



**Mombasa Maize Miller (Kisumu) Limited & another v Ongura (Civil Appeal
144 of 2019) [2023] KEHC 19560 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 144 OF 2019
RE ABURILI, J
JUNE 30, 2023**

BETWEEN

MOMBASA MAIZE MILLER (KISUMU) LIMITED 1ST APPELLANT

STEPHEN KORIR 2ND APPELLANT

AND

EMMANUEL SIDANI ONGURA RESPONDENT

*(An appeal arising out of the judgement and decree of the Honourable
R.S. Kipng'eno in the Senior Principal Magistrate's Court at Nyando
delivered on the 26th November 2019 in Nyando SRMCC No. 168 of 2019)*

JUDGMENT

Introduction

1. The respondent herein Emmanuel Sidani Ongura filed suit against the appellants for general and special damages as well as costs of the suit arising from the injuries that he sustained following a road traffic accident that occurred on the 18.3.2018 along the Ahero-Awasi road.
2. The appellants filed their statement of defence denying the averments made in the plaint and put the respondent to strict proof thereof. The parties herein entered consent on liability in the ratio of 85:15 in favour of the respondent against the appellants.
3. The court heard evidence on quantum of damages and entered judgment for the respondent against the appellants, awarding the respondent general damages of Kshs. 400,000 and special damages of Kshs. 5,550 less 15% contribution leaving Kshs. 344,718, plus costs of the suit and interest.



4. Aggrieved by the said award on quantum of damages, the Appellants filed this appeal vide a memorandum of appeal dated December 16, 2019 and filed on the December 17, 2019 raising the following grounds of appeal:
- a. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion of the same.
 - b. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
 - c. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
 - d. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
 - e. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
5. The parties agreed to canvass the appeal by way of written submissions.

The Appellants' Submissions

6. The appellants submitted that parties were bound by their pleadings as was held in the case of *Raila Amollo Odinga & Another v Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR and that the injuries to the chest, back and right shin as submitted in the respondent's submissions were not pleaded in the plaint and as such, the trial court erred in considering them and arriving at an award of Kshs. 400,000 in general damages.
7. It was submitted that an award of Kshs. 400,000 for soft tissue injuries amounted to an erroneous estimate, abuse of discretionary power of the trial court and a miscarriage of justice against the appellants and thus the court was justified to disturb the same as held in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 and the case of *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457.
8. The appellants submitted that the respondent should be awarded at most Kshs. 100,000 in general damages relying on the case of *PF (Suing as Next Friend and Father of SK (Minor) v Victor O. Kamadi & Another* [2018] eKLR, *Hantex Garments (EPZ) LTD v Haron Mwasala Mwaka* [2017] eKLR where the court awarded Kshs. 100,000 for similar injuries.
9. The appellants also relied on the cases of *HB (minor suing through mother & next friend DKM) v Jasper Nchonga Magari & Another* [2021] eKLR where the court upheld an award of Kshs. 60,000 for blunt injury to the head, neck, thorax, abdomen and limbs.
10. Reliance was also placed on the case of *Samuel Mburu N. Ngaari & 4 Others v Wangiki Wangare & Another* where the court awarded Kshs. 50,000 for abrasions and bleeding.



11. On costs, the appellants submitted that the appeal should be allowed with costs to them as costs follow the event as was held in the case of [*Rosemary Wairimu Munene, Ex Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd.*](#)

The Respondent's Submissions

12. It was submitted that a head injury of whatever nature was a serious injury and required consideration in terms of the award made. The respondent further submitted that the trial court considered the injuries sustained as soft tissue injuries and that the sum of Kshs. 400,000 for a head injury and multiple soft tissue injuries was quite conservative.
13. Reliance was placed on the case of [*Francis Ochieng & Another v Alice Kajembe*](#) [2015] eKLR, where the plaintiff suffered multiple soft tissue injuries and was awarded Kshs. 500,000 but which on appeal was reduced to Kshs. 350,000 in the year 2020.
14. The respondent further relied on the case [*John Mwendwa Kuti & 2 Others v Ibrahim Kunyaga*](#), [2020] eKLR, where the award for multiple soft injuries of Kshs. 500,000 was equally reduced to Kshs. 350,000.
15. The respondent urged the court not to disturb the award as the same reflects the set precedents for current court awards and that the authorities cited by the appellants were not for head injuries were over 6 years old thus not reflecting the current court award.
16. As to whether there was a departure from the pleadings, it was submitted that the medical report which was produced by consent did not vary in any material way from the plaint and written witness statement and further that the trial magistrate was clear that the injuries as evidenced from the pleadings, the medical documents, exhibits and the evidence were multiple soft tissue injuries.

