



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. E006 OF 2020**

**ELIUD MUTHUI MWANGI.....APPELLANT**

**VERSUS**

**JACINTA WAMBUI WARUI.....1<sup>ST</sup> RESPONDENT**

**JOHN NJUE.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the judgment of the Principal Magistrate Honourable H.N. Nyakweba*

*delivered on 29<sup>th</sup> September 2020 in Civil case No. 84 of 2019 in the Chief Magistrate Court in Embu)*

**JUDGMENT**

1. This appeal emanates from the judgment of Hon. H.N. Nyakweba dated 29/09/2020. In the suit before lower court, the appellant sued the respondents for general and special damages for personal injuries sustained through an accident involving motor vehicles KAV 527N a matatu and KAV 079U a Toyota Pick Up. The accident is said to have occurred on 15.02.2012 along the Kivaa - Embu road. From the plaint filed before the court, the respondents were accused of having caused the accident by virtue of what was termed as negligent driving of motor vehicle KAV 527N matatu which is said to have caused the collision that resulted in the appellant sustaining bodily injuries. The particulars of negligence were pleaded in Paragraph 4 of the plaint.

2. The respondents filed a defence which they later amended on 04.10.2016. They denied all the averments in the plaint and put the appellant to strict proof. They averred that if any accident occurred, it was caused and/or contributed to by the appellant and they urged the court to dismiss the suit with costs.

3. From the proceedings before the trial court, the parties recorded a consent on liability in favour of the appellant against the respondent in the ratio of 90:10 and left it to the court to determine the issue of quantum. During the hearing the appellant testified and in support of his case called a doctor to testify and produce a medical report. The respondents on the other hand called a doctor who likewise testified and produced a medical report in support of their case.

4. The learned trial magistrate delivered his judgment on 29.09.2020 and awarded the appellant general damages in the sum of Kshs. 500,000/= together with costs of the suit from date of judgment till payment in full. The appellant aggrieved by the said judgment filed the present appeal seeking to set aside the judgment rendered by the court. In the memorandum of appeal dated 22/10/2020, the appellant raised three (3) grounds of appeal which are as follows;

i) *The Learned Trial magistrate erred in law and fact by holding that the appellant was entitled to an award of Kshs. 500,000/=.*

ii) *That the Trial magistrate erred in law and fact in that he failed to give an award using the applicable law.*

iii) *The judgment of the trial magistrate is bad in law, unjust, unfair and offered no justice in the matter.*

5. The appellant urged the court to allow the appeal, set aside the judgment of the trial court and enter judgment in the sum of Kshs. 3,000,000/= as general damages. The appellant also sought for costs of the appeal and those of the lower court.

6. On 01.12.2021, this court gave directions on filing of submissions and gave a mention date on 17.01.2022 to confirm compliance. On the mention date, the matter was mentioned before Hon. T. K. Kwambai but none of the parties had filed their submissions.

7. I have considered the grounds of appeal and I have also re-evaluated the evidence that was adduced before the trial court. The only issue for determination is whether the award by the trial magistrate of Kshs. 500,000/= as general damages was appropriate.

8. This being a first appeal, the duty of a first appellate court was well stated in the case of **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

*“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).*

9. It therefore follows that this court has a duty to reassess, reanalyse matters of both law and fact and reconsider the evidence afresh and come up with its findings of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

10. As earlier stated, this appeal challenges the amount of general damages awarded by the court as being inordinately low. In the Court of Appeal case **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** the court opined as follows with regard to assessment of damages:

*As a general principle, assessment of damages lies in the discretion of the trial court and 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. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014] eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5.*

11. In placing reliance on the above case law, this court will not be too quick to interfere with the damages awarded by the trial unless on grounds as stipulated therein. The court therefore in making a determination on damages, it should appreciate that no injuries can be similar to others. The approach taken by courts is that comparable injuries should attract comparable awards.

12. The appellant in his pleadings before the lower court stated to have sustained injuries on the left parietal, left eye, chest, right upper limb, lower limb, bleeding from nostrils and left supra-orbital. The said injuries were confirmed by the medical report and testimony of Dr. Stephen Maina Wambugu. The respondent on the other hand relied on the medical report by Dr. Leah Wainaina and the testimony of Dr. Jeniffer Kahuthu who were of the view that the appellant had sustained soft tissue injuries on the left eye, left nostril, fracture of the clavicle and scalp. On cross examination Dr. Jeniffer Kahuthu had confirmed that a fracture was not a soft tissue injury.

13. The plaintiff in his submissions had sought an award of Kshs. 6,000,000/= as general damages while the respondent was of the view that an award of Kshs. 200,000/= would be sufficient as general damages.

14. The trial court in considering the injuries sustained by the appellant disregarded the medical reports by the doctors on grounds that they had examined the appellant several years after he had sustained the injuries. The court instead gave credence to and placed reliance on the injuries as stipulated on the discharge summary and the P3 form. In its judgment the court relied on the case of **Morris Miriti Vs Nahashon Muriuki & Another [2018]** in which it opined that the injuries therein were comparable to those sustained by the appellant and in which an award of Kshs. 300,000/= had been awarded as general damages and proceeded to award Kshs. 500,000/= to the appellant while factoring the issue of inflation.

15. I have reviewed the evidence before the trial court and I agree that reliance on the two medical reports would not give an accurate finding on the injuries sustained by the appellant due to the lapse of time. From the Discharge summary and the P3 form the injuries captured therein were loss of consciousness, bleeding from the nostrils, cut wound on left eye/scalp, chest pain and fracture on the right scapula bone. The plaintiff in his submissions had sought for an award of Kshs. 6,000,000/= and relied on the case of **Edward Mwamili Katama Vs CMC Motors Group & Another**. A cursory look at the injuries by the plaintiff in the said case show that the injuries sustained therein apart from the similarity in fracture of the left scapula were more severe than those of the appellant.

16. The respondent on the other hand had sought for an award of Kshs. 200,000/= and relied on the cases of **Robert Kithinji Kithaka Vs Attorney General [2018] eKLR, Catherine Gatwiri Vs Peter Mwenda Karaai [2018] eKLR** and **Morris Miriti Vs Nahashon Muriuki & Another [2018] eKLR** which they argued had far serious injuries yet the court had awarded damages between Kshs. 250,000 to Kshs. 500,000/=.

17. The trial magistrate in his considered view held that the injuries by the appellant were similar to those in the case of **Morris Miriti Vs Nahashon Muriuki & Another [2018]**. I have reviewed the injuries in the said case which were listed as tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3<sup>rd</sup> and 4<sup>th</sup> ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula. I agree with the trial magistrate that the injuries sustained by the plaintiff therein were comparable to the injuries by the appellant. The plaintiff in that case was awarded general damages of Kshs. 300,000/=. The court in its judgment took into account the inflation and in its discretion, awarded to the appellant Kshs. 500,000/= as general damages. It is trite law that a court will not interfere with an award of damages unless it is inordinately high or low or the court proceeded on a wrong principle or that it

misapprehended the evidence before it.

**18.** From my review of the judgment and the consideration taken by the lower court, I do not see any justification to interfere with the court's determination as the court neither proceeded on the wrong principle nor did it misapprehend the evidence. The award in itself as stated above, was reasonable in the circumstance as the court relied on a case with comparable injuries.

**19.** The upshot of the foregoing is that the appeal lacks merit and the same is hereby dismissed.

**20.** Each party to bear its own costs of the appeal.

**21.** It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF FEBRUARY, 2022.**

**L. NJUGUNA**

**JUDGE**

.....**FOR THE APPELLANT**

.....**FOR THE RESPONDENTS**