



REPUBLIC OF KENYA



KENYA LAW
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**Mbaithe & another v Ondijo (Civil Appeal E029 of 2020)
[2023] KEHC 2981 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E029 OF 2020
LN MUGAMBI, J
MARCH 31, 2023**

BETWEEN

FAITH MBAITHE 1ST APPELLANT

MARY IMMACULATE SISTERS 2ND APPELLANT

AND

PETER OMONDI ONDIJO RESPONDENT

((Being an appeal from the judgment and decree of the Chief Magistrate's court in Gatundu CMCC No. 69 of 2019 delivered on 16th November 2020))

JUDGMENT

1. This appeal arises from a suit filed through a plaint dated March 8, 2019 by the Respondent (then the Plaintiff) who sued the Appellants (then the Defendants) for injuries he sustained when he was knocked down by motor vehicle Registration no KAV 561B Toyota matatu while walking along Nairobi-Thika Road on December 12, 2018 at Kihunguro area. The Respondent outlined the particulars of negligence at paragraph 6 of the plaint.
2. The Appellants (then defendants) filed their defence dated February 10, 2020 in which they denied the allegations in the plaint. Without prejudice, they averred that if any accident occurred on December 12, 2018 as alleged by the plaintiff then the same was wholly caused and/or substantially contributed by the plaintiff. They outlined the particulars of negligence of the plaintiff in paragraph 8 of the defence.
3. On 10/8/2020, the parties entered into a consent on liability at 80% to 20% in favour of the plaintiff as against the defendants. On 16/9/2020, the parties entered into a further consent where the plaintiff's treatment notes and the list of documents dated 8/3/2019 were admitted as evidence, the two medical reports and plaintiff's P3 form.
4. Both Advocates confirmed filing their submissions on quantum on October 19, 2020.



5. In its judgment delivered on November 16, 2020, the trial court awarded damages as follows:

- a. General damages Kshs 700,000/=
- b. Special damages Kshs 11,050.-

Sub-total Kshs 711,050

Less 20% contribution 142,210/-

Net Kshs 578,840.00

6. Aggrieved by the judgment by the lower court, the Appellant filed this appeal and outlined one ground of appeal namely;

7. That the learned trial magistrate erred in fact and in law by awarding inordinately high general damages of Kshs 700,000/= when the Respondent sustained minor skeletal and soft tissue injuries.

- c. The appellant prayed that the appeal be allowed and this Honourable Court do proceed and set aside the award on general damages and the same be reduced. He prayed for the costs of the subordinate court and this appeal.
- d. The parties agreed to dispense with the hearing of the appeal by way of written submissions.

Appellants' Submissions

8. The Appellants filed their submissions on November 14, 2022 and outlined two issues for determination. On whether the trial magistrate awarded excessive damages on quantum, the respondent's list of documents filed in the trial court was a medical report by Dr GK Karanja of Prime Medical Services dated December 22, 2018 which recorded the injuries sustained by the respondents as follows; fracture of the sacrum, muscle spasm and soft tissue injury of left leg. The respondent was also seen by Dr Wambugu, the appellant's doctor, and a report dated November 5, 2019 documented the injuries as follows; fracture of the right sacrum and blunt trauma on left leg.

9. The appellants submitted that this court has the jurisdiction to interfere with the award of the trial court where the same is inordinately high or too low to amount to a miscarriage of justice. They cited the decision in *Muthamiab Isaac v Leah Wangui Kanyingi* (2016) eKLR where the court in allowing the appeal where the Respondent sustained the following injuries; fracture of the right superior pubic ramus, fracture of the right inferior pubic ramus and blunt injury on the left leg. The court in allowing the appeal held as follows;

“..In the end, I allow this appeal, set aside the judgment of the trial court both on liability and quantum of general damages and substitute thereof with judgment on liability to be shared equally between the respondent and appellant and an award of Kshs 400,000/- general damages in favour of the respondent subject to 50% contribution.”

10. He referred this court to the decision in *George Okewe Osawa v Sukari Industries Limited* (2015) EKLR where in allowing the appeal in which the Plaintiff sustained a fracture of the pelvis, it held as follows;

“The plaintiff, in his testimony, stated that he suffered a fracture of the pelvis and this fact was confirmed by the discharge summary from Homa Bay District Hospital where he had been admitted for 4 days and Dr Nyawade's report dated September 27, 2014. The reverse side of the Discharge Summary states, “Pt advised to have bed rest for 4/53 to give the bones time to heal. Avoid walking for a long time.” As the evidence was clear that the



appellant sustained a pelvic fracture, I find and hold that the learned magistrate ignored or failed to take into account relevant and material evidence in assessing damages. Furthermore, the appellant's evidence was unrebutted given that he was the respondent's employee and the accident took place at the workplace. I therefore find that the appellant proved, on the balance of probabilities, that he sustained a pelvic fracture. In addition, the trial court ignored the respondent's own Submissions based on the fact that the appellant sustained a pelvic fracture.

I allow the appeal and based on the decisions submitted to the subordinate court, I award the Appellant Kshs 400,000/- subject to 10% liability.”

11. The appellants submitted that the injuries the respondent sustained are comparable to injuries suffered by the plaintiff in the authorities and therefore an award of Kshs 300,000/= as general damages will adequately compensate the Respondent for the minor skeletal and soft tissue injuries sustained.
12. On whether the appellants should be awarded costs of the subordinate court and the appeal herein, they cited Section 27 of the *Civil Procedure Act* which provides that costs follow the event and therefore the costs of the suit be awarded to the successful party. They prayed that this court finds the appellants have proven their case on a balance of probability and declares them successful thereby awarding costs.

