



REPUBLIC OF KENYA



**Githuka v Serem (Civil Appeal 32 of 2021)
[2023] KEHC 427 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL 32 OF 2021
RN NYAKUNDI, J
JANUARY 24, 2023**

BETWEEN

GEOFFREY NG'ANG'A GITHUKA APPELLANT

AND

BOAZ KIPCHIRCHIR SEREM RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable D. Alego, Senior Principal Magistrate in Kapsabet PMCC No. 18 of 2017 delivered on 10th July 2019)

JUDGMENT

1. The appeal before this court arise from the judgment and decree in Kapsabet Principal magistrates' Court Case No 18 of 2017. The respondent instituted a suit against the appellant seeking general damages, special damages and costs of the suit. The cause of action arose from an accident that occurred on September 18, 2016 when the plaintiff/respondent was riding motorcycle registration no KMDC 583E at Lessos area when the defendant negligently drove motor vehicle registration no KCH 987E and knocked him down, causing him to sustain injuries.
2. The matter proceeded to full hearing and upon considering the evidence, testimony and submissions presented to the court, the trial magistrate found in favour of the plaintiff as follows;
 - a. Liability as against the defendant; 20/80
 - b. General damages Kshs 1,500,000/-
 - c. Special damages Kshs 20,650/-
 - d. Costs and interests
3. The appellant being dissatisfied by the decision of the trial court, instituted the present appeal vide a memorandum of appeal dated December 4, 2020 on the following grounds;



1. That the learned trial magistrate erred in law and in fact in the assessment of quantum on general damages of Kshs 1,500,000/- that was overly in excess in the circumstances of the case.
2. That the learned trial magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendants' submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
3. That the learned magistrates' exercise of discretion in assessment of quantum was injudicious.

Appellant's Case

4. The appellant sought to have the trial courts' decision set aside. However, there are no submissions on record for the appellant.

Respondent's Case

5. The respondent filed submissions on July 13, 2022. He submitted that from the Medical documents tendered the Respondent sustained the following injuries;
 - a. Head injury with loss of consciousness for two weeks.
 - b. Blunt injury to the neck.
 - c. Blunt injury to the chest.
 - d. Prick wound (penetrating) injury to the right hand.
 - e. Fracture of the right femur.
 - f. Left hip joint dislocation.
6. It was his case that the damages awarded by the trial court were sufficient and he cited the following cases where there were comparable injuries as a guide to the damages awarded;
 - a. Nakuru Hccc No 261 Of 1995 *KC (a Minor) Suing Throgh His Next Friend Vs Plan International*
 - b. Mombasa Hccc No 180 Of 1986 *Joseph Poko Ochieng Vs Kenya Bus Services (msa) Ltd*He urged the court to dismiss the appeal with costs.

Analysis & Determination

7. This being a first appeal, it is trite that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See *Stanley Maore vs Geoffrey Mwenda* "the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusions...")
8. Upon considering the memorandum of appeal, the record of appeal and the submissions on record, it is clear that the issue for determination is as follows;
 - a. Whether the trial court erred in its award of damages

Whether The Trial Court Erred In Its Award Of Damages

9. This branch of law on assessment of damages for pain and suffering accompanied with loss of amenities is fairly complex given the unique circumstances and facts of each case presented before our courts.



The general principle is that the assessment and final award boils down to discretionary power of the session judges and magistrates. It should be considered that the courts do not appear to be consistent in the application of the principles developed over time as reference points to structurally not to occasion on a failure of justice. The comparative jurisprudence in the case of: *Imperial Oil, Limited vs Drlik* : 234 F 2d 4(6th Cir 1956) cert, denied, 352 US 941 (1957) the court cautiously affirmed saying that:

It remains to be considered whether the method used by the District Judge in determining the total amount was error as a matter of law. It may be that it was a novel one -but it does not follow that it invalidates the award. In determining the amount of an award for pain and suffering a juror or judge should necessarily be guided by some reasonable and practical considerations. It should not be a blind guess or the pulling of a figure out of the air. At the same time there is no exact or precise measuring stick. Exact compensation is impossible in the abstract but the juror or judge should endeavor to make a reasonable or sane estimate. The practical considerations influencing a particular juror or judge or the reasoning used by him may very well differ with the method used by another juror or judge, yet each of such different methods or modes of reasoning may be a reasonable method of reaching the desired result. We are more concerned with the result, reached by a reasonable process of reasoning and consistent with the evidence, than we are with which one of several suitable formulas was actually used by the juror or judge. It is not necessary for us to adopt the method used by the District Judge as a rule of law for the proper disposition of such an issue, and we do not do so. In our opinion, it was not an arbitrary or unreasonable approach to the problem presented and its application was so adjusted in the present case as to be consistent with the evidence and to reach a result which does not appear to us to be manifestly unjust”

