



REPUBLIC OF KENYA



KENYA LAW
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**Kioko & another v Rotich (Civil Appeal E27 of 2021)
[2023] KEHC 1146 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E27 OF 2021
DKN MAGARE, J
JANUARY 27, 2023**

BETWEEN

ANNE NDUTA KIOKO 1ST APPELLANT

PETER GATHOGO 2ND APPELLANT

AND

MARYANNE WANJIKU ROTICH RESPONDENT

*(Being an appeal from the Judgment of Hon. J.B. Kalo Chief Magistrate
delivered on 5th March, 2021 in NAKURU CMCC No. 36 of 2017)*

JUDGMENT

1. This matter came up for hearing of an appeal from the Judgment of Hon. J. Kalo Chief Magistrate Chief Magistrate delivered on March 5, 2021 in Nakuru CMCC No. 36 of 2017)
2. The matter had not proceeded for some time and was placed before me due to the ongoing rapid results initiative to reactivate the same.
3. The said appeal is on quantum only. The appellant argued the appeal before me through their advocates. The appeal was opposed by learned counsel for the respondent stating that the award of general damages of Kes , 400,000/= was excessive. The court ought to have awarded a lesser amount as these were soft tissue injuries. I understood counsel to submit that the award was so excessive as to amount to an erroneous estimate of the damages. I was invited to thus interfere with the discretion of the court below
4. Mr Obae, learned counsel for the respondent maintained that the award is reasonable given the nature of the injuries which were classified as grievous harm.



5. I have the original Court file before me with typed proceedings and a record of appeal filed on 24/3/2022. The matter arose from an accident on 2/9/2016 involving Motor Vehicle KBF 170 E Toyota station wagon. Liability for the accident is not subject of this appeal.
6. The parties relied on their oral submissions and urged me to rely on both the record and the lower court file. I reserved the judgment for today 27/2/2023, which I have duly considered and will wish to render myself succinctly on points of law and fact involved.

Determination

7. The duty of the first Appellate Court is now settled. Clement De Lestang, VP, Duffus and LawJJA, in the locus classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123 set out the correct position, which has been used over time. They considered several decisions of the house of lords and the former court of Eastern African before rendering themselves as doth:-

“An appeal from the high court is by way of re-trial and the Court of Appeal is not bound to follow the trial court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

8. In relation to this matter, this court has the se powers as the court of appeal in relation to the High Court. This court therefore is to bear, in mind that it did not see nor hear witnesses. I will defer to the trial court on the demeanour and truthfulness of those witnesses unless the conclusions are not flowing from the generality of the evidence.
9. On the other hand, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.
10. The issue of documents was discussed in the case of *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017)eKLR , where the Court of Appeal, Ouko, Kiage and Murgor JJA, held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

11. Therefore, where the findings of the trial court are consistent with the evidence generally, this Court should not interfere with the same.
12. The respondent pleaded, in the amended plaint dated March 3, 2017 to have sustained the following injuries :-
 - a. Haematoma on the right thigh.
 - b. Extensive deep laceration on the right leg
 - c. Deep cut wound on the right ankle
13. The Respondent pleaded the following injuries



- a. Pain and swelling of the right thigh
 - b. Pain and swelling of the right ankle
 - c. Inability to walk without support (using a walking stick)
 - d. Visible ugly scars on the right leg and left thigh.
14. The p3 form was filled by Dr Kibos and produced as exhibit no. exhibit 1c by Dr Kiamba on 22/18/2018. The P3 form shows that the respondent had residual tenderness, abdominal tenderness, healed bruises on upper limbs, a healed skin graft on the lower limbs and a splinted plaster and ugly surgical scars. The respondent had 24 x1laceration/surgical scar, with cellulitis.
15. Dr. Wellington Kiamba also produced his report dated 17/10/2016 and a discharge summary dated 3/9/2016. The did an extensive medical report showed the injuries pleaded an outline of treatment and management that was carried out on the respondent:-
- a. Incision and drainage (of) haematoma all the right was done.
 - b. Debridement and cleaning of wounds on the right ankle joint was done.
 - c. Skin grafting was done. [This means another wound was also created elsewhere as a consequence).
 - d. Wound cleaned daily
 - e. Put on antibiotics and analgesics.
16. He classified the injuries as gracious harm with temporary incapacity for 3 months. There was a discharge summary dated September 3, 2016 had diagnosis “soft tissue injuries secondary to Trauma.

