



REPUBLIC OF KENYA



**Adhola v Peter (Civil Appeal 129 of 2021)
[2023] KEHC 24811 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 129 OF 2021
PN GICHOHI, J
OCTOBER 31, 2023**

BETWEEN

JOHN OUMA ADHOLA APPELLANT

AND

MANDI PETER RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. N.S. Lutta (CM) dated and delivered on 22nd day of September, 2022 Kisii CMCC NO. 14 of 2020)

JUDGMENT

1. By a Complaint dated 19th December 2019 filed on 21st January 2020 through the firm of M/S Khan & Associates Advocates, John Ouma Adhola (Appellant) sued Mandi Peter (Respondent) claiming that on or about 1st August 2019, he was riding on motor cycle registration number KMDC 564E along the Kisii - Oyugis Road when near Mosoch, the Respondent's driver, agent, servant, employee or assignee negligently drove, managed and/or controlled the said motor vehicle that he caused and/or permitted the same to hit the motorcycle whereby the Appellant sustained grievous injuries being:-
 - a. Left femur fracture.
 - b. Left knee dislocation.
 - c. Pelvic fracture.
 - d. Deep cut wounds on the scalp.
 - e. Deep cut wounds on the right hand.
 - f. Blunt trauma on the abdomen.
 - g. Blunt trauma on the perineal region.



2. He particularized the negligence of the Respondent, his driver, servant, and/or agent and pleaded that the Respondent should be held vicariously liable or otherwise for the tortious acts and omissions committed on the Appellant. He therefore sought general and special damages as well as costs of the suit and interest against the Respondent.
3. In his Defence dated 17th February, 2020 filed through the firm of Kairu & McCourt Advocates, the Respondent denied the occurrence of the alleged accident and the particulars of negligence attributed to him. He particularized the negligence of the Appellant and denied that the doctrine of *res ipsa loquitur*, the Highway Code and the Provisions of the [Traffic Act](#) are applicable. He further denied the particulars of the injuries and the special damages and prayed that the Appellant's suit be dismissed with costs.
4. Vide the judgment dated on 22nd September 2021, the trial court found the Respondent 100% liable and awarded the Appellant Kshs. 400,000/= as general damages and special damages of Kshs. 15, 980/= together with costs of the suit and interest.
5. Being dissatisfied with the judgement on quantum only, the Appellant preferred the instant appeal on five (5) grounds:-
 - a. That the trial Magistrate misdirected himself in law by making an award of General Damages in the sum of Kshs. 400,000/= which was inordinately low in the circumstances considering the severe injuries sustained by the Appellant;
 - b. That the trial Magistrate erred in fact and in law by failing to consider the medical record thus arriving at a finding that was erroneously low;
 - c. That the trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions on quantum and the authorities in support thereof;
 - d. That the trial Magistrate misapprehended the principles applicable in computation of damages thus occasioning miscarriage of justice;
 - e. The trial Magistrate erred in law and in fact in failing to properly evaluate the evidence on record thus reaching to an erroneous decision on quantum.
6. He therefore prayed for orders that:-
 - a. That the appeal be allowed and the judgement and decree of the trial Magistrate dated 22/10/2021 be set aside and/or varied;
 - b. That the court be pleased to substitute and give an order reviewing the quantum thereof;
 - c. That the costs of this appeal and the subordinate be borne by the respondent;
 - d. Any such further relief that the court may deem necessary.
7. Pursuant to directions by this Court that the appeal be canvassed by way of written submissions, the Appellant filed his submissions dated 20th December 2022 while the Respondent filed his dated 2nd February 2023.
8. On quantum, counsel for the Appellant highlighted the injuries sustained by the Appellant particularly that the Appellant's doctor opined that the Appellant had sustained grievous harm , that recovery would take a very long time and that permanent disability was anticipated.



