



REPUBLIC OF KENYA



KENYA LAW
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**Mbugua & another v Keshara (Civil Appeal E021 of 2022)
[2024] KEHC 9282 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E021 OF 2022**

H NAMISI, J

JULY 26, 2024

BETWEEN

EDWIN MUIRURI MBUGUA 1ST APPELLANT

CHARLES NJUGUNA MWANGI 2ND APPELLANT

AND

MICHAEL TAPORU KESHARA RESPONDENT

*(Being an Appeal from Judgement of Hon. B. Kasavuli, Resident Magistrate
in Mavoko CMCC No E060 of 2020 delivered on 7th February 2022)*

JUDGMENT

1. This arises from a suit in the lower court filed by the Respondent against the Appellants, seeking general damages for pain, suffering and loss of amenities, special damages of Kshs 63,550/-, costs and interest from the date of filing the suit.
2. It was the Respondent's case that on 5 October 2020, the Respondent was riding on motor cycle registration KMFD 589A as a pillion passenger, when the 2nd Appellant negligently and/or carelessly drove motor vehicle registration number KCA 531N, causing the same to collide with the motor cycle, thus injuring the Respondent. The accident occurred along Nairobi – Namanga Road. The 1st Appellant was the registered and/or beneficial owner of the said motor vehicle.
3. As a result of the accident, the Respondent sustained a compound comminuted fracture right tibia/fibula,
4. The Appellants entered appearance and filed a Statement of Defence dated 7th December 2020. On 20th January 2022, parties recorded a consent on liability, in favor of the Respondent in the ration of 80:20. It was also agreed that the Respondent's bundle of documents dated 20 November 2020 would be admitted into evidence without calling the makers, and that the Appellants' second medical report



dated 19 May 2021 prepared by Dr. Achegu be admitted in evidence and annexed to the Appellants' submissions. Parties then filed their submissions on quantum of damages.

5. In his submissions, the Respondent urged the trial court to award Kshs 1,500,000/= in general damages. He relied on the cases of *Savco Stores Ltd v David Mwangi Kimotho*; HCCA No. 12 of 2005 and *Hussein Abdi Hashi v Hassan Noor*.
6. On their part, the Appellants contended that a sum of Kshs 250,000/= would be sufficient for general damages. They relied the cases of *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR, *Daniel Otieno Owino & Anor v Elizabeth Atieno Owuor* [2020] eKLR and *Aloise Mwangi Kabari v Martin Muitya & Anor* [2020]eKLR.
7. In its judgement, the trial court noted that the authorities cited by both parties presented comparable injuries to those sustained by the Respondent. In its discretion, the court entered judgement in favor of the Respondent as follows:

General Damages - Kshs 1,200,000/=

Special Damages - Kshs 63,550/=

Total - Kshs 1,263,550/=

Less 20% contribution - Kshs 252,710/=

Final Award - Kshs 1,010,840/=

8. Aggrieved by this decision, the Appellants lodged this appeal on the following grounds:
 - i. That the learned trial Magistrate erred in law and in fact and misdirected himself by failing to consider at all the submissions made before him by the Defendants and reached an erroneous conclusion thereby occasioning a miscarriage of justice;
 - ii. That the learned Trial magistrate erred in law and in fact by not considering the medical reports thereby arriving at an erroneous award on quantum;
 - iii. That the learned trial Magistrate erred in law and in fact by awarding general damages to the sum of Kshs 1,200,000/- that was manifestly high and not proved and having disregard to the submissions by the defendant and cited legal authorities;
 - iv. That the learned trial magistrate in assessing quantum of damages took into account irrelevant factors as well as wrong principles and therefore arrived at a wrong decision and made an excessive award
9. The Appeal was canvassed by way of written submissions.

Analysis and Determination

10. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that, "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in



this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally".

11. In an appeal on quantum, the court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were set out 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 thus:

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.

