



REPUBLIC OF KENYA



**Kibaara & another v Mose (Civil Appeal E108 of 2022)
[2023] KEHC 877 (KLR) (Civ) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 877 (KLR)

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

**CIVIL
CIVIL APPEAL E108 OF 2022**

AA VISRAM, J

FEBRUARY 17, 2023

BETWEEN

CHARLES KARUE KIBAARA 1ST APPELLANT

ALEXANDER MWANGI MWAI 2ND APPELLANT

AND

NAOM KEMUMA MOSE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D.W Mburu
(SPM) delivered on 11/2/2022 in Nairobi CMCC NO. 1725 of 2019)*

JUDGMENT

Introduction

1. This judgment determines the appellant's appeal filed on March 2, 2022 vide its Memorandum of Appeal dated February 24, 2022. This appeal relates to the issue of quantum.
2. The respondent who was the plaintiff before the trial court and pleaded that she was injured following a road traffic accident that occurred on May 26, 2018. According to the respondent, the accident was caused by the appellant's motor vehicle xxxx, which was being driven in a negligent manner thus knocking down the respondent. The respondent claims that that she sustained injuries, suffered loss and damages as a result of the accident. .
3. The issue of liability was settled by way of consent in the ration of 90:10 in favour of the respondent. After conducting a hearing, the trial Magistrate in his judgment awarded the respondent the following together with costs of the suit:
 - a. General Damages - Kshs 1,200,000



b. Special Damages - Kshs 350,652
Kshs 1,550,652
Less 10% Kshs 155,065.2
Total Kshs 1,395,586.80

Appeal on quantum

4. It is that Judgment above, being Nairobi CMCC No 1725 of 2019 dated February 11, 2022 (the Judgment), that gives rise to the appeal, where the appellant complains that:
- a. That the learned trial magistrate erred in law and in fact in adopting the wrong principles in making a determination on the damages payable to the respondent.
 - b. That the learned trial magistrate erred in law and in fact in failing to consider the evidence tendered by the appellant on the issue of quantum thereby arriving at an erroneous decision on quantum.
 - c. That the learned trial magistrate erred in law and in fact by failing to consider the submissions by the appellant on the issue of quantum.
 - d. That the trial magistrate erred in law and in fact in awarding a sum of damages that was inordinately excessive in the circumstances thus occasioning a miscarriage of justice.
5. As observed above, the appeal is against quantum of damages only. The appeal was admitted to hearing on October 31, 2022. This court gave directions that the appeal be canvassed by way of written submissions. The appellant's counsel filed written submissions on December 5, 2022 whereas the respondent's counsel filed written submissions on December 19, 2022.

Appellants' Submissions

6. The appellants submitted that the trial court failed to critically consider and analyse the medical evidence it tendered before the subordinate court authored by Dr Ashwin Madhwala. The report stated that at the time of examination, the respondent had since healed from her injuries, with the exception of a surgical scar in the middle of her abdomen. The appellants submitted, that had the lower considered the said 2nd report, it would not have arrived at the sum of Kshs 1,200,000 for damages, and that this report was more up to date, and precise, compared to the first report.
7. The appellants submitted that damages for an award are not meant to enrich the victim, but rather, compensate the victim for the injuries sustained. In support of this submission, they quoted the decision of the High Court in *Boniface Waiti and Another v Michael Kariuki Kamau [2007] eKLR* and the decision of the Court of Appeal in *Denshire Wambua V Kenya Power and Lighting Co Ltd [2013] eKLR*.
8. In sum, the appellants urged this court to reassess the award for damages downwards to between Kshs 500,000 and Kshs 600,000. They quoted the decision of the High Court in *Gatete Muthee David v Joseph Charo Ndaa [2012] eKLR*, where an award of Kshs 500,000/- was made for an injury causing severe blunt injury to the victim's abdomen.

Respondent's Submissions

9. The respondent submitted that her injuries had caused untold pain and suffering and should not be underestimated. She stated that she was still in pain, both at the time of examination and during the



course of the hearing. She submitted that her injury was classified as ‘severe’ in Dr Mwaura’s medical report and referred to the P3 medical form as further evidence of the same.

