



REPUBLIC OF KENYA



**Njuguna v Adayo (Civil Appeal E338 of 2021)
[2023] KEHC 1203 (KLR) (Civ) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E338 OF 2021**

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

ANTHONY MUTAI NJUGUNA APPELLANT

AND

EMMANUEL ADAYO RESPONDENT

(Being an appeal from the judgment of the Honourable Court delivered on 21st May 2021 at the Chief Magistrate's Court at Nairobi by Hon. A. N Makau (Ms) Principal Magistrate)

JUDGMENT

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated July 1, 2019 pursuant to a road accident on March 30, 2019 at a bus stop within Kayole and sought for reliefs against the appellants' in the nature of general and special damages plus costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that on or about March 30, 2019 while disembarking from the stationary motor vehicle at a bus stop within Kayole, the driver of the said vehicle suddenly and without warning pulled out thus causing him to fall and thereby occasioning him serious bodily injuries.
3. The appellant filed his statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent in the sum of Kshs 902,500/=.
4. The appellant being aggrieved preferred this appeal and put forward the following grounds:
 - i. That the learned Trial Magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.



- ii. That the learned trial magistrate erred in law and in fact in finding that the respondents were entitled to general damages of Kshs 800,000/= and a further future medical cost of Kshs 100,000/= which is too high in the circumstances.
5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions. The only issue for determination put forward by both parties is quantum.
6. The appellant submitted that the trial court awarded Kshs 800,000/= as general damages and Kshs 100,000/= for future medical costs which was inordinately high considering the respondent sustained a single fracture.
7. The appellant therefore submitted that the sum of Kshs 400,000/= and Kshs 40,000/= for future medical expenses as per their medical report, will be sufficient and adequate compensation to the respondent.
8. On this the appellant relied on the case *Kenya Power Lightning Company Limited & another v Zakayo Saitoti Naingola & another* (2008) eKLR cited in the case *Jennifer Mathenge v Patrick Muriuki Maina* (2020) eKLR. The court held;

On quantum the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages:-

- (1) Damages should not be inordinately too high or too low.
 - (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
 - (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 - (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.
9. The appellant further relied on the following authorities;
 - a. *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* (2021) Eklr

In this case the appellant sustained blunt injury to the right shoulder and fracture of the femur. Having considered the injuries sustained by the appellant it is my view and I find that an award of Kshs.600,000/=is reasonable.

- b. *Jitan Nagra v Abidnego Nyandusi Oigo* (2018) Eklr

where the respondent sustained injuries of lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. In that case, a medical report was produced where the doctor noted that the Plaintiff complained



severe headache, severe pains on the chest, back, right hand and right leg. The Plaintiff could also not walk without crutches and was still on plaster of paris. The Court set aside the trial court's award of Kshs. 1,000,000/- and substituted the same with an award of Kshs. 450,000/-

c. *Reamic Investment Limited v Joaz Amenya Samuel* (2021) eKLR

According to the plaint the respondent sustained the following injuries: open left femur fracture, abrasion on the left knees, face, neck, right upper imp and left upper lip as well as a contusion on the anterior chest. For the reasons set out above, I find that the sum of Kshs. 350,000 for general damages and 158,700/- for special damages was proved. The award of Kshs. 600,000 and Kshs 165,750 for general and special damages respectively, is hereby set aside.

