



REPUBLIC OF KENYA



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**Odembe & another v Kagonya (Civil Appeal E007 of 2020)  
[2023] KEHC 26770 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26770 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E007 OF 2020**

**DAS MAJANJA, J**

**DECEMBER 22, 2023**

**BETWEEN**

**SOLOMON KODHEK ODEMBE ..... 1<sup>ST</sup> APPELLANT**

**DISMAS JEROME ODHIAMBO OMONDI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FAITH KAGONYA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. G. A. Mmasi, SPM dated 29th July 2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 10517 of 2018)*

**JUDGMENT**

1. It is not dispute that the Respondent was injured in a road traffic accident that took place on 21.03.2018 when she was walking off the road near Raila Estate, Lang'ata and was hit by the 2<sup>nd</sup> Appellant's Lorry registration number KBQ 913Z being driven by the 1<sup>st</sup>Appellant. The issue of liability was resolved when the parties recorded a consent with the Appellant shouldering 90% liability. The Subordinate Court was left to decide the issue of quantum of damages. The parties agreed to rely on the documents produced by the parties without calling the makers and their written submissions.
2. By the judgment dated 29.07.2019, the Subordinate Court awarded the Respondent Kshs. 5,000,000.00 as general damages, Kshs. 200,000.00 as future medical costs and Kshs. 22,900.00 as special damages subject to the agreed contribution. It is this judgment that has occasioned this appeal.
3. In their Memorandum of Appeal dated 08.05.2020, the Appellants complain that the award of Kshs. 5,000,000.00 is inordinately high as to amount to an erroneous estimate and an error of principle taking into account the available medical evidence that the Respondent did not suffer long term incapacitation from the injuries sustained. That the trial magistrate disregarded the Appellant's



submissions and in particular the authorities cited by them. That the award of Kshs. 200,000.00 was not based on the pleadings and evidence adduced and that the whole award was against the weight of evidence. The Respondent supports the decision by the trial magistrate and urges the court to dismiss the appeal. Both parties have filed written submissions which I have considered and do not propose to rehash but rather refer to the material parts and arguments in resolution of the matter.

4. According to the Plaintiff, after the accident, the Respondent was rushed to St. Mary's Hospital for first aid. She lost consciousness for one week and was later transferred to Nairobi Women's Hospital where she was admitted for three weeks. The Respondent had multiple brain concussions and brain edema (swelling of the brain), major blunt injury to the pelvic region, haematoma on the right buttock, intra uterine death of mature fetus at 35 weeks and blunt lacerations on both legs. In support of her case, she produced the Discharge Summary from Nairobi Women's Hospital confirming that she was admitted on 21.03.2018 and discharged on 06.04.2018 and a medical report dated 05.11.2018 confirming the pleaded injuries.
5. The Respondent also produced the medical report prepared by Mr Wokabi dated 21.11.2018. He was of the view that she sustained major injuries particularly the head injuries which had recovered reasonably well with treatment when he examined her. He noted that after the caesarian section, the Respondent suffered a lot of pain and the loss of the fetus would affect her psychologically although future pregnancy would not be affected by the trauma and surgery. He observed that the heamatoma on the right buttock was too large to be absorbed by the body and would require surgery to evacuate it.
6. Dr P. M. Wambugu examined the Respondent on 18.04.2019 on behalf of the Appellants. He confirmed the injuries sustained by the Respondent. At the material time, the Respondent was complaining of occasional headaches. He assessed her general condition as good and did not observe or record any long term issue with her health.
7. Before the trial court, the parties cited several decisions to guide the court in making the award. The Respondent suggested that the court award Kshs. 10,000,000.00. It cited *Duncan Kimathi Karagania v Ngugi David & 3 Others* [2016] eKLR where the plaintiff sustained a blunt head injury with loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fracture of the maxilla bilaterally at Le Fort II level, compound fracture of the mandible, comminuted fracture of the right humerus, articular region of the elbow surge of radial carpal, comminuted fracture of the right humerus, articular region of the elbow surface of the radio carpal and multiple lacerations of the hands and forearms. The court awarded Kshs. 4,000,000.00 as general damages. The Respondent also urged the court to award Kshs. 800,000.00 for pain and suffering, Kshs. 1,500,000.00 for loss of pregnancy and Kshs. 200,000.00 for shock and trauma.
8. The Appellants urged the court to award Kshs. 800,000.00 as general damages based on the decision in *Tom Obita Ndago and Another v Alfonse Omondi Otieno* [2015] eKLR where the plaintiff suffered a fracture of the right tibia and fibula, had a swelling on the fracture side and had bone overgrowth. She also had a contused abdomen which led to intra-uterine foetal death of term pregnancy. The Appellant urged the court to reject that all forms of damages ought to under the single head and not separate heads. They also cited *PBS and Another v Archdiocese of Nairobi Registered Trustees and 2 Others* [2016] eKLR where the court held that a claim for loss of an unborn foetus should not be considered as a separate head of damages from pain and suffering.



