



REPUBLIC OF KENYA



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**Njoroge & another v Kimani (Civil Appeal E024 of 2022)
[2023] KEHC 20758 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E024 OF 2022**

**PM MULWA, J
JULY 26, 2023**

BETWEEN

DUNCAN NYAMU NJOROGE 1ST APPELLANT

SAMUEL NGANGA 2ND APPELLANT

AND

LINCOLIN KINUTHIA KIMANI RESPONDENT

*(Being an appeal from the judgment of the Honourable P. Gichohi –
CM, delivered on 28th April 2018 in Kiambu CMCC No. 323 of 2018)*

JUDGMENT

1. The respondent's claim arose from a road traffic accident that occurred on 30th May 2018, along Banana-Ruaka road. The respondent was a fare-paying passenger in Motor Vehicle KAU 649T which was negligently managed/controlled by the 2nd appellant an agent/servant of the 1st appellant, who caused it to lose control, veered off the road and hit Motor Vehicle KBY 008M which was stationary by the roadside. As a consequence of the said accident, the respondent sustained injuries. He suffered a head concussion, a blunt injury on the scalp, chest and back neck and rib cage, and bruises on both legs.
2. The appellants in their joint defence denied the occurrence of the accident. They attributed the cause of the accident to the negligence of the respondent. They denied the doctrine of Res Ipsa Loquitur.
3. On 28th August 2018 by consent of the parties the interlocutory judgment earlier entered was set aside and the suit set down for hearing. On 23rd April 2019 by a further consent of parties, liability was apportioned in the ratio of 90:10 in favour of the respondent. Both the appellant and the respondent called one witness to support their case on damages.
4. After the hearing of evidence, the learned trial magistrate made the following award:



- a. General damages for pain and suffering.....Kshs. 328,000/=
 - b. Special damagesKshs. 8,930/=
 - c. Less 10% contributory negligence.....Kshs. 38,893/=
- Total Kshs. 350,037/= Plus costs and interests.
5. Aggrieved by the judgment of the court the appellant filed the instant appeal by a Memorandum of Appeal dated 19th February 2022 on the following grounds:
 - i. The learned trial magistrate failed to apply herself judicially and to adequately evaluate the Defendant's evidence and witness exhibits on record thereby arriving at an erroneous finding on quantum.
 - ii. The learned trial magistrate misdirected herself and erred both in law and in fact in failing to consider the Defendant's overwhelming evidence on record and hence arrived at an erroneous finding in quantum.
 - iii. The learned trial magistrate erred in fact and law and misdirected herself by awarding general damages of Kshs. 380,000/= and special damages of Kshs, 8930/= which amount is manifestly excessive as to be erroneous vis a vis the actual injuries sustained by the Plaintiff.
 - iv. That the learned trial magistrate misdirected herself and erred in law and in fact by totally failing to consider the Defendant's submissions on record thus arriving at an erroneous finding on quantum on quantum.
 - v. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (to apply precedents and tenets of law applicably).
 - vi. The learned magistrate erred in law and in fact in arriving at the said decision.
 - vii. The learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and occasioned a miscarriage of justice.
 - viii. The learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
 6. The appellants proposed to ask that the appeal be allowed, the judgment of the Kiambu CMCC No. 323 of 2018 be set aside, and costs of the appeal be awarded to them.
 7. On 19th January 2023, the court directed that the appeal be dispensed by way of written submissions. The appellants filed submissions on 19th April 2023 while the respondent on 24th February 2023.

Appellant's submissions

8. Counsel submits the award of general damages was excessive considering the respondent suffered mainly soft tissue injuries. The trial magistrate failed to consider comparable awards and erred in awarding general damages of Kshs. 380,000/= which was excessive.
9. He cited several cases including:
 - a. *Ndungu Dennis vs Ann Wangari Ndirangu & Anor (2018)* eKLR where Justice Ngugi sitting on appeal reduced an award of general damages for soft tissue injuries from Kshs. 300,000/= to 100,000/=



- b. George Mugo & Anor vs AKM (suing as a minor through next friend and mother of ANK) (2018) where Kemei, J awarded Kshs. 90,000/= as general damages for soft tissue injuries.
10. The appellants pleaded with the court to review the award of general damages issued by the trial court set it aside and in place an award of Kshs. 80,000/=.

Respondent's submissions

11. In opposing the appeal counsel submits the trial magistrate's award on the quantum of damages cannot be faulted, the trial magistrate purely exercised her judicious discretion based on the evidence and guiding authorities placed before her.
12. That the appellant has failed to show that the discretion of the trial magistrate was exercised on the wrong principle, and to that extent the appeal must fail. Counsel called for the dismissal of the appeal with costs.