10. It is the appellant's submissions that the award of Kshs 400,000/= and the award of Kshs 40,000/= for future medical expenses would be sufficient and adequate compensation to the injuries sustained by the respondent.
11. In response, the respondent submitted that the trial court was convinced that the respondent's injuries were grievous in nature, that the award was reasonable and not inordinately high.
12. It is the respondent's submissions that the award on general damages for similar injuries range from Kshs 600,000/= to Kshs 1,500,000/= and on this the respondent relied on the following decisions:
 - a) In *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* (2021) eKLR The appellant sustained blunt injury to the right shoulder and fracture of the left femur. The judge substituted trial court award with Kshs.600,000/=
 - b) In *Zachary Kariithi v Jason Ocbola* (2016) eKLR the plaintiff had fractures to the right tibia /fibula and femur bone mid shaft and soft tissue injuries. An award of Kshs 1,500,000/=was upheld on appeal.
13. The respondent contends that the appellant has not demonstrated that the trial court proceeded on wrong principles or that it misapprehended the evidence therefore this court cannot disturb the said award as the required legal threshold was not met by the appellant.
14. It is the respondent's submissions that the trial court found that he had a metallic implant in situ and the same ought to be removed at a cost of Kshs 100,000/= and that the respondent's doctor had suggested the cost of removal of the implants was Kshs 100,000/= while the appellant's doctor suggested Kshs 40,000/=.On this the respondent relied on the case of *Business Travellers & another v Peter Ogango Oruma* (2020)eKLR held:

"Therefore, where experts differ in their opinions, the appellate court will not interfere with the findings of the trial court merely because were it the trial court, it would have preferred one opinion and not the other. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs Stage Coach International Services Limited & Another* Civil Appeal No 6 of 2001, it is not for the appellate court to set aside the trial court's exercise



of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently."

15. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See *Selle & another vs Associated Motor Boat Co Ltd & others* (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 stated as follows:

"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

16. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established. In *Butt vs Khan* (1977)1KAR.

17. The Court of Appeal observed in *Simon Taveta vs Mercy Mutitu Njeru* [2014] eKLR that

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

18. In this instant case it is not disputed that the respondent sustained a fracture of the femur and soft tissue injuries. The respondent maintains that the trial court made no error in awarding Kshs 800,000/= and has cited the case of *Zachary Kariithi v Jason Ochola* (2016) eKLR. In the said case the plaintiff had fractures to the right tibia /fibula and femur bone mid shaft and soft tissue injuries. An award of Kshs 1,500,000/= was upheld on appeal.

19. From the evidence on record, I note that the respondent suffered the injuries as pleaded before the trial court. The medical report by Dr Wokabi produced by the respondent indicated that the respondent at his young age he expects him to rehabilitate maximally and not have any permanent disability in the long term.

20. I have examined other relevant decisions. In the case of *Godfrey Wamalwa Wamba & another vs Kyalo Wambua* [2018] eKLR, where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip, he was in hospital for three weeks, he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court awarded him general damages at Kshs 700,000/=, which the appellate court upheld.

21. In the case of *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs 1,600,000/= had the same reduced on appeal to Kshs. Kshs 800,000/=.

22. No evidence was presented by the respondent to rebut the medical evidence adduced by the appellant's witnesses. It was therefore a misapprehension of the evidence for the trial magistrate to conclude that:

"I have considered the effect the accident had on the plaintiff, the passage of time when the cited cases laws were decided and rate of inflation and the type of injuries the plaintiff suffered were grievous harm."



23. I have endeavored to look for more recent comparable awards and found instructive the following two authorities:

- (a) In *Cold Car Hire Tours Limited vs Elizabeth Wambui Matheri* [2015] eKLR wherein the Respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement, the lower court award of Kshs 1,400,000/= as general damages was upheld by the High Court on appeal in a decision delivered on February 11, 2015.
- (b) Similarly, in *Kennedy Ouma Dachi vs Joseph Maina Kamau & Another* [2018] eKLR an award of Kshs 1,000,000/= was made by the lower court for a comminuted fractured acetabulum. On appeal, the award was enhanced to Kshs 1,400,000/= on the grounds that:

“A fracture of the tibia or femur for instance, is very different from a hip fracture, especially in terms of long term consequences to the victim’s health, and especially mobility... the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis.”

24. Upon consideration of the nature and extent of injuries, authorities cited and comparable awards, and inflation, the award by the trial court is reasonable compensation of the injuries sustained; it is neither inordinately high nor erroneous estimate of damages. I do not also find any error in principle on the part of the trial court.

25. The upshot and conclusion from the foregoing analysis and findings is that the appeal is devoid of merit. It is dismissed with costs the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

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J. K. SERGON

JUDGE

