



**Mwangi v Lesk Investment Ltd & another (Civil Appeal 10 of 2017)
[2023] KEHC 18265 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 18265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL 10 OF 2017
SM MOHOCHI, J
JANUARY 27, 2023
(FORMERLY ELDORET HCCA NO. 33 OF 2012)**

BETWEEN

ANNE WANGARE MWANGI APPELLANT

AND

LESK INVESTMENT LTD 1ST RESPONDENT

ALEX KASINA MUETI 2ND RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable M. Kasera (Principal Magistrate) delivered on 13th March, 2012 in Eldama Ravine SPMCC No. 69 of 2010)

JUDGMENT

Introduction

1. This Appeal contests the issue of determination of quantum by the trial court.
2. By a plaint dated August 9, 2010 the appellant sued the respondents seeking general damages, special damages and costs plus interests of the suit, arising from a road accident that occurred on October 19, 2009 along Eldoret- Nakuru highway involving motor vehicle registration number KAU 596L in which the appellant was travelling in as passenger and motor vehicle registration number KAW 718 W being driven by the 2nd respondents. As a result of the said accident the appellant sustained severe injuries.
3. The appellants filed a joint statement of defence dated 11th November, 2010 denying the allegations made by the appellant. In the alternative, they blamed the driver of motor vehicle registration number KAU 569 for occasioning the accident.



4. By consent of parties, liability had been apportioned in the ratio of 85: 10 in favour of the appellant herein.
5. The trial court after hearing the parties and scrutinising the evidence before it delivered its judgment dated 15th march, 2012 whereby the appellant herein was awarded kshs.200,000/= as general damages, kshs.3,500/= as special damages and costs and interest of the suit.
6. Aggrieved by the trial court's award of general damages, the appellant filed a memorandum of appeal dated 26/3/2012 on the 27/3/2012 setting out a sole ground:That the Honourable Trial Magistrate erred in law and fact in considering the injuries sustained by the appellant and hence arrived at an award that was inordinately low as to be fair and reasonable compensation for the appellant.
7. The Appeal was canvassed by way of written submissions. The appellant filed her submission on January 27, 2020whereas, the respondents did not file any notwithstanding the courts directions and numerous opportunity(es) availed.
8. The respondents has had ample opportunity to file their written submissions since February 25, 2020when the court issued directions in this regard, however they failed and/or refused to comply with the court's directives and failed to participate in all proceedings since February 2020.
9. When the matter came up for hearing an Advocate Mr. Songok holding brief for M/S Nyaundi Tuiyott addressed the Court indicating lack of instructions to prosecute the appeal owing to the fact that Concord Insurance ltd (the insurer) had collapsed hence the want of instructions on the advocates he sought an adjournment on this basis but the same was declined.

appellant's Written Submissions

10. On the issue of quantum, the appellant faulted the learned trial Magistrate for awarding general damages that were inordinately low.
11. Regarding the injuries sustained, the appellant submitted that as result of the said accident she sustained a severe injury to the left elbow joint with ulna nerve injury. The appellant further submitted that she was admitted at the Moi Teaching and Referral Hospital on October 20, 2009and discharged on November 4, 2009 after spending 14 days at the said facility. In addition, she was taken to theatre for debridement and ulnar nerve repair.
12. The appellant submitted that regrading the injuries she sustained, Dr. Kiamba opined as follows in the medical report;

“ There is a depressed scar on the posterior and medical aspects on the left elbow. There is loss of soft tissues on this part. The scar tissue is tender. She has wasting of the muscles of the forearm. All movements of the left elbow joint are restricted. She has loss of sensation of the medial aspect of the forearm. The function of the left upper limb is markedly reduced.”
13. Further that he assessed permanent disability at 60%.
14. The appellant further submitted that the said findings were similar to those that were rendered by the respondents' doctor, Dr. Jakait who assessed the appellant's permanent disability at 30% and further stated that the appellant had recovered from the left ulna nerve injury with a reduction of the left arm function by 50%.
15. The appellant contended that the findings by the two doctors tally and show that appellant suffered a very serious injury, rendering her left arm incapable of doing essential duties to the extent of more



than 50%. Furthermore, that the paralysis suffered made appellant's left arm functionless and that the 5th ring finger could not flex.

16. The appellant's main contention is that in view of the injuries that she sustained, the award of Kshs.200,000/= was too low. The appellant contended that although she was undergoing physiotherapy, she had not fully healed.
17. The appellant urged the Court to set aside the award of Kshs.200,000/= and in its place award her Kshs.800,000/= as general damages for pain and suffering and loss of amenities.
18. To buttress her submission the appellant relied on the case of *Beatrice Khamede vs. Eric Wanunu & another* (2019) eKLR, where the court upheld the award of Kshs.800,000/= as general damages.

