Mutuku v Mwangi & 2 others (Civil Appeal 100 of 2022)
[2023] KEHC 24468 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24468 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 100 OF 2022

SM MOHOCHI, J

OCTOBER 25, 2023

BETWEEN

JASON MUUO MUTUKU ..... APPELLANT

AND

JORAM MWANGI ..... 1ST RESPONDENT

LEO CAPITAL HOLDINGS LTD ..... 2ND RESPONDENT

WANJIRU HINGA ..... 3RD RESPONDENT

(Being an Appeal from the judgment/decree of Hon. R. Kefa Principal Magistrate delivered on 20th July, 2022 Nakuru Civil Suit No. 557 of 2021)

JUDGMENT

Background

1. The Appellant moved Court vide Plaint dated 14th June, 2021 and sued the Appellant together with the Respondents for injuries sustained as a result of an accident that occurred on 16th January, 2021 along the Nairobi Bahati Road near White House area involving motor vehicle Registration number KCN 075A and a motorcycle where the Appellant was a pillion rider. The vehicle KCN 075A belonged to the 1st and 2nd Respondents and was being driven by the 3rd Respondent. He claimed special and general damages as well as costs of the suit.

2. The Respondents entered appearance and denied the entire claim, negligence occurrence of the accident as well as ownership of the accident motor vehicle through their Statement of Defence dated 8th July, 2021 and prayed for the suit to be dismissed with costs

3. In the alternative and on a without prejudice basis the Respondents averred that if the accident did occur, it occurred without negligence on their part and the negligence was on the part of the rider of the motor cycle.

Summary Evidence

4. PW1, Jason Muuo Mutuku, testified that on 16th January at around 1.15pm he was on his way home from Mediheal Hospital, when he boarded a motorcycle. As they were coming on the minor road of the Nakuru Nairobi Highway, at the junction of St Mary's Pastoral Center the rider checked to see whether the road was clear and joined the highway towards Bismark-Nyahururu direction.

5. He further testified that after 20-25 minutes they were hit from behind by motor vehicle registration number KCN 075A and he was thrown off the motorcycle falling on the middle of the left side of the road and sustaining a fracture on his leg and injuries on the hand. The motorcycle fell 50 meters from the road. He was taken to Mediheal Hospital for treatment and admitted for 6 days. He adopted his witness statement.

6. He produced discharge summary (PEX3), police abstract(PEX2) P3 Form (PEX1), motor vehicle search (PEX5) and a medical report (PEX8)

7. On cross-examination, he testified that he could not recall the registration number of the motorcycle, and the rider fled from the scene immediately after the accident. He had also not availed the rider as a witness. There were police officers who visited the scene but were not sure if the driver had been charged.

8. PW2, No. 49807, CPL Jackson Kionange produced abstract dated on 16th January, 2021 as PEX2 in relation to a road traffic accident that occurred on 16th January, 2021 between motor vehicle registration number KCN 075A and an unknown motorcycle where the Appellant was grievously injured and the matter referred to insurance.

9. On cross-examination he testified to not being the investigating officer and could not tell about the rider of the motorcycle or whether he had a driving license and that the details of the motorcycle were not captured. He also testified that the driver of the motor vehicle was not blamed or charged with any offence. He further added that neither the motorcycle nor the rider was at the scene

10. After the conclusion of the trial, the trial Court entered judgment in favour of the Appellant against the Respondent jointly and severally in the following terms;

    a. General damages Kshs 250,000

    b. Future medical expenses Kshs 150,000

    c. Special damages Kshs 12,750

    Grand total Kshs 412,750

The Appeal

11. The Appellant being dissatisfied with the judgment lodged the present appeal. The Appeal is based on the following grounds:

    i. That the Learned Trial Magistrate erred in law and in fact in misapprehending the injuries sustained by the Appellant and thereby arrived at an award which is ordinately low.

ii. That the Learned Trial Magistrate erred in law in proceeding on the wrong principles by solely relying on the case of (*IMN (minor suing through Next friend and father WWN v Petroleum & Industrial Services Ltd* (2014) eKLR where the Appellant had no comparable injuries with the Appellant herein.

iii. That the learned Trial Magistrate erred in law and in failing to consider the cases cited by the Appellant for comparable awards.

iv. That the Learned Trial Magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages of Kshs 250,000 which is very low.

v. That the Learned Trial Magistrate erred in law and in fact when making the award by failing to carefully consider the passage of time and incidence of inflation.

vi. That the Learned Trial Magistrate erred in law and in fact in awarding the Appellant general damages of Kshs 250,000 which was inordinately low as to represent an entirely erroneous estimate.

