



REPUBLIC OF KENYA



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**Kiliungu v Kananga alias Jeremiah Kirema (Civil Appeal E174 of 2022)
[2023] KEHC 27212 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E174 OF 2022
EM MURIITHI, J
DECEMBER 20, 2023**

BETWEEN

AYUB KIMATHI KILIUNGU APPELLANT

AND

**JEREMIAH KALING'E KANANGA ALIAS JEREMIAH
KIREMA RESPONDENT**

JUDGMENT

1. By a Plaintiff dated 27th May, 2021, the Respondent in this appeal, Jeremiah Kaling'e Kananga alias Jeremiah Kirema sued the Appellant herein, Ayub Kimathi Kiliungu, in Maua CMCC No. 105 of 2021 seeking general damages for pain, suffering, and loss of amenities, and special damages of Kshs. 8,950/=, plus costs of the suit and interests.
2. In that suit, the Respondent alleged that on or about 24th January, 2021, the Respondent was a pedestrian along the Meru-Maua road when the Appellant's motor vehicle registration number KAR xxxX Toyota L. Touring S. Wagon was so negligently driven and/or controlled by the Appellant and/or the Appellant's authorized driver causing it to veer off the road and knocking the Respondent down. Further, that as a result of the said accident, the Respondent sustained serious injuries.
3. The particulars of negligence on the part of the Appellant and the injuries sustained by the Respondent were pleaded and tabulated in paragraphs 3 of the aforementioned Plaintiff.
4. In response, the Appellant filed his statement of defence dated 7th July, 2021. He denied occurrence of the accident and the particulars of negligence or liability as alleged by the Respondent. In the alternative, the Respondent averred that if the Respondent got injured whilst a pedestrian as a result of the alleged accident, the occurrence of the accident was wholly or substantially contributed to by the Respondent. The particulars of the negligence on the part of the Respondent as alleged by the Appellant were stated in paragraph 6 of the statement of defence. The Appellant thus denied the



Respondent's claim for general and special damages set out in the plaint and prayed for the suit to be dismissed for want of merit.

5. This appeal arises from the decision of the trial court delivered on 21st November, 2022 in which the learned trial magistrate entered judgment in favour of the Respondent against the Appellant as follows:

- i. Liability: 70:30
- ii. General damages Kshs. 1,800,000/=
- iii. Special damages Kshs. 8,750/=
Kshs. 1,808,750/=
Less: 30% Liability Kshs. 542,625/=
Kshs. 1,266,125/=
- iv Costs and Interests at court rate from the date of the judgment

6. This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the [Civil Procedure Act](#) to re-evaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 where Sir Clement De Lestang stated that:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Sarif v Ali Mohammed Solan* [1955] 22 EACA 270).”

7. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst 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 plainly gone wrong, the appellate court will not hesitate so to decide.”

8. Before the trial court, the Respondent (PW1) herein testified as the sole witness in support of his case. He adopted his statement dated 27th May, 2021 and produced a bundle of documents into evidence including a police abstract, motor vehicle copy of records, invoice, medical report by Dr. John K. Macharia dated 26/4/2021, Receipts of Kshs. 6,000/= dated 24/04/2021, abdominal ultrasound report dated 25/01/2021, final invoice from St. Theresa's Mission Hospital dated 31/07/2021, P3 form, Discharge summary from St. Theresa's Mission Hospital Kiirua dated 30/01/2021, a letter from St. Theresa's Mission Hospital Kiirua dated 26/01/2021, and a bundle of receipts. PW1 testified that he was still feeling pain in his head, ribs, and neck.

9. On cross-examination, the Respondent stated that he sustained fractures on his neck and ribs. That he does not use support to walk and that his ribs are healed. According to him, the accident occurred while he was standing at the stage waiting for a vehicle going to Kangeta. He thus denied that he was



crossing the road when the accident occurred. On re-examination, the Respondent testified that the accident occurred at 7.00 p.m.

10. For the defence case, one Patrick Mutembei Kabuku, testified as DW1 and the sole witness in support of the defence case. He adopted his statement dated 17th November, 2021 as his evidence in chief. DW1 stated that he was the driver of the subject motor vehicle and that he blamed the Respondent for the accident. On cross-examination, he stated that he was driving at a speed of 20-30 km/hr. That the visibility was good and he could see clearly. Further, that the pedestrian was in front of the motor vehicle and that the pedestrian hit his windscreen. That afterwards, members of the public started screaming and started hurling threats that they would burn the motor vehicle. That is when he went to report the incident at Kangeta.
11. Following the delivery of impugned judgment, the Appellant filed the present appeal raising nine (9) grounds of appeal that all relate to the sole issue of quantum of damages awarded by the trial court. The appeal was premised on the following verbatim grounds:
 - i. That the learned magistrate erred in fact and ended up misdirecting herself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards on deceased of closely related age.
 - ii. That the learned magistrate erred in law in making such a high award on general damages so as to show that the magistrate acted on a wrong principle of law.
 - iii. That the learned magistrate's award on quantum was so high as to be entirely erroneous.
 - iv. That the learned magistrate's award on general damages was inordinately high as to entirely be erroneous and based on a wrong principle of the law.
 - v. That the learned magistrate erred in law and fact by awarding inordinately high general damages and failed to consider comparable awards for similar injuries and acted on a wrong principle of law.
 - vi. That the learned magistrate erred in fact and in law in assessing the damages in the face of the evidence adduced and the authorities cited.
 - vii. That the learned magistrate erred in fact and in law in failing to consider the nature of injuries sustained by the plaintiff in assessing general damages.
 - viii. That the learned magistrate erred in law and fact in failing to consider the injuries sustained by the plaintiff.
 - ix. That the whole judgment on quantum was against the weight of evidence before the court and without any consideration to the pleadings and the Appellant's submissions and authorities on quantum.
12. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions.

