



**Kirugumi v Gikandi (Civil Appeal E099 of 2022)
[2023] KEHC 24199 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E099 OF 2022
FN MUCHEMI, J
OCTOBER 25, 2023**

BETWEEN

JACOB GICHIRA KIRUGUMI APPELLANT

AND

RITA NYAWIRA GIKANDI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. S. M. Nyaga (SRM)
delivered on 27th October 2022 in Baricho SRMCC No. E018 of 2021)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Baricho Senior Resident Magistrate in SRMCC No. 18 of 2021 arising from a road traffic accident whereby by consent on liability was apportioned at the ratio of 20:80 with the appellant bearing 80%. The respondent was awarded general damages of Kshs. 200,000/- for pain, suffering and loss of amenities and special damages of Kshs. 9,220/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law in awarding Kshs. 200,000/- as general damages for pain & suffering which amount is inordinately low;
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that according to the medical report by Dr. Munyi he sustained the following injuries:-



- a. Fracture of the right ankle;
 - b. Deep cut wound on the right thumb;
 - c. Soft tissue injury around the left eye;
 - d. Soft tissue injury to the chest.
5. The appellant further submits that he produced a medical examination report that indicated that he sustained a fracture of the right ankle joint. However, the learned trial magistrate in his judgment said that the P3 Form did not indicate a fracture of the ankle. Furthermore, the respondent states that the treatment note issued by Sagana sub county hospital indicated that he sustained a fracture of the right ankle. The appellant further states that Dr. Wambugu in his medical report dated 24th September 2021, did not consider all the medical documents that had been availed to him. As such, the appellant submits that the court ought to be guided by the medical report of Dr. Munyi dated 21st December 2020 as it was prepared 3 weeks after the occurrence of the accident thus correctly capturing the injuries he sustained. Whereas Dr. Wambugu's report was prepared 10 months after the occurrence of the accident. The appellant relies on the case of Peter Muchiri Njuguna vs David Njuguna Muiruri [2020] eKLR to support his contentions.
6. The appellant submits that the award of Kshs. 200,000/- as given by the trial court was inordinately low and opines that the sum of 1,000,000/- will suffice as reasonable compensation. He relies on the cases of Athumani & Another vs David (Civil Appeal 22 of 2020) [2022] KEHC 10385 (KLR) (28 April 2022) and *Finlays Horticulture Kenya Limited vs Grace Wacugu Chiira [2020]* eKLR on the basis that the injuries sustained by the respondents therein were similar to those he sustained.

The Respondent's Submissions

7. The respondent submits the judgment of the trial magistrate was regular and well within the law. As per the medical report by Dr. Kenneth Munyi dated 21st December 2020, the appellant sustained the following injuries:- fracture of the right ankle, deep cut wound on the right thumb, soft tissue injury around the left eye and soft tissue injury to the chest. He estimated permanent incapacity at 20% and the cost of future medical expenses at Kshs. 350,000/-. The respondent further states that the appellant was examined by Dr. Wambugu who noted in his medical report dated 24th September 2021 that the appellant sustained the following injuries:- blunt trauma right ankle joint and left foot, blunt trauma with bruising left eye brow, cut wound on the right thumb and blunt chest trauma. In conclusion, he noted that the appellant sustained soft tissue injuries.
8. The respondent submits that he has examined the treatment notes from Sagana Sub County Hospital that were prepared three (3) days after the accident indicates there was a fracture on the right ankle joint. However the medical examination report dated 5th December 2020, had no mention of a fracture. The respondent states that both were done on the same day of the accident. As such, the respondent submits that the medical examination report is in line with the medical report by Dr. Wambugu which confirms that the appellant only sustained soft tissue injuries.
9. The respondent argues that the appellant did not discharge the burden of proof as he did not present any x-ray documents to prove the fracture and he further declined to visit the doctor the second time when he was requested to take the documents to prove that he sustained a fracture. To support her contentions the respondent relies on Section 107 of the *Evidence Act* and the case of *Alice Wanjiru Rubiu vs Messaic Assembly of Yabweb [2021]* eKLR.



10. The respondent relies on the cases of *African Line Transport Company & Another vs Sylvester Keitany [2017]* eKLR and *Kenya Power & Lighting Co. Ltd vs Clement Likobebe Shikondi (personal representative of the estate of Desmond Tutu Likobebe (Deceased) [2018]* eKLR and submits that the appellant only proved a sum of Kshs. 9,220/- as special damages and he was rightfully awarded the said damages.
11. The respondent argues that the appellant ought to be awarded Kshs. 100,000/- for the soft tissue injuries he sustained. She relies on the cases of *Gilbert Odhiambo Owuor vs Nzoia Sugar Company Limited [2012]* eKLR where the appellate court awarded the claimant Kshs. 50,000/- for soft tissue injuries sustained by the claimant on his leg. Further in *Buds and Bloom Ltd vs Lawrence Emusugut Obwa (2016)* eKLR where the appellate court reduced the award of Kshs. 70,000/- to Kshs. 50,000/- for a deep cut wound on the left leg and soft tissue injuries sustained by the claimant on his leg. Similarly in *Paul Kipsang Koech & Another vs Titus Osule Osore [2013]* eKLR where Gikonyo J held that soft tissue injuries generally attract a sum of Kshs. 50,000/- to Kshs. 200,000/- depending on the extent and severity of the injuries.
12. It is further submitted by the respondent that future medical expenses are considered special damages and thus they have to be pleaded and proved. The respondent argues that the appellant has not demonstrated clearly on the costs of future medical expenses and relies on the case of *Valji Jetha Kerai & Another vs Julius Ombasa Manono & Another [2019]* eKLR to support her contentions.