12. The Appellant thus seeks that the Appeal be allowed and the Judgement of Honourable R. Kefa Principal Magistrate delivered on 20th July, 2022 set aside and the Court be pleased to re-assess the general damages payable to the Appellant.

13. The Appeal was disposed of by way of written submissions

Submissions

14. The Appellant submitted that the trial magistrate misapprehended the injuries sustained by the Appellant and thus arrived at an award that was inordinately low to represent an erroneous estimate. It was the Appellant's submission that the Learned Trial Magistrate relied on wrong principles of law by relying on one case in which the injuries were not comparable therefore failing to consider the decided cases that had been cited by the Appellant.

15. The Respondents in opposing the appeal submitted and encouraged the Court to be cautious in exercising its discretion. The Respondents also submitted that the Appellants doctor did not award any permanent disability and that the Learned Magistrate did not misapprehend the injuries sustained. That the Plaintiff in the authority relied on sustained more serious injuries and as such the trial Court's decision should not be interfered with. The Respondents further posited that the decision of the Trial Court should be upheld as the same was based on fact and law.

Analysis and Determination

16. I have considered in detail, the entire Record of Appeal, the rival Submissions filed both before the Trial Court and in this Appeal and will consider the whole appeal and freshly scrutinize the facts and arrive at my own determination and conclusion.

17. This being a first Appeal, I am guided by the dictum in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] EA. 123, where it was held that the first Appellate Court has to reconsider and evaluate the evidence that was tendered before the trial Court, assess it and make its own conclusions in the circumstances.

18. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court stated with regard to the duty of the first Appellate Court;

> " This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

19. In this appeal, the Appellant is only challenging the quantum of general damages that is; to be too low. The Court of Appeal 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."

20. Similarly considering whether an award was too low, the Court of Appeal in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 stated 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..."

21. The Appellant sustained the following injuries;

    a. Comminuted Subtrochanteric fracture of the left femur

    b. Soft tissue Injuries of the chest

    c. Soft tissue injuries of the right wrist

22. The injuries were confirmed by the medical report of Dr. Kiamba dated 26th May, 2021. The medical examination was conducted 4 months after the accident. The doctor opined that the Appellant would require the removal of implants in future where the open reduction and internal fixation was done. The doctor classified the degree of injury as grievous harm.

23. In his judgment, the Learned Trial Magistrate relied on *(JMN (minor suing through Next friend and father WWN v Petroleum & Industrial Services Ltd* [2014] eKLR in which the Court expressed itself as hereunder:

5). In the instant case, the medical evidence produced by DR. P. M. Ajuoga (M.D) was that the appellant suffered bruises on the face, chest contusion, cerebral concussion, bruises on the elbows and the fracture of the right tibia and fibula bones. Treatment included dressing, plaster of paris and the provision of analgesics, antitetanus and antibiotics. When the appellants was examined on 8th April, 2008 the injuries had healed except for scars. The fracture had healed except for residual pains. The doctor opined that the compound fracture presented a high risk of developing osteomyelitis as a common complication. The record shows that the doctor testified and was cross-examined to say.....

24. The Appellant has faulted the Leaned Trial Magistrate for failing to consider authorities cited by the Appellant. Looking at the judgment Learned Trial Magistrate considered the submissions of all parties and addressed the authorities cited by the parties in the judgment. It is my considered view that the trial magistrate properly addressed his mind in this regard.

25. Looking at the other grounds of appeal, the substance of the Appellant's contention is that the Learned Trial Magistrate failed to consider the nature and extent of the injuries sustained by the Appellant and hence came to the wrong assessment of damages basing the same on a single authority and therefore awarding the Respondent an amount which was inordinately low.

26. The question for determination therefore is whether the learned trial magistrate awarded inordinately low damages in view of the injuries sustained and whether this Court should interfere.

27. It is not in dispute that the Appellant sustained a fracture of the left femur and soft tissue injuries to the chest and wrist. The Respondents submitted and maintained that the trial Court correctly assessed damages and stated that the authorities relied on by the Appellant are based on serious injuries which are not comparable to the Appellant herein.

28. The Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR that:

> " The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this Court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

29. This was the pronouncement in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that: –

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

30. I agree with the Respondents that the injuries in so far as the following authorities relied on by the Appellant being more severe are concerned;

    a. *Elizabeth Wamuyu Wanjohi v John Murithi Mbaya and 2 others* [2015] eKLR which was decided on 24th April 2015 the Court awarded the sum of Kshs 1.5million where the injuries were distal fracture in the right supracondylar region of the knee, dislocation of right elbow and deformity and soft tissue injuries to the spinal region and lower limbs, The doctor who examined the plaintiff found him to be"....moribund with severe debilitation, unable to walk without support and then only with limited motion due to severe back and knee pains ..."

    b. *World vision Kenya v Bebora Mwaono Bemwingo* [2020] eKLR where there was 30% incapacity further the patient developed stiff knee which was as a

result of poor physio therap. The injuries sustained were equally severe and not at all comparable to the injuries herein.

