



Wambui & another v Chelimo (Anti-Corruption and Economic Crimes Civil Suit 20 of 2021) [2023] KEHC 26710 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 20 OF 2021
CM KARIUKI, J
DECEMBER 21, 2023**

BETWEEN

MARGARET WAMBUI 1ST APPELLANT

JOSEPH MWAI 2ND APPELLANT

AND

ROSE CHELIMO RESPONDENT

(Being an appeal arising from the Judgment and Decree of Hon. Charles Obulutsa, Chief Magistrate at Nyahururu in Nyahururu CMCC No. 161 of 2019 dated and delivered on 12th August 2021)

JUDGMENT

1. The appeal herein arose from the judgement delivered on 12th August 2021 in Nyahururu CMCC No. 161 of 2019 by Hon. Charles Obulutsa, Chief Magistrate at Nyahururu. The Appellants lodged an appeal vide a memorandum of appeal dated 3rd September 2021 where the grounds of appeal were mainly on the trial court's finding on the quantum of damages and the award for future medical expenses.
2. The Respondent filed a cross appeal dated 3rd November 2021 contending that the trial court erred in fact and in law in awarding an inordinately low amount in general damages. The Respondent proposed that the said amount be re-assessed and enhanced upwards by this honourable Court.
3. The appeal stems from the trial court suit instituted on 12th July 2019 where the plaintiff now Respondent sought for judgement against the defendants now Appellants for damages arising out of a road traffic accident that occurred on 25th February 2019. The matter proceeding for hearing and eventually the trial court awarded the defendants damages as follows: -General damages



.....Kshs. 2,000,000Special damages Kshs 86,403Future
medical treatment Kshs 200,000

Appellants' Submissions

4. The Appellants submitted that the Respondent's injuries particularized under paragraph 8 of the plaint were as follows: -Bruises – scalp and faceBruises – upper limbsBlunt injury – abdomenFracture – left femurFracture – right femur
5. That the Respondent filed a further list of documents dated 6th November 2019 on Dr. Kiamba's report dated 12th September 2019.
6. The Appellants submitted that it is indispensable to note that the Respondent's doctor opined that the Respondent did not sustain any permanent disability.
7. It was asserted that an award of Kshs. 2,000,000 was inordinately high considering the injuries sustained and that the Respondent had healed as confirmed by the Respondent's doctor. It was stated that the large sum awarded was unaccompanied by reasons and that the learned trial magistrate's Court only explained the reasons for such an award by examining the Respondent's submissions without giving a further view to the Appellant's submissions. That no case laws were plaintiff's suffered analogous injuries were used to explain the colossal award rendered.
8. Reliance was placed on *Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd* [2013] eKLR & *Kemfro Africa Limited t/a Meru Express Services & Anor vs Lubia & Anor* [1985] eKLR
9. The Appellant urged the Court to find guidance in the cases of *Reamic Investment Limited v Joaz Ameyia Samuel* [2021] eKLR, *Ibrahim Kalema Lewa vs Esteel Company Limited* [2016] eKLR, *Erick Ratemo vs Joash Nyakweba Ratemo* [2018] eKLR & *Jitan Nagra vs Abidnego Nyandusi Oigo* [2018] eKLR
10. The Appellants contended that the Respondent testified that she needed Kshs. 300,000 for future medical expenses and that the same is a special damage that ought to be specifically proved and pleaded. That the Respondent did not prove that she needs any future medication. Further, they argued that the trial magistrate did not consider the facts pleaded and proved. It is also evident that the magistrate went beyond his duties. They relied on the case of *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR
11. On the Respondent's cross appeal, the Appellant submitted that the Respondent purported to file the cross appeal on 3rd November 2021. The judgement in the trial court was delivered on 12th August 2021. The law is clear that any appeal from the subordinate Court to the High Court be filed within 30 days. Further, the Respondent's purported cross appeal was filed more than 80 days following the delivery of judgment. The Respondent never sought time to lodge the cross appeal. The Appellant urged the Court to find that the cross appeal was grossly incompetent and an abuse of the court process and strike out with costs.

