



Kisangau v Musee (Civil Appeal 3 of 2020)
[2022] KEHC 12942 (KLR) (21 September 2022) (Judgment)

Neutral citation: [2022] KEHC 12942 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 3 OF 2020
RK LIMO, J
SEPTEMBER 21, 2022

BETWEEN

MUSEMBI KISANGAU APPELLANT

AND

ERICK KILUNDA MUSEE RESPONDENT

(Being an appeal against the decree and judgement delivered on 24th day of January, 2020 by Hon. Z.J. Nyakundi, (SPM) in Mutomo, CMCC Suit No. 28 of 2017)

JUDGMENT

1. This appeal arose from the Judgement of hon Nyakundi in Mutomo Senior Principal Magistrate's Court Civil Suit No 28/17. In that case the appellant had sued the respondent due to a traffic accident involving the Appellant and respondent motor vehicle registration No KBK 484X. The appellant was a pedestrian walking along Kitui-Kibwezi Road and he blamed the respondent for negligence in the manner in which the appellant drove the motor vehicle and caused the accident where he suffered injuries. During the trial, the respondent tendered no evidence to contest the appellant claim on liability. The appellant pleaded that he suffered the following injuries from the accident.
 - i. Compound fracture of the right lower leg.
 - ii. A cut on the leg.The appellant pleaded for Kshs 300,000 for future medical expenses and special damages of Kshs 5,900.
2. The trial court assessed the evidence tendered and found the respondent 100% liable for the accident and awarded the appellant as follows;
 - i. General damages - 200,000



- ii. Special damages- 5,900
 - iii. Future Medical Costs- 300,000
 - Total (Kshs.) 505,900
3. The appellant was dissatisfied with the judgment and filed this appeal *vide* a memorandum of appeal dated February 7, 2020 raising the following grounds;
- i. The learned Magistrate erred in law and in fact by making a manifestly low award on general damages against the injuries sustained by the appellant.
 - ii. The learned Magistrate erred in law and in fact by considering and addressing irrelevant matters that were not before the court
 - iii. The learned Magistrate erred in law and in fact by reaching at a conclusion that is contrary to the evidence before him and the appellant submission
 - iv. In all the circumstances of the case, the findings of the learned Magistrate were characterized by misapplication of the applicable laws, case-laws and wrong exercise of discretion in awarding of general damages to the appellant.
4. In submissions dated March 16, 2022 and filed on March 21, 2022, the appellant faults the trial court's decision and submits that damages for his injuries should have been assessed at Kshs 3,000,000.
5. He submits that he suffered severe bodily injuries which included a compound fracture of the right tibia bone protruding around the mid-leg, a compound fracture of the fibula bone and a deep cut of approximately 10cm and that the court's award was neither comparable to the injuries or previous awards by other courts.
6. He submits that his monetary award should have been comparable to his injuries and he has cited the case of *Mutua Kaluku vs Muthini Kiluto* (2018) eKLR where the principle of comparable awards was cited by the court.
7. The appellant relied on the following cases;
- a. *Alex Wachira Njagua vs Gathuthi Tea Factory & Anor* (2010) eKLR; where the plaintiff was awarded general damages for pain and suffering at Kshs 3,000,000/-. The injuries sustained by the plaintiff included blunt injury of the head with a contusion, fracture of the left tibia, fracture of the right fibula, cut wound of the forehead, bruised elbow and bruised knee. The plaintiff was also left mentally ill and 100% incapacitated from the injuries he sustained.
 - b. *Zipporah Nangila vs Eldoret Express & 2 Others* (2016) eKLR where the court awarded general damages at Ksh 2,400,000 to the plaintiff who suffered bilateral leg injuries, right wrist injury, fracture dislocation of the right ankle, comminuted compound fracture of the distal and fibula and a fracture of the left distal and tibia and fibula. The plaintiff was also rendered 70% incapacitated and required assistance to perform daily activities as her legs and hands were left dysfunctional.
 - c. *Dorcas Wangithi Nderi vs Samuel Kiburu Mwaura & Anor* (2015) eKLR; where the court maintained an award of general damages of Kshs 2,000,000/- for the following injuries; multiple soft tissue injuries, blunt injury to the head, failure fracture to the radius /ulna (left), compound fracture to the right tibia/fibula, compound fracture to the left tibia/fibula. The



appellant in this case lost consciousness for two weeks following the accident and was admitted in hospital for 1 ½ months.

8. The respondent is opposed to this appeal through his submissions dated May 24, 2022 and filed on May 31, 2022.
9. The respondent asks the court to maintain the award of general damages granted by the trial court and further asks the court to only interfere with the award only if it finds that the same was inordinately high or low or based on wrong principles.
10. The respondent has quoted the case of *Simon Mutisya Kavii vs Simon Kigutu Mwangi* (2013) eKLR where the court upheld an award of general damages at Kshs 200,000/- awarded pursuant to the following injuries compound fracture of left tibia with severe friction burn on left thigh and leg.
11. He has also cited the case of *Isaac Mwenda Michemi vs Mutegi Murango* (2004) Eklr where the court awarded general damages at Kshs 100,000/- for the following injuries; wound on scalp, fracture on left tibia and fibula, cut wound on knee and bruised forearm.
12. This being a first appeal, the duty of the first appellant court was well stated in *Selle vs Associated Motor Boat Co* [1968] EA 123 where the Court of Appeal stated: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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 demeanor of a witness is inconsistent with the evidence in the case generally.”
13. This appeal as observed above is only on quantum. The appellant contends that the award given to him by the lower court was too low. An award of damages is a matter of discretion by the trial court. An appellate would not readily interfere with an exercise of trial court’s discretion unless it is shown that the trial court applied wrong principles or that the award is too excessive or too inordinately low.
14. That principle was restated in the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, where the Court of Appeal held;

“...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 versus 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, JA 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.”

