



REPUBLIC OF KENYA



KENYA LAW
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**Nyatera v Nyakundi (Civil Appeal E033 of 2022)
[2023] KEHC 24532 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E033 OF 2022
WA OKWANY, J
OCTOBER 31, 2023**

BETWEEN

PURITY NYATERA APPELLANT

AND

DAVIS ANGWENYI NYAKUNDI RESPONDENT

*(Being an Appeal from the Judgment/Decree of the Honourable W. K. Chepseba (CM)
dated & delivered on 5th July 2022 in the original Nyamira CMCC No. 197 OF 2017)*

JUDGMENT

1. The Respondent herein was the plaintiff before the trial court where he sued the Appellant seeking damages for the injuries he suffered in a road accident that occurred on 22nd 2017. The Respondent's case was that he was on the material day riding motorcycle registration number GKB xxxQ towards Nyamira Town when the driver of the Appellant's motor vehicle registration number KBP xxxS which was heading towards Kisii Town lost control and hit him thereby occasioning him severe injuries.
2. The respondent was immediately after the accident rushed to Nyamira County Referral Hospital and later transferred to Tenwek Hospital where he was admitted until 20th May 2017 when he was discharged. His treatment involved several surgical procedures that entailed the placing of metal pins in the fractured bones which will require removal as explained in the medical report that was marked as P. Exhibit 8.
3. The respondent tendered the evidence of 5 witnesses before the trial court while the Appellant did not call any witness. In a judgment rendered on 5th July 2022, the trial court found the Appellant 100% liable for the accident and awarded the Respondent general damages for pain and suffering at Kshs. 1,400,000, future medical expenses of Kshs. 200,000, and special damages of Kshs. 39,710/=.



4. The said judgement precipitated the filing of this appeal wherein the Appellant challenges the trial court's findings on quantum only. The Appellant listed the following grounds of appeal in her Memorandum of Appeal: -
 - a. That the learned trial magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs. 1,400,000/= that was overly in excess in the circumstances of the case.
 - b. That the learned trial magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
 - c. That the learned magistrate's exercise of discretion in assessment of quantum was injudicious.
5. The Appellant seeks orders to set aside the trial court's judgment on quantum and its substitution with this court's assessment. The Appellant also seeks the costs of the Appeal.
6. The appeal was canvassed by way of written submissions. As the first appellate court, I am required to re-consider and re-analyze the evidence adduced before the trial court in order to my own conclusions while bearing in mind the fact that I did not hear or see the witnesses who testified, (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).
7. In view of the fact that the only contest in this appeal is on the award of damages, I will limit my analysis of the evidence tendered before the trial court to the evidence relation to the injuries that the Respondent sustained in the accident in question.
8. PW3 Dr. Morebu Peter Momanyi produced the medical report P. Exh 8. He testified that the respondent suffered the following injuries: -
 - i. Fracture of the right femur bone
 - ii. Compound fracture of the right tibia bone
 - iii. Fracture of the left tibia bone.
 - iv. Pulmonary contusion.
 - v. Bruises on the right and left upper limbs.
 - vi. Blunt injuries to the neck.
9. PW3 further testified that as at the time of the examination the patient was unable to walk and had respiratory distress. He noted that the Respondent would require to undergo another operation at the cost of Kshs. 200,000. He assessed permanent disability at 50%.
10. PW4 Lydia Maritim testified that she works at Tenwek Hospital where the Respondent was admitted following the accident. She stated that the Respondent sustained a fracture of the upper end of the tibia, a pertochantheric fracture on the hip side and a femur fracture. She produced a discharge summary (P. Exh 2), a medical report by the Medical Superintendent of Tenwek Hospital (P. Exh 3), a fracture form (P. Exh 4) and receipts for all the money paid by the respondent while at Tenwek Hospital (P. Exh 6) which came to a total of Kshs. 39,710/=.



11. PW5 Pius Moseti Maagi was a clinical officer at Nyamira Referral Hospital. He testified that he examined the Respondent on 22nd April 2017 and found that he had neck injuries with some tenderness, bruises on the upper limbs, fractured right tibia, fractured fibula and fracture of the head bone. He testified that he prepared and signed the P3 form which he produced as P. Exh 7. On cross examination he stated that he was not sure if the respondent could fully recover from the fractures.
12. The appeal was canvassed by way of written submissions which I have considered.

