



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. E016 OF 2021**

**ELIZAPHEN MOKAYA BOGONKO.....APPELLANT**

**VERSUS**

**FREDRICK OMONDI OUNA.....RESPONDENT**

*(Appeal against judgment and decree in Ukwala Principal Magistrate's Court*

*Civil Case No. 6 of 2020 delivered on 5<sup>th</sup> May 2021 by*

*Hon C.N.Sindani, Principal Magistrate)*

**JUDGMENT**

1. This appeal is against the award of damages by the trial court in Ukwala PMCC No. 6 of 2020 in the sum of Kshs. 850,000/= less liability at 30% bringing a net general damages award of Kshs. 595,000 for general and special damages of Kshs. 27,648 plus costs of the suit with interest at court rates from the date of judgement.

2. The judgment was delivered on 5.5.2021 by Hon. C.N. Sindani, Principal Magistrate. Aggrieved by the judgment and decree, the Appellant filed a memorandum of appeal dated 2.6.2021 on the 3.6.2021 challenging the trial Court's finding on quantum. The grounds of appeal are:

*a) The Learned Trial Magistrate erred in law and fact in making the award of general damages in the said judgement that was manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent.*

*b) The Learned Trial Magistrate erred in law and in fact entering judgement for general damages without considering the applicable principles as established by precedent that comparable injuries ought to attract comparable damages and by so doing reached a figure of damages that is inordinately high, arbitrary and totally unsupportable.*

*c) The Learned Trial Magistrate grossly misdirected herself and erred in law and in fact in awarding damages of Kshs. 850,000 without considering and without any regard to precedents and relevant case law put before her in total disregard to established and applicable principles of assessment of damages.*

*d) The Learned Trial Magistrate erred in law and in fact in awarding damages of Kshs. 850,000 without laying any basis therefore.*

*e) The Learned Trial Magistrate totally ignored and/or paid lip service to the appellant's submissions and authorities therein cited.*

*f) The Learned Trial Magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general damages.*

3. The background to this matter is that the respondent instituted suit against the appellant vide plaint dated 30.1.2020 and filed in court on the 5.2.2020 seeking among other prayers, general and special damages for the injuries he allegedly sustained following a road traffic accident that occurred on the 7.11.2019 involving motor vehicle registration number KCE 610Z said to be driven and owned by the appellant.

4. The defendant, now appellant filed her statement of defence dated 24.3.2020 on 16.6.2020 disputing the plaintiff/respondent's claim. On the 27.1.2021, the parties recorded a consent apportioning liability in the ratio of 70% to 30% in favour of the plaintiff/respondent against the defendant/appellant.
5. The matter proceeded to hearing with the plaintiff/respondent testifying while the defendant/appellant closed her case without calling any witness. The trial court delivered judgement on the 5.5.2021, awarding the respondent general damages in the sum of Kshs 850,000 prompting this appeal.
6. The parties canvassed the appeal by way of written submissions.

