



REPUBLIC OF KENYA



KENYA LAW
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**Gitathi v Kinyua & another (Civil Appeal 32 of 2018)
[2023] KEHC 18357 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 32 OF 2018
SC CHIRCHIR, J
MAY 31, 2023**

BETWEEN

JANE KIRIGO GITATHI APPELLANT

AND

CHARLES MAINA KINYUA 1ST RESPONDENT

PETER GATURA 2ND RESPONDENT

(Being an appeal against the Judgement of Hon. A.K. Mwicigi P.M. delivered on 15th September, 2017 in Chief Magistrate's Court at Murang'a in Civil Case No. 107 of 2015)

JUDGMENT

1. On March 19, 2015 the Appellant filed suit at the chief Magistrate's court seeking for special and general damages for injuries and attendant costs sustained as a result of a Road traffic accident which occurred on July 16, 2014.
2. Liability was settled by way of consent between the parties whereby it was shared in the ratio of 15% against the plaintiff and 85% against the defendant.
3. Consequently, the hearing proceeded on the issue of quantification of damages only. At the conclusion of the hearing the Appellant was awarded general damages of Kshs 200,000 and special damages of Kshs 279,635. Aggrieved by the award on general damages the Appellant proffered this Appeal.

Grounds of Appeal.

4. The Appellant has set out the following grounds of appeal:
 - a). That the court made an award in general damages that was so inordinately low in view of the injuries sustained by the Appellant as to disclose an entirely erroneous estimate, hence the wrong principle.



- b). The learned magistrate erred in law and fact by relying on the Respondent's Authorities which were too old and this reflected an incorrect picture of the relevant award. The court wrongly dismissed the Appellant's authorities as being for more severe injuries.
- c). The Magistrate took into consideration an irrelevant factor of avoiding to punish the respondent by granting a low award
- d). The learned magistrate failed to consider the factors of inflation.

Appellant's Submission

- 5. It is the Appellant submissions that the award of Kshs200,000 did not accord with the injuries suffered by the plaintiff; that the amount is so low that it constitutes a wrong estimate of the injuries suffered. In comparison the Appellant cited the case of *Agility Logistics Ltd v John Wambwa Musau & another* (2017) eKLR where the high court awarded Kshs600,000 for less severe injuries.
- 6. The Appellant further submits that the Authorities relied on by the trial magistrate to arrive at the award were too old and hence affected by inflation. It was pointed out that the said authorities were decided about 13 years earlier, yet the court failed to consider factors of inflation from the time the aforesaid decisions were made. The appellant urges the court enhance the award to Kshs850,000 on the basis of the case of *Agility Logistics Ltd (supra)*.
- 7. The Respondent did not file any submissions.

Summary of evidence at the lower court

- 8. The Appellant was the only witness in the case. She told the court that she suffered a fracture on the right hand following the subject accident. She had a metal plate on the fracture site at the time of the hearing. She was also injured at the back. she was admitted for 7 days at Kijabe hospital and later for 6 days at St. Francis Hospital. She produced medical reports by Dr. Kanyi and Dr. Maina Ruga. she also produced P3 form and discharge summaries from St. Francis community hospital and Kijabe hospital.
- 9. At the time of the hearing, she told the court that she still experienced pain, when the weather is cold, she could not make a fist and the metal plate was causing her some discomfort.

Determination

- 10. This appeal is against the award of damages only. The role of this court as the first appellate court is to relook at the evidence, re-evaluate, it and arrive at its own independent decision. (see *Ann Wambui Nderitu v Joseph Kiprono* Court ,CA No 345 of 2000).
- 11. Assessment of damages is an act of discretion and as such certain principles have been set out to guide the exercise of the said discretion. In *Robert Nzioki Kitari v Costal Bottlers Ltd* (1982) – 1981 KAR 891 – 895, It was held

