



Owino v FOO (Minor Suing Through Father and Next Friend MOO) (Civil Appeal E001 of 2023) [2023] KEHC 24335 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E001 OF 2023
MS SHARIFF, J
OCTOBER 27, 2023**

BETWEEN

ELIUD ONYANGO OWINO APPELLANT

AND

FOO (MINOR SUING THROUGH FATHER AND NEXT FRIEND MOO) RESPONDENT

JUDGMENT

A. Introduction

1. The Respondent herein FOO (Minor suing through his father and next friend) one MOO had filed a claim for tortious negligence against the Appellant in Kisumu CMCC NO. 540 of 2019. Judgement was entered in his favour for a sum of Kshs.1,800,000 by way of general damages.

B. Appeal:

2. The Appellant was aggrieved by the said judgement and therefore lodged this appeal herein be bases it or the following grounds:
 - i. That the learned trial magistrate erred in law and in fact awarding general damages of Kshs.1,800,000 which award was excessive and not commensurate to the nature of injuries sustained by the Plaintiff.
 - ii. That the learned trial Magistrate erred in law and in fact in failing to pay regard to authorities in the Defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case she was deciding.



C. Submissions:

3. This appeal was canvassed by way of written submissions. Both parties complied.

Appellant's Submissions:

4. The Appellant submits that the award of Kshs.1,800,000 was excessive and he proposes a sum of Kshs.400,000. He emphasizes that courts are bound by precedents and that comparable injuries should attract comparable awards. Reliance has been placed on the case of *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013)* eKLR and *Michael Okello -vs- Priscilla Atieno (2021)* Eklr.
5. The Appellant further posits that awards of damage must be within the limits of the Kenyan economy. The case of *Kigaraari -vs- Aya (1982 - 88) 1 KAR 768* has been cited in this regard. While the cases of *TAM -vs- Richard Kirimi Kinoti and Another (2015)* eKLR, *Ibrahim Kalema Lewa -vs- Esteel Company Ltd (2016)* eKLR *Erick Ratemo -VS- Joash Nyakwacha Ratewa (2018)* eKLR and *Jitan Nagra -vs- Abidnego Nyandusi Oigo (2018)* eKLR have been advanced to support the Appellant's submissions for a reduction of the general damages from Kshs.1,800,000 to Kshs.450,000.

Respondent's Submissions:

6. The Respondent's submits that the minor had sustained severe injuries as reflected in his exhibits 2, 3, (a) (b) (c), 4 (a) 4 (c) and 7, 7(b) and 5. It is submitted that PW3 Professor Were Okombo a physician and epidemiologist from JOOTRH had stated that the minor had sustained injuries of both soft tissues and bones and per his assessment; the injuries were categorized as grievous harm. Further that the minor suffered a shortening and deformity of the left leg with a disability quotient of 20%.
7. The Respondent posits that the Appellant did not call any rebuttal evidence and the medical evidence presented by its witnesses and especially PW3 stood uncontroverted.
8. The Respondent thus supports the award on general damages.

D. Analysis and determination:

9. The duty of a first Appellant court was enunciated and the case of *Gitobu Imanyara & 2 others v Attorney General [2016]* eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High 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 allowances in this respect”

10. The Respondent herein had sustained severe multiple soft tissue and bones injuries that were described in the treatment notes, P3 form and a medical report prepared by Dr. L. W. Okombo (PW3) as follows:-
 - a) Salter – hams type II fracture of distal left femur
 - b) Anterior femoral epiphysis and apparent lateral metaphysical fracture of the left femur



- c) Head injuries:
 - Motion blur artefacts
 - Left frontal hemorrhage contusion
 - headache
 - d) Deformity and shortening of the left leg
 - e) Multiple deep cuts on the left elbow joint
 - f) Multiple deep cuts on the left shoulder joint
 - g) Cut wounds on the left cheek
 - h) Chest pain
 - i) Multiple cuts on the left knee with swelling and tenderness
- The Respondent had deformation and shortening of the left leg.

11. In the case of Barnabas –vs- Ombati, Kisii High Court Civil Appeal No. E43 of 2022 (2022) KEHC 12136, Justice Rose Ougo sustained an award of Kshs.800,000 for a Plaintiff who had sustained a fracture of the femur. While in the case of Penina Waithira Kaburu –vs- KP (2019)eKLR Justice Ngaah Jairus upheld an award of general damages of Kshs.2,000,000 for a Claimant who suffered multiple fractures on the pelvis, injuries on the urethra and bruises on the legs.
12. The authorities relied on by the Appellant are distinguishable. The case of Ibrahim Kalema Lewa –vs- Esteel Ltd was decided in 2012 by the trial court and the appeal was concluded in 2016. The injuries suffered by Ibrahim Kalema Lewa were less severe as compared to the ones suffered by the Respondent herein. In the case of Erick Ratemo –vs- Joah Nyakweba Ratemo the injuries sustained by the Plaintiff/ Respondent were multiple but of lesser severity in comparison to the ones sustained by the Respondent herein.
13. Upon re-evaluation, scrutiny and re-analysis of the evidence I do not find that the award made by the trial court was excessive. The court properly directed its mind on the evidence and did not consider any extraneous factor nor did it leave out any relevant ones. I do find that indeed the minor sustained severe multiple soft tissue and bones injuries. I also note that exhibit PW3 had even assessed future medical costs of Kshs.1.4 million but given that it was never pleaded in the primary suit I will not delve into the matter.

E. Conclusion:

14. This appeal is devoid of merit and thus dismissed with costs to the Respondent assessed at Kshs.20,000.
15. The money and interest currently held in a joint account of parties namely Account No. 0180183971505 Equity Bank Community Corporate Branch Nairobi in the name of Rakewa Otieno & Company Advocates and Kimondo Gachoka & Company Advocates be released forthwith to the Respondent’s advocate Ms. Rakewa Otieno & Company Advocates.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 27TH DAY OF OCTOBER, 2023.

MWANAISHA S. SHARIFF

JUDGE