10. In our jurisdiction anyone who has been victim under the tort of negligence has an enforceable right of compensation. That award of compensation at the hands of the court is a creative jurisprudence evolved by our courts. However, the criteria adapted by the courts in quantifying the compensation has been subjected to varied criticism. One of the general principles being emphasised is that in the assessment of the compensation, the emphasis has to be on the compensatory not on the punitive element. The court in *Abraham vs Minneapolis*, St Paul and Sault Ste Marie R Co in 244 Minn 1, 68 NW 2d 873 (1955). The court added its voice on the method of computing damages for pain and suffering as demonstrated in the following passage:-

An award for pain, suffering, and disability on a per diem basis ignores the subjective basis of such damages. Unlike loss of earnings or the cost of a medical attendant, pain, suffering, and disability recoveries cannot be reduced to mathematical formulae, and on this theory they have been exempted from deductions for present worth. Each day of suffering is a part of a whole and will vary and generally decrease as time goes on. To permit a per diem evaluation of pain, suffering, and disability would plunge the already subjective determination into absurdity by demanding accurate mathematical computation of the present worth of an amount reached by guesswork”

11. Whether a court is looking at the claim in the 1st instance or an appeal they are identifiable foundation guidelines on assessment of damages. The only minimum differentia on appeal is the basic reliance on the trial court record. Even with that scope of jurisdiction and the stated evidence brought out the characteristics on the claim to the injury itself it is possible to make some inferences capable to vary or enhance the award of damages. I keep in mind the following components:
 - a. The pain and suffering caused by it before trial.
 - b. The disability and loss of amenity caused by it before trial.



- c. The pain and suffering which the plaintiff will probably suffer in the future, which may be prognosed as permanent or temporary.
 - d. The disability and loss of amenity which the plaintiff will probably suffer in the future, which again may be prognosed as permanent or temporary.
 - e. Loss of life expectancy (i.e. the amount by which the life expectation of the plaintiff is shortened by the injury) which is of course, a factor only in some cases or serious injury.
 - f. Loss of earning before trial.
 - g. Expenses incurred before trial such as medical and surgical treatment nursing and similar attention, Cost and maintenance or special equipment and damages to property,?
 - h. Loss of earning either vial or partial which is expected to continue in the future either permanent or temporary capacity.
 - i. Loss of earning capacity. It may be that a plaintiff at trial is earning as much or more than he was before his accident but that he will be handicapped by his disability if in the future he has to seek employment on the open labour market. Or it may be that because of his disability he has to work longer hours to maintain his earning at their pre-accident level.
 - j. Expenses of the sort referred of the sort referred to in (g) above which are expected to occur or continue in the future either permanently or temporarily.
12. As I have mentioned above it is accepted both in comparative jurisdiction and our very own that the scale of discretion does tilled in either way having taken into account the factors underlined herein in assessing the pecuniary loss of a claimant. It is obvious I will test the circumstances of this appeal as envisaged in these principles.
13. The principles guiding an appellate court when considering whether to set aside an award for damages were set out in *Butt v Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470) where the court pronounced itself as follows;
- Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low.”
15. It follows that in order for the appeal to succeed the appellant must prove that the trial magistrate proceeded on the wrong principles or that the figure arrived at was inordinately high or low. In the present appeal, the contention is that the award for damages was manifestly excessive.
16. It is trite that in awarding damages the courts are required to use comparable awards where parties suffered comparable injuries to guide their decisions. The injuries sustained by the plaintiff as per the medical report and the pleadings were as follows;
- a. Head injury with loss of consciousness for two weeks.
 - b. Blunt injury to the neck.



- c. Blunt injury to the chest.
 - d. Prick wound (penetrating) injury to the right hand.
 - e. Fracture of the right femur.
 - f. Left hip joint dislocation.
17. The appellant mainly suffered soft tissue injuries and had permanent disability of 10%.
 18. In *Joseph Kimanthi Nzau v Johnson Macharia* [2019] eKLR the Respondent sustained head injuries, chest injuries and lower limb injuries. He had a hematoma of the scalp and severe tenderness in the same region while the x-ray showed fracture of the skull bone at the surgical suture region. He further had tenderness of severe degree in the right chest anteriorly with haematoma formation in the same region while x-ray showed fractures of the 1st and 2nd ribs and fracture of the clavicle bone. He also had tenderness of severe degree in the right hip. The court of appeal reduced the award by the trial court from Kshs 1,000,000/- to Kshs 800,000/-.
 19. In the respondent sustained a head injury with loss of consciousness for 3 weeks, blunt injury to the left eye, fracture of the right humerus, fracture of the right femur, fracture of the left femur and multiple cut wounds on both lower limbs. The appellate court reduced the award from 1,800,000/- to 1,200,000/-.
 20. Upon considering comparable awards, and taking into account the time passed and inflation I find that the trial court did not err in its award of general damages.
 21. In the premises, the appeal is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED AT KAPSABET ON THIS 24TH DAY OF JANUARY 2023

In the presence of Wanyonyi for the Respondent.

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R. NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

Kimondo Gachoka & Co Advocates

Mwinamo Lugonza & Co Advocates

