



REPUBLIC OF KENYA



**Ouma v Jumba alias Chumba Ndeda (Civil Appeal E028 of 2023)
[2024] KEHC 13525 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E028 OF 2023
JN KAMAU, J
OCTOBER 31, 2024**

BETWEEN

FREDRICK OCHOLA OUMA APPELLANT

AND

ALEX JUMBA ALIAS CHUMBA NDEDA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon S. O. Ongeru (SPM) delivered at Vihiga in Principal Magistrate's Court Case No 137 of 2022 on 12th October 2023)

JUDGMENT

Introduction

1. In his decision of 12th October 2023, the Learned Trial Magistrate, Hon S. O. Ongeru, Senior Principal Magistrate, found the Appellant to have been eighty percent (80%) liable for the injuries that the Respondent herein sustained. He entered Judgment in favour of the Respondent herein against the Appellant as follows:-
General Damages Kshs 2,000,000/=
Special Damages -
Less 20% contribution Kshs 400,000/=
Kshs 1,600,000/=
Plus costs and interest
2. Being aggrieved by the said decision, on 30th October 2023, the Appellant filed a Memorandum of Appeal dated 25th October 2023. He relied on six (6) grounds of appeal.



3. His Written Submissions were dated 29th April 2024. However, they did not bear a court stamp. In view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood of the Registry having omitted to stamp the same.
4. When this matter came up for mention on 4th July 2024, the Respondent indicated that he would not file any Written Submissions.
5. The Judgment herein is therefore based on the said Appellant's Written Submissions only.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
8. Having looked at the Grounds of Appeal and the Appellant's Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.
9. The Appellant submitted that the duty of a first appellate court in considering an appeal against an award of damages was settled in the case of *Denshire Muteti Wambua vs Kenya Power & Lighting Co Ltd* [2013]eKLR wherein the Court of Appeal confirmed the approach in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.M.M Lubia & Another* [1982-88]1 KAR 777 at pg 730 where it was held that the principles to be observed by an appellate court in deciding whether it was justified in disturbing an award of damages were 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 was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
10. He pointed out that the Trial Court listed some injuries that were never pleaded and/or proved. He contended that the P3 Form showed fractures of the distal humerus, right femur and right tibia/fibula and the report by Dr Otieno showed left elbow fracture, right tibia and femur. However, it did not allude to a fracture of the left leg or comminuted fractures of the elbow.
11. He invoked Order 21 Rule 4 of the Civil Procedure Rules, 2010 and argued that the Trial Court did not give reasons or findings on the injuries. He submitted that without making any findings on which injuries the Respondent sustained, it was difficult to appreciate what similar injuries the Trial Court considered.
12. In that regard, he placed reliance on the case of *South Nyanza Sugar Co Ltd vs Omwando Omwando* [2011] eKLR where it was held that a judgment had to comply with the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules which provides that a judgment in a defended suit should contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision.
13. He urged this court to reconsider the evidence, evaluate it itself and draw its own conclusion and make due allowances bearing in mind that it neither saw nor heard the witnesses as was held in *Ram Gopal*



vs Nairobi Tea Packers Limited & 2 Others [2017] eKLR and Selle and Another vs Associated Motor Boat Co Ltd & Others (Supra).

14. He contended that the Trial Court failed to consider his submissions and the authorities he had cited. To buttress his point, he relied on the cases of Denshire Muteti Wambua vs Kenya Power & Lighting Co Ltd (Supra) and Ram Gopal vs Nairobi Tea Packers Limited & 2 Others (Supra) where the common thread was that the trial court did not consider any of the authorities cited by counsel for the parties so as to guide itself on the assessment of the damages.
15. He further contended that the Trial Court erred in not taking into account the cardinal principle on the assessment of damages which was that similar injuries attracted similar awards. In this regard, he relied on the case of Simon Taveta vs Mercy Mutitu Njeru [2014] eKLR where it was held that comparable injuries should as far as possible be compensated by comparable awards.
16. He argued that the Trial Court relied on the cases, Guardial Singh Ghataurhaf vs Parminder Singh Manku & 3 Others (eKLR citation not given) and Peace Kemuma Nyang'era vs Michael Thuo & Another [2014]eKLR which were cited by the Respondent wherein the courts therein awarded the plaintiffs Kshs 2,500,000/= for more severe injuries than those that the Respondent herein had sustained and hence, were not comparable to the case herein.
17. He proposed that an award of Kshs 700,000/= would have been sufficient in the circumstances and relied on the authorities he relied upon at the Trial Court which he submitted, involved similar injuries to those sustained by the Respondent.
18. In his Complaint dated 5th July 2022 and filed on 13th July 2022, the Respondent herein stated that he sustained fracture of the right proximal tibia/fibula, right femoral bone and right humerus bone, laceration on the hands and legs, injuries on the abdominal area, chest, head at the occipital area, neck and back.
19. In his Judgment, the Trial Court indicated that the Respondent sustained multiple lacerations on the scalp, compound tibia/fibula, fracture of the bone of the left leg, mid shaft femur of the leg and comminuted fractures of the left elbow, injuries to the chest, neck and back.
20. According to the Second Medical Report of Dr Tobias Otieno, the Respondent herein sustained left elbow fracture, tibia and right femur fracture and left ear injury.
21. Having analysed the evidence on record, this court agreed with the Respondent's argument that comminuted fractures of the elbow were not included and/or proved. Fracture of the left leg was ambiguous and may have been referring to fracture of either the right femur or the tibia.
22. Be that as it may, as at the time of his medical examination, the Respondent's right femur, tibia fractures and left elbow had healed but with arthritis. He had left elbow extension lag of forty five (45) degrees, flexion to eighty (80) degrees hence range of motion was 35 degrees. He also had pronation/supination loss of twenty (20) degrees, right knee ten (10) degrees loss flexion and scarring right leg. He put permanent disability at fifteen percent (15%).
23. It is well settled in law that an appellate court will not disturb an award of general damages unless the same was so manifestly high or inordinately excessive or manifestly or inordinately low or that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR.
24. It must be understood that money can never really compensate a person who had sustained any injuries. No amount of money could remove the pain that a person went through no matter how small an injury appeared to be. It would in fact be difficult to say with certainty that a particular amount of money



