



**Waweru & another v NMN alias NM (Suing thru the father and next friend JNG
(Civil Suit 38 of 2019) [2022] KEHC 33 (KLR) (13 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 33 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT 38 OF 2019
A MSHILA, J
JANUARY 13, 2022**

BETWEEN

BEN KINYUA WAWERU 1ST APPELLANT

KENYA POWER & LIGHTING CO.LTD 2ND APPELLANT

AND

**NMN ALIAS NM (SUIING THRU THE FATHER AND NEXT FRIEND
JNG RESPONDENT**

*(Appeal from the judgment of Hon.P.Mutua (SPM) delivered
on 14th May, 2019 in Nyeri SPMCC No.419 of 2017)*

JUDGMENT

1. This is an Appeal from the judgment of Hon.P.Mutua (SPM) delivered on 14th May, 2019 in Nyeri SPMCC No.419 of 2017; the respondent's claim arose from a road traffic accident along Nyeri-Karatina Road; the respondent's case was that on 7/05/2017 he was lawfully walking off the road on the pedestrian path when the 1st appellant as a driver and/or agent of the 2nd appellant so negligently drove, managed and or controlled motor vehicle registration number KAL 340C Isuzu Canter that he caused it lose control and it veered off the road and as a consequence thereof the minor sustained severe injuries.
2. The respondent's claim was for special and general damages and the trial court found the appellant 100% liable and made the following award;Liability: 100%General damages – Kshs.1,000,000/=Special damages – 313,333/-Costs of the suit and interest from the date of delivery of judgment.
3. Being dissatisfied with the judgment of the trial court, the appellant filed this instant appeal and listed four (4) grounds of appeal which are summarized, hereunder;-



- (i) The learned magistrate erred in awarding a manifestly high and excessive award for general damages in the sum of Kshs.600,000/- for the injuries sustained by the respondent;
 - (ii) The learned magistrate failed to consider the written submissions of the appellant and the annexed authorities;
 - (iii) The judgment of the learned magistrate was as against the weight of the evidence on record;
4. When this Appeal came up for hearing, the parties were directed to file and exchange written submissions; hereunder is a summary of the parties respective submissions.

APPELLANTS CASE

5. The appellants' case is raised only on the issue of quantum and it was submitted that the award made was exorbitantly high; at trial the respondent had proposed a sum of Kenya Shillings One Million (Kshs.1,000,000/-) whereas the appellant had offered Kenya Three Hundred Thousand(Kshs.300,000/-); the trial court in its judgment proceeded to make an award of Kenya Shillings One Million (Kshs.1,000,000/-) as general damages.
6. The appellant argued that this amount was excessive when the nature of the injuries sustained is taken into consideration; from the medical report prepared by Dr. F.W. Muleshe the respondent suffered the following injuries namely;
- (i) Fracture of the radius and ulna of the left upper limb;
 - (ii) Bruises on the volar region of the hand;
 - (iii) Cuts on the right foot on the lateral region; and
 - (iv) Blunt injuries on the chest.
7. The appellants submitted that the court must strike a balance between endeavoring to award just amounts and guarding excessive awards which in the end have a deleterious effect; the court in its discretion should award comparable awards for comparable injuries; case law relied on *Tayab vs Kinanu* [1983] eKLR 114.
8. They urged this court to allow the appeal and the entire judgment delivered on 14/05/2019 against the appellants be set aside and costs of the appeal be provided for.

RESPONDENT'S CASE

9. In opposing the appeal the respondent submitted that the award made by the trial court was fair and it be correctly awarded general damages at Kshs.1,000,000/- and special damages at Kshs.313,333/- plus costs and interest of the suit from the date of delivery of judgment.
10. The respondent had relied on various documents and in particular the child's medical report which when produced were not objected or disputed by the appellants who also never called any witnesses to controvert, challenge or to rebut the respondents' evidence; the trial court also noted that the appellants defence of contributory negligence as pleaded stood unproven as no witnesses were called; in its well-reasoned judgment considered the trial court considered the injuries pleaded by the respondent, his supporting documents, the authorities cited by both parties and it cannot be said that the judgment was based on the wrong principles; case law relied on *Butt vs Khan (1981) KLR 349*.
11. The award for special damages was pleaded and strictly proved and the trial should not be faulted for awarding the same; case law relied on *Banque vs D. J. Lane & Company Ltd (2006) 2KLR 208*.



12. The respondent submitted that the appeal lacked merit and should thus be dismissed.

ISSUES FOR DETERMINATION

13. After having read the written submissions filed by both parties and having perused the Record of Appeal this court has framed only one issue for determination which was;

- (i) Whether to the trial court applied wrong principles of law in arriving at the award for general damages of Kshs.1,000,000/-;
- (ii) Whether the respondent proved Special Damages.
- (iii) Costs of the appeal.

