



REPUBLIC OF KENYA



KENYA LAW
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**Watu Nominees Company Limited & another v Wangingi (Civil Appeal
E638 of 2023) [2024] KEHC 10695 (KLR) (Civ) (22 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E638 OF 2023

REA OUGO, J

AUGUST 22, 2024

BETWEEN

WATU NOMINEES COMPANY LIMITED 1ST APPELLANT

PETER MBUTHIA 2ND APPELLANT

AND

LUCY WANGUI WANINGI RESPONDENT

(Being an appeal against the Judgment and decree of Hosea Ng'ang'a (Principal Magistrate) in Milimani CMCC No E13556 of 2021 delivered on 15th June 2023)

JUDGMENT

1. This appeal challenges the judgment of the trial magistrate on the damages awarded. The respondent in his plaint alleged that he was a pillion passenger travelling in the appellant's motorcycle registration number KMFS XXXX. The rider, 2nd appellant, carelessly rode the motorcycle causing it to collide with another motorcycle causing the respondent to sustain bodily injuries. Liability was settled in favor of the respondent by consent in the ratio of 80:20.
2. The only issue before the subordinate court was whether the respondent proved that he sustained the injuries pleaded and what the damages were awardable. According to the respondent in paragraph 7 of his plaint, he suffered the following bodily injuries:
 - a. Fracture of the right frontal maxillary
 - b. Fracture of the right frontal ethmoids
 - c. Left elbow dislocation



- d. Postero displacement
 - e. Deep laceration on the right supraorbital region
 - f. Blood rhinorrhoea
 - g. Pain on the left elbow
 - h. Pain on the face
 - i. Lacerated scar on the right supraorbital region
 - j. Elbow joint movements is tender
3. The respondent in her plaint sought general and special damages, costs and interest from the date of filing suit. The allegations by the respondent were denied by the appellants who filed a statement of defence. However, the parties agreed to have liability settled in the ratio of 80:20 in favour of the respondent and the parties' documents as per the list of documents to be admitted without calling their makers.
 4. The trial court in his judgment found that the respondent as per the evidence contained in the medical reports proved the injuries listed in his plaint and made an award of Kshs 1,400,000/- as general damages. He awarded special damages of Kshs 8,108/-.
 5. The appellant is dissatisfied with the judgment of the trial magistrate and has filled this instant appeal on the following grounds:
 1. That the learned trial magistrate misdirected himself erred both in law and fact by awarding general damages for pain and suffering that are manifestly excessive as to be erroneous vis-a-vis the injuries sustained by the respondent.
 2. That the learned trial magistrate misdirected himself erred in law and fact in failing to consider the medical reports on record and hence arrived at an award that was not supported by the Doctor's findings and hence arrived at an award that was not supported by the doctor's finding and hence arrived at an erroneous award that is so manifestly excessive as to be erroneous.
 3. That the learned trial magistrate misdirected himself erred both in law and fact by not properly considering the severity of the respondent's injuries and hence arrived at an award that was not manifestly excessive as to be erroneous.
 4. The learned trial magistrate misdirected himself and erred in law and fact by totally failing to consider the appellant's submissions on record thus arrived at an erroneous finding on quantum that is so manifestly excessive.
 6. The appellant sought that the decision of the trial magistrate be set aside and urged this court to reassess a proper award of damages.
 7. The appeal was canvassed by way of written submissions. The appellant in his submissions identified a single issue for the court's determination: whether the general damages awarded by the trial magistrate are excessive. The appellant submits that the respondent suffered a broken bone fracture and dislocation of the left elbow, therefore an award of Kshs 800,000/- would be adequate. He cited the case of *Specialized Aluminium Renovators Limited & another v Stephen Mutuku Musyoka* [2021] eKLR where the respondent therein sustained fracture of the frontal nasal bones, fracture of nasal bone, fracture of right orbit, frontal lobe hemorrhage contusion, bleeding into sinuses and fracture of right radius and the court made an award of Kshs 500,000/-. The appellant relied on the decision of



Moiz Motors Limited & another v Harun Ngethe Wanjiru [2021] eKLR where the respondent had sustained multiple facial lacerations; depressed skull frontal bone, soft tissue injuries and was awarded Kshs 500,000/-.

8. The respondent opposed the appeal and filed its submissions dated 29/2/2024. It identified two issues raised by the appeal:
 - a. Whether the learned trial magistrate applied the correct principles of law and available facts in assessment of damages payable to the respondent.
 - b. Whether the learned trial magistrate's determination on the amount payable to the respondent was inordinately high as to represent an entirely erroneous estimate of compensation to which the respondent was entitled.
9. The respondent submits that the injuries it sustained were not in contention. The appellants have not disputed the injuries particularized in the respondent's pleadings. Further, the appellants have not challenged the treatment notes and the medical report produced before the trial court and as such, the respondent's claim under this head stands unchallenged. Considering the injuries sustained by the respondent, it was her submission that Kshs 1,400,000/- for general damages was reasonable and appropriate. She cited the case of *Peter Namu Njeru v Philemone Mwangoti* [2016] Civil Appeal 132 of 2012. The appellant argued that the trial magistrate's determination was within the law and principles of justice. The awards were fair and reasonable and it has not been shown that the assessment was too high to warrant interference.

Analysis And Determination

10. The factors under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in *Bashir Ahmed Butt v. Uwais Ahmed Khan* (1982-88) KAR as follows:

‘An appellate court will not disturb an award for general 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..’
11. The appellants in their appeal took issue with the trial court's finding on the injuries sustained by the respondent but abandoned this ground as they made no submissions to support it. Therefore, the only issue before the court is whether the award of damages was excessive for the injuries pleaded in paragraph 7 of the plaint.
12. In this case the respondent sustained left elbow dislocation, fracture of the right frontal maxillary and ethmoids and soft tissue injuries. The trial court's award was pegged on the award made in *Kenya Wildlife Service v Godfrey Kirimi Mwiti* [2018] eKLR. However, in that case, the plaintiff sustained 5 fractures: left zygomatic bone fracture, left ethmoidal bone fracture and maxillary fracture, nasal septum fracture, lower orbital floor fracture, and distal left radius fracture. In this case, the respondent only sustained one fracture of the right frontal maxillary and ethmoids therefore the trial court fell into error as the injuries in Kenya Wildlife Service are not comparable to those sustained by the respondent.
13. The court in *Mirie v Njoki* (Civil Appeal E061 of 2021) [2024] KEHC 2337 (KLR) (7 March 2024) (Judgment) awarded Kshs 500,000/- where the plaintiff thereinsustained soft tissue injuries, linear non-displaced fracture in the walls of orbit and within the right ethmoid bone. The *Mirie v Njoki* (*supra*) has fairly similar fractures however, in this case, the respondent also suffered left elbow dislocation. In *Chilaga & another v Gude* (Civil Appeal 85 of 2021) [2023] KEHC 25309 (KLR)



(6 November 2023) (Judgment) the plaintiff sustained soft tissue injuries and dislocation of the right elbow and the court affirmed the award of Kshs 300,000/-.

14. I have considered the injuries sustained by the respondent and comparable awards on similar injuries, and find the trial court's award of damages of Kshs 1,400,000/- was inordinately high. Therefore, I set aside the sum of Kshs 1,400,000 awarded as general damages and substitute it with a sum of Kshs 750,000/- as general damages. special damages of Kshs 8,108/- was pleaded and proved. The award shall be subjected to the agreed apportionment of liability.

15. The upshot is that the appeal is merited and the appellant shall have the cost of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 22ND DAY OF AUGUST 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Miss Kasina - For the Respondent

Diana -C/A