The Appellant's Submissions

13. It was the Appellant's submission that the damages awarded were not commensurate with the nature of injuries suffered by the Respondent as there was no resultant permanent incapacitation that was evident from either the medical report adduced by the Respondent or that adduced by the Appellant. That no explanation can be deduced from the proceedings why the injuries suffered by the Respondent attracted an award of Kshs. 1,800,000/=. That the injuries sustained in the authority relied upon by the



trial court to justify its award, that is, the case of *Bernard Ondieki v Boniface Ndege Orayo* [2020] eKLR, were more severe than the injuries sustained by the Respondent. It was the Appellant's submission that the said award was grossly exorbitant, unfair, and unreasonable, and that the same ought to be reduced to the Appellant's proposed figure of Kshs. 400,000/=. The Appellant thus urged this Court to allow this appeal with costs.

The Respondent's Submissions

14. It was submitted on behalf of the Respondent that the authorities cited by the Appellant in support of his proposal for an award of Kshs. 400,000/= referred to awards made for injuries that were not comparable to those sustained by the Respondent as they were less severe. That on the other hand, the authorities cited by the Respondent contained comparable injuries. The Respondent thus submitted that the Appellant has failed to demonstrate that the trial court proceeded on the wrong principles in assessing the damages. Further, that the Appellant had failed to demonstrate that the award of general damages by the trial court was excessive. The Respondent thus urged this court to dismiss the appeal with costs.

Issues For Determination

15. I have carefully considered the record of appeal, the grounds of appeal, and the rival submissions by the parties herein. The main issues that arise for determination are:
 - i. Whether the award of damages by the trial court were excessive in the circumstances; and if so,
 - ii. Would the appellate court interfere with the trial court's assessment of quantum of damages in the circumstances of this case?

Analysis and Determination

16. In the case of *Ephantus Mwangi v Duncan Mwangi Wambugu* [1984] eKLR, the Court of Appeal laid down the principle that a court on appeal will not normally interfere with a finding on fact by a trial Court unless it is satisfied that the finding was based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles. Liability is an issue that is predominantly dependent on the evidence adduced.
17. For personal injury claims, it is trite that damages for bodily injuries must be commensurate with the injuries sustained. In this case, the injuries sustained by the Respondent were particularized in the plaint as follows:
 - i. Loss of consciousness.
 - ii. Depressed left sided parietal skull fracture.
 - iii. Linear un-displaced second vertebrae (cervical) fracture.
 - iv. Liver injury with a capsular hematoma.
 - v. Pains over the chest and lower limbs.
18. In ground no. 1 in the Memorandum of Appeal, the Appellant faults the trial court of awarding exorbitant quantum of damages and failing to be guided by "...the prevailing range of comparable awards on deceased of closely related age." This is clearly an error on the part of the Appellant as the injuries sustained in this case were not fatal.