- would be commensurate with the injuries that a person had sustained. It was merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who had suffered an injury.
25. However, this assessment was not without limits. A court had to have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court therefore had to be guided by precedents.
 26. Indeed, in the case of *Kigaraari vs Aya*(1982-88) 1 KAR 768, it was stated that damages had to be within the limits set out by decided cases and also within the limits the Kenyan economy could afford. This was because high award would lead to higher insurance premiums which would in turn affect the members of public.
 27. This court also had due regard to the case of *Lim vs Camden HA* [1980] AC 174 where it was held that even in assessing compensatory damages, the law sought to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury that he had caused.
 28. Besides the fractures that the Respondent herein sustained, he also suffered soft tissue injuries. A fracture was not a minor injury. Remaining faithful to the doctrine of *stare decisis*, this court had due regard to the following cases with a view to coming to a fair and reasonable assessment of the general damages that ought to be awarded herein.
 1. *Akamba Public Road Services vs Abdikadir Adan Galgalo* [2016] eKLR
This very court reduced the lower court award of Kshs 800,000/= to Kshs 500,000/= where the respondent therein had sustained a fracture on the right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. In his prognosis, the doctor had observed that the respondent therein had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain and estimated the permanent partial disability at three (3%) per cent. It was his opinion that the soft tissue injuries would leave no residual disability.
 2. *Peter Namu Njeru vs Philemone Mwangoti* [2016] eKLR
The court held that Kshs 700,000/= was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.
 3. *Barnabas vs Ombati* [2022] KEHC 12136 (KLR)
The court upheld the trial court's award of Kshs 800,000/= for general damages where the plaintiff therein had sustained soft tissue injuries together with fracture of the right femur, right humerus and fracture of the pelvic.
 29. Taking into account the injuries that the Respondent sustained herein vis a vis the damages in comparable cases and the inflationary trends, this court came to the firm conclusion that the sum of Kshs 2,000,000 general damages was inordinately high or manifestly excessive to warrant interference of this court. The Trial Court therefore erred in considering the Respondents' authorities which proposed excessive awards with injuries not comparable to the ones herein and disregarding the Appellant's submissions and authorities.
 30. On the other hand, an award of Kshs 700,000/= as proposed by the Appellant would be a bit low in the circumstances and bearing in mind inflationary trends. Therefore, it was this court's view that an award of Kshs 1,000,000/= would be sufficient in the circumstances.



31. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Memorandum of Appeal were merited and the same be and are hereby allowed.

Disposition

32. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 25th October 2023 and filed on 30th October 2023 was merited. The effect of this decision is that the Judgment of Kshs 1,600,000/= that was entered by the Trial Court in Vihiga in PMCC No 137 of 2022 on 12th October 2023 be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondent herein against the Appellant on a ration of eighty per cent (80%) to twenty per cent (20%) basis for the sum of Kshs 800,000/= made up as follows:-

General damages Kshs 1,000,000/=

Less 20% contribution Kshs 200,000/=

Kshs 800,000/=

Plus costs and interest at court rates.

33. For the avoidance of doubt, interest on general damages will accrue at court rates from the date of judgment of the Trial Court until payment in full.

34. As the Appellant was partially successful in his Appeal, this court deviated from the general principal that costs follow the event and directs that each party will bear its own costs of this Appeal.

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF OCTOBER 2024

J. KAMAU

JUDGE

