



**Otieno v Mathias (Civil Appeal E014 of 2022)
[2022] KEHC 14649 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E014 OF 2022
RE ABURILI, J
OCTOBER 31, 2022**

BETWEEN

CAROLINE ATIENO OTIENO APPELLANT

AND

JOBITA ODUOR MATHIAS RESPONDENT

*(An appeal arising out of the judgement and decree of the Honourable
S.W. Mathenge in the Principal Magistrate's Court at Bondo
delivered on the 20th April 2022 in Bondo PMCC No. 84 of 2019)*

JUDGMENT

Introduction

1. This appeal is similar in facts to Civil Appeal E015 of 2022 with the difference being that it involves the estate of a deceased child of the appellant herein wherein this court has determined the question of liability as between the respondent herein and the appellant at 100% against the respondent in favour of the appellants therein. The appellant in this appeal is also the second appellant in Civil Appeal No E015 of 2022. I shall therefore proceed to determine the appropriate damages awardable to the appellant having found in Siaya High Court Civil Appeal E015 of 2022 that the respondent was 100% to blame for the accident that occurred on the April 29, 2018 along Aram – Gobei road where the appellant was walking on the right side of the road when she was hit by motor vehicle Registration No KCA 601K owned by the respondent.
2. The principles which guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd v Musingi Mutia* [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge, which of course has to be exercised judicially and with regard to the



general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

3. The appellant pleaded that as a result of the accident, she sustained the following injuries:

- i. Severe head fracture
- ii. Fracture of the right ulna bone
- iii. Swelling and cut wound on the head with contusion
- iv. Bruises on the cheeks and ears
- v. Backache
- vi. Chest tenderness
- vii. Tenderness and bruised elbow joint
- viii. Tenderness and bruised knee joints

4. The appellant claimed for general damages as well as special damages amounting to Kshs 20,235. In support of her claim, the appellant produced a discharge summary from Jaramogi Oginga Odinga Teaching & Referral Hospital – Kisumu that save for the severe head fracture, noted that the appellant sustained all the pleaded injuries and also that she suffered non-haemorrhagic contusions of the left temporal lobe of the brain. The same was the conclusion of Dr Otieno W who carried out a CT Scan of the appellant’s brain as contained in the report dated 1/5/2018 produced in support of the appellant’s claim and at page 19 of the record of appeal.



5. The respondent did not file any submissions in this appeal.
6. In her judgement, the trial magistrate stated that had the appellant proved her case, she would have awarded her Kshs 450,000 general damages. She relied on the decision in *Phillip Musyoka Mutua v Leonard Kyalo Mutisya* [2018]eKLR.
7. I note from the medical notes produced as exhibits that the appellant sustained severe head injuries-contusions that led to her losing consciousness. She was admitted in hospital from April 29, 2018 to May 4, 2018 undergoing treatment and continued with outpatient treatment thereafter, from the documents produced as exhibits. She had fracture of the right ulna bone and the contusions in the brain, all the other injuries sustained by the appellant are all soft tissue injuries.
8. It is trite that in assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are usually similar in terms of the nature and extent of the injuries sustained. The Court of Appeal in *Stanley Maore v Geoffrey Mwenda* [2004] eKLR stated as follows:

“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.”
9. In *Joseph Njuguna Gachie v Jacinta Kavuu Kyengo* [2019] eKLR Odunga J reduced to Kshs 600,000/ = the general damages which the trial court had assessed at Kshs 1,000,000. The plaintiff had suffered the following injuries;
 - (a) Blunt temporal injury with swelling;
 - (b) Facial bruises;
 - (c) Blunt injury on the left forearm;
 - (d) Comminuted fracture of left radius and dislocated left ulna joint.
10. In the circumstances of this case, the appellant sustained soft tissue injuries but with more serious injuries involving the fracture of the right ulna bone and contusions in the brain. Her injuries in my view compare well with the injuries sustained by the plaintiff in the *Joseph Njuguna Gachie(supra)* case which is the later case as compared to the case relied on by the trial court, which is an earlier case in time. In my view, the trial magistrate made an award that was inordinately low compared to similar awards where similar injuries were suffered. For the above reasons, I hereby set aside the award of Kshs 450,000 and substitute it with an award of Kshs 700,000 general damages for pain, suffering and loss of amenities. Liability is 100% against the respondent.
11. On special damages, it is trite that a court only awards that which is proven. In this case, the appellant pleaded special damages of Kshs 20,235 and produced receipts to prove the same. This sum is hereby allowed as pleaded and proved.
12. I thus find this appeal merited. I allow it and make the following final orders:

Liability 100% against the respondent

General damages – Kshs 700,000

Special Damages – Kshs 20,235



Total..... Kshs 720,235

13. The appellant shall also have interest on general damages from the date of judgment in the lower court until payment in full. The interest on special damages shall be calculated from the date of filing suit until payment in full.
14. The appellant shall further have costs of the suit in the lower court and costs of this appeal assessed at Kshs 40,000 as this appeal has been fast-tracked by the court.
15. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF OCTOBER, 2022.

R.E. ABURILI

JUDGE

