



REPUBLIC OF KENYA



KENYA LAW
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**Muiruri & another v Nduku (Civil Appeal E007 of 2020)
[2023] KEHC 21637 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E007 OF 2020**

**G MUTAI, J
AUGUST 9, 2023**

BETWEEN

JUDY MUTHONI MUIRURI 1ST APPELLANT

JAMES MUIRURI THUITA 2ND APPELLANT

AND

DANIEL NDAMBUKI NDUKU RESPONDENT

JUDGMENT

1. The appellants were defendants in the lower court. The court delivered its decision on September 22, 2020 in Kangundo SPMCC 232 OF 2019.
2. The appellants being aggrieved by the decision of the court filed this appeal on quantum only. They set out 3 grounds.
3. The three grounds are in essence once issue, that is whether the damages were arrived at using wrong principles and or are inordinately high as to amount to erroneous estimate of damages.

Pleadings

4. The respondent filed suit on October 16, 2019 arising from an accident on November 2, 2017 at Joska Shopping Centre, along Nairobi- Kangundo Road involving motor vehicle registration number KBY 087 H Isuzu Lorry.
5. The respondent suffered the following injuries: -
 - a. Crashed left hand;
 - b. Degloving on the left thumb with total loss of soft tissue cover exposing the bones;



- c. Degloving on the left index finger with total loss of soft tissue cover exposing the bones with a fracture of the distal phalanx;
- d. Bruises on the dorsum of the left hand;
- e. Bruises on the posterior forearm; and
- f. Deep cut hand on the left palm.

Present Complaints

- a. Persistent pains on the left hand;
- b. Unable to meaningfully use his left hand;
- c. Amputated left thumb stumps;
- d. Amputated left index finger stumps;
- e. Permanent estimated disability of 35%.

Evidence

- 6. The respondent testified that he was injured on November 2, 2017. The doctor, James Muoki examined the Respondent on November 12, 2018. The injuries enumerated are not seriously objected to. The only issue is that the court awarded excessive damages.
- 7. The doctor had relied on the p3 form, treatment noted X Ray and physical examination. He assessed the Respondent at 35% liability. The lefty thumb and index finger were amputated, degloving injuries to the same finger, exposing the bones, with a fracture of the distal phalanx, among other injuries.
- 8. The respondent adopted his statement and was not cross examined on injuries. For these injuries, the court below awarded Kes. 1,700,000/-, hence the Appeal. The court also awarded Kes.4,550/= as special damages.

Duty of the appellate court

- 9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
- 10. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd*[1968] EA 123 where the court of Appeal rendered itself as follows: -

“...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...”
- 11. I will therefore re-evaluate the evidence and come up with my own conclusions but also bear in mind that I should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its



findings. This is also in tandem with *Peters v Sunday Post Limited* (1958) EA at Pg. 424, it was held as follows:

“It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion.”

12. This being an appeal on quantum, the court has a duty to re-evaluate the evidence. in *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia* (1985) 1KAR 727 , 730 Kneller J.A. said: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.

13. This buttresses the decision in *Mbogo v Shah* 1968 EA 93, where the court of Appeal the 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 and in doing so arrived at a wrong decision.”

Damages

14. Damages are dealt under 2 limbs, that is general and special damages.

15. The court awarded Kes.4,550/- as pleaded. In The case of *David Bagine v Martin Bundi* [1997] eKLR settles what is required of special damages. The court posited as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M Nyambu t/a sisera store*, Civil Appeal No 5 of 1990 (unreported) and *Idi Ayub Sabbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684: “....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it" We also refer to the cases of *Ouma v Nairobi City Council* [1976] KLR 297 at page 304 and *Kenya Bus Services v Mayende* (1991) 2 KAR 232 at page 235.”