### **The Appellant's Submissions**

7. On behalf of the appellant, it was submitted that the trial Magistrate failed to appreciate a cardinal principle in the assessment of damages, namely, that similar injuries attract similar awards. That the trial court did not show what similar cases it applied so as to arrive at the award of Kshs. 850,000/= general damages. It was submitted that it was not enough to proclaim in a judgment that the Plaintiff asks for too much and the Defendant offers too little but that the duty of the Court was to assess damages, and in so doing, look at the injuries sustained, their effect on the victim, and then compare the injuries with awards in similar cases before reaching at an award which the Court failed to do, and in effect plucked the Kshs. 850,000/= from the air, making the award arbitrary and capricious and as such, the award should be interfered with.
8. The appellant submitted that the trial magistrate ignored the cardinal principle enunciated in such cases as **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR** and **Simon Taveta v Mercy Mutitu Njeri Civil Appeal No. 60 of 2004** that similar injuries attract similar awards or differently put, that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.
9. It was submitted that the trial Magistrate fell into error by failing to consider the authorities cited and relate or compare them to the facts of the case before him which had he done, he would have found that the authorities cited by the Respondent showed very serious injuries incomparable to the case before him, and that the authorities cited by the Appellant related very closely to the Respondent's injuries.
10. The appellant's counsel further submitted that failure to consider the authorities and submissions was a misdirection warranting an intervention on an award of damages by an appellate court as was held by the Court of Appeal in the cases of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd (supra)** and that of **Ram Gopal Gupta v Nairobi Tea Packers Limited & 2 others [2017] eKLR**.
11. It was further submitted that all the three cases cited by the Respondent involved skull fractures and additional fractures of the mandible and teeth, and very severe sequelae, in some cases being epilepsy and seizures, facial asymmetry and eye complications and mental illness and were thus of little help as the injury of the respondent was that of the right maxillary and zygomatic bone fracture (facial cheekbone).
12. It was submitted that an award of Kshs 400,000.00, being a similar award as made in the cases cited by the appellant before the trial court was sufficient. The cases cited were:
  - i. **Peter Muvake & another v Agnes Nduku Mutie [2018] eKLR** where the Respondent suffered a fractured mandible, blunt chest injury, multiple cut wounds to face, neck and shoulders, deep cut wound on the right elbow and bruises on the right knee and upon examination by Dr. P.N Mutuku was found to be at risk of suffering neurological conditions later in life. The Court made an award of Kshs. 400,000/- in December 2018.
  - ii. **Paul Kithinji Kirimi & another v Gatwiri Murithi [2018] eKLR** where the plaintiff suffered a mandible fracture that was managed by dental wiring that stayed in place for 3 weeks and a femur fracture managed surgically with open reduction and internal fixation with a nail and screws. When the respondent was discharged, she was on crutches. The High Court awarded a sum of Kshs. 450,000/- general damages in June 2018.
  - iii. **Mombasa Maize Millers (Ksm) Ltd & another v Rengo Joshua Wafula [2017] eKLR** where the plaintiff suffered injuries involving facial injury with fracture; an injury to right jaw and teeth; an injury to chest and a fracture right condylar (mandible), the High Court made an award of Kshs. 400,000 in June 2017.
  - iv. **BK Suing Thro' His Mother and Next friend EM v Wilson Gitari Mburugu [2020] eKLR** where the Plaintiff suffered multiple injuries to the face; soft tissue injury to the thorax, abdomen as well as on his upper and lower limbs; severe injuries to the maxilla and mandible resulting to loss of five (5) teeth with cut on the lip. The injuries left him with cosmetic damage to the mouth. The Court made an award of Kshs. 400,000/- in February 2020.
  - v. **Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR** where the injuries sustained by the child were; head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. The two doctors who examined the child concluded that the child sustained serious head injuries, which put him at risk of developing seizures as a long-term complication together with disfiguration resulting from the scalp and leg scars. The High Court awarded a sum of Kshs. 500,000/- general damages in December 2018.
  - vi. **GA (Minor suing thro' her father and next friend BZ) v Paul Muthiku [2020] eKLR** where the High Court increased an award of Kshs 300,000 to Kshs 500,000.00 in general damages to an Appellant who suffered multiple fractures of the frontal left orbital roof (comminuted), multiple fractures of right temporal bones (petrous), bleeding in the skull airspaces (haemosinus), cut on the head (frontal) and cut on the chin, in May 2020.

13. The appellant further urged this court to consider the following authorities:

- i. ***Specialized Aluminium Renovators Limited & another v Stephen Mutuku Musyoka [2021] eKLR*** where the High Court awarded Kshs 500,000.00 in general damages to a Respondent who suffered fracture of the frontal nasal bones, fracture of nasal bones, fracture of right orbit, frontal lobe hemorrhage contusion and bleeding into sinuses, in July 2021.
- ii. ***Moiz Motors Limited & another v Harun Ngethe Wanjiru [2021] eKLR*** where the High Court reduced an award of Kshs 700,000 and made an award of Kshs 500,000.00 in general damages to a Respondent who suffered multiple facial lacerations, a depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises both hips, swollen toes right leg and bruises of both knees, in February 2021.
- iii. ***Nyota Tissue Products v Charles Wanga & 4 Others [2020] eKLR***, where the plaintiff suffered a head injury with open depressed frontal fracture. The High Court in 2020 reduced an award of Kshs 1,200,000.00 and substituted it with an award of Kshs 500,000.00 in general damages.

14. The appellant thus submitted that the court ought to interfere with the said award and substitute therefore with an award that is comparable with the awards made in cases showing similar injuries as above and make an award of Kshs 400,000 as general damages.

#### **The Respondent's Submissions**

15. On behalf of the Respondent, it was submitted that an appellate court would only disturb an award of damages where it is satisfied that the trial court proceeded on wrong premises in its assessment or that the award is too low or too high as to amount to an erroneous estimate of the injury as was held in the case of **Civil Appeal No. 147 of 2002: Stanley Maore v Geoffrey Mwenda**. The appellant's counsel thus submitted that a re-evaluation of the evidence on record with regard to the injuries sustained by the respondent would lead to the conclusion that the learned trial Magistrate made an award commensurate with the injuries which award was also within the range of awards made by various courts for comparable injuries.

