



REPUBLIC OF KENYA



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**Ndungu & another v Munene (Civil Appeal 31 of 2020)
[2022] KEHC 3023 (KLR) (21 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 31 OF 2020
GWN MACHARIA, J
APRIL 21, 2022**

BETWEEN

CHARLES WANGICHO NDUNGU 1ST APPELLANT

OBADIA CHEGE KARANJA 2ND APPELLANT

AND

GABRIEL WAHINYA MUNENE RESPONDENT

(Being an appeal from the judgment and decree in the Chief Magistrate's Court at Naivasha CMCC No.686 of 2014 delivered by Hon. Martin Mutua (Mr), RM on 7th day of October, 2019)

JUDGMENT

The Appeal

1. The instant appeal is with respect to the judgment by Hon. M. Mutua RM delivered on the 7th day of October, 2019 in Naivasha CMCC 686 of 2014 Gabriel Wahinya Munene vs Charles Wangicho Ndungu and Another where the trial court awarded Kshs. 1,000,000.00 as general damages and Kshs. 7,500.00 as special damages.
2. The Appellants were aggrieved by the foregoing awards and filed their Memorandum of Appeal on the 9th October, 2020 pursuant to an order of the Court granting leave to appeal out of time made on the 24th September, 2020 in Naivasha High Court Misc. Civil Application number 29 of 2020. The appeal is on the Trial Court's finding on quantum as the Appellants do not fault the trial court for finding that liability was to be apportioned in the ratio of 90:10% in favour of the Plaintiff.
3. The Appellants presented three grounds of appeal and urged the Court to set aside the award on quantum by the Learned Trial Magistrate and substitute the same with an assessment according to the law and comparable authorities for comparable injuries sustained.



4. At the hearing of the appeal, directions were taken that the parties canvass the appeal via way of written submissions.
5. This being the first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see: *Selle & another vs Associated Motor Boat Company Ltd & others* [1968] EA 123.

Background

6. By a Plaint dated the 10th day of November, 2014 the Respondent filed a suit against the Appellants seeking general damages, special damages of Kshs. 9,000.00, costs of the suit and interests. The claim was grounded on averments that the Respondent was a passenger in motor vehicle registration number KSN 926 Mazda Saloon along Nakuru-Nairobi Highway at weighbridge area when the motor vehicle registration number KBB 184P owned by the 2nd Appellant was so negligently driven and/or controlled by the 1st Appellant that he lost control and rammed into motor vehicle registration number KSN 926 causing a road traffic accident whereby the Respondent sustained serious injuries. Consequently, the Plaintiff suffered loss and pain. The particulars of negligence were as enumerated in paragraph 6 of the said plaint.
7. The Respondent as per paragraph 8 of the Plaint sustained the following injuries:
 - a) Cut wound and abrasion on the right forehead and bruises on the upper and lower lips.
 - b) Blunt injury to the right cheek with a broken right incisor tooth and extracted right 3rd molar tooth.
 - c) Fracture of distal end of the left radius bone.
 - d) Blunt injury on the pelvis
 - e) Blunt injury to the chest
 - f) Bruises on the left leg.
8. The Respondent filed a statement of Defence dated the 19th December, 2014 in which it denied the occurrence of the accident, negligence on its part and suffering of any injuries by the Appellant as a result of the aforementioned accident.

Evidence

9. The Respondent was PW1. He testified that the accident occurred on the 1st day of December, 2011 at around 5.30 pm at Gilgil. He was aboard motor vehicle registration number KSN 926 as a passenger. He was treated at St. Mary's Mission Hospital. He produced documents as PExhibit-2A-C. A receipt for cost of treatment of Kshs. 5000.00 was produced as PE-3, Police Abstract as PExhibit-4, Demand Letter "PExhibit-5A-C, Medical Report by Dr. Charles Kariuki as PExhibit-6. It was also the Respondent's testimony that the person he had travelled with died.
10. DW1 was the 2nd Appellant. He testified that he was a businessman based in Ruiru. He was not present at the scene of the accident but was called by a good Samaritan and informed his motor vehicle registration KBB 184P had been involved in an accident. His driver was not blamed for the accident as per the contents of the police abstract. He confirmed that the 1st Appellant was his employee.
11. The Appellants' case was closed following adjournments on multiple occasions.



Submissions

Appellant's submissions

12. The Appellants filed their submissions on the 4th day of February, 2022 in which they consolidated the three grounds of appeal and submitted that the amount of award for general damages was inordinately high and entirely an erroneous estimate and was not commensurate to the injuries sustained. The Appellants in listing the injuries sustained by the Respondent and intimating to court that there was an exaggeration made reference to a report by Dr. Maina Ruga's report of the 21st June, 2017 which only listed three injuries as follows:
 - i. Cut wound on the right side forehead and bruises on the face.
 - ii. Bruises on both legs.
 - iii. Mouth injury with pain on upper central incisor teeth
13. It was the Appellants' contention that the above injuries were soft tissue in nature and the learned trial magistrate would have treated them so. The Appellants urged the Court to set aside the award by the learned trial magistrate and substitute the same with Kshs. 200,000.00 and be subjected to liability at 90:10% in favour of the Respondent.

