



**Waithaka & another v Kanyi (Civil Appeal 56 of 2016)  
[2022] KEHC 127 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 127 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL 56 OF 2016  
A MSHILA, J  
FEBRUARY 18, 2022**

**BETWEEN**

**JOHN M. WAITHAKA ..... 1<sup>ST</sup> APPELLANT**

**GERALD WACHIRA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETER WANJOHI KANYI ..... RESPONDENT**

*(Being an appeal herein from the judgment of Hon. P.Mutua (PM)  
in Nyeri CMCC No.164 of 2011 delivered on 3rd November, 2016)*

**JUDGMENT**

**FACTS**

1. The accident occurred on the 24/04/2010 along the Nyeri - Mukuruweini road. The respondent had boarded the Appellants motor vehicle registration number KAQ 386D as a fare-paying passenger. The brakes of the motor vehicle failed causing it to veer of the road, it hit a culvert and overturned. As a result of the accident the Respondent suffered bodily injuries and filed a suit against the Appellant for damages for the injuries sustained.
2. The parties filed a consent on the issue of liability and it was agreed that liability be apportioned on a ratio of 90%:10% with the defendant bearing the larger portion. The matter proceeded for hearing only on the issue of quantum and the trial court awarded the Respondent the sum Kshs.300,000/- as general damages and the sum of Kshs.46,517 for special damages.
3. The Appellants being dissatisfied with the trial court's judgment on quantum filed this appeal and sought to set it aside. The Appellants listed grounds of appeal in the Memorandum of Appeal dated the 29<sup>th</sup> November, 2016 which are as summarized hereunder;



- i. The trial court erred in finding that the Respondent sustained fractures to the humerus and scapula from the accident. The damages were too high in view of the injuries being only soft tissue injuries and the injuries were not proved to the desired threshold;
  - ii. The trial court failed to consider the appellants Medical Report ('PEXh.1') and the testimony of their doctor (DW1);
  - iii. The trial court failed to consider the Appellants' submissions and authorities on quantum and conventional awards and general damages in similar cases; and therefore arrived at an erroneous assessment of damages and an erroneous award.
4. The parties were directed to dispose of the appeal by way of written submissions which were filed and exchanged between the parties. Hereunder is a summation of the parties rival submissions.

#### APPELLANTS SUBMISSIONS

5. The Appellants in their submissions contend that the trial court made a finding on quantum without due regard to the injuries sustained by the Respondent or the appellants' submissions nor to commensurate authorities. According to the Respondents' initial treatment notes dated 29<sup>th</sup> April, 2010 filed with the respondents List of Documents, the notes indicate that the respondent was admitted for five (5) days and was treated for severe laceration of the left upper arm. The said treatment notes also indicate that X-rays were done and they turned out to be normal.
6. The Appellants' further submitted that the injuries pleaded by the Respondent are grossly exaggerated and tailored to enable the Respondent justify a high award and the fractures pleaded were not proved at all. From the evidence adduce in court. The initial treatment notes, the P3Form, the appellants Medical Report all point to soft tissue injuries to the arm without permanent consequences or incapacities. The injuries sustained by the respondent do not warrant the award.
7. That it is trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries and comparable awards. this court was invited to consider the following authorities and awards;
  - (i) *George Mugo & Another vs AKM (minor suing through next friend and mother of AMK [2018] eKLR*; where Kemei J held the award by the trial court to be inordinately high and that the same did not reflect a reasonable estimate of damages; there was good reason to interfere with the award and the sum of Kshs.90,000/- was awarded for soft tissue injuries;
  - (ii) *Gideon Ireri vs Franklin Gitonga [2018] eKLR* where Majanja J made an awarded Kshs.90,000/- after finding the amount awarded by the trial court to inordinately high for soft tissue injuries;
  - (iii) *George Kinyanjui t/a Climax Coaches & Another vs Hussein Mahad Kuyala [2016] eKLR*; the Respondent sustained injuries on his chest, neck, knees and lost two teeth; the appellate court reduced the award of Kshs.650,000/- to Kshs.109,800/- upon finding that the loss of teeth was unrelated to the accident in question and that the respondent had only sustained soft tissue injuries; and
  - (iv) *Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018] eKLR* where Ngugi Joel J reduced general damages for soft tissue injuries from Kshs.300,000/- to Kshs.100,000/-.
8. The award by the trial court was therefore not premised on any quoted authority to justify the said award in the light of the injuries sustained by the Respondent. The award of Kshs.300,000/- was inordinately high compared to the injuries suffered and was founded on wrong principles.



9. The Appellants pray that this Court reverses the decision of the lower Court and that the Respondent be awarded a sum between Kshs.80,000/= to Kshs.100,000/= as damages and rely on the aforesaid comparable authorities and awards in support of their prayer.
10. The Appellants urged the court to allow their appeal.

#### RESPONDENTS SUBMISSIONS

11. In response, the Respondent opposed the appeal and submitted that the trial Court was correct in its finding that the Respondent sustained a fracture of the left humeral neck and a fracture on the left scapula as a result of the accident. The trial magistrate considered all the evidence tendered during the trial and there was no misapprehension of the evidence.
12. The award of general damages for pain and suffering in the sum of Kshs.300,000/- was commensurate to the injuries sustained by the respondent. This award for general damages is comparable to the award made in the case of *David Gakinya vs Mary Nyambura [2017] eKLR* where the appellate court upheld the award of Kshs.300,000/- as general damages where the respondent sustained a fracture of the upper end of the right humerus where it joins the scapula and was in a sling for three weeks.
13. His contention was that the authorities cited by the Appellants in their submissions relate to soft tissue injuries with no fractures; and urged the court to find the authorities distinguishable and thus uphold the trial magistrates finding on quantum. The Respondent urged the court to dismiss the appeal lacked merit.

