

Pascal v Ouko (Civil Appeal E005 of 2022)
[2023] KEHC 24463 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24463 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET

CIVIL APPEAL E005 OF 2022

RL KORIR, J
OCTOBER 18, 2023

BETWEEN

AMOKE OTIENO PASCAL APPELLANT

AND

ELIZABETH AWINO OUKO RESPONDENT

*(Being an Appeal from the Judgment of the Principal Magistrate, Muleka E.
at the Principal Magistrate's Court at Sotik, Civil Suit Number 166 of 2019)*

JUDGMENT

1. The respondent (then plaintiff) sued the appellant (then defendant) for General and Special Damages that arose from a road traffic accident that involved the Motor Vehicle Registration Number KCS 022Q in which she was a passenger and which allegedly belonged to the appellant.
2. The trial court conducted a hearing where four witnesses testified on behalf of the respondent (then plaintiff) while the appellant (then defendant) did not call any witnesses.
3. In its Judgment dated December 21, 2021, the trial court awarded Kshs 200,000/= as General Damages and Kshs 11,550/= as Special Damages to the respondent (then Plaintiff).
4. Being aggrieved with the Judgment of the trial court, Amoke Otieno Pascal through his Memorandum of Appeal dated January 5, 2022 appealed against the quantum of damages and relied on the following grounds:-
 - I. That the learned trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs 200,000/= that was overly excess in the circumstances of the case.
 - II. That the learned trial Magistrate erred in law and in fact in failing to pay regard to the decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding (sic!)



- III. That the learned trial Magistrate's exercise of discretion in assessment of quantum was injudicious.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR.

The Plaintiff's/respondent's case.

6. Through her Complaint dated December 17, 2019, the respondent stated that on August 21, 2019, she was involved in a road accident when the Motor Vehicle Registration Number KCS 022Q she was travelling in lost control and overturned at Mokomoni area along Chepilat-Ikong road.
7. The respondent stated that the appellant being the owner or proprietor of Motor Vehicle Registration Number KCS 022Q, was negligent in causing the accident and particularized the negligence in paragraph 4 of the Complaint.
8. That as a result of the accident, she suffered the following injuries: -
- i. Chest contusion.
 - ii. Blunt trauma to the back.
 - iii. Blunt trauma to the scalp.
 - iv. Blunt trauma to the neck.
 - v. Blunt trauma to the upper limbs.
 - vi. Blunt trauma to the lower limbs.
 - vii. Lacerations on the right knee.
9. The respondent prayed for Special and General Damages against the appellant

The appellant's/defendant's case

10. Through his statement of defence dated February 17, 2020, the defendant/appellant denied that he was the registered owner of Motor Vehicle Registration Number KCS 022Q and further denied the occurrence of the accident.
11. The appellant denied the particulars of negligence levelled against it. That if any accident happened, it was contributed to by the respondent's negligence. He particularized the negligence in paragraph 6 of his statement of Defence.
12. Pursuant to the directions of this court on March 7, 2023, the Appeal was canvassed by way of written submissions.

The appellant's Submissions.

13. In his submissions dated April 15, 2023, the appellant submitted that the injuries suffered by the respondent were soft tissue in nature and the award of Kshs 200,000/= was inordinately high. He further submitted that an award of Kshs 50,000/= would be adequate compensation for the injuries suffered. He relied on the following authorities: -



- i. [*Kenya Power & Lighting Company Limited & another v Zakayo Saitoti Naingola & another*](#) (2008) eKLR
 - ii. [*HB \(minor suing through mother & next friend DKM\) v Jasper Nchonga Magari & another*](#) (2021) eKLR
 - iii. [*Eva Karemi & 5 others v Koskei Kieng & another*](#) (2020) eKLR
 - iv. Homabay Civil Appeal No. E113 of 2021-[*James Kwanya Rege v Loice Mbone Cweya*](#).
14. The appellant submitted that costs followed the event and prayed for costs of this Appeal based on section 27(1) of the [*Civil Procedure Act*](#).

The respondent's Submissions.

