



**Mutaaru v Nyangau (Civil Appeal 77 of 2021)
[2022] KEHC 9860 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 9860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 77 OF 2021
REA OUGO, J
MAY 31, 2022**

BETWEEN

MARY WANJIRU MUTAARU APPELLANT

AND

NELSON OTISO NYANGAU RESPONDENT

*(Being an appeal from the judgment delivered at Kisii Law Courts by Honourable
P.K. Mutai (SRM) on 9th June 2021 in Kisii Civil Suit No 269 of 2020)*

JUDGMENT

1. The appeal before the court challenges the award of damages by the trial court. The respondent was the plaintiff before the subordinate court while the appellant was the defendant.
2. The respondent's claim before the lower court was that the respondent on or about 24th January 2020 was lawfully riding motor cycle Reg. No. KMEW 292M along Ibeno-Nyabisabo road at Nyanturago Market when the appellant's driver/agent so negligently drove motor vehicle Reg. No. KCN 470L and thus hitting the motor cycle Reg. No. KMEW 292M from behind. As a consequence of the accident the respondent sustained the following injuries:
 - a) Fracture of the skull
 - b) Tender anterior chest wall
 - c) Fracture of the right fore-arm, right ulna/radius bones
 - d) Fracture of the left tibia/fibula
 - e) Tender neck



3. The appellant denied the claim by filing his statement of defence. However before the matter was heard by the trial court, the parties entered into consent in respect of liability in the ratio of 25:75 in favour of the respondent against the appellant. The only issue for determination before the trial court was on damages. After hearing the case, the trial magistrate awarded the respondent Kshs 500,000/- as general damages subject to liability, costs of the suit plus interest. It is this judgment that has occasioned the instant appeal. The appellant in his Memorandum of Appeal dated 8th July 2021 has challenged the judgment of the subordinate court on the following grounds:
1. That the award of general damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance.
 2. That the Learned Trial Magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.
 3. The Learned Trial Magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.
 4. That the Learned trial Magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination.
8. The appeal was canvassed by written submissions and both parties have filed their respective submissions. The appellant through the firm of O.M Otieno & Co. Advocates submitted that decisions with similar injuries as those sustained by the Respondent attract an award of Kshs 400,000/-, thus an award of Kshs 400,000/- would be sufficient and reasonable in the circumstances. They relied on the decision of *Gabriel Kariuki Kigathi & Another v Monica Wangui Wangechi* (2016) eKLR in which the court awarded general damages of Kshs 400,000/= where the Plaintiff had sustained fracture of the neck, bilateral rib fractures, bilateral lung contusion and injuries to both hands and legs. In the case of *David Kimathi Kaburu versus Dionisius Mburugu Itirai* (2017) eKLR the plaintiff sustained a fractured (sic) fractured midshaft femur, interochantheric fracture which injuries are more similar to those suffered by the Respondent herein.
9. On its part the respondent submitted that the injuries sustained by the respondent were very serious and the trial magistrate was lenient to have made an award of Kshs 500,000/-. He contends that the trial magistrate's decision was based on an old case, i.e. *Mark Ochieng v Stephen Kariga Dindingwa* MSA, HCCC No 813 of 1990. The respondent urged the court to use its discretion to substitute the finding of the trial magistrate with a higher award on damages.
10. In an appeal against assessment of damages, an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR thus:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it 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 damage.



11. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR where the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
12. The appellant challenged the nature of the injuries sustained by the respondent. According to the medical report by Dr. Philip Nyameri Abuga, the respondent had sustained the injuries as indicated in his plaint and he concluded that the injuries sustained were serious, but were in the process of healing. According to the medical report by J.A.S. Kumenda the respondent sustained fracture of the right distal ulna and fracture of the left tibia and fibula. He formed the opinion that the respondent had healed well without any disability. The two reports are in conflict to the extent of fractures sustained by the respondent. However, the initial treatment notes from Kisii Teaching and Referral Hospital give a clearer picture on the respondent’s injuries. The card indicates that the respondent suffered a fracture of the skull, fracture of the right ulna/radius bones (forearm) and a fracture of the left tibia/fibula. Therefore in my view, the respondent proved that he sustained soft tissue injuries as well as a fracture of the skull, fracture of the right ulna/radius bones (forearm) and a fracture of the left tibia/fibula.
13. I shall now turn to consider the issue of quantum. The injuries sustained by the plaintiff in *Gabriel Kariuki Kigathi & Another* case (supra) were less serious compared to those sustained by the respondent herein.
14. In *Martin Ireri Namu & another v Alicalinda Igoki Kiringa* [2019] eKLR the respondent therein sustained the following injuries: dislocation on the left shoulder and fractures to the right tibia fibula and left radius ulna and the court awarded her Kshs 800,000/-. The injuries sustained by the respondent in this case were serious injuries and find no reason to disturb the trial court’s award. Although the respondent urged the court to use its discretion and set aside the award for reasons that it was inordinately low, they neither filed an appeal against the trial magistrate’s decision nor a cross appeal and thus their prayer in their submissions is unmerited.
15. In conclusion therefore, I find that the appeal herein lacks merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MAY 2022.

R.E. OUGO

JUDGE

In the presence of:

Appellant Absent

Mr. Ombati For the Respondent

Aphline Court Assistant

