



**Mombasa Maize Millers Limited v Ngugi (Civil Appeal 229 of 2019)
[2023] KEHC 22204 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 22204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 229 OF 2019
F WANGARI, J
FEBRUARY 24, 2023**

BETWEEN

MOMBASA MAIZE MILLERS LIMITED APPELLANT

AND

JAMES CHEGE NGUGI RESPONDENT

*(Being an appeal from the Judgement delivered by the Learned Senior
Principal Magistrate Hon. F. Kyambia in Civil Suit No. 1520 of 2016 in
the Senior Resident Magistrate's Court at Mombasa on 1st November, 2019)*

JUDGMENT

1. This is an appeal against the judgement delivered by Honourable F Kyambia, Senior Principal Magistrate on November 1, 2019. The Appellant being dissatisfied with the said judgement has preferred this appeal.
2. The Appellant preferred the following six (6) grounds of appeal in urging this court to set aside the judgement delivered on November 1, 2019: -
 - a. That the Learned Senior Principal Magistrate erred in awarding a sum of Kshs 400,000/= to the Respondent as general damages.
 - b. That the said award of Kshs 400,000/= is in the circumstances of this case so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the Plaintiff considering the injuries suffered by him and the opinion of Dr Ajoni Adede in his medical report dated July 27, 2016.
 - c. That the said award of Kshs 400,000/= is altogether disproportionate to the injuries sustained by the Plaintiff and is not in keeping with other comparable awards made in respect of similar injuries.



- d. The Learned Senior Principal Magistrate failed to give any or any adequate or credible reasons of how he arrived at the figure of Kshs 400,000/= general damages which he awarded to the Plaintiff on the basis of 100% liability.
 - e. That the Learned Senior Principal Magistrate erred in failing: -
 - f. To appreciate the significance of the various facts that emerged from Dr Ajoni Adede's medical report dated July 27, 2016.
 - g. To consider or properly consider all the evidence before him and/or;
 - h. To make any or any proper findings on the aspect of quantum of damages on the evidence before him.
 - i. That the Learned Senior Principal Magistrate erred in failing to adequately consider the written submissions filed by counsel for the Appellant. The Appellant thus sought for the appeal to be allowed and the ruling delivered on December 16, 2021 be set aside in its entirety and the Appellant's Notice of Motion dated June 30, 2021 be allowed in terms of prayer 1 or in the alternative, in terms of prayer 2.
3. Directions were taken and the appeal was disposed of by way of written submissions where all parties duly complied and relied on various decisions in support of their rival positions.
 4. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano vs Associated Motor Boat Co Ltd (1968) EA 123*). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd (1982-88) 1 KAR 278* and *Kiruga –versus- Kiruga & Another (1988) KLR 348*.
 5. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, decree, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise I will carefully revisit the record.
 6. The Respondent vide a plaint dated August 11, 2016 and filed on August 16, 2016 sought for general and special damages from the Appellant for an accident that allegedly occurred on January 2, 2016 along Mijikenda Road, Mombasa occasioning the Respondent serious injuries. The suit was defended. The matter was fully heard and through a judgement delivered on November 1, 2019, the Lower Court found in favour of the Respondent. The Appellant was found to be 100% liable for the accident. The Respondent was awarded Kshs 400,000/= in general damages and Kshs 2,000/= as special damages. The Appellant being aggrieved by this judgement has preferred this appeal.

Appellant's submissions

7. The appellant while citing the case of *Henry Hidayat Ilanga v Manyema Manyoka [1961] 1 EA 705* (CAD) which applied the rule laid down by the Privy Council in *Nance v British Columbia Electric Railway Co Ltd (4), [1951] AC 601*, it enunciated the principles that guide the appellate court on an appeal against award of damages. The Appellant further referred to the case of *Cecilia W Mwangi & Another v Ruth Mwangi [1977] eKLR* cited in *Tayab v Kinanu (1982 – 88) 1 KAR 90*. The Appellant submitted that the Learned Magistrate award of Kshs 400,000/= in general damages was so excessive to amount to an erroneous estimates of the damages payable to the Respondent. The Appellant invited the court to look and ascertain the injuries that the Respondent suffered in order to determine whether



they resonated with the award given. According to the Appellant, the Respondent suffered soft tissue injuries.

8. The case of *Mwavita Jonathan v Silvia Onunga [2017] eKLR* was cited for the proposition that in assessing general damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards. Distinguishing the authorities relied on by the Respondent in the Lower Court, the Appellant stated that those authorities were for much serious injuries than those sustained by the Respondent. The Appellant concluded that the sum of Kshs 450,000/= submitted by the Respondent in the Lower Court was inordinately high considering the injuries sustained.
9. The Appellant further cited the cases of *Mokaya Mochama v Julius Momanyi Nyokwoyo [2013] eKLR*, PF (Suing as Next Friend and Father of *SK (Minor) v Victor O Kamadi & Another [2018] eKLR* and *Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR*, the Appellant submitted that an award of Kshs 90,000/= on the basis of 100% liability is reasonable compensation. It therefore urged that the appeal be allowed with costs.