Analysis and Determination

17. I have considered the grounds of appeal and submissions by both counsel for the parties. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions as was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 and reiterated by the Court of Appeal in several cases including the case of [*Gitobu Imanyara & 2 others v Attorney General*](#) [2016] eKLR.
18. The issue for determination is whether the appeal on quantum of damages is merited.
19. I shall first address the issue raised by the appellants that the award made by the trial court was in regard to injuries not pleaded by the respondent.
20. From the record, the respondent sustained injuries in the nature of soft tissue injuries to the scalp of the head, chest, back and right shin. Though the appellants have refuted the aforementioned injuries, and further stated that the trial court erred by considering the same, it is noteworthy that by a consent entered by the parties herein on the 22.10.2019, the parties agreed on the documents listed in the list of documents dated 8.8.2018 to be adopted without calling the makers as PEX 1 – 7.
21. PEX6a was a medical report dated 29.8.2018 prepared by one Dr. Wokabi listing the respondent's injuries as soft tissue injuries to the scalp of the head, chest, back and right shin.
22. The law on variation of a consent is now settled to the effect that the variation of a consent can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited



to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts. See the cases of *Flora Wasike v. Destimo Wamboko* (1982 -1988)1 KAR 625

23. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (1982) KLR P. 485 held that:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.

24. The Court further held that:

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding”.

25. Accordingly, the appellants are estopped from claiming that the injuries referred to by the trial court were not pleaded.

26. With the above position, and having reconsidered the evidence and the submissions by the parties’ advocates, I now restate the legal principle on exercise of discretion by a superior court over jurisdiction of a subordinate court or inferior tribunal on appeal. This principle is best summed up in *Mbogo v Shab* [1968] EA 93, where he held as follows:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

27. Regarding the circumstances under which an appellate court will disturb a lower court’s assessment of damages, the court in the case of *Butt v Khan* (1982 -1988) 1 KAR pronounced itself as follows:

“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 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.”

28. The Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages.



The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

29. In this appeal, the Respondent suffered injuries of the nature soft tissue injuries to the scalp of the head, chest, back and right shin.
30. I have considered the authorities relied on by both parties. The authorities relied on by the appellant are rather old while those relied on by the respondent involve injuries that are far more serious than those that he sustained.
31. In more recent decision with comparable injuries, the Courts have held as follows: In *Jyoti Structures Limited & another v Truphena Chepkoech Too & another* [2020] eKLR, where the Respondent had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs. 250,000/=; and for the Respondent that had sustained bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand, general damages were assessed at Kshs. 200,000/=. On appeal, the court set aside both awards and substituted them with Ksh. 125,000/= each.
32. In *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers. The trial court assessed general damages for pain and suffering in the sum of Ksh. 120,000/- and this was affirmed by the High Court.
33. Taking a cue from the above, and even taking into consideration the effects of inflation and time lapse, I agree with Counsel for the Appellants that the award of damages by the trial magistrate was on the higher side and did not take into consideration the fact that the Respondent sustained soft tissue injuries, which according to the medical report, had healed without causing any form of disability and did not affect the Respondent’s ability to work.
34. In the premises, this court is inclined to interfere with the discretion of the learned trial magistrate and does so by setting aside the award of Ksh. 400,000 as general damages and substituting it with an award of Ksh. 200,000.
35. The upshot of the above is the appeal herein is merited. It is allowed as follows:
General damages Kshs. 200,000
Less 15% contribution (30,000) Kshs 170,000
Add Special damages Kshs. 5,550
Total Kshs. 175,550
36. The general damages shall attract interest at court rates from the date of judgment until payment in full. Special Damages will attract interest at court rates from date of filing suit until payment in full. The respondent shall have costs of the suit in the lower court.
37. As costs on appeal are likely to subsume the award of damages leaving the respondent with very little yet he sustained injuries in the accident, I order that each party shall bear their own costs of this appeal.
38. This file is closed.

Dated, Signed and Delivered at Kisumu this 30th Day of June, 2023

R.E. ABURILI

JUDGE