Respondent's Submissions

12. The Respondent submitted the following issues requiring the honourable Court's adjudication: - Whether failure to attach a decree to the record of appeal is fatalWhether the Appellant's appeal is meritoriousWhether the Respondent's cross appeal is meritorious
13. On the first issue, it was stated that the record appeal tendered before the Court clearly omits a crucial document which ought to be the gist of the appeal filed herein. That the rules of procedure



- as far as appeals are concerned are elaborated under order 42 of the [Civil Procedure Rules, 2010](#). The Respondent stated that it was fatal to the very essence of the appeal to omit the decree and urged the Court to take judicial notice. Reliance was placed on order 42 rule 2 of the [Civil Procedure Rules, *Chege vs Suleiman \[1988\] eKLR, Lucas Otieno Masaye vs. Lucia Olewe Kidi \[2022\] eKLR*](#)
14. The Respondent averred that noting that the appeal is majorly on quantum, the finding on liability is uncontested and should remain undisturbed and I agree.
 15. Regarding quantum, it was submitted that a perusal of the record of appeal captures treatment notes and a medical report that were produced as the plaintiff's evidence. None of the documents produced were contested and it is equally important to note that the Appellants did not file a medical report contrasting that of Dr. W. Kiamba despite having the plaintiff availed for the 2nd medical exam. They submitted that the injuries listed In Dr. Kiamba's report are uncontested for which they urged the Court to investigate and assess general damages for the following injuries: -Fracture of the cervical vertebra C3, C4 Displaced fracture of the right femur, middle one third Displaced fracture of the left femur, distal one third Blunt abdominal injury resulting into hemoperitoneum and had hematuria Severe burst injury to the chest with hemothysis Deep laceration on the left leg Soft tissue injuries on the left ankle joint Bruises on the right leg
 16. The Respondent stated that the authorities cited by counsels for both the plaintiff and the defendants and in his considered view, the learned trial magistrate found that the plaintiff had cited more relevant authorities. Reliance was placed on [Jabane vs Olenja \[1986\] KLR 661, Nkuve vs Nyamiro \[1983\] KLR 403, *Kemfro Africa Limited t/a Meru Express Services & Anor vs Lubia & Anor \[1985\] eKLR*](#)
 17. It was averred that the Appellants proposed an award of Kshs. 300,000/- as general damages for which they quoted authorities that awarded a proximate amount for a single femur structure. As can be observed from the injuries sustained by the plaintiff/Respondent, she suffered severe injuries to those quoted by the Appellants since not only did she have femur fractures on both legs, she had a severe chest injury and a fractured cervical vertebra C3, C4 which the Appellants doctors did not contest upon 2nd medical exam.
 18. In addition, to the authorities cited before the trial court in support of an assessment of general damages of Kshs. 2,500,000 they urged the honourable Court to be guided by the following authorities; [Edward Nzamili Kata vs Motors Group Ltd & Anor \[2006\] eKLR, *George William Awuor vs. Beryl Awuor Ochieng \[2020\] eKLR, *Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd \[2013\] eKLR, *Michael Njagi Karimi vs Gideon Ndungu Ngurubi & Anor \[2013\] eKLR***](#) among others.
 19. The Respondent urged the Court to note that the plaintiff was admitted at the Intensive Care Unit for 6 days as her fractures were being managed and/or remedied. That she was equally admitted in the hospital for approximately one month where she underwent blood transfusion where 30 units of blood were utilized. Upon her discharge from hospital, she was on a wheel chair and later she was put on a walking frame and eventually in crutches. That from the medical report produced by Dr. Kiamba it was observed that the Respondent has a plate inserted on both her right and left lower limbs. It was the doctor's further opinion that the metal plates inserted will require removal in the future once the fractures are adequately reunited. The cost of removal was estimated to be at least Kshs. 300,000/- It was asserted that the award of future medical expenses as awarded remain undisturbed.
 20. Reliance was placed on [Tracom Limited & Anor vs Hassan Mohammed Adan \[2009\] eKLR](#)
 21. On whether the Respondent's cross appeal is meritorious, the Respondent contended that the trial court's award was inordinately low considering the extent of injuries sustained out of the accident. That some of the injuries resulted to some deformities that she will have to live with for the rest of her



life. They urged the Court to note that the Respondent suffered displaced femoral fractures on both limbs which necessitated that she be supported whenever she attempted to walk. That as part of the recovery process she is required to attend physiotherapy sessions to aid recovery and proper movements of both limbs in view of the fact that she had metal plates inserted to aid in the reunion.