Duty of the court

17. The duty of the appellate court as regards damages is that of discretion. The Court of Appeal for East Africa in *Shah v Mbogo & another v Shah* (1968) EA 93, held as doth;-
- “The (appellate Court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice.”
18. In one of the decisions used by the appellant in the lower court, Justice DS Majanja on February 21, 2019 in *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 others* (2019)eKLR held as doth:-
- “General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”
19. It is thus settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.



20. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows as paragraph 8.

“In awarding damages, a court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree ofis to be sought in the awards, so regard would be paid to recent awards in comparable cases in local courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”

21. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously and capriciously. It is not my duty to substitute the lower court discretion with my discretion. The court cannot disturb damages unless the award is not too high or too low as to be an erroneous estimate of damages.

22. The High Court, pronounced itself succulently on these principles in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

23. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“ The principles which apply under this head are not in doubt.

Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

24. Therefore, for me as an appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

25. So my duty as the appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
- c. The award is simply not justified from evidence.

26. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

27. In analysing the injuries the Court relied on the decision of *Duncan Mweda & 2 others v Silas Kinyua Kithela* (2018)eKLR and *Fontiers Okbug & another v Alice Kayimba* (2015)eKLR.



28. From the submission, the appellant relied on decisions of the court from 1993 to and 2006. The appellant relied on the decision of *Vincent Oduor v KPLC* and *Josephine Angweyi v Samuel Ochilo & Sokono Saw M/s v Grace Nduta* (2006)eKLR. In the case of *Josephine Angweyi*, where Justice Asika Makhandia awarded Kes .70,000/- on September 16, 2010 over 13 years ago. The injuries were comparatively minor in that case and healed without disabling except a scar on the right leg.
29. In the case of *Grace Nduta v Sokono Said Mills* Justice Kimaru awarded Khs.30,000/= on March 24, 2006 for soft tissue injuries. This was 17 years ago. Even using the cases by the appellant the inflation for thee number of years place the award at between Ksh. 400,000-Kes 500,000/=.
30. The respondent in this matter suffered more serious injuries which resulted in grafting on the left thigh after draining the haematoma. The trial Court used comparable authorities and used the inflationary trends and the individuality of each case.
31. The authorities that were used by the respondent on the other hand were for more serious injuries for example the case of Joseph Kimanthi Nzau dealt with serious injuries been lacerations, fracture of the skull, cervical vertebrae and ribs.
32. On the other hand, Justice Majanja awarded Kes 350, 000/= in Francis Ochieng & Another v Alice Kajimba for multiple soft tissue injuries in 2015.
33. Further the same Court awarded Kes 350, 000/= on June 6, 2018 in *Duncan Mwewa & 2 others v Silas Kinyua Kitbela*(2015) eKLR for more similar

injuries.

34. I am satisfied that the award of Kes .400, 000/= as general damages as ordered by the Court will adequately compensate the respondent. The award did not take into consideration irrelevant issues and the court considered correct facts.
35. I cannot find fault with the decision of the court below. Consequently, I dismiss the appeal with costs.
36. In exercise of the powers granted to the Court under section 27 of the *Civil Procedure Act*, I award costs of the appeal of Kes 95, 000/= payable to the respondent within 30 days from the date hereof. In default execution to issue.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

In the presence

For AppellantMr Karanja

For the RespondentMr. Obae

Court Assistant Nancy Bor