“the appellate court will only interfere with a trial's judge assessment of damages when the trial judge had taken into account a factor he ought not to have taken into account or failed to take into account that which he ought to have taken into account or the award is so low that it amount to an erroneous estimate”



12. In *Ephantus Mwangi & another v Wambugu* (1983) 3KCA 100, the court held

“This court will however, interfere where the findings is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on a wrong principle in reaching a finding he did”
13. Finally, in *Butt v Khan* (1981) KLR 349, The Court of Appeal stated

“an appellat court will not disturb an award of damages unless it so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect, and so arrived at a figure which was cited inordinately low or high.”
14. Based on the above guiding principles, should this court interfere with the trial’s court discretion? According to Doctor Gitau in his report dated 23.10.2014, the Appellant’s fracture of the right humerus bone with a resultant wrist drop (radial nerve damage). At the time of the examination, she had a right wrist drop and unable to raise her hand. In his opinion the radial nerve damage is a severe injury.
15. The appellant was also examined by Dr. Maina Ruga on 22.2.2017 (exb). He listed the Appellant’s injuries as a fracture of the humerus lower third and a radial nerve injury on right arm. In his opinion radial nerve injury led to the weakness of the arm and hand. At the time of examination, he found that there was improvement but the arm and hand were still weak. The appellant was hospitalized for a total period of 11 days, first in Kijabe hospital and then at St. Francis Community Hospital.
16. In the light of the above injuries, can the award of Kshs200,000 be said to be too low. In entering judgment for Kshs200,000 the trial court stated that it considered the same reasonable in the light of the Authorities cited by the Respondent. It was his view that the authorities cited by the appellant was for more severe injuries compared to the injuries suffered by the Appellants herein.
17. The guiding principles when it comes to assessment of damages has been restated in many decisions of the courts. In the case of *Boniface Waiti & Another v Michael Kariuki Kamau* (2007) e KLR the principles were set out as follows;
 - a). An award of damages is not meant to enrich the victim but to compensate such victim for injuries sustained.
 - b). the award should be commensurate to the injuries sustained.
 - c). Previous awards in similar injuries sustained are mere guide but each can be treated on its own facts.
 - d). Previous awards to be considered to maintain stability of awards such factors as inflation should be considered.
18. The awards should not be inordinately low or high. I agree with the trial court that the authorities cited by the Appellant were for more severe injuries but in accepting the Respondent’s authorities the court failed to consider factors of inflation. As pointed out by the Appellant, the decisions cited by the Respondent were decided about 13 years before. The trial court failed to take into account the factors of inflation since the said decisions were made and consequently arrived at an award that was too low.
19. For this reason this court has finds it necessary to interfere with the lower court discretion



- a). In the case of *Philip Mwago v Lilian Njeru Thuo* (2019) eKLR, the court upheld the lower court award of Kshs500,000 for fairly similar injuries of the fractures of left humerus with permanent disability of 8%
 - b). In *Mulatya vs Kenya Railway Corporation* (2004) eKLR Ksh. 400,000 was awarded for a communitated fracture of the humerus and head injury.
 - c). In *Nguku Joseph & another – vs Gerald Kibui Maina* (2020) e KLR the court awarded Kshs500,000 for slightly more serious injuries.
20. In the light of the above decision I consider an award of Kshs600,000 more appropriate. I therefore set aside the lower court award of Kshs200,000 and substitute it with Kshs600,000 subject to the agreed apportionment of 85%/15%. Accordingly, I enter judgment in favour of the Appellant as follows; -
- a. General damages Kshs 600,000
 - b. Special damages Kshs 270,635
Total Kshs 870,635/-
Less 15% (sh.130,595.25)
Net Kshs 740,039.65/=
 - c. Interest at court rates from the date of the judgment in the lower court.
 - d. Costs of this Appeal to the Appellant

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF MAY 2023

S. CHIRCHIR

JUDGE

In the presence of:-

Susan- Court Assistant

Mr. Mbuthia for the Appellant

No appearance by the Respondent.