ANALYSIS

14. Before addressing this issue, it is important that to state the principles to be considered when reviewing an Appeal on damages are laid out in the Court of Appeal case of *Farah Awad Gullet vs CMC Motors Group Limited [2018]eKLR*; this decision sets out the parameters under which an appellate court will interfere with an award in general damages; it held that: -

‘This is a first appeal. Our mandate is to re-appraise, re-assess and re-analyze the evidence on record before us and arrive at our own conclusions on the matter and give reasons either way. (See the case of *Sumaria & Another vs Allied Industries Limited [2007] 2KLR*). We are also reminded that we should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, or based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did. (See also *Musera vs Mwechelesi & Anor [2007] 2KLR 159*’

15. Similarly, in the case of *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003* the Court of Appeal held that: -

‘We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Mariga V Musila [1984] KLR 257*).’

Whether to interfere with the award of Kshs.1,000,000/- for the injuries sustained; or whether it was correct and fair;

16. The appellants took issue with the award made by the trial court and submitted that it was excessive as the respondent had fully recovered and had proposed a sum of Kshs.300,000/- that this amount would have sufficed for the injuries sustained; the injuries were as set out in the respondent’s medical report dated 29/04/2015 and was prepared by Dr. Muchai Mbugua; the report had been produced at the trial court ‘By Consent’ of both parties and the injuries are as set out hereunder;

- (a) Bruises on the valor region of the right hand
- (b) Cut wounds on lateral aspect of the right hand
- (c) Anterior chest tenderness and
- (d) Tender, swollen and deformed left upper limb.



17. The report indicates that the respondent had responded well to both conservative and operative treatment and was in good condition; the scars had healed, the movements of the wrist and elbow and joints were intact and there was good fracture alignment with the implants in situ.
18. The trial court made an award to the respondent for general damages in the sum of Kshs.600,000/-;in its judgment it stated that ‘In assessing damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal observed in *Simon Taveta vs Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR* as follows:-

‘The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.’
19. The trial court went on to make the following observation;

‘It is the duty of advocates to guide the court by citing relevant case law to enable the court to arrive at a fair decision. This court has also looked at several other authorities which in the view of the court would provide better guidance in the instant case.’
20. The trial court then criticized the respondents for providing authorities whose injuries were more severe in comparison to the present case and that the appellant had submitted authorities where the injuries were less severe.
21. Having made the observation on comparable awards for comparable injuries as a basis for assessing general damages this court after having perused the judgment at length notes that when making the award for general damages in the sum of Kshs.600,000/- the trial court failed to cite the ‘several other authorities’ or any comparable case law that it had looked at ‘which in the view of the court would provide better guidance in the instant case.’
22. It then follows that the trial court was fully aware of the applicable principles of law but failed to apply them and there is therefore good reason for this court to interfere with the award.
23. It is always difficult to place a particular amount of money and to say with certainty that the amount would be commensurate with the injuries sustained by a person; the duty of the court is to merely assess what would be reasonable in the circumstances to compensate a person who has suffered injuries; the amount awarded can never really remove the pain no can it fully compensate the injured person.
24. This assessment by the court however has its limitations as a court must be guided by decided cases, especially those which appellate courts would ordinarily have awarded in respect of particular injuries; case law referred to *Kigaraari vs Aya (1982-88) 1KAR 768*; In this instant case the respondent did not suffer any permanent disability and he only had one single fracture which the doctor in his Medical Report indicated was in good condition and that the scars had healed; in awarding the sum of Kshs.450,000/- this court relies on the following decision *Gogni Construction Company Limited vs Francis Ojuok Olewe HCCA No.1 of 2014 [2015] eKLR* where the claimant was awarded Kshs.350,000/- as general damages having sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalized for six (6) weeks.
25. This court finds that the trial court’s award was based on wrong principles of law and it therefore arrived at a wrong estimate when assessing general damages.
26. This ground of appeal is found to be devoid of merit and it is hereby disallowed.

FINDINGS AND DETERMINATION



27. For the forgoing reasons this court makes the following findings and determinations;

- (i) The appeal is found to be partially meritorious;
- (ii) Liability is hereby upheld;
- (iii) The award made for general damages is hereby upheld;
- (iv) This court finds that the respondent did not strictly prove the whole amount pleaded for special damages; therefore the judgment on the award for special damages is hereby set aside and substituted with the sum of Kshs.89,100/-Liability – 100% is upheldGeneral Damages – Kshs.1,000,000/- upheldSpecial Damages – Kshs.89,100/-Costs and Interest -upheld
- (v) Each party shall bear their/its own costs on this appeal.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 13TH DAY OF JANUARY, 2022

HON.A.MSHILA

JUDGE