#### ISSUES FOR DETERMINATION

14. After reading the written submissions filed by the respective Counsels together with the annexed authorities, the only issue found and framed for determination relates to whether the award made for general damages was inordinately high and erroneous to justify interference.

#### ANALYSIS

15. For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in the case of *Butt vs Khan (1977) 1KAR* where Law JA stated that;

“ 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 arrived at a figure which was either inordinately high or low.”

Whether the award made for general damages was inordinately high and erroneous to justify interference;

16. In the Plaintiff dated 10/06/2011 the Respondent pleaded that he had suffered the following injuries;
  - (i) Severe lacerations on the lateral upper part of the left arm;
  - (ii) Injuries on the lower limbs; and left upper limbs;
  - (iii) Fracture of the left humeral neck; and
  - (iv) Fracture of the left scapula.
17. The main issue derived from the grounds of appeal is that the Respondent herein sustained soft tissue injuries which have completely healed; and that the injuries did not occasion the Respondent any permanent disability. The Appellants contention was that no fractures were detected beforehand and



that the fractures detected three weeks after the accident could have been sustained by the Respondent elsewhere.

18. Dr. Muleshe (PW2) in his medical report dated 25<sup>th</sup> February, 2011 had indicated that the Respondent returned to the hospital three weeks after the accident with complaints of pain in the left shoulder. An x-ray that was conducted showed fractured humeral neck and fractured left scapula. However, the Medical Report dated 19/11/2011 by Dr.Theuri (DW1) supported the Appellants contention and further stated that if the said fracture was as a result of the accident then the clinician who had carried out the first surgical toilet would not have missed it. Under cross-examination, DW1 conceded that the fractures were on parts the Respondent had earlier complained of injuries; and the possibility of the fractures having been sustained from the same accident was not completely ruled out by DW1.
19. It has been held that the expert evidence should not outdo or trump all other evidence and it also should not be considered in a vacuum. It should be considered or evaluated in the context of other evidence. Case law referred is the Court of Appeal case of *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs Augustine Munyao Kioko CA [2007] 1EA 139* where it was held that;

‘Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although the court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.’
20. In re-evaluating the evidence on record it is noted that the defence called DW1 to testify and the record reflects that this witnesses’ expert medical opinion was contrary to that of PW2 who had also given an expert medical opinion. The evidence of PW2 was that during the first admission no X-ray was done and that was why the fractures undetected. The doctor added that when he examined the Respondent on the second admission ‘...he didn’t complain on having been injured elsewhere except through the Road Traffic Accident the subject of this suit.’
21. As for DW1 during cross-examination the doctor conceded that there was ‘no other medical history’; and that ‘the medical history tendered was consistent’ This witness also admitted that the fractures were on parts the Respondent had earlier complained of injuries and the possibility of the fractures having been sustained from the same accident was not completely ruled out by DW1.
22. The trial court took into consideration both medical reports and the treatment notes and noted in its judgment that all these documents were ‘in agreement that the plaintiff sustained lacerations on the upper left arm.’. The trial court then proceeded to address the issue of whether the plaintiff sustained the fractures as a result of the accident. It then stated that the evidence of PW2 was ‘the only direct evidence on record as to the issue of fractures’;
23. As for the second medical report the trial court noted that it was ‘....produced without the makers being called; DW1 was not the maker and produced the medical report on behalf of Dr. Theuri. She could not therefore explain the basis of the opinion given by Dr. Theuri.

.....She didn’t, through her evidence, rule out the possibility of the plaintiff having sustained fractures as a result of the accident.
24. The trial court also noted that ‘Even Dr. Theuri’s medical report does not completely rule out the possibility of the injuries having been sustained in the accident.’ It then concluded that ‘...Since all the experts agree that it is possible the plaintiff could have sustained the injuries at the road traffic accident



notwithstanding the failure of the initial diagnosis.....I accept the evidence of the plaintiff and find that the fractures were indeed as a result of the accident.’

25. This court is satisfied that the trial court was entitled to reject the second medical opinion and upon consideration of all other available evidence, alongside is further satisfied that there was a proper and cogent basis for doing so. This court finds no good reason to fault and interfere with the findings of the trial court that the fractures were indeed as a result of the accident.
26. It is not difficult to ascertain how the award in the sum of Kshs.300,000/= as general damages was arrived at. Upon perusal of the judgment it is noted that the learned trial magistrate considered the authorities cited by the Appellant and found the same to be irrelevant as they related to totally different injuries. As for the authorities cited the Respondent the trial court found that ‘ though relevant relate to more serious injuries but at least they involve fractures’ and then proceeded to award Kshs.300,000/= as general damages.
27. In consideration of the submissions filed in this appeal and the medical reports produced before the trial court, this court is satisfied that there was a reasoning given for this award and this court finds that the learned magistrate’s award was based on comparative decisions on the comparative injuries and is further satisfied that the award was not inordinately high or excessive in light of the evidence on injuries sustained by the Respondent.
28. This court is satisfied that trial court did not apply wrong principles of law and arrived at a correct assessment of damages which was not inordinately high or excessive in the circumstances.
29. As such, this ground of appeal is hereby disallowed.

#### FINDINGS AND DETERMINATION

30. In the light of the foregoing this court makes the following findings and determinations;
  - (i) The appeal is found to be lacking in merit and it is hereby dismissed;
  - (ii) The judgment of the trial court on quantum is hereby upheld;
  - (iii) The Appellants shall bear the costs of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**HON.A.MSHILA**

**JUDGE**

In the presence of;

Mr. Macharia for the Respondent

No appearance for the Appellant

Kinyua-----Court Assistant