Analysis

13. The duty of the appellate court is to re-evaluate, re-assess, re- consider the evidence of the trial court evidence and come up with its own conclusion - See Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

14. I will first analyse the trial court evidence.
15. According to Pw1 - Lincoln Kinuthia as a result of the road traffic accident he sustained injuries on both legs, head, back, chest and neck. He was treated at both Tigoni and Karuri Hospitals. He adduced the attendance, a P3 form, police abstract and a medical report by G.K. Mwaura.
16. Dw1 - Dr. Ruth Ichamwenge a medical practitioner with Direct Line Assurance Company adduced a medical report dated 26th September 2018 prepared by Dr. Jenifer Kahuthu. In the report, the respondent had a loss of consciousness and no head concussion.

Determination

17. The issue for determination is whether the trial court erred in the award of general damages.
18. According to the treatment note dated 25th June 2018 from Karuri Hospital, it indicates the respondent suffered blunt injuries to the head, chest and both legs. The same injuries have been captured in the P3 form filled on 25th June 2018.
19. The medical report by Dr. G. K. Mwaura dated 26th June 2018 indicates the respondent suffered the following injuries blunt injury (tender) on the scalp, chest and back, neck and rib cage, head concussion and bruises on both legs. The doctor observed that the injuries had not completely healed. However, during the hearing the respondent indicated he had completely healed.



20. This court notes that the medical report captures head concussions which was not initially treated and which is not supported by the initial treatment notes from Karuri Hospital. The court thus makes a finding that the respondent suffered blunt injuries to the head, chest and both legs.
21. Assessment of general damages is a discretionary remedy that should be exercised judiciously taking into account previous trends and recent comparable awards. In the case of Stanley Maore vs. Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR the Court of Appeal held:
- “ Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in the assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
22. In the award of general damages, the trial magistrate relied on the case of Catherine Wanjiru Kingori & 3 others vs Gibson Theuri Gichubi (2005) eKLR where the 1st Plaintiff suffered an injury to the left ankle, injuries on the legs and injuries on the chest. She was awarded Kshs. 300,000/=, the second Plaintiff suffered an injury to the back and was awarded Kshs 100,000/= the third plaintiff suffered multiple soft tissue injuries, injuries to the elbow joint, and injuries on both ankles and was awarded Kshs. 350,000/= The fourth plaintiff suffered an injury on the neck and had a headache and was awarded Kshs. 100,000/=
23. The injuries suffered by the respondent are comparable to the injuries sustained by the 1st Plaintiff in the above-cited authority.
24. The trial magistrate went ahead to find the proposal by the appellants was manifestly low and unjustified compared with awards of similar injuries. She considered the age when the award was made and awarded the respondent Kshs. 380,000/= as reasonable compensation.
25. This court sitting as an appellate court will not interfere with the finding of the trial magistrate unless it is satisfied that the trial magistrate applied the wrong principles of the law and arrived at a wrong award. The Court of Appeal in Bashir Ahmed Butt vs Uwais Ahmed Khan [1982-88] KAR 5 the court held 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.”
26. In the foregoing, this court is persuaded that the award by the learned trial magistrate fell on the higher side considering the injuries sustained. I agree with the trial magistrate that the award suggested by the appellants is on the lower side.
27. In the circumstances therefore and considering the authorities cited by the parties, and taking into consideration the time factor and inflation, this court makes an award of Kshs. 200,000/= as sufficient and reasonable compensation for the injuries sustained by the respondent.
28. In making this decision this court takes into consideration of the following cases are appropriate: -
- i. [Justine Nyamweya Ochoki & Anr vs Jumaa Karisa Kipingwa \[2020\]](#) eKLR, wherein the plaintiff suffered blunt injuries to the chest, left wrist and lower lip. The trial court awarded Kshs 300,000/=, but on appeal the same was reduced to Kshs 150,000/=.



- ii. *Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018]* eKLR, wherein the plaintiff sustained soft tissue injuries to the lower right leg and to the back. On appeal, the award was reduced from Kshs 300,000/= to Kshs. 150,000/=.

29. In the upshot, and for the reasons I have enumerated above:

- (a). I allow the appeal, set aside the award of Kshs. 380,000/= and substitute it with Kshs 200,000/=.
- (b). Each party will bear their costs of the appeal, but the respondent will have costs in the trial court.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

THIS 26TH DAY OF JULY 2023.

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P.M. MULWA

JUDGE

In the presence of:

Duale – Court Assistant

Mr. Kabita h/b for Mr. Ng'ang'a for the Appellant

Mr. Mwangi for the Respondent