9. Both parties are agreed on the extent to which an appellate court will intervene in an appeal relating to quantum of damages. In *Gitobu Imanyara and 2 Others v Attorney General* [2016] eKLR, the court summarized the position as follows:

[I]t 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 judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

10. General damages for pain and suffering are damages at large and in assessing and making an award, the court does the best it can in reaching an award. The award must reflect the nature and gravity of the injuries and compensate the claimant fairly in the sense that it puts her to the position, in so far a money can, she would have been before the accident took place. In assessing damages, the general approach is that comparable injuries should as far as possible be compensated by comparable awards bearing in mind that no two cases are exactly alike. On this approach, the Court of Appeal in *Stanley Maore v Geoffrey Mwenda* [2004]eKLR observed as follows:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

11. In considering the similar cases, the court ought to consider the current value of the shilling and in particular the rate of inflation. The court must avoid astronomical awards and ensure that award makes sense and results in fair compensation (see *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982]eKLR and *Jabane v Olenja* [1986] KLR 661).
12. In this case, the nature and extent the injuries is not in dispute. The dispute revolves around the amount awarded. The Appellants complain that the award of Kshs. 5,000,000.00 is inordinately high given that the Respondent injuries had healed completely without any abnormal incapacity and disability. They also complained that that the court disregarded the authority it cited which is relevant to the circumstances of this case. The Respondent urged that the trial court considered the injuries sustained and the award was justified on the ground that the Respondent lost her unborn child. That the court objectively factored in the immense and suffering endured by the Respondent and the likely effects of the injuries which could not be discounted.
13. The trial magistrate accepted that principle that the court could only make a single award under the rubric of general damages for pain and suffering, shock and psychological trauma. However, the Appellants are correct to submit that from a reading of the judgment it is apparent that the trial magistrate failed to consider the case cited by the Appellants. Since the duty of the trial court is to ensure that the comparable injuries attract comparable awards, it is important for the trial court to engage with the decisions cited by the parties, demonstrating why the court should follow one or otherwise reject others. By failing to do so the trial court erred in principle and such a decision would not be judicious but arbitrary. It therefore falls on this court to evaluate the nature and extent of injuries alongside the decisions cited by the parties in order to determine the appropriate award.
14. The trial court confirmed the injuries sustained by the Respondent as pleaded. It concluded that it was evident from both medical reports that the Respondent did not suffer long term incapacitation



from the injuries sustained. The trial magistrate relied on the case *Duncan Kimathi Karagania v Ngugi David & 3 Others* (*Supra*). A reading of that case shows that the injuries sustained by the plaintiff were more serious than those sustained by the Respondent. The plaintiff sustained serious fractures, compound and comminuted, on the mouth area and humerus. According to the evidence in that case, the plaintiff fractured jaws compromised his chewing ability. The court in the judgment observed as follows, “The court had an opportunity to see the plaintiff as he testified. The accident disfigured him. He could hardly speak, stand or even hold an item due to fractures and restricted movements in the jaws and elbows and left wrist.” His permanent capacity was assessed at 30% and he would need further surgery not only to remove metal implants but also plastic surgery and superficial radiotherapy to deal with keloids. In making the award, the court accepted that the injuries affected the plaintiff’s quality life. It is abundantly clear that the plaintiff in the case cited by the Respondent and relied on by the trial court bore little relationship to the case under consideration.

15. Turning to the case cited by the Appellant, *Tom Obita Ndago and Another v Alfonse Omondi Otieno* (*Supra*), the High Court affirmed the award of the Kshs. 400,000.00 general damages awarded to the plaintiff who had suffered a miscarriage and fractured the leg bones. This case is closer to the case at hand in so far as it included the case of loss of a fetus. Unlike the present the case, the plaintiff in that case suffered fractures of the legs and had disability assessed at 10%.
16. From what I have set out above, it must now be clear that the award of Kshs. 5,000,000.00 is excessive in the circumstances and bear little relationship to the injuries sustained by the Respondent. I agree with the Respondent that the miscarriage entails psychological pain and suffering but this is loss and injury that ought to be taken into account in assessing the entire award. The medical evidence shows that the Respondent did not suffer any residual or long-term disability hence the case cited by the Appellants would be closer but for the fractures sustained by the plaintiff in that case. Taking into account the head injuries sustained, the haematoma that will require further treatment and the element of inflation, I would award the Respondent Kshs. 900,000.00 as general damages.
17. The next and final issue concerns the award of Kshs. 200,000.00 as future medical expenses. In *Tracom Limited & another v Hasssan Mohamed Adan* [2009] eKLR, the court outlined the general principal governing this head of damages is that, “[A] claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it.
18. The Respondent pleaded that the costs for future medical operation was Kshs. 150,000.00 which was based on the report by Mr Wokabi. Since the parties agreed to rely on medical reports without calling the makers, there was no reason for the trial magistrate to depart from what had been pleaded and proved. The award of Kshs. 200,000.00 is set aside.
19. Based on the reasons I have set out, I allow the appeal on the following terms:
  - a. The judgment of the Subordinate Court dated 29.07.2023 is set aside and substituted with Judgment for the Respondent against the Appellants to the extent that the Respondent is awarded for Kshs. 900,000.00 as general damages and Kshs. 150,000.00 for future medical costs.
  - b. The Respondent shall pay costs of the appeal assessed at Kshs. 80,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF DECEMBER 2023.**

**D.S. MAJANJA**

**JUDGE**



Mr Kairaria instructed by Gitonga Kamiti, Kairaria and Company for the Appellants.

Ms Said instructed by Rashid and Company Advocates for the Respondent.