Respondent's submissions

14. The Respondent on the other hand equally filed its submissions on the 8th day of February, 2022 in which it urged the Honourable Court to uphold the decision of the Learned Trial Court and dismiss the Appeal with costs to the Respondent.

Analysis and Determination

15. Being the first appellate court, this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. This position was emphasized in the case *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999) in the following manner:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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.”
16. The issue for determination is whether the award of Kshs. 1,000,000.00 as general damages was inordinately high to warrant the interference by this Court having in mind that comparable injuries should attract comparable interests as was the position in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR.
17. I am further alive to the doctrine that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the learned trial magistrate which advantage an appeal court by its mode of delivery lacks. See *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR.



18. It is crucial to note that in order for the appellate court to interfere with the award of the trial court, there has to be sufficient grounds and principles as was held in Butt v Khan {1981} KLR 470 and Kitavi v Coastal Bottlers Ltd {1985} KLR 470) that:

“Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on his areas of specialization. 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.”

19. This Court is guided by the principles on interfering with judicial discretion as laid down in the case of Price and another v Hilder {1996} KLR 95 which laid down the following guidelines that:

“In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

20. Further, in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:

‘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.’

21. I have considered the rival submissions by parties, the evidence on record and the authorities cited by both counsel. I appreciate that injuries will never be fully comparable to other person’s injuries. What a court is to consider is that as far as possible comparable” to the other person’s injuries, and the after effects.



22. The Respondent was issued with a P3 Form and a Police Abstract both produced as P.Exhibit-4. The Respondent was examined by Dr. Charles K. Kariuki who prepared a report dated the 16th day of August, 2014 produced as P.Exhibit-6.
23. The Appellants did not call for the makers of those documents to produce them and neither did they put the Respondent to task with respect to the nature of injuries. The contents of the said documents thus stood unchallenged.
24. The aforementioned documents classified the Respondents injuries as grievous harm which would mean that they were not soft tissue injuries as submitted by the Appellants. Further, the medical report by Dr. Charles Kariuki in addition to noting that the nature of the injuries was grievous harm, went ahead to state that the said injuries would continue being aggravated due to the advanced age of the Respondent.
25. Additionally, Dr. C. Kariuki observed that:
- “ Healed scars on both legs, right forehead and both knees
There is apparent deformity on the left wrist with protruding distal radius bone.
Weakened grip of the left hand.”
26. The Appellants allude to a medical report by Dr. Maina Ruga who only listed three soft tissue injuries. The same was not produced at the trial as the Appellants only called one witness before the close of their case. The said witness never produced the said report relied on by the Appellants in their submissions. The Court is of the considered view that the said report does not form part of the record and the attempt by the Appellants to sneak it in at the point of submissions is a futile mission.
27. This Court associates itself with the position of the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & another* [2014] eKLR where it was stated:
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
28. In the case of *Geoffrey Kamuki & another v RKN (Minor suing through her late father and next friend ZKN)* [2020] eKLR, the Court made an award of Kshs. 450,000.00 for a minor who sustained the following injuries:
- i. Blunt trauma to the scalp, which was tender with bruises.
 - ii. Blunt trauma to the periorbital region, which was tender.
 - iii. Blunt trauma to the right eye, which was tender and could not see clearly.
 - iv. Blunt trauma to the chest, which was tender.
 - v. The right forehead was swollen and tender.
 - vi. She sustained a dislocation of the wrist joint.
 - vii. She sustained fractures of the right radius and ulna.



- viii. Blunt trauma to the right leg, which was tender.
29. In the case of *China Wu Yi Limited & another v Irene Leah Musau* [2022] eKLR the Court awarded Kshs. 800,000.00 for Respondent who had a cracked Upper left 3rd molar teeth, soft tissue injuries to the left upper limb, fractured left humerus bone, fractured pelvic bone and dislocation of the right hip joint.
30. In view of the foregoing, the Court is of the considered view that an award for general damages in the sum of Kshs.700, 000.00 would be commensurate to the injuries sustained by the Respondent.

Disposition

31. The upshot is that this Court finds that the Appeal is meritorious and give the following awards:
- (a) The award of Kshs. 1,000,000.00 for general damages is substituted with an award of Kshs. 700,000.00.
 - (b) The special damages of Kshs. 7,500.00 are not disturbed.
 - (c)
 - (i) Sub-Total -Kshs. 707,500.00
 - (ii) Less 10 contributory negligence of Ksh. 70,750/
 - (iii) Balance payable Ksh. 636,750.00
 - (d) The Appellants shall have costs of the Appeal.
 - (e) The Respondent shall have costs in the lower court based on the judgment sum awarded by this Court and interest at court rates from the date of the judgment in the lower court.
32. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 21ST DAY OF APRIL, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Ms. Korir h/b Mr. Arusei for the Appellants.

No appearance for Joshua Kiarie for the Respondents.