15. Having set out the principles applicable in such circumstances where the appeal is on quantum, let me look again at the basis for the quantum awarded by the trial court. The quantum was based on the injuries pleaded and proved through medical evidence tendered.
16. A medical report dated June 24, 2016 by dr P N Mutuku was produced in court as part of the plaintiff's bundle of documents. The doctor prepared the report with reference to the P3 form dated March 11, 2016 as well as medical notes from Mutomo Hospital dated February 29, 2016 and it listed the appellant's injuries as follows;
 - i. Compound fracture of tibia bone protruding around mid-leg-right lower limb.
 - ii. Compound fracture of fibula bone protruding around mid-leg-right lower limb.
 - iii. Deep cut approximately 10 cm in length.
17. The report also indicted as follows with regards to the prognosis;

The fracture and would healed with a deformity which will require a corrective surgery which will cost approximately Kshs 300,000/- for refracture and metal implants (ORIF). The degree of injury was assessed as grievous harm.
18. The appellant argues that the award of Kshs 200,000/- as general damages was inordinately low with regards to the injuries he sustained. The trial court relied on three authorities in consideration of the award as follows;
 - a. *Channan Agricultural Contractors Ltd vs Fred Barasa Mutayi* [2013] eKLR Where the High Court reviewed downwards an award of Kshs 250,000 to Kshs 150,000 for “moderate soft tissue injuries that were expected to heal in eight months' time.” The injuries sustained were blunt injury to the chest, cut wounds to the head and left leg.
 - b. *Patrick Mwiti & Anor vs Mugambi Nkunja* (2013) eKLR Where the court maintained an award of Kshs 170,000/- injuries that were assessed as being soft tissue injuries. injuries were listed as follows; swollen scalp, right side, tender, swollen and bruised left shoulder, bruised right knee, tender neck, tender back, X-rays showed no fractures, complaints of on and off headaches and lower back pain.
 - c. *Moses Ogutu Omwono vs Shiloah Investment Ltd* (2011) eKLR Where the court enhanced an award of Kshs 40,000 to Kshs 60,000 for soft tissue injuries to the face, chest and shoulder which were indicated to have been improving.”
 - d. *Menengai Oil Refineries Ltd vs Jeremiah Mwaura Wandeto* (2012) eKLR Where the court awarded Kshs 60,000 for injuries it considered to be minor soft tissue injuries.”
19. The injuries supplied by the appellant were not soft tissue injuries because of the fracture suffered. The fracture healed but with a deformity that, going by the medical report tendered, required corrective surgery which he estimated would cost approximately Kshs 300,000 and hence the award on future medical expenses. The trial court appears to have proceeded from the opinion that the fractures had healed but failed to consider the possibility of future complication which in my view is a relevant factor. The comparative decisions in respect to the injuries suffered by the appellant are as follows;



- a. *Daneva Heavy Trucks & another versus Christpine Otieno* [2022] eKLR where the court substituted an award of Kshs 1,000,000/- with an award of Kshs 800,000/- appellant sustained the following injuries Blunt trauma to the chest, blunt trauma to the back, blunt trauma to the spinal column, injury to the left leg and fracture of the left tibia and fibula.”
 - b. *Godfrey Wamalwa Wamba & another vs Kyalo Wambua* [2018] eKLR.

Where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip, he was in hospital for three weeks, he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court awarded him general damages at Kshs 700, 000/- which the appellate court upheld.”
 - c. *David Mutembei versus Maurice Ochieng Odoyo* [2019] eKLR;

the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs 1, 600, 000/- had the same reduced on appeal to Kshs.800, 000.00
 - d. *Aloise Mwangi Kabari versus Martin Muiya & Another* [2020] eKLR;

where the court awarded Kshs 500,000/- for the following injuries, compound fracture of the right tibia and fibula, severe soft tissue injuries on the face and soft tissue injury on the left shoulder joint.
20. The above decisions show that the award made by the lower court was a bit on the lower side. In *Gicheru versus Morton & Another* [2005]2 eKLR, the court of Appeal made the following observations which I consider relevant or guiding in this matter;
- “In order to justify reversing the trial judge on the question of the amount of damages, it was necessary that the Court of Appeal 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, the judgement of the court an entirely erroneous estimate of the damage to which the appellant is entitled.”
21. This court finds that the award on quantum by the trial court was too low in the light of the serious injury suffered by the appellant. I am persuaded to interfere with the discretion by the trial court for the interest of justice and in line with the above cited decision. This court finds merit in this appeal for that reason and sets aside the award of this Kshs 200,000 general damages and in its place the award is enhanced. The appellant in line with the comparative decisions I have cited above, is hereby awarded Kshs 600,000 in general damages. The lower court’s awards on special damages and future medical expenses are upheld. The appellant will have half costs of this appeal. Interests shall be from date of this judgement.

DATED, SIGNED AND DELIVERED AT KITUI THIS 21ST DAY OF SEPTEMBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