15. Through her submissions dated March 24, 2023, the respondent submitted that Dr. Peter Morebu opined that she sustained multiple injuries which were in the process of healing and that she needed analgesics when she was in pain. That the award of Kshs 200,000/= was not too high to warrant interference by this court. She relied on [*Charles Gichuki v Emily Kawira Mbuba & another*](#) (2018) eKLR.
16. It was the respondents' submission that the award by the trial court was based on evidence and supported by recent authorities and that there was no basis to fault the same. That the fact that the trial court failed to adopt the appellant's submissions did not mean that they were not considered. It was her further submissions that parties' submissions were not binding upon the court.
17. I have considered the Record of Appeal filed on January 25, 2023, the Supplementary Record of Appeal dated February 3, 2023, the appellant's written submissions dated April 15, 2023, the respondent's written submissions dated March 24, 2023 and the only issue for my determination was whether the award of Kshs 211,550/= was fair and just.
18. In regards to liability, I concur with the trial court's decision to find the appellant 100% liable. The appellant did not testify as to the circumstances of the accident and therefore the respondent's testimony was uncontroverted. Further, the respondent was a passenger and was not in control of the motor vehicle or the circumstances surrounding the accident.
19. It is also salient to note that the appellant's appeal was to the extent of the assessment of damages and not liability.

General Damages

20. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Section 107 of the [*Evidence Act*](#) provide as follows:-
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
21. In determining general damages the court has to examine the extent and gravity of the injuries suffered by the respondent. The respondent stated that she had suffered the injuries listed in the Plaint. The Medical Report by Dr. Morebu marked as P.Exh 5 stated that the respondent was examined



- on November 14, 2019 and was found to have scars on the right knee and had tenderness on her chest and back.
22. The treatment notes marked as P.Exh 2 indicated that the respondent was treated on the material day at Kendu Bay sub-county hospital for road traffic injuries. There was no challenge by the appellant during cross examination as to the type of injuries the respondent suffered. In fact when he cross examined Juma Magora (PW4) who was a nursing officer at Kendu Bay sub-county hospital, PW4 confirmed that the respondent had suffered soft tissue injuries and that she complained of chest, hip and ankle pain.
 23. Flowing from the above, I am satisfied the respondent suffered the injuries as described and listed in the Plaintiff.
 24. It is trite that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards.
 25. The injuries suffered by the respondent were soft tissue injuries. I have found the following cases quite helpful in terms of comparison:-
 - I. In *Daniel Gatana Ndungu & another v 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/-
 - II. In *Justine Nyamweya Ochoki & another v 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/=.
 - III. In *John Wambua v Mathew Makau Mwololo & another* (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000/= and this was affirmed by the High Court.
 - IV. In *Charles Gichuki v Emily Kawira Mbuba & another* (2018) eKLR, the respondent suffered a blunt injury (tender) on the right side of the face, a blunt injury (tender) on the shoulders, a blunt injury (tender) on the chest and a blunt injury (tender) to the left thigh. Serگون J. substituted the trial court's award of Kshs 400,000/= with Kshs 300,000/=
 26. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2)* (1987)) KLR 30 stated that:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”
 27. Guided by the comparable cases above, it is my finding that the award of Kshs 200,000/= for the injuries sustained by the respondent was high. It is my further finding that an award of Kshs 150,000/= was sufficient and just. I set aside the award of Kshs 200,000/= and substitute therefore an award of Kshs 150,000/=.



Special Damages

28. It is trite law that Special Damages ought to be specifically pleaded. The Court of Appeal in Jogoo Kimakia Bus Services Ltd v 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.”

29. The respondent particularized the Special Damages as follows: -

Medical Report Kshs 5,000/=

Registration of demand Kshs 100/=

Doctor's attendance Kshs 6,000/=

Charges for the 2nd Medical Kshs 3,000/=

30. The respondent produced a receipt marked as P.Exh 6 which indicated that he had paid Kshs 5,000/= for the Medical Report. There was no evidence that the respondent incurred costs for the postage fee for the demand letter and procuring the doctor's attendance in court. The amount awarded under this head is Kshs 5,000/=
31. In the final calculation, the summation of the General and Special Damages awarded is Kshs 155,000/=.
32. In the end, the Memorandum of Appeal dated 5th January 2022 succeeds as the Damages awarded to the respondent are reduced from Kshs 211,550/= to Kshs 155,000/=.
33. Each party shall bear their costs in this Appeal while the costs of the suit remain as awarded by the trial court.
34. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 18TH DAY OF OCTOBER, 2023

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms.Kusa for the Respondent and in the absence of the Appellants, Siele (Court Assistant)