16. It was submitted that although it was alleged the Respondent did not mention that he suffered the fracture of zygoma, during cross-examination, the Respondent stated that he suffered injury with loss of consciousness and further that though he may not have used the exact medical term, his evidence was clear that he suffered a fracture and it was thus the responsibility of the medical experts to pin point the exact bone fractured, and or injury sustained. It was submitted that all the medical documents on record proved comminuted fractures of the facial bones, the zygoma and maxillary sinus.

17. Further, the Respondent's counsel submitted that the Appellant offered no documentary proof to controvert the evidence adduced by the Respondent.

18. The respondent submitted that before an appellate court interferes with an award of damages, it should be satisfied that the court below acted on wrong principles of law, or misapprehended the fact, or has made a wholly erroneous estimate of the damage suffered and that it is not enough that there is a balance of opinion or preference. Reliance was placed on the case of **Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 (2004) 2 KLR 55** as cited in **Machakos HCCA No. 42 of 2018: Joseph Kivati Wambua v SMM & Another**.

19. The respondent's counsel further submitted that being discretionary, a trial court can award less or more damages depending on the circumstances of a particular case and the submissions of parties to the suit cannot be said to be binding on a court.

20. It was submitted that the amount awarded by the trial Magistrate was not inordinately high to warrant interference by this Court and that there was no evidence either that the trial court acted on wrong principles of law, misapprehended the facts or made a wholly erroneous estimate of the damages suffered by the Respondent.

21. Further submission was that both sets of authorities supplied by the Appellant and Respondent confirm that courts have made awards of between Kshs. 500, 000 - 1,800,000/- for injuries in the nature sustained by the Respondent, depending on each particular case and thus Kshs.850, 000 was not outside the range that courts have awarded before to warrant interference by this Court.

22. The respondent relied on the following cases in support of the award of general damages:

- i. **Nakuru HCCA No. 21 of 2013, Kyoga Hauliers (K) v Philip Mahiw Nyangi**, in which the plaintiff was awarded Kshs.1, 000, 000/- general damages for depressed fracture of the occipital bone of the skull; deep cut wound on the occipital region and multiple soft tissue injuries. The case was decided in 2013.
- ii. **Machakos HCCA No. 312 of 2009, Isaac Waweru Mundia v Kiilu Kakie Ndeti T/A Wikwatyo Services** in which the plaintiff was awarded Kshs. 1,000,000/- general damages for fracture of base of skull at the mandible, coupled with multiple soft tissue injuries. The case was decided in 2012.
- iii. **Nakuru HCCA No. 171 of 1998, John Joel Koskei v Kenya Power & Lighting Co. Limited** in which the plaintiff was awarded Kshs.1, 700, 000/- general damages for fracture of skull, loss of 2 teeth and soft tissue injuries to the knee. The case was decided in 2005

23. It was submitted that the degree of injury was a question of fact and that an appellate court should be slow to interfere as the trial court had the benefit of hearing the respondent, observing him, the physical injury as well as his demeanour, which benefit cannot be overlooked.

24. The respondent's counsel thus submitted that the trial court had the benefit of and correctly assessed the injuries sustained by the respondent and that in awarding general damages, as he did, the trial magistrate correctly exercised his discretion and thus the instant appeal lacked merit and ought to be dismissed with costs to the respondent.

### **Analysis & Determination**

25. I have considered the grounds of appeal and submissions by both counsel for the parties. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions as was held by the Court of Appeal for East Africa in **Peters v Sunday Post Limited [1958] EA 424** and reiterated by the Court of Appeal in several cases including the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**.

26. The single issue for determination in this appeal is whether the award of general damages of Kshs. 850,000 in favour of the Respondent herein by the trial court, in light of the injuries suffered by the respondent was manifestly high to persuade this court to interfere with it. The Court of Appeal in **Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR** stated that *"comparable injuries should attract comparable awards."*

27. Re-evaluating the material and evidence placed before the trial court, in his plaint filed on the 5.2.2020, the respondent pleaded that he suffered the following injuries:

- a) *Head injury with loss of consciousness*
- b) *Fracture of the right zygoma (facial bone)*
- c) *Multiple facial lacerations*
- d) *Blunt injury to the shoulders*
- e) *Blunt injury and bruises to both lower limbs.*

28. The nature of the injuries sustained by the respondent as pleaded was corroborated in the discharge summary produced as PEx 1, the radiology report produced as PEx 2 and the P3 form dated 16.11.2019 produced as PEx3 which all reiterated the injuries suffered by the respondent as those pleaded in the plaint.