12. I have considered the Record of Appeal as well as the submissions by the parties.
13. In the trial court, the Respondent the Discharge Summary and Treatment Notes from Kitengela Sub County Hospital as well as a Medical Report by Dr. G. K. Mwaura. The Discharge Summary indicated that the Respondent was admitted on 5 October 2020 and discharged on 13 October 2020. The Medical Report by Dr. G.K. Mwaura dated 2nd November 2020 revealed that the Respondent walked with the aid of crutches. The Doctor's prognosis and opinion was that the Respondent was expected to heal within 1.5 years and permanent degree of incapacity was assessed at 10% in the right lower limb.
14. The Appellants produced a Medical Report by Dr. Adegü dated 19 May 2021. The doctor noted that there was still some level of weakness in the Respondent's right leg and that the right leg may require intervention. The doctor's assessment of permanent incapacitation was 5%.
15. In addressing whether the general damages awarded by the trial court were exceedingly high, I am guided by the principle in the assessment of damages that an award must reflect the trend of previous, recent and comparable awards. In the case of *Stanley Maore v Geoffrey Mwenda NYR* CA Civil Appeal No. 147 of 2002 [2004] eKLR, 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."

16. Having stated that, I am alive to the fact that no two cases are exactly the same. It is incumbent upon this court to analyse the damages awarded by the trial court in light of cases that may have comparable injuries.
17. In their submissions herein, the Appellants relied on the same 3 cases. In *Harun Muyoma Boge (supra)*, the plaintiff suffered blunt chest injuries, cut wound on the right wrist, deep cut wound on the right foot, compound fracture right tibia and fibula and soft tissue injuries. The court assessed the general damages at Kshs 300,000/=.
18. In Daniel Otieno Owino (*supra*), the injuries sustained were head injuries with cut wounds, chest injuries, injuries to the right leg with cut wounds and a fracture, injuries on the left lower ankle joint and on the left thigh. The court reduced an award of Kshs 600,000 to Kshs 400,000/= on appeal. In Aloise



Mwangi Kahara (supra), for injuries consisting of compound fracture of the right tibia and fibula, severe soft tissue injuries on the face, soft tissue injury on the left shoulder joint, the court awarded Kshs 500,000/-.

19. The Respondent relied on two cases. In *Kornelius Kweya Ebitchet v C & P Shoe Industries Ltd* [2008] eKLR, the plaintiff sustained a blunt trauma to the forehead and compound fracture of the left tibia and fibula bones. The court awarded Kshs 1,000,000/-. In *Mwaura Muiruri v Suera Flowers Ltd & Another* [2014] eKLR, the plaintiff was awarded Kshs 1,750,000.
20. I have looked at cases with comparable injuries. In *Nabson Nyabaro Nyandega v Peter Nyakweba Omboga* [2021] eKLR, the plaintiff sustained bruises on the face, compound fracture of the right tibia bone and cut wound on the right leg. The Court awarded Kshs 650,000 for general damages.
21. In *Moses Kirimi & another v GKJ (suing as the next friend of JK minor)* [2019] eKLR, the plaintiff sustained fracture right upper 1/3 tibia and fibula and bruises on the chin. The court found Kshs 1,200,000/= to be inordinately excessive and reduced it to Kshs 800,000/=.
22. In *Paul Otieno Obuya & another v Joshua Atuti Ngoto & another* [2016] eKLR the respondent had suffered compound fractures of both tibia and fibula of the right leg. The Court found Kshs. 900,000/= to be inordinately excessive and reduced it to Kshs. 700,000/=.
23. Based on the decisions I have cited, and bearing in mind their age, I find that the award made by the trial court of Kshs 1,200,000/= for general damages to be excessive. I, therefore, set aside the award and award the Respondent general damages in the sum of Kshs 900,000/=. The award in the special damages remains as decreed by the trial court. The Respondent will have costs and interest at court rates in the primary suit. Given the outcome of the appeal, each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT MACHAKOS THIS 26 DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

In the presence of:

...Wachira h/b Kiwinga..... for the Appellant

.....N/A..... for the Respondent

