



REPUBLIC OF KENYA



**Lelan v Saina (Civil Appeal 31 of 2021)
[2023] KEHC 26751 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 31 OF 2021
RN NYAKUNDI, J
DECEMBER 20, 2023
CORAM: BEFORE JUSTICE R. NYAKUNDI
M/S ONYINKWA & CO. ADVOCATES
M/S ALWANGA & CO. ADVOCATES**

BETWEEN

DAVID LELAN APPELLANT

AND

EMMANUEL KIPCHOGE SAINA RESPONDENT

(Being an appeal from the judgement and decree of Hon.L.Kassan Chief Magistrate delivered on 26.3.2021 in Eldoret CMCC No. 720/2015 between Emmanuel Kipchoge Saina Vs David Lelan)

JUDGMENT

Coram: Before Justice R. Nyakundi

M/s Onyinkwa & Co. Advocates

M/s Alwanga & Co. Advocates

1. This Appeal arises from the judgement and decree in Eldoret CMCC 720 of 2015 delivered on 26th March 2021 by Hon. L Kassan. The suit in the trial court was instituted vide a plaint dated 22/9/2015 and amended on 19/6/2019 against the appellant claiming for general damages, special damages, costs and interests of the suit. The cause of action was premised on the allegations that 12/7/2015 while aboard motor vehicle Reg No KBN 377A as a passenger, the appellant's driver negligently drove the said motor vehicle causing it to collide head on with motor vehicle registration No KBS 928A thereby occasioning her severe bodily injuries. The suit proceeded to full hearing and the parties consented on apportionment of liability. Upon considering the evidence tendered in court and the testimonies of the witnesses, entered judgement against appellant in the following terms;



- a. Liability in the ratio of 85%: 15% as agreed
 - b. General damages Kshs 2,100,000/=
 - c. Special damages Kshs 243,000/=
 - d. Subtotal Kshs 2.343.000/=
 - e. Less 15% contributory negligence Kshs 315,450/=
 - f. Total Kshs 1,991,550/=
 - g. Costs and interests of the suit to the plaintiff
2. Being aggrieved with the judgement and decree of the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated 7th April 2021 premised on the following grounds;
1. That the learned trial magistrate erred in law and fact by adopting the wrong principles in making a determination on the damages awardable to the respondent thereby arriving at an erroneous decision.
 2. That the learned trial magistrate erred in law and fact by failing to take into account relevant factors and/or evidence adduced by the appellant thereby arriving at an erroneous decision as to the damages payable to the respondent.
 3. That the learned trial magistrate erred in law and fact in making an award which was manifestly excessive in view of the injuries sustained by the respondent and the medical evidence produced.
3. The parties were directed to prosecute the appeal vide written submissions.

Appellants' submissions

4. Learned counsel for the appellant filed submissions dated 5th October 2023. Counsel urged that the respondent pleaded the following injuries in his plaint; - Fracture dislocation of the right hip
5. Further, that a medical report by Dr Sokobe dated 12/8/2015 indicated that the injury sustained by the respondent had not fully healed and awarded permanent disability at 10%. The respondent was re-examined by Dr V.V Lodhia on 18/9/2018. The said doctor opined that the injury had healed well and assessed permanent disability at 5%. Counsel urged that is a well-established principle that in suits brought in respect of bodily injuries, the measure of damages is governed by the principle of restitutio in integrum, that is; an award for bodily injuries is intended to be compensatory in nature such that the Plaintiff should receive in monetary terms no more and no less than the injuries sustained. The role of an appeal court as regards an appeal on quantum was well espoused by the Court in *Barnabas v Ombati* (Civil Appeal E43 of 2021).
6. Additionally, counsel stated that an award for general damages must reflect the trend of previous, recent, and comparable awards. Courts should be guided by the relevant authorities and/or precedents with comparable injuries keeping in mind that the award should fairly compensate the injured within Kenyan conditions. The trial magistrate in making a determination on the issue of general damages herein stated; -

“..The plaintiff’s advocate suggested general damages at Kshs 3,000,000/= whilst the defendant’s advocate opined that Kshs 300,000/= would be sufficient compensation. I have



taken into consideration all necessary factors. I award general damages of Kshs 2,100,000/=”.

7. Counsel urged that the trial magistrate did not mention the cases with comparable injuries that he took into account that compelled him to reach the decision that he did. It is the appellant’s case that it is clear that the trial magistrate left out very necessary factors such as the fact that the respondent had fully recovered as at 18/9/2018. The appellant’s case is that the learned trial magistrate not only adopted the wrong principles in making a determination on the damages awardable to the respondent but also failed to consider or be guided by the relevant authorities with comparable injuries therefore making an award that was inordinately high considering the injuries sustained by the respondent.
8. It is the appellants’ case that taking into account the nature of the injuries sustained by the respondent an award of Kshs 450,000/= to Kshs 600,000/= would suffice as opposed to Kshs 2,100,000/= which the trial court awarded as general damages. He relied on the case of *Patrick Marianya v Ronald Ondicho Mose* (2021) eKLR where the plaintiff suffered a fracture of the malleoli, fracture of the right hip and dislocation of the right elbow joint and the court substituted the award of Kshs 800,000/= with Kshs 450,000/= as general damages. Counsel also cited the case of *Lilian Wanja v Cyprian Mugendi Igonga & 2 others* [2016] eKLR where the plaintiff was awarded Kshs 500,000/= for a fracture dislocation of the hip and multiple soft tissue injuries.
9. It is the appellants’ case that the appeal should be allowed and the subordinate court’s award of Kshs 2,100,000/= should be set aside and re-assessed downwards to an award of between Kshs 450,000/= to Kshs 600,000/=,