31. The case of *George William Owuor v Beryl Awuor Ochieng* [2020] eKLR is the only authority relied on by the Appellant which has almost comparable injuries and line of treatment. The Respondent in that case suffered fractures of the right femur and left tibia fibula. The doctor noted that the tibia fibula fractures were compound while the femur fracture was simple. The award of general damages of Kshs 2,000000 was set aside and substituted with an award of Kshs 1,200,000 on appeal.

32. The Respondents on the other hand submitted and relied on the following authorities: -

    a. *Isaac Mbataru v Silas Kalumani* [2017] eKLR which was cited in *Simon Kimote v Agro Solutions Limited* [2021] eKLR where the Appellant sustained right femoral fracture lower 1/3, tibia plateau fracture, blunt head injury and blunt neck injury and was awarded Kshs 350,000 which was upheld on Appeal.

    b. *Reamic Investment Limited v Joaz Amenya Samuel* [2021] eKLR, the Court reduced an award of Kshs 600,000 to Kshs 350,000 for injuries: open left femur fracture, abrasion on the left knees, face, neck, right upper limp and left upper lip as well as a contusion on the anterior chest.

33. The injuries that were sustained by the Plaintiff in the judicial authority relied upon by the Learned Trial Magistrate were not exactly the same but comparable to the ones sustained by the Appellant herein. In the authority, the fractures were of the right tibia and fibula where the Plaintiff then was awarded Kshs 180,000 in 2014.

34. Before I proceed, I wish to note that, no separate accident can result in similar injuries or set of injuries. There will definitely be a difference in pain and suffering, nature of injuries, degree of harm of level of incapacity. What a Trial Court is expected to consider is whether there is a particular case that bears any relevancy to the one at hand and if so consider it and use it as a base for assessment of damages. That consideration and assessment is what is discretionary.

35. The tibia and fibula are bones of the leg from the knee joint to the ankle joint (the lower leg bones) and the femur is the bone of the leg from the knee joint to the hip joint also referred to as the thigh bone. The femur in addition to being the longest bone is the heaviest and strongest bone in the human body. For the femur to fracture the impact must be from a high energy trauma event therefore making a femur injury quite serious which the Learned Magistrate ought to have taken into account.

36. The proper comparison in my view lies in the following authorities;

    a. *Kenyatta University v Isaac Karumba Nyuthe* [2014] eKLR where the Plaintiff sustained fracture of right femur, soft tissue on head and bruises on right knee, the High Court awarded Ksh.350,000/-.

    b. *Francis Maina Kahura v Nahashon Wanjau Muriithi* [2015] eKLR, where the Plaintiff who sustained a segmented fracture of the mid-shaft right femur and a cut would on the left knee was awarded by the High Court ksh.500,000/- general damages.

    c. *Prima Management Ltd v Wilson Suba Kindaranga* (2017) eKLR where the plaintiff suffered a fracture of the left femur with 12% permanent disability and the trial Courts award of KShs 900,000 was upheld.

d. *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR Appellant sustained blunt injury to the right shoulder and fracture of the femur. The Court on appeal increased the award of damages from Kshs 350,000 to Kshs 600,000.The Court stated

"In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body."

e. Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR Respondent sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh with 4% incapacity. The Court on appeal set aside an award of Kshs 1,200,000 and substituted it with one of Kshs 800,000.

37. The award increases as the years go by and reflects the strength of the shilling which keeps changing at the time of each decision thus factoring inflation trends.

38. Upon considering the damages awarded in the authorities I have just cited; it is my finding that the Learned Trial Magistrate did not take into consideration similar award for similar injuries and therefore based the award on a wrong principle.

39. I am also persuaded that the award made by the Learned Trial Magistrate fell on the lower side in comparison to the comparable awards, hence there is a need for me to exercise my discretion and interfere with it. Taking into account the inflation trends I find an award of Kshs600,000 to be reasonable and adequate to compensate for the injuries suffered by the Appellant at the time.

40. As there was no challenge on special damages and cost of future treatment, there is no reason to interfere with that award which was based on receipts produced in Court and a medical report respectively.

41. Accordingly, and for reasons stated above, the Appeal succeeds and the award of Kshs 250,000 is hereby set aside by substituting it with Kshs600,000.00/=,

42. Taking into account the salvage of inflation as an additional factor. Each party shall bear its own costs.

It is so ordered.

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

MOHOCHI S. M.

JUDGE OF THE HIGH COURT