



Ngugi & another v SJ (Minor Suing through Mother and Next Friend MJT) (Civil Appeal 42 of 2020) [2022] KEHC 12045 (KLR) (17 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 42 OF 2020
TM MATHEKA, J
AUGUST 17, 2022**

BETWEEN

ZACHARY NGUGI 1ST APPELLANT

KENAFRIC BAKERY LIMITED 2ND APPELLANT

AND

SJ RESPONDENT

MINOR SUING THROUGH MOTHER AND NEXT FRIEND MJT

(Appeal arising from the Judgment and Decree of Hon. Faith Munyi delivered on 14th February 2020 Nakuru Chief Magistrate's Civil Case Number 417 of 2019)

JUDGMENT

1. On August 31, 2018, the plaintiff/respondent was travelling in motor vehicle registration number KCM 837B along Nakuru Ravine road, when, the driver the 1st defendant appellant on his own admission lost control of the said motor vehicle which entered the lane of the oncoming motor vehicle KCQ 233H leading to an unavoidable collision, as a result of which the plaintiff/respondent sustained injuries, loss and damage.
2. On November 20, 2021 the parties entered into a consent through their counsel, Mrs Oliech holding brief for Mr Onyinkwa for the appellants, Mr Juma for the respondent. The consent was to the effect that judgment was entered for the respondent against appellants on liability at 15%:85%.
3. The respondent's witness statement, list of documents all dated April 15, 2019 were admitted as evidence, together with Dr Otara's medical report. The plaintiff's mother then testified with respect to the treatment process the minor went through for the purposes of assisting the court in determining damages.



4. Her testimony was that the minor, SC was her daughter, aged 8 years old at the material time and following the road traffic accident she was admitted at Mediheal Hospital for one month. She had sustained a fracture of the humerus. She required skin grafting, and some flesh was taken from her right leg and fixed on the fractured hand. She underwent five operations, where a k-wire was fixed, and eventually removed. She incurred expenses, the bill was Kshs 794,000/= . She paid Kshs 50,000/= while NHIF paid Kshs 720,000/= . The child still experienced pain in the right arm and especially when she was writing.
5. The defence did not offer any evidence and parties through counsel filed submissions on the awardable damages.
6. Relying on *Deepak Pandit v Kennedy Otieno Obara & another* [2016] eKLR, the plaintiff sought general damages of Kshs 3,000,000/= from the subordinate court. The defendant/appellant sought Kshs 370,000/= to Kshs 400,000/= relying on *Said Abdulahi & another v Alice Wanjiru* [2016] eKLR, *Anderson Hunte Njuguna & 2 others v David Njibia Njoroge* [2018] eKLR, *Haree Construction Co Ltd v Regina Nduku Muli* [2016] eKLR, *Cleophas Shimanyua v Mohammed Salat* [2018] eKLR.
7. In her judgment delivered on February 14, 2020, the learned trial magistrate found from the plaintiff/respondent; special damages pleaded and proved of Kshs 7,550/= and general damages of Kshs 1,200,000/=, less 15% in total awarding Kshs 1,026,417/50.
8. It is against this that the defendant/appellants have brought this appeal. The grounds of the appeal are that; - The learned trial magistrate erred in law and fact in;
 - i. Awarding manifestly excessive and exaggerated general damages to the respondent of Kshs 1,200,000/=
 - ii. Failing to consider the appellants' submissions on quantum.
 - iii. Using the wrong principles in assessment of damages and thereafter arriving at the wrong decision in awarding damages that were against the weight of the evidence adduced.
9. Parties filed written submissions.
10. This appeal is against the award of general damages.
11. It is trite that assessment of damages is the discretion of the trial court. It is submitted for both the appellants and the respondent, relying on *Kemfro Africa Ltd T/A Meru Express Services Gathungo Kanini v A M Lubia & Olive Lubia* and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470 that an appeal court should only disturb an award of damages where the trial judge has taken into account an irrelevant factor or failed to take into account a relevant factor or the amount is so inordinately high or low that it must be a wholly erroneous estimate of damages.
12. This being a first appeal, the court is required to re-assess and reexamine the evidence and draw its own conclusions keeping in mind that it never saw nor heard the witness.
13. It is not in dispute that the plaintiff sustained the following injuries;
 - i. Fracture of the right humerus (gustilla (sic))
 - ii. Deep cut wound on the forehead leading to soft tissue injuries
 - iii. Deep cut wound on the right peri-orbital region leading to soft tissue injuries.
 - iv. Blunt injuries to the interior chest wall leading to soft tissue injuries.



- v. Degloving wound on the right shoulder joint.
 - vi. Soft tissue injuries to the right leg.
14. The discharge summary dated October 3, 2018 shows the diagnosis of Gustilo III A shoulder and extensive soft tissue injury. I note that the medical reports and pleadings renamed the injury as Gustilo IIIA. However, it is clearly indicated as Gustilo IIIA on the discharge summary. There being no explanation of what this entails I took a look at the Google i
- and found various descriptions. Turns out it is a classification of the fracture of the humerus depending on degree of injury. In this case it falls under the high energy injury wound more than 10 cm, extensive soft tissue injury and contamination, severe fracture among others. I noted from the evidence that this was the position. That the fracture was serious, there was debridement, she also suffered a degloving injury which required grafting. Evidently the plaintiff, who was 8 years old at the time of the accident sustained very serious injuries that required five (5) surgeries to deal with.
15. The medical report showed that injuries had healed. She had pain in the right hand, multiple scars on the face, the fracture was visible on x-ray. However, she suffered 10% permanent disability. The degree of injury was grievous harm. That she was treated for fractured humerus and facial soft tissue injuries, which healed with prominent scars. That there was no loss of joint function.
16. In *Said Abdalla*, the plaintiff sustained a fracture of the right humerus, the judge in dealing with the appeal described it as a single fracture of the humerus. In *Nduku Joseph*, it was fracture of the humerus and other soft tissue injuries.
17. In comparison, the respondent herein sustained a more serious fracture clarified as Gustilo III A, the child suffered pain and suffering from the injuries, and they are not comparable to those suffered by the plaintiffs in the authorities cited by the appellant.
18. The trial magistrate relied on *Deepak Pandit*. There the plaintiff sustained multiple fractures including the left humerus, with complications and requirements for future medical care where the plaintiff was awarded KShs 2,000,000/= general damages for those injuries.
19. The question to be answered here is whether the trial magistrate applied any wrong principles in arriving at her decision or whether the assessment was so high as to call for interference.
20. From the foregoing I have considered all the authorities cited by the parties and in particular by the appellant vis a vis the injuries sustained by the plaintiff respondent and I do not find any reason to interfere with the findings of the trial court.
21. The appeal is dismissed with costs.

SIGNED, DATED AND DELIVERED VIA EMAIL THIS 17TH DAY OF AUGUST, 2022.

Mumbua T Matheka

Judge

Court Assistant: Edna

For Appellant: Onyinkwa & Co Advocates

For Respondent: E M Juma & Ombui Advocates

ⁱ <https://www.orthobullets.com/trauma/1003/gustilo-classification>