19. In the impugned judgment, the trial court proceeded with the assessment of damages on the basis the medical reports presented before it by the parties. The trial court noted that Doctor John K. Macharia in his medical report dated 26th April, 2021 noted that the Respondent sustained the following injuries:
- i. Admitted unconscious and regained consciousness while on management.
 - ii. Depressed left sided parietal skull fracture.
 - iii. Linear un-displaced second vertebrae (cervical) fracture.
 - iv. Liver injury with a capsular haematoma.
 - v. Pains over the chest and lower limbs.
20. The trial court further noted that the Respondent was managed conservatively for the head, cervical and liver injuries. That he was given mannitol, analgesics, and antibiotics. That the Respondent was observed with nursing till he was discharged stable on 30th January, 2021 with a cervical collar. That at the time of examination, he complained headaches and neck pains. He had no convulsions or change of consciousness levels since discharge. His memory was intact. No neuro-muscular deficit was noted, abdomen was soft/non tender and the liver was unpalpable. Movements of the neck were slightly painful. Dr. Macharia concluded that the Respondent sustained life threatening injuries and he was at a risk of developing head injury convulsions.
21. The trial court proceeded to note that the injuries noted in the second medical report by Doctor Wambugu P.M. dated 19th September, 2021 were consistent with the initial medical report by Doctor John K. Macharia save that he indicated that cervical spine scans were not availed to him. That he noted that the discharge summary indicated that the Respondent was drunk on admission. Further, that he opined that the Respondent made adequate recovery, fractures had united, no further complications were envisaged and no total permanent incapacitation occurred.
22. Having perused the two medical reports that were presented before the trial court, it is thus my finding that the Respondent sufficiently proved the injuries he sustained in his claim. I now turn to the issue of whether the learned magistrate did consider the nature of the said injuries.
23. It was held in *Butt v Khan* [1981] KLR 349 that for an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied.
24. In this case, it was submitted on behalf of the Respondent that an award of Kshs. 2,500,000/= was adequate compensation for the injuries sustained. His counsel on record relied on the following authorities:
- i. *Rebecca Adams v Francis Mutavi Kimuyu* [2009] eKLR where the court held that no two injuries can be exactly the same.
 - ii. *Bernard Ondieki v Boniface Ndege Orayo* [2020] eKLR where the High Court on 19/02/2020 awarded Kshs. 1,750,000/= as general damages for pain and suffering to the respondent who had suffered fracture of the tibia/fibula right side, multiple cut wounds on the scalp, depressed skull fracture occasioning loss of consciousness for some time, contusion of the right mid femur and fracture of the cervical bone.
 - iii. *Wendy Kendi Kabira & Grace Muthoni Kobia v VM alias VM (A minor suing through her next friend and mother IKH)* [2021] eKLR where the High Court upheld an award of Kshs.



2,500,000/= where the injuries sustained by the Respondent included depressed fracture, depressed right parietal skull fracture, loss of consciousness, fracture of the right humerus and bruises on scalp and knees with a 5% chance of developing epilepsy or convulsion.

25. On the other hand, counsel for the Appellant proposed an award of KShs. 400,000/= and relied on the following authorities:
- i. *GA (Minor suing through her father and next friend BZO v Paul Muthuku* [2020] eKLR where the appellant sustained multiple fractures of the frontal left orbital roof (comminuted) right temporal bones (petrous), bleeding in the skull air spaces (haem sinus), cut on the head (frontal), and a cut on the chin and the court substituted an award of KShs. 300,000/= with an award of KShs. 500,000/=.
 - ii. *Specialized Aluminum Renovators Limited & Another v Stephen Mutuku Musyoka* [2021] eKLR where the respondent who suffered fracture of the frontal nasal bones, fracture of right orbit, and frontal lobe haemorrhage contusion and the court set aside an award of KShs. 800,000/= and substituted it with an award of KShs. 500,000/=.
 - iii. *Francis Ochieng & Another v Alice Kajimba* [2015] eKLR where the plaintiff suffered severe head injuries with cerebral intusion, massive haematoma on the right parietal head and subconjunctival haematoma of the right eye and the court made an award of KShs. 280,000/=.
26. The trial magistrate considered the injuries and the authorities cited by the parties and came to the conclusion that the injuries sustained by the Respondent were comparable to the injuries sustained in the case of Bernard Ondieki (*supra*).
27. I have considered the injuries suffered by the Respondent as well as the authorities cited in support of the rival proposals in respect of the award of damages. In my view, the injuries suffered in the case of Bernard Ondieki (*supra*) were much more severe than those sustained by the Respondent herein. On the other hand, however, I agree with the trial court's finding that the authorities relied upon by the Appellant referred to injuries that were less serious than those the Respondent herein suffered. In the end, I find that the award by the trial court was excessive and not commensurate with the injuries sustained by the Respondent in this case. This calls for interference by this Court.

The principle of comparable awards for comparable injuries applies. It is however sometimes difficult to get comparable injuries in decided cases as no case is exactly the same to another. The Court of Appeal in *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR held 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.”

See also *Ali Ahmed Naji vs. Lutheran World Federation* Civil Appeal No. 18 of 2003,

28. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards result in fair compensation (See: *Kigaraari v Aya* [1982-88] 1 KAR 768; *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR; and *Jabane v Olenja* [1986] KLR 661).
29. In light of the injuries sustained by the Respondent, the authorities cited, the age of the authorities, inflationary trends, and taking into account the fact that there was no resultant permanent



incapacitation and that an award of damages is meant to compensate a party but not to enrich him or her, an award of Kshs.900,000/= would be adequate compensation for the injuries suffered as the same is not inordinately high or low in the circumstances.

Orders

30. The upshot of the above, in my view, is that the present appeal is merited and should be allowed by substituting the trial court's award of Kshs.1,800,000/= as general damages with an award of Kenya Shillings Nine hundred Thousand Kshs.900,000/=) subject to contribution of 30%.
31. The Appellant is awarded the costs of this appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 20TH DAY OF DECEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Wangechi for Ms. Muchemi for Appellant.

Mr. Nkunja for the Respondent.

