that he caused the same to ram into another Motor Vehicle thus causing me serious injuries."
12. The Appellants, who had notice of the hearing date, did not avail themselves to test the evidence of the Respondent on cross examination or offer their version of events. The 1st Appellant, being the driver of the accident motor vehicle, owed a duty of care to the Respondent and the other passengers of ensuring they arrived safely at their destinations.
13. This court thus finds that the Respondent proved, by uncontroverted evidence, that the Appellants were wholly to blame for the accident and the trial court's apportionment of liability at 100% against the Appellants was beyond reproach.

Exorbitant Damages

14. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR in the following terms:

"It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case at 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 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. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470)”

15. In awarding general damages of Ksh.2,000,000, the trial court rendered thus, “It will not be fair in my view to give low awards that do not sufficiently address pain and suffering and the inconvenience that the claimant has been put through...Kshs. 2,000,000/= in general damages is sufficient. Only Ksh. 10,000/= was proved in special damages.”
16. Whether or not that award of general damages was an erroneous estimate of the damage suffered by the Respondent can only be gauged by the injuries he sustained. Those injuries are enlisted by Dr. S. Githu Wachira in his medical report dated 5/12/2016 to be a fracture of the distal radius and a dislocation of the proximal interphalangeal joint of the right hand, injuries to the upper back and right shoulder. He concluded that, “The client suffered a lot of pain as he sought for definitive treatment. He also incurred expenses amounting to about Kes 10,000. He will have to stay with a POP cast for about one month or more. His ability to carry out his normal duties has been grossly affected given that his right hand is the dominant hand. He is also at a risk of developing post traumatic arthritis of the affected joint.”
17. From the evidence on record of evidence, the Respondent’s injuries were mainly soft tissue injuries in nature save for a single fracture of the right hand.
18. This contrast with the cases cited by the Respondent, where the claimants suffered multiple fractures which justified the awards of general damages ranging from Ksh.1,500,000 to Ksh.2,400,000. Unlike in those cases, the Respondent herein sustained a single fracture, which has since healed, together with soft tissue injuries. On the other hand, the injuries suffered by the claimants in the cases cited by the Appellants are more or less similar to this case, where varied awards for general damages ranging from Ksh. 300,000 to Ksh.450,000 were made.
19. The outpatient attendant card and the general outpatient record from Nyambene District Hospital (Pexh. 7) are proof that the Respondent was managed at that facility as an outpatient. That clearly points to the fact that his injuries, though inclusive of a fracture, were not so grave, to justify an award of Ksh.2,000,000.
20. This court in *Jonah Kirimi Muthamia v David Kimathi James* Meru Civil Appeal No. E156/ 2021 B86/23 upheld an award of general damages of Ksh.700,000 for a claimant who sustained a fracture of the right clavicle with displacement of the distal segment, scalp injury, injury on the knee joints and pains all over the body, leading to his admission in hospital for 5 days.
21. In view of the principle that comparable injuries should attract comparable damages, this court finds an award of Ksh. 700,000 to be a proper estimate of the suffering the Respondent underwent regard being had to the recent steep loss of value in the Kenya Shilling.
22. The Respondent pleaded special damages of Ksh. 15,000 being Ksh. 5,000 for demand notice and Ksh. 10,000 for medical report. The court notes 2 receipts of Ksh. 5,000 for demand notice (PExh. 2) and Ksh. 10,000 for medical report (PExh. 4). That brings the award for special damages to Ksh. 15,000 instead of Ksh. 10,000 awarded by the trial court.
23. The trial court is wrongly faulted for failing to consider the Appellants’ submissions and authorities, because it analyzed both sets of submissions together with the authorities relied on in reaching the decision it did.



Orders

24. Accordingly, for the reasons set out above, the appeal partially succeeds and it is allowed in the following terms:
1. The award of general damages of Ksh. 2,000,000 is hereby set aside and substituted with an award of Ksh. 700,000.
 2. The award of special damages of Ksh. 10,000 is hereby set aside and substituted with an award of Ksh. 15,000.
25. The Appellants shall have costs of the appeal.
Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances:

M/s Kimondo Gachoka & Co. Advocates for the Appellant.

M/s Gikonyo & Ngugi Advocates for the Respondent.