Issue for determination

13. The main issue for determination is whether the award of general damages was inordinately low.

The Law

14. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others [1968]* 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

15. It was also held in *Mwangi vs Wambugu [1984]* KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
16. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another [1988]* KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”



17. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the award of general damages was inordinately low.

18. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele 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.”

19. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

20. The bone of contention is whether the appellant sustained a fracture of the ankle and whether it was captured in the medical examination report. According to the plaintiff, the appellant suffered a fracture of the right ankle, deep cut wound on the right thumb, soft tissue injury around the left eye and soft tissue injury to the chest.
21. Dr. Kenneth Munyi in his report dated 21/12/2020 confirmed the said injuries. The record specifically the treatment notes from Sagana Sub County Hospital indicate that the appellant sustained a fracture of the right ankle joint. The medical examination report dated 5/12/2020 also indicates that the appellant suffered a fracture on his right ankle joint. On perusal of the medical report of Dr. Wambugu dated 24th September 2021, it indicates that the appellant sustained the following injuries:- blunt trauma right ankle joint and left foot, blunt trauma with bruising left eyebrow, cut wound right thumb and blunt chest trauma. He noted in his report that the x-rays taken then and available at the time of examination did not reveal any bone or joint lesion of the ankles and both feet. He further concluded that no radiological features of fracture noted on the x-rays taken then and classified the injuries of the appellant as soft tissue injuries.
22. The trial court in its judgment stated that the medical examination report did not indicate that the appellant suffered a fracture and faulted the appellant for failing to explain the discrepancy between the



medical examination report and his treatment notes. At this point, this court is obligated to determine which one of the two medical reports reflects the correct assessment of the appellant's injuries. The court in *Peter Muchiri Njuguna vs David Njuguna Muiruri [2020]* eKLR when faced with a similar situation stated:-

I have considered the two reports as to the nature of injuries sustained by the appellant herein and I find the report by Dr. Wambugu not being persuasive. I note that the said witness examined the appellant on 20/1/2016 and in his report noted that he did not see any fracture from the x-ray films presented to him. One wonders whether the doctor was presented with different x-ray films from the ones Dr. Njiru had used earlier as he stated that the appellant suffered soft tissue injuries. The opinion of Dr. Wambugu contradicts the report of Dr. Njiru as well as the P3 Form and the treatment notes. Yet I have reason to believe that the doctors used the same documents to prepare their reports.

23. Guided by the above authority, the accident occurred on 5/12/2020 and Dr. Munyi examined the appellant on 21/12/2020 which is about sixteen (16) days after the accident. Dr. Wambugu examined the appellant on 24/9/2021 which is nine (9) months after the accident. I have perused the treatment notes from Sagana sub county hospital dated 8/12/2020 and the P3 Form which refers to the injuries in the same terms as Dr. Munyi's report. The P3 confirms that the appellant sustained a fracture to the ankle joint. Consequently, I am well persuaded by Dr. Munyi's report, the P3 Form and the treatment notes that the appellant suffered a fracture to the right ankle joint, and I so find.
24. I have considered the authorities cited by both parties on the award of damages and noted that the authorities cited by the appellant are not comparable as the injuries sustained by the claimants in both cases were more severe than those suffered by the appellant herein. The authorities cited by the respondent are not comparable either as they only touch on soft tissue injuries. It is my considered view that the case of *Peter Muchiri Njuguna vs David Njuguna Muiruri [2020]* eKLR is comparable to the case herein. The appellant suffered a dislocation/fracture of the left leg at the ankle joint and the court awarded Kshs. 250,000/- for general damages for pain and suffering. The Njuguna case was decided about three years ago and in my view, inflation factors need be taken into account.
25. Therefore it is my considered view that this is a suitable case for the exercise of this court's discretion to interfere with the trial court's finding on general damages for the reason that the quantum that was awarded was inordinately low. I find that a reasonable and adequate award of Kshs. 350,000/- would suffice for general damages for pain and suffering.

Conclusion

26. In view of the foregoing, I find that the appeal has merit and it is hereby allowed. the award of Kshs.200,000/- is hereby set aside and substituted with an award of Kshs.350,000/- which is subject to the ratio of liability.
27. The appellant shall be paid Kshs.359,220/- inclusive of the special damages of Kshs.9,220/- subject to the 80:20 ratio.
28. The appellant is hereby awarded the costs of this appeal
29. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

.....



JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