10. Learned Counsel submitted that the essence of awarding general damages is to compensate the victim for the injury suffered, and to try as much as possible, to restore the injured to the position that he, or she, was in before suffering the injury. The respondent asserted that assessment of damages is not an exact science to be achieved by a calculus, and therefore, being discretionary, a trial court may award less or more damages depending on the circumstances of the case.
11. In the respondent’s view, the learned magistrate had arrived at the correct finding. Learned Counsel cited the decision of the High Court in *BN (Minor Suing through his next friend IMS) v Mary Chebet [2021] eKLR* where the high court awarded Kshs 2,000,000 for comparable injuries; *AM (Minor Suing through his next friend MAM) v Mohamud Kabiye [2014] eKLR* where the High Court awarded Kshs 800,000 for comparable injuries in 2014; and *James Njenga v Coast Bus (Mombasa) limited [2016] eKLR* where the High Court awarded a plaintiff with comparable injuries Kshs 900,000 in support of his submission.

Analysis and Determination

12. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda NYR Civil Appeal No 147 of 2020 [2004] eKLR* where the Court of Appeal held:

‘ Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that 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.’

13. Further to the above, in the Court of Appeal decision of *Butt vs Khan (1977) 1 KAR* the court stated that the test on whether or not to interfere with an award of damages, is as follows:

‘ An Appellate court will not disturb an award for damages unless it is 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.’

14. As this is a first appeal, I have a further duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123*, where the court stated that:

‘ An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.’



15. Looking at the evidence on the record before me, is evident that the Magistrate based his assessment on three primary pieces of evidence: the medical report of Dr GK Mwaura dated January 4, 2019; the P3 form; and the summary from the Nairobi Women's Hospital, all of which indicated that the respondent had sustained a blunt abdominal injury and hemoperitoneum due to rupture of her small intestine, and that she had accordingly suffered 'grievous harm' arising out of the accident.
16. It is clear from a reading of the Judgment that the lower court did not consider and analyse the content of the 2nd medical report. Looking at the Judgment, there is no reference to that report whatsoever.
17. I have looked at the said medical report and having considered the same, I do not think its exclusion has materially altered the outcome of the case. Even if he had considered the evidence, I am of the view he may still have reached the same conclusion. I say this because, for starters, the argument made by the appellants' that the 2nd medical report is more precise' was not supported by any evidence. Secondly, I do not think that the second report has more value simply because it is more recent than the 1st report.
18. Based on the facts, the respondent was injured on May 26, 2018. She was first examined on January 4, 2019 and re-examined on August 7, 2020. The second exam took place more than two years after the accident. The fact that the second exam still classified the respondent as 'maimed' two full years after the accident and that she still presented scarring and abdominal pain is sufficient evidence of the gravity of her injury, and continued pain and suffering.
19. Further, looking at the Judgment, it is clear to me that Magistrate reached his conclusion after considering the weight of evidence based on several reports, rather than the 1st medical report in isolation. He considered at least one legal authority cited by each of the parties, a comparison of legal authorities was therefore made, and a decision was reached after considering the disparity between the authorities present by the parties.
20. I have considered the authorities cited by the parties in this appeal. It is worth noting that one of the authorities cited by the appellant, namely, the Court of Appeal decision in *Denshire Wambua V Kenya Power and Lighting Co Ltd* [2013] eKLR, actually increased the award of damages from Kshs 100,000 in the lower court to Kshs 1,500,000/- on appeal. In that case, the court also stated that:

' Monetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness.'
21. I have considered the variance across the relevant awards cited above by counsel, which vary between Kshs 500,000 on the lower end and Kshs 2,000,000 on the higher side. I do not think that the award of Kshs 1,200,000 was inordinate in comparison to similar injuries. I agree with the respondent's submission that the assessment of general damages is not an exact science and that a certain amount of discretion ought to be left to the trial court subject to the correct legal principles articulated above. I am satisfied that the test in *Butt V Khan* (Supra) has not been met, and that the award falls within a range of acceptable outcomes.
22. Based on the reason above, I do find sufficient reason to interfere with the decision of the lower court.
23. I find that the appeal is without merit and is dismissed with costs to the respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF FEBRUARY 2023.



ALEEM VISRAM

JUDGE

In the presence of;

..... for the Plaintiff

..... for the Defendant