Determination

19. This is a 1st Appeal to the High Court. It is therefore an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to re-evaluate, re-assess and reconsider the evidence presented before the trial court to reach its own determination bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage. See: *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123

Issue for determination

20. I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the appellant together with all the authorities cited. Having done so, I find that only one key issue emerges for my determination: Whether the award of general damages of Kshs.200,000.00/= in light of the injuries stated above is inordinately low to persuade this court to interfere with it.
21. It is not in dispute that on October 19, 2009 along Eldoret- Nakuru Highway an accident occurred involving motor vehicle registration number KAW 718W said to have been driven by the 2nd respondent and owned by the 1st respondent, and motor vehicle registration number KAU 569L in which the appellant was travelling in.
22. As assessment of damages is at the discretion of the trial court, this court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)*; [1985] eKLR as follows: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

23. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal held that –

“...it is firmly established that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this court



should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

24. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A 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.’

25. The question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court considered an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.

26. It must be noted that injuries will never be fully comparable to other person’s injuries. What a court is to consider is that as far as possible comparable” to the other person’s injuries, and the after effects.

27. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.

28. In this matter two medical reports were produced. The first medical report dated May 19, 2010 produced by Dr. Wellington Kiamba, who opined that the injuries sustained by the appellant were as follows; severe injury to the left elbow joint with ulnar nerve injury. He assessed the appellant’s disability at 60%.

29. The second medical report dated 16th August, 2011 was produced by the respondent’s doctor, Dr. Jakait Charles Sang’alo who opined that injuries sustained by the appellant were as follows; severe injuries to the left elbow joint with ulna nerve injury. Further examination of the appellant revealed:
-Depressed scar on the postero-medial aspects of the left elbow
Wasting of the muscles on the medial aspect of the left forearm
Reduced flexion and extension movement as the left elbow joint by more than fifty (50%) percent
Total paralysis of the left 5th finger and partial paralysis of the ring finger with no flexion.
She has vitiligo on most parts of her body.
Dr. Jakait, assessed the appellant’s permanent disability at 30%.

30. From my re-evaluation of the evidence, I find that the learned trial Magistrate referred to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made.

31. At the trial court Counsel for the appellant proposed an award of Kshs.800,000/= as general damages. He relied on two authorities: *Barry Proud Foot v Coast Broadway Co. Ltd & another* HCCC No. 1265 of 1997 (NBI) in which the plaintiff was awarded Kshs.800,000/= for fractured ribs and permanent paralysis of his left hand as result of nerve damage and *Philip Sila v Eliud Kioko & another* HCCC No 42 of 1995 in which the plaintiff was awarded Kshs.600,000/= for dislocation of his left shoulder, fractured left humerus resulting into paralysis of the left arm. He also suffered soft multiple tissue injuries over the neck, forehead, upper eyelid and knee.

32. On the other hand, the respondents in their submissions at the trial court proposed the award of Kshs.150,000/= as general damages. They relied on findings in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2016] in which the plaintiff was awarded Kshs.300,000/= for



multiple bruises on the forehead, deep cut on palm of hand, fracture of left radius and ulna bones, severe injuries on the left arm, severe injuries on the flexion tendons of the thumb, index and middle fingers of the left arm and injuries on left fore-arm.

33. From the authorities cited by the appellant it evident that the injuries therein were more severe as compared to those sustained by the appellant whereas in the authority relied upon by the respondent there was no case disability.
34. In this matter both parties' doctors agree on the nature and extent of the injuries. Disagreement is only on the degree of permanent disability. Dr. Kiamba assessed permanent disability at 60% whereas in a later medical report done by Dr. Jakait permanent disability was at 30%.
35. Taking the two medical reports into account and the fact that Dr. Kiamba had assessed permanent disability at 60% while Dr. Jakait assessed permanent incapacity at 30%, this court will take the average of higher assessment of 60% by Dr. Kiamba and 30% by Dr. Jakait, bringing permanent incapacity to 45%.
36. In the case of *John Onyango Omollo v Mary Omolo Ndege* [2014] eKLR, the respondent sustained degloving injury to the right upper limb with loss of tendons and cut wound on the forearm. The court upheld an award of Kshs.600,000/=.
37. In case of *Mulandi David Kole v George Odhiambo Obiewe & another* [2019] eKLR appellant suffered post traumatic osteoarthritis of the right elbow joint and had 30% permanent disability. The Appellate Court set aside Kshs.350,000/= awarded as general damages and in it place awarded the appellant Kshs.600,000/=.
38. In this case, the trial Magistrate did not consider the issue of permanent disability while arriving at the award of Kshs.200,000/= as general damages. Although the award of damages was at the discretion of the trial Magistrate, the discretion should be exercised judicially. It is the view of this court that the award of damages by the learned trial Magistrate was inordinately low that it was a wholly erroneous estimate of the damages, to call for this court's interference.
39. Accordingly, I allow this appeal on quantum, set aside the award of Kshs.200,000/= as general damages awarded to the appellant/Plaintiff by the trial court and substitute therewith an award of Kshs.500,000/= less 15% contribution leaving a balance of Kshs.425,000/= plus special damages as proved in the sum of Kshs.3,500/= Interest shall be paid on the awarded sum from the date of the judgment by the trial court.
40. The appellant shall have costs and interest awarded by the trial court.
41. Each party to bear their own costs of the Appeal.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY, 2023.

S. MOHOCHI (JUDGE)

In the Presence of;

Appellant: Ms Chelagat of Ms Mboga G.G & Co Advocates

Respondents: Absent

Mr. N. Kemboi C.A

