



REPUBLIC OF KENYA



KENYA LAW
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**Gitonga v Wanjiru (Civil Appeal 122 of 2020)
[2022] KEHC 15721 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 122 OF 2020
RB NGETICH, J
NOVEMBER 24, 2022**

BETWEEN

PETER MICHAEL NDUNGU GITONGA APPELLANT

AND

DEDAN MUNGE WANJIRU RESPONDENT

*(Being an appeal from the judgment and decree of the Hon C. A. Otieno Senior
Principal Magistrate at Ruiru Law Courts delivered on 30th September 2020)*

JUDGMENT

1. This appeal arises from suit filed by appellant/plaintiff through plaint dated October 22, 2019 seeking general and special damages for the injuries he sustained while traveling as a passenger in the respondent's motor vehicle registration number KCF 252C on December 23, 2018 along Kamiti Road.
2. After the hearing, the trial court awarded the appellant general damages of Kshs 500,000/= and special damages of Kshs 170,772/=.
3. The appellant being aggrieved by the judgment of the trial court filed the memorandum of appeal citing five (5) grounds as follows;
 - a. That the learned magistrate erred in law and fact in finding that the plaintiff/appellant was entitled to general damages of Kshs 500,000/= that was manifestly too low given that the injuries suffered by the plaintiff/appellant.
 - b. That the learned magistrate's award of the general damages was so inordinately low as to be a wholly erroneous estimate of general damages and was a miscarriage of justice.
 - c. That the learned magistrate erred in fact and law in failing to consider the plaintiff's submissions on quantum and the authorities therein.



- d. That the learned trial magistrate erred in law and fact in considering an authority in which the plaintiff therein had suffered less severe injuries than the plaintiff/appellant herein.
- e. That the learned magistrate erred in fact and law in failing to consider conventional awards for general damages in cases of similar injuries.

It is proposed to ask the court for the following orders that

- a. This appeal is allowed with costs.
 - b. The judgment of the honorable trial court in the award of general damages is set aside.
 - c. The honorable court be pleased to award the plaintiff/appellant quantum of general damages commensurate with the injuries sustained.
4. Directions were issued on September 21, 2021 for parties to canvass the appeal through written submissions. Both parties complied.

Appellant's Submissions

5. Counsel for the appellant filed submissions on October 13, 2021. He submitted that the trial court erred in declining to grant the appellant future medical expenses despite the life-threatening injuries sustained and pointed out that medical report by Dr Wandugu recommended the removal of the implant at an estimated cost of Kshs 500,000/=. He relied on the case of Mary Maina v Joseph Maini HCCA No 261/2017 Makueni where the high court in upholding the award of future medical expenses held that:-

“this court is a layman in matters which are medical and is faced with two conflicting opinions on whether the Respondent is entitled to future medical expenses of Kshs 300,000/= for removal of metal implant or whether the implant should not be removed. Now, in the light of the standard of proof in civil cases and the fact that the existence of the metal implant is not in dispute, the probability, as is common in similar cases, is that the metal implant will be removed or will require some sort of maintenance.”

6. Counsel urged this court to find the appellant deserving of future medical expenses as he has proved the same on a balance of probability.
7. Counsel further pointed out that the failure of documentary evidence on his future earnings cannot hinder the court from awarding the appellant future earnings as the appellant has proved to the court that before the accident, he engaged in farming activities that he can hardly perform.
8. Counsel submitted that the award of Kshs 500,000/= as general damages was inordinately too low considering the injuries sustained by the appellant; that an award of Kshs 500, 000/= is conventionally awarded by courts to a party who has suffered a single fracture.
9. The appellant's counsel submitted that in his evidence, the appellant proved the injuries sustained as the trauma of the left leg, fracture of the neck of femur and fracture of the ankle joint and at the time of the injury, he indicated that he had not properly healed and urged the court to award general damages of Kshs 3,000,000/= and cited cases hereunder: -
 - a. Jeremiah Watab Barasa v Director General NYS & others [2017] eKLR where the court awarded the party Kshs 4,000,000/= for similar injuries as the plaintiff.