Respondent’s case

10. Learned counsel for the respondent filed submissions dated 2nd November 2022. Counsel submitted that from the analysis of evidence presented before the trial court, the injuries sustained by the Respondent are not in dispute. The Respondent’s evidence tendered before the trial court indicate that he sustained a fractured dislocation of the right hip that was surgically treated with total replacement and fixation with artificial implants. His evidence is supported by the doctor’s evidence and medical report, x-rays as well as discharge summaries produced in court as Plaintiffs exhibits 2, 3 (a-e), 4, 6, 7 and 9. The second medical report by Dr V.V Iodhia confirms that the Respondent sustained a fracture dislocation of the right hip joint that was treated with multiple surgeries leading to total hip replacement.
11. Counsel urged that it is of paramount importance to review the Respondents treatment journey since the accident. After the accident, the Respondent was treated as inpatient at MTRH between 13/7/2015 to 20/7/2015. During that admission he underwent surgical treatment for open reduction and internal fixation and was discharged on crutches. Doctor Sokobe saw the Respondent on 12/08/2015 and prepared a medical report on the injuries sustained. In that report, he opined that the patient would develop early osteoarthritis due to disruption of the acetabulum. He assessed his physical disability at 10%. In 2018, the Respondent developed osteoarthritis of the right hip with avulsion of the right femoral head and was again admitted at MTRH between 23/1/2018 and 29/1/2018. He was advised to have a total hip replacement but the implants were unavailable and he was sent home until the same were acquired. On 12/2/18 the Respondent returned to the facility where he underwent total hip replacement and was discharge on 16/2/2018. In light of the injuries suffered and pain endured by the Respondent following the accident and as supported by medical documents produced in court and decided case laws, the trial court made an award of Kshs 2,100,000/= in general damages and Kshs 243,000/= in special damages.



12. It is the respondents' case that in an appeal against quantum of damages awarded by the subordinate court, the court should not ordinarily interfere with the findings of the trial court unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. Counsel relied on the Court of Appeal case of *Kemfro Africa Ltd t/a Mem Express & Another v A.M. Lubia & another (No2)* [1987] KLR 30 in support of this submission.
13. Counsel urged that the appellant failed to substantiate the grounds of appeal in respect to the case before court. Ground 2 in the memorandum of appeal is scandalous and frivolous and ought not to be a ground for consideration by this court. Further, that the trial court was required to take into account all relevant factors and evidence adduced by the parties and therefore, the faulting by the Appellant of the trial court doing what it was required to do is inopportune and should be frowned by this court. Additionally, that the parties are bound by their pleadings and it is never the duty of the court to try and make sense of what a party intended to mean in their pleadings.
14. It is the respondent's submission that since July 2015, when the Plaintiff was involved in the accident, his life took a drastic change with life threatening complications developing in 2018. The Respondent has been in and out of the hospital close to three years after the accident. Both Dr Sokobe and Dr Lodhia agreed in their medical reports that the Respondent developed some level of disability, albeit differing in percentages, following the injuries sustained in the accident. The Respondent's earning capacity was diminished and he can no longer perform his daily normal routines with ease and swiftness. Doctor Lodhia in his report opines that the Respondent may develop weakness in acetabulum after hip replacement and therefore the Respondents fate is not sealed. He has been exposed to life threatening complications and with a weak acetabulum, he is likely to be subjected to more complications that could alter his entire life in drastic ways.
15. It is the respondent's case that the trial court did not rely on any wrong principles and neither was the award in general damages excessive in the circumstances. The respondent urged the court dismiss the appeal with costs to the respondents.

Analysis & Determination

16. Upon considering the record of appeal, memorandum of appeal and submissions tendered, the following issues arise for determination;
 1. Whether the trial court erred in its award of damages

Whether the trial court erred in its award of damages

17. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated the duty of an Appellate Court as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze 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.”



18. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

19. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkuba v Nyamuro* [1983] KLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

20. The respondent sustained a fractured dislocation of the right hip which had not healed at the time of the examination by Dr Sokobe on 12th August 2015, a month after the accident. The doctor opined that the plaintiff was predisposed to early osteoarthritis and permanent incapacity was assessed at 10 %.

21. It is trite law that in awarding damages, comparable injuries attract comparable awards as the Court of Appeal stated in the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR. In *Shabani v City Council of Nairobi* (1985) KLR 516 the Court of Appeal had the following to say regarding the paramount need for Courts to attempt to give comparable awards in like cases:

There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is...to have regard to recent award in comparable cases in the local courts.

22. The trial court relied considered the cited cases by the parties to the extent that it distinguished that the award in Nakuru HCCC 260/2009 *Naomi Wambui Njiriaini v Professor Ezra Kiprono Maritim* was a case where the injuries were more severe.

23. In *Elisba Akello Raga v Shajanand Holdings Limited & another* [2016] eKLR, the plaintiff sustained Cut wound on the right orbital area, Blunt trauma to the chest, Contusion on the right hip joint leading to dislocation of the right hip, Bruises on the right knee and a Fracture of the femur. It was the doctor’s opinion that as expected to suffer post-traumatic osteoarthritis of the right hip joint that would make him limp. He assessed permanent disability at 10%. The appellate court upheld the award of Kshs 450,000/-. Whereas the decision is almost seven years old, the respondent therein had sustained similar injuries with a few more than the present one. I am guided by the Court of Appeal in *Kemfro Africa Limited t/a Meru Express Services & Another v A.M. Lubia and another* (1976) where it stated :-

“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 or 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.”

24. I have considered the comparable authorities on comparable injuries, the principles applied by the trial court in awarding damages and the submissions of the parties and it is my considered view that the trial magistrate did not apply the wrong principles in assessing damages.

25. In the premises, the appeal is dismissed in its entirety for lack of merit with costs to the respondents.

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

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R. NYAKUNDI

JUDGE