Respondent's submissions

10. For the Respondent while making reference to Dr. Ajoni Adede's medical report indicated that as a consequence of the said injuries, the Respondent was left with multiple scars of 3 cm, his right elbow and right hand have 2cm scars and his right foot upper surface has 2 cm by 2 cm scars. He urged that the award of Kshs 400,000/= as general damages was merited taking into account comparable awards and rate of inflation. The Appellant cited the case of *Evans Mururia Karani v Nthenya Muine Mukenya [2021] eKLR* for the proposition that an appellate court is required to be slow in interfering with awards made by a trial court and should only do so if it is satisfied that in making the award, the trial court either misapprehended the evidence adduced in the case or applied the wrong legal principles or that it abuse its discretion.
11. The Respondent went on to submit that the Appellant did had not shown any evidence that the Learned Magistrate applied wrong principle of law. According to the Respondent, the Learned Magistrate stated that he took into consideration the inflationary trend which in our submission is a relevant factor and that he also analysed the nature of injuries with comparable awards which is the basis of assessing quantum of damages. According to the Respondent, there was no basis to disturb the award.
12. On whether the award was inordinately high as to be a wholly erroneous, the Respondent cited the cases of *Easy Coach Limited v Emily Nyangasi [2017] eKLR* and *Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichubi [2005] eKLR* for the proposition that the award was in tandem with recent authorities. The Respondent urged the court to dismiss the appeal with costs by upholding the Lower Court's award.

Analysis and Determination

13. After considering the pleadings, proceedings, submissions and the law, I find that there is only one (1) issue for determination: -
 - a. Whether the award made by Lower Court was inordinately high that it must be a wholly erroneous estimate of the damage.
14. This appeal concerns the award of general damages. 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. As was held



by the Court of Appeal in *Stanley Maore v Geoffrey Mwenda [2004] eKLR*, in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

15. From both parties' submissions, it is clear that the issue of liability is not in contest and I thus proceed to consider the quantum of damages only.
16. At this juncture, it is imperative that I caution myself on the extent with which this court as an appellate court can interfere with an award on damages. It must be shown that the trial court in awarding the damages took into consideration an irrelevant factor or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage or it should be established that a wrong principle of law was applied. Further, it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time. (See *Mary Wanjiku Gachigi v Ruth Muthoni Kamau, Civil Appeal No 172 of 2000*, Tunoi, Bosire and Owuor JJA)
17. The issue for determination in this appeal is whether taking into account the nature of the injuries sustained by the Respondent, comparable awards and inflation or passage of time the award of the trial magistrate was inordinately excessive as to warrant this court to interfere.
18. The injuries suffered by the Respondent can be summarized as follows: -
 - a. Multiple bruises on the right knee, right hand and right elbow;
 - b. Blunt object injury to the right knee, right foot and right elbow;
 - c. Abrasions on the right foot.
19. Dr Ajoni Adede in his medical report which was produced as an exhibit concluded that the injuries suffered by the Respondent were soft tissue in nature with no permanent disability. In his judgement, the Trial Magistrate held that save for the case of *Easy Coach Limited v Emily Nyangasi [2017] eKLR*, the other authorities cited by Counsel was comparable to the injuries sustained by the Plaintiff herein. There was no distinction of which authorities were said to be comparable considering that both parties adopted sharp and contrasting authorities. On the one side, the Respondent was proposing Kshs 450,000/= while the Appellant was proposing Kshs 90,000/=.
20. Having considered the injuries suffered by the Respondent vis a vis the award made, I am unable to agree with the Lower Court's judgment on quantum. The doctor concluded that the injuries were soft tissue in nature with no permanent disability. The authorities cited by both parties were not comparable. In *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR*, the court set aside an award of Kshs 230,000/= and substituted it with an award of Kshs 180,000/=. In that case, the Respondent had sustained the following injuries: -
 - a. Multiple cut wounds on the right lower limb.
 - b. Bruises on the right lower limb.
 - c. Bruises on both elbows.
 - d) Bruises on the right iliac region.
 - e) Bruises on the frontal region.
 - f) Bruises on the temporal region.
 - g) Lacerations on the frontal region.



- h) Cut wounds on the left iliac region.
 - i) Cut wounds on the frontal region.
 - j) Cut wounds on the temporal region.
 - k) Blunt trauma to the abdomen.
21. The injuries above were more than in the present case but were classified as soft tissue injuries. The award of Kshs 400,000/= was thus excessive. The award of Kshs 90,000/= proposed by Counsel for the Appellant is on the other hand much on the lower side and would in my view amount to an erroneous estimate of the damage. The award in Francis Omari Ogaro (supra) was made two years ago and this Court must take passage of time and inflation into account and I proceed to find that an award of Kshs 200,000/= would suffice. In the premises, the award of Kshs 400,000/= is set aside and substituted with one for Kshs 200,000/=.
22. The award for special damages was not contested and I shall therefore not disturb it. The Appellant has succeeded only partially and whereas costs follow the event, they are also in the discretion of the court and in this case, the order that best commends itself to me is that the Appellant is entitled to half the costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF FEBRUARY, 2023.

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F. WANGARI

JUDGE

In the presence of:

For the Appellant.....

For the Respondent.....

Court Assistant.....