9. Counsel submitted that the Respondent did not avail any medical evidence to controvert the Appellant's evidence and the injuries sustained and further, the Respondent did not challenge the said evidence through cross-examination. Counsel therefore submitted that the award on general damages was inordinately low and not commensurate with the injuries sustained by the Appellant herein considering the case law for similar injuries and further taking inflation into account.
10. He submitted that injuries in the case of *David Kimathi Kaburu vs Dionisius Mburugu Itirai* [2017] eKLR relied on by the trial court were less severe in that the victim had only sustained fractures of femur and he would be able to walk without support and no permanent disabilities were anticipated. Counsel therefore urged this Court to be persuaded by the case of *Geoffrey Maraka Kimchong vs Frechiab Hugi* [2020] eKLR and *Francis Ndungu Wambui & 2 Others vs VK (a minor suing through next friend and mother MCWK)* [2019] eKLR relied on by the Appellant before the lower court and where an award of Kshs. 1,000,000/= was made on each of the said cases. He therefore submitted that an award of Kshs. 1,500,000/= would be appropriate taking into account the inflation rates.
11. On his part, the Respondent opposed the appeal through the firm of Kimondo Gachoka & Co. Advocates who urged this Court to uphold the findings of the trial court while considering several cases including *Peter Gakere Ndiangui vs Sarah Wangari Maina* [2021] eKLR.

Determination

12. I have considered the submissions by both parties. This being the first appeal, the Court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion bearing in mind that it neither saw nor heard the witnesses testify - See *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
13. It is also settled that an appellate court will not ordinarily 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 trial court proceeded on demonstrably wrong principles not supported by evidence or that the trial court misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
14. From the material before the trial court, the Appellant's case was stated by five witnesses including the Appellant himself who testified as PW1. He relied on his recorded statement and documentary evidence being Exh. 1 to 8. In particular, the P3 Form, medical reports from the Matata Nursing Hospital and the report by Dr. Morebu Peter Momanyi dated 30th October 2019 reflect the injuries sustained by the Appellant as pleaded in the Plaint.
15. This accident occurred on 1st August, 2019. The Appellant was admitted in hospital for three days. By the time of examination about two months later, Dr. Morebu opined that the Appellant suffered grievous harm and he would require physiotherapy with occupational therapy and permanent disability anticipated. The doctor also observed that the patient was walking with a limping gait using crutches.
16. The evidence produced in the Appellant's case was not controverted through cross-examination or otherwise and the Respondent closed his case without calling any witness. There is no dispute that no evidence presented before the trial court to challenge the injuries the sustained by the Appellant. This was aptly captured by the trial magistrate.



17. On general damages, it is noted that the trial magistrate appreciated that the Appellant “sustained serious injuries and pain” and while guided by case law in *Rahima Tayab and others vs Annah Mary Kinanu* Civil Appeal No. 29 of 1982 eKLR, he stated:-

From the said case the principles which were formulated were that in awarding damages, the general picture, the while circumstances, and the effect of injuries on the particular person concerned must be looked at some degree of uniformity must be sought and the best guide in this respect is to have regard to recent awards in comparable injuries should be compensated by comparable awards as was held in the case of Mbaka Nguru and another vs James George Rakwar [2019] eKLRAnd further in Denshire Muteti Wambua versus Kenya Power and Lighting Company Limited [2013 eKLR ...”