29. At the hearing, the plaintiff/respondent adopted his witness statement filed in court in which he reiterated the averments in his plaint regarding the occurrence of the accident on the 7.11.2019. In cross-examination, the plaintiff/respondent reiterated his claim and stated that he had not pleaded that he had a fracture to the leg.

30. I have considered the Appellant's submissions on the quantum of damages, the authorities cited by both parties in their submissions for and against this appeal. I have also considered the medical report filed by the plaintiff/respondent and produced as PEx 6a in which Dr. Joseph C. Sokobe who examined him concluded that the plaintiff/respondent received severe soft and bony tissue injuries from which he was recovering well. The doctor did not assess any disability on the part of the plaintiff/respondent or foresee any future complications arising from the injuries sustained.

31. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case **Khambi & Another v Mahitu & Another** (supra). Further the Court of Appeal in the case **Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others Civil Appeal Case No. 192 Of 1992** Stated:

*"Those principles were well stated by Law, J.A in Bashir Ahmed Butt vs. Uwais Ahmed Khan, By M. Akmal Khan [1982-88]I KAR 1 at pg 5 as follows-*

*'An Appellate Court will not disturb an award of damages unless it is so 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 ...."*

10. I am further guided by the case **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR** where the Court of Appeal stated that:

*"It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated H. West & Son Ltd vs. Shephard [1964]AC 326 at page 353- 'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."*

32. I have perused the authorities relied on by the plaintiff/respondent in this case and note that in the **Kyonga Hauliers (K) & Another v Philip Mahiu Nyingi (2017) eKLR**, in addition to the injuries suffered, the doctor who examined the respondent therein noted that the respondent stood a chance of suffering epilepsy and further assessed his disability at 20%. In **Isaac Waweru Mundia v Kiilu Kakie Ndeti T/A Wikwatyo Services (2012) eKLR**, the doctor who examined the plaintiff similarly assessed his disability at 20% and in the case of **John Joel Koskei v Kenya Power & Lighting Co. Limited** the doctor therein calculated the plaintiff's disability at 30%.

33. Upon examining the authorities relied on by the plaintiff/respondent in this appeal, I find that those authorities do not provide comparable injuries to those suffered by the Respondent/ Plaintiff herein. In each of the cases cited in the lower court by the Respondent's counsel, the plaintiffs were assessed to have some percentage of disability which is not the case with the present respondent.

34. I am alive to the fact that no two injuries can be exactly the same. However, I find the authorities relied on by the appellant herein are far more comparable to the injuries sustained by the Respondent. For example, in the case of **Specialized Aluminium Renovators Limited & another (supra)**, the respondent suffered a fracture of the frontal nasal bones, fracture of nasal bones, fracture of right orbit, frontal lobe hemorrhage contusion and bleeding into sinuses. In **Moiz Motors Limited & another (supra)**, the respondent suffered multiple facial lacerations, a depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises both hips, swollen toes right leg and bruises of both knees whereas in the case of **Nyota Tissue Products (supra)**, the plaintiff suffered head injury with open depressed frontal fracture.

35. In the circumstances, I am inclined to find that the trial court made an award which was excessive in comparison to the injuries suffered by the respondent. This calls for interference by this court.

36. The upshot of the above is that the instant appeal succeeds substantially on the award of general damages and the lower court's award of general damages in the sum of Kshs 850,000 is hereby set aside and substituted with the award of Kshs 500,000 general damages. This award is subject to contribution of 30% consented to in the lower court leaving a balance of kshs 350,000 general damages for pain, suffering and loss of amenities.

37. Special damages of Kshs. 27,648 as pleaded were proved. I sustain the award. Total award is Kshs **350,000+27,648= 377648/-** plus costs and interest at court rates. The interest on general damages accrues from date of judgment in the lower court until payment in full while interest on special damages accrues from date of filing suit in the lower court until payment in full.

38. The respondent will have costs of the suit in the lower court. Each party will bear their own costs of this appeal.

39. File closed.

40. I so order.

**DATED, SIGNED AND DELIVERED VIRTUALLY FROM MOMBASA THIS 17TH DAY OF JANUARY, 2022**

**R.E. ABURILI**

**JUDGE**