- b. *Peace Kemuma Nyangera v Michael Thuo & anor Ltd* [2014] eKLR where the plaintiff had suffered less severe injuries compared to plaintiff herein and the court granted general and special damages of Kshs 2,500,000/=
 - c. *Michael Maina Gitonga v Serah Njuguna* [2012] eKLR where the court awarded the plaintiff Kshs 1,500,000/= for slightly less severe injuries than the instant case.
10. Counsel for the appellant urged this court to be guided by the fact that time has passed since the above cases were determined.

Respondent's Submissions

11. Counsel for the respondent filed submissions on October 27, 2021. He submitted that this being the first appellate court, it is bound to evaluate the evidence of the trial court and make a just determination.
12. Counsel further submitted that the trial court did not err in relying on the authorities provided by the parties and the award of general damages is reasonable and should not be disturbed and added that authorities relied on by the appellant's victims sustained severe injuries than in the present case.
13. Counsel further submitted that the appellant failed to appeal the decision of the trial court on future medical expenses in the memorandum of appeal and thus the appellant is bound by his pleadings and further, the decision of the trial court on the loss of earnings was correctly applied as the appellant failed to prove loss of earnings and cited the case of *Milka Kemuma Kimanga v Peter Gabi Nyandisi* [2019] eKLR where the court upheld as follows: -

“loss of earning capacity is awarded for real assessable loss proved by evidence.
... the respondent did not qualify for the award as he did not adduce evidence of real assessable loss.”
14. Counsel submitted that the claim for future medical expenses was not provided for by the medical reports adduced by the appellant as evidence and the claim for future medical expenses is therefore wanting in proof. Counsel urged the court to uphold the trial court's judgment.

Analysis and Determination

15. This being the first appeal, this court is required to re-evaluate the facts afresh and come to its independent findings and conclusions. This position was stated in the case of *Selle v Associated Motor Boat Co & others* [1968] EA 123 where it was stated as follows: -

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its 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, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 EACA 270) 45”.



16. In view of the above, I have perused and considered pleadings and proceedings before the trial court and the submissions by parties herein. I note that liability is not disputed. I also note that even though the appellant submitted on future medical expenses and loss of earnings, the appeal is on general damages. I will therefore limit myself to the issue appealed against which is award under general damages. The appellant appealed against award of Kshs 500,000/= as general damages on ground that it is manifestly too low considering the injuries suffered by the appellant.
17. I do agree with counsel for the appellant that comparable injuries ought to be compensated by comparable awards and the primary purpose of awarding the general damages is not to enrich the victim but to put him in the position where he could have been if not for the accident.
18. In the case of *Asal v Muge and another* [2001] KLR 202 the court stated that assessment of damages is essentially an exercise of discretion and the grounds on which an appellate court will interfere with how a trial court assessed damages relate to issues of an error of principle.
19. Counsel for the appellant argued that the trial court failed to consider the authorities it had submitted. Record shows that the appellant sustained trauma of the left leg, fracture of the neck and femur and fracture of the ankle joint. The injuries were confirmed by a medical report produced in court. Percentage of permanent incapacity was assessed at 65%.
20. In the authorities cited by the appellant, the court awarded damages ranging from Kshs 2,000,000/= to Kshs 4,000,000/=.
21. I however note that injuries sustained by victims in authorities cited by the appellant are more severe than injuries sustained by the appellant. I note that the award was made in the year 2017 and considering the period when the award was made and inflation, I am of the view that the award was inordinately low and will interfere by awarding Kshs 1,500,000/= as general damages.
22. From the foregoing I allow the appeal and set aside award under general damages.
23. Final orders: -
 1. General damages assessed at Kshs 1,500,000/=.
 2. Costs of the appeal to the appellant.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 24TH DAY OF NOVEMBER, 2022.

RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua/Martin – Court Assistant

Ms. Kimotho holding brief for Mr Muhia for appellant