18. From the above reasoning, it is clear that the trial magistrate was well guided on principles in awarding damages and further clearly considered the authorities relied on by both parties before it.
19. The trial magistrate found that the injuries sustained in *Geoffrey Maraka Kimchong vs Frechiab Hugiru* [2020] eKLR and *PW vs Peter Muriithi Nigari* [2017] eKLR relied on by the Appellant where the court awarded Kshs. 1,000,000/= and Kshs.1,500,000/= respectively were more serious than those sustained by the Appellant herein. He therefore sought guidance in the case of *David Kimathi Kaburu vs Dionisius Mburugu Itirai* [2017] eKLR in making the award the subject of this appeal.
20. In *David Kimathi Kaburu* (supra), the Respondent suffered fragmental fracture, midshaft femur and intertrochanteric fracture femur. He was said to be in a fair general condition and able to walk without support except he had a wobbly gait with a limp on the right lower limb and complained of severe pain on the right hip joint and entire limb mostly in the morning or when it was cold and upon walking for long distance. By its decision delivered in the year 2017, the Appellate Court did not interfere with the award of Kshs. 630,000/= awarded as general damages.
21. In *Peter Gakere Ndiangui* (supra), the Respondent therein (*Sarah Wangari Maina*) had suffered pelvic fractures, blunt injuries in the chest, head, buttocks, right thigh, suffered a head concussion and the right lung had bruises. She was still on crutches and the permanent disability was assessed at 15%. The injuries were classified as grievous harm. On appeal *J. K. Serگون*, J substituted the award of Kshs.1,200,000/= with 500,000/= . This award was made in May 2021.
22. In *PW v Peter Muriithi Nigari* [2017] eKLR, the Minor (Appellant) sustained fracture left femur which was operated on and fixed with a metallic plate, fractures of the left fibula and tibia malleoli which were operated on and fixed with K-wires and plates and blunt injuries to the pelvis causing fractures of the pelvis. She could not walk fast or far or even squat and was unable to control urine and had to wear diapers. She had suffered 20% permanent incapacity. The lower court awarded the Appellant a sum of Kshs. 600,000/= as general damages. On appeal, *F. Muchemi J* found the award as inordinately low and therefore substituted it with Kshs. 1,600,000/=. This award was made in April 2017.
23. This Court is alive to the fact that no injuries are exactly the same in respect of two individuals. Of great significance in this Appeal is that other than fracture of the femur, the Appellant also sustained a fracture of the Pelvic as was in the Minor in the case of *PW* (supra).
24. In *Geoffrey Maraka Kimchong* (supra) the Appellant sustained a cut wound on the cheek, blunt trauma to the pelvis which was tender; and a fracture of the right acetabulum. He was still experiencing tenderness on the cheek and pelvis. The doctor opined that the Appellant had sustained very severe



injuries which were continuing to heal; and that he would still require the use of analgesics to manage the pain he was experiencing.

25. On appeal, the Appellant was awarded Kshs. 1,000,000/- as damages for pain and suffering and in arriving at the said award in March 2018, Olga Sewe J quoted the case of *Kennedy Ooko Ouma Dachi vs Joseph Maina Kamau & another* [2018] eKLR where an award of Kshs. 1,000,000/= was made by the lower court for a comminuted fractured acetabulum. On appeal, the award was enhanced to Kshs. 1,400,000/= on the grounds that:-

“A fracture of the tibia or femur for instance, is very different from a hip fracture, especially in terms of long-term consequences to the victim’s health, and especially mobility... the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis.”

26. In the present case however, there is no doubt that the injuries were less severe than in *Kennedy Ooko Ouma Dachi* (supra) and in *PW* (supra).
27. In *Barnabas v Ombati* (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) (28 July 2022) (Judgment), Doris Nyanduko Ombati (the Respondent) sustained injuries on the head, right limb, and hand; and had pain around the waist, fractures of the femur, humerus and pelvis. A permanent disability was assessed at 5%. On appeal, Ougo J did not disturb the lower court’s award of Kshs. 800,000/=.
28. Guided by the above authorities, and considering inflation, this Court is satisfied that trial magistrate failed to consider more comparable authorities cited in support of the Appellant’s case. He also failed to consider inflation too thus arriving at an inordinately low award as general damages.
29. This calls for interference by this Court in that the award of Kshs. 400,000/= as general damages. The award is hereby set aside and substituted with an award of Kshs. 1,000,000/= together with interest at court rates from the date of judgment by the lower court.
30. Liability and award of special damages were not issues in this appeal and therefore not disturbed. The Appellant is also awarded costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 31ST DAY OF OCTOBER, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

Ms Mugo for Respondent

Aphline, Court Assistant

