



REPUBLIC OF KENYA



**Ndungu v Maina (Civil Appeal E139 of 2021)
[2023] KEHC 21312 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21312 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E139 OF 2021**

A MSHILA, J

JULY 28, 2023

BETWEEN

PETER MAINA NDUNGU APPELLANT

AND

DAMARIS WANJIKU MAINA RESPONDENT

*(Being an appeal from the whole of the Judgment delivered at Limuru
Law Courts by the Honorable I.F. Koome (RM) on the 7th of July, 2021)*

JUDGMENT

Background

1. By a Plaint dated February 26, 2018, the Respondent herein sued the Appellant claiming for general damages for pain and suffering and loss of amenities, Special Damages at Kshs 12,000/=, costs and interest at court rates for the injuries she sustained on or about the 27th day of December, 2017, when the Respondent was lawfully walking along Nairobi-Naivasha road, when the Appellant so negligently drove motor vehicle registration number KBY 719 that he caused the same to lose control, veered off the road and violently knocked down the Respondent as a result of which she sustained severe bodily injuries.
2. The Appellant filed his Defence denying any liability for the accident. In particular, he contended that if any accident occurred the same was caused solely by the negligence of the Respondent.
3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honourable Trial Magistrate apportioned liability at 60:40% in favour of the Respondent. The court also awarded damages as follows:-

General damages Kshs 250,000/=

Special damages Kshs 12,000/=



Total Kshs 262,000/=

Less 40% Kshs 157,200/=

4. The Appellant being dissatisfied with the lower Court's judgment has preferred the instant Appeal and he has listed six grounds of appeal in his Memorandum of Appeal, namely that:-
- a. The Learned Magistrate erred in fact and in law in awarding the Respondent Kshs 250,000 as general damages, Kshs 12,000 for special damages and apportioning liability in the ratio of 60:40 in favour of the Respondent as against the Appellant which amount was exorbitantly high in the circumstances and injuries suffered by the respondent.
 - b. The Learned Magistrate erred in fact and in law in holding that the Respondent had proved her case on a balance of probabilities which finding was against the height of the evidence on record.
 - c. The Learned Magistrate erred in law and in fact when he failed to consider the Appellant's evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondent.
 - d. The Learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - e. The Learned Trial Magistrate erred in law and in fact in failing to pay regard to submissions and decisions filed alongside the Respondents' submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
 - f. The Learned Magistrate erred in fact and law in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Respondent. It is proposed to ask the Court for the following Orders that;-
 - a. This Appeal be allowed with costs.
 - b. That the appellate court do set aside the Learned Trial Magistrate's judgment delivered on 7th of July, 2021 on quantum and re-place with its own assessment.
 - c. That cost of this appeal be borne by the Respondent.
5. The court directed the parties to canvass the appeal by way of written submissions. Hereunder is a summary of the

Appellant's Submissions.

6. The Appellant submits that the award of Kshs 250,000/= as general damages was inordinately high considering the injuries sustained by the Respondent. An award of Kshs 60,000/= was said to be reasonable. Reliance was placed on among other cases the case of *Ndungu Dennis vs Ann Wangari Ndirangu & Another* (2018) eKLR. In conclusion the court was urged to allow the appeal with costs.



Respondent's Submissions

7. The Respondent submitted that the trial court exercised its judicial discretion and the same should not be interfered with unless it can be shown that it was exercised on the wrong principles. *Ratnam vs Kumarasamy & another* ALL ELR (1964) Volume 3 at pg 933. It was submitted that the Appellant had not discharged the burden of proving that the trial court exercised its discretion improperly. Reliance was placed on the case in Civil Application No 204 of 1998 *Peter Mburu Echaria vs Priscilla Njeri Echaria*.
8. The court was urged to dismiss the appeal with costs.

Trial Court's Evidence

9. Dr. George Kung'u Mwaura (PW1) a registered medical practitioner testified that he examined the Respondent when she was involved in a road traffic accident on December 27, 2017. He indicated that the Respondent sustained blunt injury on the left side of the head, head concussion, blunt injuries on the chest, back and right knee, deep cut wounds, left knee and big toe. He testified that the Respondent's healing was fair apart from pain on the chest and back and left knee upon exertion. He testified that the Respondent had suffered multiple soft tissue injuries but prognosis was fair. He produced the medical report and the receipts thereof of Kshs 8,000/= and Kshs 15,000/= for court attendance.
10. No 63914 P.C. David Kipchirchir Ruto (PW2) testified on 27/12/17 at Kimende Stage the Respondent was involved in a road accident with motor vehicle registration number KBY 719D when she was crossing the road towards Naivasha. That the driver of the said motor vehicle tried to avoid hitting the Respondent but she was hit by the front bumper.
11. Damaris Wanjiku Maina (PW3) the Respondent herein testified that she sustained injuries on the head, ribs, knee and toes. That she was treated at Kijabe Hospital where she spent Kshs 15,211/=. She produced the said receipts. She reported the accident at Lari Police Station where she was issued with a P3 form which she produced in court. She also produced the copy of records for the accident motor vehicle. She testified that the motor vehicle lost control and found her at the stage. She blamed the driver for hitting her. She stated that she cannot perform tough chores due to pain on her ribs. She sought for compensation.
12. No 63914PC David Kipchirchir Ruto (DW1) testified that PW1 was hit when crossing the road by the vehicle's front bumper and windscreen.
13. Dr. Jeniffer Kahuthu (DW2) testified that the Respondent sustained soft tissue injuries to the chest, back, left knee and toe. She produced the report. Upon re-examination she was in a fair and general condition. Her conclusion was that she sustained soft tissue injuries without a head concussion as stated by Dr. Mwaura.
14. Samuel Waweru Kamau (DW3) the driver of the accident motor vehicle testified that the Respondent was crossing the road from the right side to the left side when he was driving from Nairobi headed to Nyahururu. That the Respondent was hit by the side mirror on the left side. He indicated that he took the Respondent to Kijabe Hospital who at the time was unconscious.



