



REPUBLIC OF KENYA



KENYA LAW
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**Mucheru v Kimari (Civil Appeal 125 of 2023)
[2024] KEHC 8376 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 125 OF 2023
JK NG'ARNG'AR, J
JUNE 26, 2024**

BETWEEN

MOSES MUCHERU APPELLANT

AND

LUCY WANJIKU KIMARI RESPONDENT

*(Being an appeal against the judgment of Hon. Manuela
Kinyanjui delivered on 8/5/2023 in Kiambu PMCC 102 of 2010)*

JUDGMENT

1. This judgment determines the appellant's appeal brought vide the memorandum of appeal dated 12/5/2023. The appeal relates only to the issue of quantum.
2. The respondent who was the plaintiff before the trial court pleaded that she was injured following a road traffic accident that occurred on 5/10/2009 along Kiambu/Nairobi road when she was lawfully traveling in motor vehicle KBD 083K as a passenger. She averred that the defendant therein or his driver/agent/servant drove motor vehicle KAR 908B carelessly and caused it to ram into motor vehicle KBD 083K which she was on board and an accident occurred wherein she sustained serious injuries.
3. After conducting the hearing, the court entered liability at 100% as against the 2nd 3rd party therein who is the appellant in the instant suit. The trial court also awarded Kshs. 2,400/= for special damages and Kshs. 1,000,000/= for general damages. The plaintiff therein was also awarded costs.

The Appeal

4. It is that judgment that gave rise to this appeal where the appellant complains that: the trial magistrate erred in law and fact in awarding the respondent general damages that were inordinately high considering the injuries sustained, the trial court erred in law and fact by failing to appreciate that the



respondent had recovered from her injuries substantially, and that the trial court erred in law and in fact by departing from the conventional awards of damages for similar injuries.

5. As observed above, the appeal is against quantum of damages only. The appellant filed submissions dated 23/5/2024 whereas the respondent's were dated 7/6/2024. I have considered those submissions alongside the entire record.

Analysis and Determination

6. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for *East Africa in Peters –vs- Sunday Post Limited* [1958] EA 424.
7. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of [*Kemfro Africa Limited t/a “Meru Express Services \(1976\)” & Another v Lubia & Another \(No 2\)*](#) Civil Appeal No 21 of 1984 [1985] eKLR where the court held that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

8. The first issue for consideration is whether the award of Kshs. 1,000,000/= for general damages was inordinately high considering the nature of injuries as submitted by the appellant. According to the treatment notes from Kiambu District Hospital dated 5/10/2009, P3 form and medical report dated 28/11/2011, the respondent sustained a fracture on the lower 1/3 tibia of the right leg and contusion of the right foot calf. At the time of the examination, the respondent still complained of pain and swelling on the left foot after a long walk and had no obvious deformities. She was in fair general condition and her vital signs were stable. She however had post traumatic myalgia.
9. I do note that the respondent called three witnesses during the hearing including PW3, Dr. John Muiru who examined the respondent and prepared the medical report which he produced as exhibit 6. He confirmed the injuries sustained and testified that the respondent was put on a plaster and analgesics and was incapacitated for 8 weeks. That she had also sustained permanent scars on the right leg but had normal movement. On cross-examination, he testified that the respondent was expected to heal with pain killers and physiotherapy. The appellant did not call any witness to challenge the testimony of PW3 neither did he file any medical report to challenge the injuries sustained by the respondent thus her evidence remained unchallenged. See the Court of Appeal in [*John Wainaina Kagwe v Hussein Dairy Ltd*](#) [2013] eKLR.
10. Taking into consideration the injuries sustained, I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held: -

“Having so said, we must consider the award of damages in the light of the injuries sustained.

It has been stated now and again that in assessment of damages, the general approach should



be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

11. The appellant in his submissions proposed an award of Kshs. 450,000/= on grounds that the respondent had healed substantially from the injuries as the accident occurred 14 years prior. He cited the cases of *Zacharia Mwangi Njeru vs. Joseph Wachira Kanoga* (2014) eKLR where an award of Kshs. 800,000/= was substituted with one of Kshs. 400,000/= where the plaintiff sustained fracture of the tibia and fibula. I however consider that the judgment was delivered 10 years ago. He also cited *Naom Momanyi vs. G4S Security Services Kenya Limited & Another* (2018) eKLR, *Daniel Otieno Owino & Another Vs. Elizabeth Atieno Owour* (2020) eKLR, *Herbert Otara Marube Vs. Dankan Ochora* (2022) eKLR where the plaintiffs had sustained various injuries the major being fractures of the tibia/fibula bones and the courts awarded an average of Kshs. 300,000/= - 450,000/=. I do note that the judgments were delivered between 2-5 years ago. Though the injuries are similar, I do note that there have been substantial economic changes between the time the authorities were delivered and the amount of Kshs. 450,000/= would be on the lower side more so considering that the respondent sustained a permanent scar on the right leg.
12. However, taking into consideration that the injuries sustained had healed at the time of the medical examination and there was no permanent deformity nor need for any future medical expense, and further considering that the respondent also had normal movement/mobility, I do find that the award of Kshs. 1,000,000/= was inordinately high. The Court of Appeal in *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 held that: -

“An appellate Court will not disturb an award of damages unless it is so 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”
13. I do find that this Court is justified in disturbing the award of damages.
14. In making an award for damages, I rely on the cases of *Atunga vs. Mogambi* (Civil Appeal E009 of 2021) [2022] KEHC 9854 (KLR) where the plaintiff sustained fracture of the right tibia/fibula bones, cut wounds and other minor soft tissue injuries and the court upheld the trial court award of Kshs. 550,000/=. *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR where the award of Kshs. 800,000 by the trial court was substituted with an award of Kshs. 500,000/= on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.
15. In the end, I find that an award of Kshs. 600,000/= was reasonable in the circumstances taking into account the lapse of time and different economic circumstances of the day.
16. The upshot is that the appeal is found to be partly merited and the award of Kshs. 1,000,000/= on general damages is set aside and replaced with an award of Kshs. 600,000/=. The award on liability and special damages remain undisturbed.
17. Each party to bear their own costs of the appeal.

It is so decreed.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

J.K. NG'ARNG'AR, HSC

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Taribo for the Appellant

No appearance for the Respondent

Court Assistant- Peter Ong'idi.