22. It was contended that the Respondent's way of life was extremely affected as a consequence of the accident noting that she was merely 29 years old and a teacher by profession. The accident affected her career wise and has brought about cosmetic concerns on her physical appearance, noting that her chances at prospective suitors have also been negatively affected. The injuries have affected her physically and psychologically.
23. Lastly, it was stated that the learned trial magistrate ought to have considered the current economic realities and inflation rate compared to the quoted years for which they believe that an amount of Kshs.2,500,000 would be adequate compensation in the circumstances. They prayed that the defendants/Appellants' appeal be dismissed with costs to the Respondent and judgment be entered in favour of the Respondent as follows: -General damagesKshs. 2,500,000Special damages Kshs 86,403Future medical expenses Kshs 300,000
24. Costs of the suit and interest at court rates.

Analysis and Determination

25. Having carefully considered the evidence adduced before the trial court in its entirety, the grounds of appeal, the cross-appeal, the judgment of the learned trial magistrate, and the written submissions filed by both parties together with all the authorities cited, the main issue that arises for determination from both the Appellant's and Respondent's case is on quantum and costs.
26. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal stated that
“An 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, this Court must reconsider the evidence, evaluate it, and draw its 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.”
27. Further, in *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;
“While an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had gone wrong, the appellate court will not hesitate so to decide.”
28. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same stated concerning 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 reanalyze 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.”



29. The appeal herein emanates from a road traffic accident claim in Nyahururu CMCC No. 161 of 2019, where it was the Respondent's case that she was lawfully traveling in motor vehicle registration number KCD 906J as a passenger along Nyahururu Rumuruti Road near Kingola area when motor vehicle registration number KCL 108X was negligently driven knocking down motor vehicle KCD 906J and resulting to the Respondent sustaining severe bodily injuries. The Appellants were found to be 100% liable for the accident, and the Court then awarded the Respondent Kshs. 2,000,000 in general damages, Kshs. 86,403/- in special damages and Kshs. 200,000 for future medical treatment. The issue of liability being uncontested shall remain undisturbed by this Court.
30. The Appellants filed an appeal on quantum stating that the damages as awarded were inordinately high, and the Respondent filed a cross-appeal and submitted that the same was low given the injuries that she suffered. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that "comparable injuries should attract comparable awards."
31. To begin with, the Appellants asserted that the Respondent's purported cross-appeal was filed more than 80 days following the delivery of judgment. The Respondent never sought time to lodge the cross-appeal. The Appellant urged the Court to find that the cross-appeal was grossly incompetent and an abuse of the court process and strike out with costs, whereas the Respondent averred that the record appeal tendered before the Court omits a crucial document which ought to be the gist of the appeal filed herein.
32. I have considered both claims, and taking all the above factors into account, it is my finding that in order for the interests of justice to be met and to give effect to the overriding objective of the *Civil Procedure Act*, both the appeal and cross-appeal shall not be rendered incompetent and/or fatally defective. The mere fact that a decree has not been drawn does not necessarily render an appeal to this Court incompetent if the judgment is on record, as is the case in this appeal.
33. That being the case, I will proceed to determine the appeal and cross-appeal herein based on their merits on the substantive issue of quantum. The injuries suffered by the Respondent were listed in the treatment notes from Mediheal Hospital, the P3 form, and the medical report by Dr. Kiamba: Fracture of the cervical vertebra C3, C4 Displaced fracture of the right femur in the middle one-third Displaced fracture of the left femur in the distal one-third Blunt abdominal injury resulting in haemoperitoneum and haematuria Severe burst injury to the chest had hemoptysis Deep laceration on the left leg Soft tissue injuries of the left ankle joint Bruises on the right leg
34. The assessment of the quantum of damages is a discretionary exercise. An appellate court would interfere with a trial court's decision on quantum if it took into account an irrelevant factor, left out of account a relevant factor, and/or if the award was so inordinately low and/or so inordinately high that it must have been a wholly erroneous estimate of the damages, which principles were set out in the case of *Kemro Africa Limited t/a "Meru Express Services (1976)" & Another vs. Lubia & Another* (No 2) [1985] eKLR.
35. The learned trial magistrate, in his judgment dated 12th August 2021, held as follows: -