16. The court did nor err in award of special damages.



General damages

17. General damages awarded are the subject of ground one of appeal. In awarding the damages, the court relied on the authority of *B A J v Roadstar Limited & 2 others* [2018] eKLR, where the court awarded Kes. 1,500,000/- for injuries including facial and leg injuries which necessitated two weeks of admission and five operations to correct her disfigured face, scarred legs and to remove some of the metal implants. Her further evidence was that a metal plate below her left eye and in her chin were still in situ and required to be removed at an estimated costs Kes.150,000/-. She had pain in her right ankle if she stood for long. That the right leg also swelled if she walked for long and was unable to lift heavy objects. The scars caused her embarrassment and she could not wear skirts, do modelling or swim as she used to do before.
18. The authority thus covered more serious injuries than suffered by the respondent herein. The court thus fell into error by relying on a wrong precedent, unrelated to the injuries.
19. The court ought to use similar precedents for similar injuries. For example in the case of *Kaluworks Limited v Nicholas Ngome Kombo* [2020] eKLR. A knife dropped and chopped off three of the Respondent's fingers. The court awarded Kes.800,000/= as general damages for pain suffering and loss of Amenities on October 1, 2020.
20. Further, in *China Road and Bridge Construction v James Ponda* [2020] eKLR, while considering similar injuries, the court, R. Nyakundi confirmed an award of Kes.750,000/=, while holding as doth: -

“Having considered this matter on appeal it seems clearly, the learned trial magistrate factored in the principles in *Coussens v Attorney General* (1999) 1 EA 40 which largely sums up in object of assessment as follows:

“The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered and the heads or elements of damage recognized as such by law are divisible into two main groups: Pecuniary and non-pecuniary loss, with the former comprising of financial and material loss incurred such as loss of business profits, loss of income or expenses such as medical expenses, while the latter comprises all losses which do not represent in road upon a person's financial or material assets such as physical pain or injury to feelings See also (*Butler v Butler (William J Butler v Maura Kathleen Butler* [1984] eKLR).”

21. In *Kenya Power & Lighting Company Limited v Margaret Wanjiku Njunge* [2019] eKLR, the court, T. W. CHERERE reduced an award of 800,000/= to 500,000/= for a Respondent who lost distal phalanx of the right thumb and left little finger whereas the right index finger healed with a deformity and left ring finger healed with surgical scars.
22. In *Peter Kibe Waweru v Moses Maina* [2022] eKLR, Justice Mumbua T. Matheka, awarded Kes.600,000 stating that an award of Kes.750,000/= in *Pietro Canobbio vs Joseph Amani Hinzano* [2016] eKLR was based on amputation of three fingers with 18% disability. In that case, the court relied on the Court of Appeal Decision in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded



by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

23. In contrast the Appellant herein was given 35% permanent disability. This means that the award should be far below that of *BA J v Roadstar Limited & 2 others*[2018] eKLR, and above *Peter Kibe Waweru v Moses Maina* [2022] Eklr. The award herein is far excessive. It is out of range with similar authorities. Doing the best I can, the award of Kes. 900,000/-, will be sufficient, taking into consideration the nature of injuries, permanent disability of 35%, similar awards and loss of amenities. The loss of the thump makes the left hand virtually useless.
24. I therefore allow the appeal and set aside the award of Kes.1,700,000/- and in lieu thereof substitute with a sum of Kes.900,000/-

Determination

25. The upshot is that I allow the appeal in the following terms: -
- a. The award of general damages are set aside and in lieu thereof enter judgment for Kes.900,000/-
 - b. Special damages of Kes.4,550/- remains
 - c. Total 904,550
 - d. Less 50% liability Ksh 452,275/-
 - e. Total award Ksh 452,275/=
 - f. Each party to bear their costs herein. The appellant to bear costs in the court below.
 - g. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF AUGUST 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

GREGORY MUTAI

JUDGE

In the presence of:-

.....for The Appellant

.....for the Respondent.

Mr. Arthur Ranyondo Court Assistant