Issues For Determination

15. Having read and considered the pleadings, the brief submissions by both parties and the authorities relied upon, the singular issue arising for determination is whether the trial court awarded damages that were inordinately high in the circumstances.

Analysis

16. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was enunciated thus

“... this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”

Whether the trial court awarded damages that were inordinately high in the circumstances.

17. On quantum, the Appellant contends that the Honourable Magistrate awarded damages that were exorbitantly high.

18. General damages awarded at the lower court can only be interfered with if it is:-

“So inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) 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.” (See *Butt v Khan*, Nairobi Civil Appeal No 40 of 1977).

19. A similar view was expressed in by the Court of Appeal in *Gitobu Imanyara & 2 Others V Attorney General* (2016) eKLR thus:-

“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.”

20. The appellate court has jurisdiction to only interfere with the assessment of damages by a trial court if it is demonstrated that the trial court:-
 - a. Took into account an irrelevant factor or
 - b. Left out of account a relevant factor or,
 - c. The award is so inordinately high that it must be a wholly erroneous estimate of the damage – (see the case *Kemfro Africa Limited T/a “meru Express Services (1976)” Another Vs Lubia & Another (No 2)* [1985] eKLR).



21. The Respondent testified that she sustained injuries on the head, ribs, knee and toes and was treated at Kijabe Hospital. Dr. Mwaura, indicated that the Respondent had sustained blunt injury on the left side of the head, chest, back and right knee, deep cut wound on the left knee and big toe. He concluded that the Respondent suffered multiple soft tissue injuries.
22. Dr. Jenipher Kahuthu stated that the Respondent sustained soft tissue injuries to the chest, back, left knee and toe. She disputed the head concussion as indicated by Dr. Mwaura. She concluded that the Respondent sustained soft tissue injuries.
23. The Appellant submitted that an award of Kshs 40,000/= would be adequate. He relied on the case of *HB (Minor suing through mother and next friend DKM) vs Jasper Nchonga Magari & another* (2002) eKLR where an award of Kshs 60,000/= was awarded for soft tissue injuries. The Respondent prayed for Kshs 750,000/= as reasonable compensation. She relied on the case of *Easy Coach Limited vs Emily Nyangasi* (2017) eKLR where the Plaintiff was awarded Kshs 700,000/=.
24. The trial magistrate analysed the authorities cited by both parties as well as inflationary trends and awarded Kshs 250,000/=.
25. See the case of *Justine Nyamweya Ochoki & Another V Jumaa Karisa Kippingwa* [2020] eKLR where Nyakundi J had this to say:-

“In recent matter with comparable injuries, the Courts have ruled as follows:-

In *Jyoti Structures Limited & Another V Truphena Chepkoech Too & Another* [2020] eKLR for a Respondent that had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs 250,000/=. 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.

Looking at the case of *Maimuna Kilungwa Vs Motrex Transporters Ltd* [2019] eKLR Makueni Civil Appeal No 11 of 2017, the court awarded Kshs 125,000/= for injuries to the neck, left ear and left shoulder.

Similarly, in the matter referenced by Counsel for the Appellant, Civil Appeal No 54 OF 2016: *Ndung’u Dennis V Ann Wangari Ndirangu & Another* (2018) eKLR where the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands, the trial court awarded Ksh. 300,000/= which was reduced to Ksh. 100,000/= on appeal.

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.

Taking my cue from the above, I agree with Counsel for the Appellants’ that the award of quantum 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 evidence had healed without causing any form of disability and did not affect the Respondent’s ability to work.



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. 300,000/- as general damages and substituting it with one of Ksh. 150,000/=”

26. Having been persuaded by the above authorities, this Court is inclined to interfere with the award of Kshs 250,000/= as assessed by the trial court as the Respondent is found to have sustained soft tissue injuries which have healed well. In the circumstances and bearing in mind comparable awards for comparable injuries, this court is satisfied that the award of Kshs 250,000/= is inordinately high.
27. This ground of appeal is found to have merit and it is hereby allowed; and the award for general damage is substituted with an award of Kshs 150,000/=.

Findings And Determination

28. For the forgoing reasons this court makes the following findings and determinations;
 - i. This court finds the appeal to be partially merited and it is hereby allowed.
 - ii. The Judgment of the Hon IF Koome in Limuru CMCC No 231 of 2013 delivered on July 7, 2021 in favour of the Respondent against the Appellant is hereby set aside and substituted with the judgment as follows;
 - iii. Liability apportioned at 60:40 is upheld.
 - iv. The award for general damages is hereby set aside and substituted with an award of Kshs 150,000/-;
 - v. Kshs 12,000/= For Special Damages is upheld:-
Sub-Total Kshs 162,000/- less 40% contribution = Kshs97,200/-
 - vi. The Respondent shall have costs in the lower court and interest at court rates.
 - vii. Each party shall bear their own costs on this appeal.
- 29 Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 28TH DAY OF JULY, 2023

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Njuguna for the appellant

Mwangi for the respondent.