“The Court has considered the authorities cited by the defendant and noted that they give minor injuries compared to what the plaintiff sustained. Their proposal of 300,000/- is on the lower side. The plaintiff's authorities gave more relevant injuries. The medical report confirms that the plaintiff was managed in the ICU for six days and admitted for almost two weeks. She underwent surgery and required a transfusion of 30 units of blood. She has to use crutches and will require 300,000/- to remove metal plates that had been used to fix fractures, though what was pleaded is 200,000/-



Having considered the evidence and submissions, the Court is satisfied that the plaintiff has proved on a balance of probability that he is entitled to compensation. Judgment will be entered for general damages of 2,000,000/-, special damages of 86,403/-, future medical treatment of 200,000/- plus costs of the suit and interest."

36. Accordingly, I agree with the trial magistrate that the authorities cited by the Appellant, the defendant, do not present injuries comparable to those suffered by the Respondent. Moreover, contrary to the Respondent's submission that the trial magistrate did not consider the injuries she suffered and the magnitude of her treatment, I believe that the trial court did just that in awarding her general damages. Further, the trial court considered the authorities the Appellant and the Respondent relied on to come up with its determination.
37. I have keenly considered the awards in the authorities cited by the Appellant in this appeal and the Respondent in her cross-appeal. As stated above, the authorities cited by the Appellant do not present comparable injuries to the ones the Respondent suffered and, therefore, cannot assist this Court. On the other hand, the awards in the cases cited by the Respondent ranged between Kshs. 1,200,000/- to Kshs. 2,000,000/- and involved severe injuries which, in my considered opinion, can be compared to those suffered by the Respondent. For example, in *Bernard Ondieki vs. Boniface Ndege Orayo* [2020] eKLR, the appellate Court awarded Kshs. 1,750,000/- as general damages for the fracture of the cervical bone C3 & C4, fractured right tibia fibula, and contusion on the right mid-shaft femur.
38. There is a comparison between the injuries suffered in those cases and the injuries sustained by the Respondent in the present case, who suffered multiple fractures and several other injuries. It is settled law that comparable injuries should attract comparable damages. Kneller JA in *Kitavi v. Coast Bottlers Ltd* [1985] KLR 470 had this to say: -
- "It is now settled law that what the Appellant was entitled to was a reasonable compensation assessed with moderation and conformity with the general method of approach local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency, but awards will very much depend on the facts of each case, and any attempt to standardize "or rigidly" classify them will be in vain and wrong..."
39. Additionally, in the case of *Penina Waithira Kaburu v. LP* [2009] eKLR, the Court upheld an award of general damages of Kshs. Two million for the claimant who suffered multiple fractures on the pelvis, injuries on the urethra, and bruises on the legs.
40. Consequently, I find that the award of general damages of Kshs. 2,000,000 was not an erroneous estimate of the pain suffered by the Respondent, and the Court considered that it would be adequate compensation as held by the trial magistrate. Further, I will not disturb the award of Kshs. 200,000 for future medical expenses as awarded by the trial court. The same was as pleaded by the Respondent in the trial court, and in any case, Dr. Kiamba's report was not specific on the cost and only gave an estimate.
41. Accordingly, for the reason set out above, the Court finds no merit in the appeal and the cross-appeal herein and thus makes the orders;
- i. The appeal and the cross-appeal are hereby dismissed. Each party will bear its own costs on this appeal.

DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 21ST DAY OF DECEMBER 2023

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C KARIUKI
JUDGE