Determination

13. I have considered the record of appeal and the respective submissions over the award of general damages. I find that the main issue for determination is whether this court should interfere with the trial court's award of damages.
14. Courts have taken the position that there can be no uniformity in the assessment of damages and that such assessment falls within the trial court's discretion. In *Livingstone Rawyards Coal Co.* [1880] 5 App Cas 25 the court stated that: -

“I do not think there is any difference of opinion as to its (sic) being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages, you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong”.

15. In *Cornilliac v St Louis* [1965] 7 WLR 491 the court highlighted the factors that should be considered in making an award of damages as follows: -
 - a) The nature and extent of the injuries sustained
 - b) The nature and gravity of the resulting physical disability
 - c) The pain and suffering hence had to be endured
 - d) The loss of amenities suffered
 - e) And the extent to which consequentially the claimant's pecuniary prospects have been materially affected. (See also *H. West & Son Ltd v Shephard* [1964] AC 326).

16. The principles that guide the court when considering whether or not to interfere with the trial court's assessment of general damages were outlined in *Rahma Tayab & Another v Anna Mary Kinaru* [1987-88]1KAR 90 and *Hassan vs Nathan Mwangi Kamau Transporters* [1985] eKLR 250CAR where it was held that: -

“On appeal, the Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out on account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”



17. In *Cuossens v Attorney General* [1999] 1EA 40 the court held thus: -

“That is 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 the law and divisible into two main groups pecuniary and non-pecuniary loss. The aim of compensatory damages as seen from the above case law is to restore the plaintiff to the position he or she would have been in if the relevant tort had not been committed by the tortfeasor”.

18. It is also trite that an appellate Court will not ordinarily interfere with trial court’s assessment of damages unless it is satisfied that the trial court 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 judgement of the Court, an entirely erroneous estimate of the damage. This is the position that was taken by the Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR where the learned judges held that: -

“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 judgement of this Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled”.

19. A similar holding was made in *Rook v Rairrie* [1941] KLR 349 the court held that (per Law; JA): -

“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.”

20. In the off-cited case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.M. Lubia and Olive Lubia* [1982-88] 1 KAR 727 at p. 730 Kneller JA 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, this amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.

21. In the present case, the medical report (P. Exh 8) and the P3 form (P. Exh 2) reveal that the Respondent sustained the following injuries in the accident in question: -

- a. Blunt trauma to the neck
- b. Bruises on the right upper limb
- c. Bruises on the left upper limb
- d. Compound fracture of the right tibia
- e. Right intertrochanteric fracture



- f. Right femur shaft fracture
- g. Left bi-condylar tibia plateau fracture
- h. Pulmonary contusion.

The following injuries were listed in the Discharge Summary (P. Exh 2): -

Fracture of upper end of tibia – tibial: condyles, head, proximal end, tuberosity with or without mention of fracture of fibula. Pertrochanteric fracture – intertrochanteric fracture, trochanteric fracture. Fracture of femur.

22. I note that the injuries that the Respondent suffered were grievous in nature. The doctor who prepared the Medical Report assessed permanent disability of 50%. My finding is that the Respondent suffered considerable pain and suffering as a result of the said injuries. The practice in our courts has been to award a fair and reasonable compensation while considering similar awards using judicial precedents as a guide.
23. I have examined past decisions where the claimants suffered similar injuries such as; the case of *Godfrey Wamalwa Wamba & another v Kyalo Wambua* [2018] eKLR, where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip, he was in hospital for three weeks, he underwent surgery to repair the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court awarded him general damages at Kshs. 700,000.00, which the appellate court upheld; *Wakim Sodas Limited v Sammy Aritos* [2017] eKLR, the respondent sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400,000.00, which was upheld on appeal; *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR, the appellate court declined to disturb an award of Kshs. 500,000.00 for a fracture of the left tibia bone (medial malleolus), blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe; the case of *David Mutembei vs Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1,600,000.00 had the same reduced on appeal to Kshs. Kshs. 800,000.00
24. Taking into consideration the more recent decisions on similar injuries cited above, and the inflationary trends that have weakened the Kenyan Shilling, it is my view that the award of Kshs. 1,400,000 was way much on the higher side. I am of the view that an award of Kshs. 900,000 general damages will be adequate compensation for the Respondent's injuries.
25. Consequently, I find that the appeal is merited and I therefore allow it and substitute the award of Kshs. 1,400,000 general damages with an award of Kshs. 900,000. I however uphold the trial court's award of Kshs. 200,000 future medical expenses and special damages of Kshs. 39,710/= which were not contested in this appeal.
26. I award the Appellant half the costs of the appeal.
27. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER 2023.

W. A. OKWANY

JUDGE