Respondent's Submissions

13. The Respondent filed his Submissions on November 2, 2022 and submitted that he suffered a lot of pain from the injuries and was treated at Plainsview Nursing Home. He was discharged on a walking frame and put on physiotherapy and bed rest. According to Dr George K Karanja, the severe skeletal injuries and multiple severe soft tissue injuries caused him grievous harm and he complained of restrained back movements and inability to sit at the time of examination. He referred to *Halbury's Laws of England*, 4th edition Vol 12 Par 884;

“Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and future as a result of injury. This includes the pain caused by the injury itself and the treatment intended to alleviate it; the awareness of an embarrassment at the disability or disfigurement or suffers caused by anxiety that the plaintiff's condition may deteriorate.”
14. The respondent stated that the trial court in its judgment noted that the medical report dated 5/11/2019 filed by the appellants confirmed the injuries sustained by the respondent. He contended that the sacrum bone in the human anatomy is a complex structure providing support to the spine and accommodation of the spinal nerves and it also articulates the hip bones. Both medical reports confirmed that the respondent was on strict medical bed rest and had difficulties sitting as his normal spine curvatures were restricted, necessitating the need to go for physiotherapy sessions.
15. He submitted that the trial court justifiably awarded him Kshs 700,000/= as general damages. He cited the following decisions; in *George Njenga And Another V Daniel Wachira Mwangi* NYK HCCA no 1 OF 2015 (2017) ECLR in which the court affirmed Kshs 800,000/= as general damages awarded to the plaintiff who sustained a pelvic fracture, unstable left knee and ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterior aspect of the left leg.
16. In *Peace Kemuma Nyang'era v Micheal Thuo & Another* (2014) eCLR where the appellant suffered a fracture of the sacrum bone (transformational fracture), fracture of the right superior pubic ramus of the pubic bone, fracture of the right ischium/inferior pubic ramus of the pelvic bone, haematoma on both thighs and lumbo-sacral haematoma. The court awarded Kshs 2,500,000/= as damages. In *Kajiado Hcca no 39 Of 2015; Salome Mantai & Anor v Lucia Wanjiru Mwangi* (2016) eCLR, the



respondent sustained the following injuries; fracture 1/3 of the humerus drop, fracture right clavicle, scapula comminute fracture and haemo pneumo thorax. The doctor's prognosis after 7 months was that the fracture had not resolved. An award of Kshs 1,500,000/= was reduced to Kshs 700,000/=.

17. He submitted that the appeal lacks merit and it was his prayer that the same be dismissed with costs.

Analysis and Determination

18. Having read and considered the submissions together with the memorandum and record of appeal and the law applicable, I find that there are only two issues for determination of this appeal;

- a. Whether the general damages awarded were excessive;
- b. Who should pay costs of this appeal?

19. As the first appellate court, this court has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

20. In *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

21. The Appellants have asked this court to interfere with the trial court's award of general damages as it is excessively high and the respondent only suffered minor skeletal and soft tissue injuries. The Court of Appeal's decision in the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, where the Court of Appeal held as follows on the issue of quantum –

“...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. 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, JA 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.”

22. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No 147 of 2002 [2004] eKLR). The Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No 133 of 1998 [1998] eKLR that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

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

24. The trial court in its judgment examined both medical reports filed by both parties which noted that the injuries the respondent sustained were fracture of right sacrum, blunt trauma on left leg. The respondent was admitted in hospital from December 12, 2018 to December 21, 2018 where he was put on oral and injectable medications, physiotherapy and bed rest and was discharged on a walking frame. When he went for the appellant’s medical evaluation, the doctor found that he sustained skeletal and soft tissue injuries from which he had made adequate recovery. The fractured sacrum had united and no permanent incapacitation occurred.

25. The trial court magistrate compared the respondent’s injuries with other decisions made by courts of appellate jurisdiction.

26. While I appreciate that the trial court applied the right principle in awarding the general damages, it is my finding that the same was excessive considering the nature of the injuries and the general trend of awards for those kind injuries as evidenced by the authorities. The second medical report noted that the respondent was adequately recovered and no further complications were expected.

27. Looking at the cases cited both in this Court and the trial court, the one where injuries closely compare with the injuries that were sustained in this case was *Muthamiab Isaac vs Leab Wangui Kanyingi* (2016) eKLR where the plaintiff sustained fracture of right superior pubic ramii, fracture of the right inferior ramii and blunt injury to the left leg and awarded Kshs 400,000/- on appeal. I find that it is closest since the sacrum and pubic ramii are part of the pelvic area. They both can be termed as pelvic fractures as they are around that area.

28. I set aside the award general damages of Kshs 700,000/- and substitute the same with an award of Kshs 500,000/in general damages due to the passage of time and inflation less 20% contributory negligence. The total award therefore is as follows:

- a. General damages Kshs 500,000/-
- b. Special damages Kshs 11,050 (not contested in this appeal)

Sub-total = 511,050

Less 20% contribution Kshs 102,210

Damages payable Kshs 408,840



29. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT BUSIA THIS 31ST DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE

In presence of:

Appellant- absent

Respondent-absent

Advocate for Appellant-absent

Advocate for Respondent-absent

Court Assistant- Etyang

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N. MUGAMBI

JUDGE

