



**Mombasa Maize Miller (Kisumu) Limited & another v Ibrahim (Civil Appeal 145 of 2019) [2023] KEHC 19638 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19638 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 145 OF 2019  
RE ABURILI, J  
JUNE 30, 2023**

**BETWEEN**

**MOMBASA MAIZE MILLER (KISUMU) LIMITED ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN KORIR ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GRACE APUDO IBRAHIM ..... RESPONDENT**

*(An appeal arising out of the judgement and decree of the Honourable R.S. Kipng'eno in the Senior Principle Magistrate's Court at Nyando delivered on the 26th November 2019 in Nyando SRMCC No. 171 of 2019)*

**JUDGMENT**

**Introduction**

1. The respondent herein Grace Apudo Ibrahim filed suit against the appellants for injuries sustained following a road traffic accident that occurred on March 18, 2018 along the Ahero-Awasi road, claiming general and special damages as well as costs of the suit.
2. The appellants filed their statement of defence denying the averments made in the plaint and put the respondent to strict proof. The parties herein entered consent on liability in the ratio 85:15 in favour of the respondent against the appellants.
3. The respondent was awarded general damages of Kshs 2,800,000 and special damages of Kshs 5,550 which when factoring in contribution on liability reduced to Kshs 2,384,718.
4. Aggrieved by the said decision, the Appellant instituted this appeal vide a memorandum of appeal dated December 16, 2019 and filed on 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 canvassed the appeal by way of written submissions.

### **The Appellants' Submissions**

6. The appellant submitted that of Kshs 2,800,000 as general damages was inordinately high based on the injuries sustained by the respondent and as such the trial court was justified in interfering with the award 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.
7. The appellant submitted that the respondent should be awarded at most Kshs. 400,000 in general damages relying on the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR and that of *Mwavita Jonathan v Silvia Onunga* [2017] eKLR where the court awarded Kshs 400,000 for similar injuries.
8. The appellants also relied on the case of *Morris Miriti v Nabashon Muriuki & Another* [2018] eKLR where the court upheld an award of Kshs. 300,000 for injuries of the nature of ; tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula.
9. Reliance was also placed on the case of *West Kenya Sugar Company Limited v David Luka Shirandula* [2017] eKLR where the court awarded Kshs. 180,000 for injuries of fracture of 2 ribs on the right side, blunt injury to right thigh, blunt injury to the right ankle, bruises to both elbows and blunt injury to the right knee.
10. On costs, the appellants submitted that the appeal should be awarded 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**

11. It was submitted that the injuries sustained by the Respondent could not be described in the terms used by appellant but were life threatening injuries to the brain which necessitated five separate hospital admissions, emergency operations involving burying holes into the respondent's skull to evacuate



recurrent subdural hematoma and further as the said brain injuries exposed the respondent to epilepsy which is a serious condition.

12. It was submitted that the back injuries were quite severe too and that therefore the award of Kshs 2,800,000 was very conservative given the injuries sustained.
13. The respondent relied on the cases of *Terry Kanyua Marangu v Wells Fargo Limited* (2014) eKLR where the trial court awarded Kshs. 3,600,000 as general damages for pain and suffering for head injury and unconsciousness, loss of two incisors, depressed skull fracture and a cut wound on the right lower tibia region on October 16, 2014 which is nearly ten years ago.
14. Reliance was also placed on the case of *Estate of E S M K* (2017) eKLR where the trial court awarded Kshs. 5,000,000 damages for severe head injuries with loss of consciousness, severe brain oedema and intraventricular hemorrhage.

### **Analysis and Determination**

15. I have considered the grounds of appeal and submissions by both counsel for the parties. This being a first appeal, 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.
16. The respondent pleaded that she sustained injuries involving grievous head injuries involving chronic epidural haematoma, focal left frontal subcortical hypo density gliosis and mass effect on the left lateral ventricles with midline shift to right and fractures to the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> ribs posteriorly.
17. Dr Wokabi who examined the respondent and prepared a medical report dated August 8, 2018, which was produced as PEX4, noted that the respondent sustained the following injuries;
  - i. Major head injuries including loss of consciousness and scalp lacerations as a result of several operations to relieve subdural haematoma on both sides of the brain,
  - ii. Major chest injuries including fracture of 5 ribs and lung contusions.
18. Dr Wokabi noted that after the repeat craniotomy to relieve the subdural haematoma, the respondent was well and not exhibiting any neurological deficits but that there were surgical scars on each side of the head and metal staples on the left side of the scalp. He further stated that the chest injuries had since healed with the ribs reuniting but that in the long term the respondent would experience chest pains when exerting herself. It was his report that the respondent was likely to get epilepsy in the future
19. 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.”



20. 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.”

21. In the present appeal, the Respondent suffered major injuries to the head that necessitated surgeries on four different occasions to relieve the subdural haematoma, and further that the injuries left her exposed to contracting epilepsy in the future. The respondent also suffered 5 fractures to the ribs which would manifest as pain in the future whenever she exerted herself.
22. I have considered the authorities relied on by both parties. The authorities relied on by the appellant contain injuries not comparable to those sustained by the respondent herein rather old while those relied on by the respondent involve injuries that are far more serious than those she sustained.
23. In the case of *Edward Mzamili Katana v CMC Motors Ltd* [2006] eKLR, the court awarded the plaintiff therein a sum of Kshs 2,000,000/= general damages for pain, suffering and loss of amenities for having sustained a head injury leading to concussion, cut wound and bruise on the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injuries with multiple fractures of left 5th, 6th and 7th ribs and fracture of the left femur.
24. In the case of *Sosphinaf Company Limited & James Gatiku Ndolo v Daniel Ng'ang'a Kanyi* [2006] eKLR, the Court of Appeal upheld an award of Kshs. 2,000,000 was awarded as general damages for pain and suffering and loss of amenities where the plaintiff sustained compound depressed skull fracture of the right frontal bone and developed a post – traumatic epilepsy and had to take anti – epileptic drugs lifelong.
25. In the case of *Bonface Mugendi Njiru V Ochieng T/A Tobel Agencies & Another* [2011] eKLR the victim was awarded Kshs. 2,000,000/- for injuries in the nature of Blunt head injury with loss of consciousness for over 24 hours, Loss of four upper incisor teeth, Fracture of the shaft of right femur and Compound fracture of the right tibia with loss of soft tissues including tendons
26. In the case of *Sansora Bakers Limited v Naftali George Obare* [2019] eKLR the plaintiff sustained Multiple skull fractures, Severe head injury and loss of consciousness for three days, Multiple bruises on the face, Multiple fracture of ribs left side 3, 4, 5, 6 (4 ribs) and Segment fracture of the left radius and ulna and the court awarded Kshs. 1,500,000 in general damages.
27. Taking into consideration the aforementioned comparable cases and the injuries sustained by the respondent with the after effect thereof, I find that the award of kshs 2,800, 000 made by the trial court was inordinately high and the same warrants interference by this court.
28. I set aside the award of kshs 2,800,000 and substitute the same with an award of kshs 2,000,000 general damages. This figure is subject to the agreed contribution of 15% contribution leaving a balance of kshs 1,700,000. Interest will be earned at court rates from date of judgment in the lower court until payment in full. As no issue was raised on special damages, the same is retained at Kshs 5,500.
29. As the appellant has minimally succeeded, each party to bear their own costs of this appeal.



30. File closed.

**Dated, signed and delivered at Kisumu this 30<sup>th</sup> day of June, 2023**

**R E ABURILI**

**JUDGE**

