



**Kihara & another v Namaswa (Civil Appeal 34 of 2018)
[2022] KEHC 15613 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 34 OF 2018
RM MWONGO, J
NOVEMBER 17, 2022**

BETWEEN

RUTH WAIRIMU KIHARA 1ST APPELLANT

KIHARA RAGAE 2ND APPELLANT

AND

RUKIA KHAKASA NAMASWA RESPONDENT

(An appeal against the judgment of Hon. E. K. Nyutu in PMCC No. 151 of 2015 at Engineer)

JUDGMENT

Background

1. This appeal is one of a series of five appeals emanating from cases in the lower court (CMCC case Nos 150, 151, 152, 153 and 165 of 2015). The claim in the lower court arose from a road traffic accident that occurred on August 12, 2015 along the Nairobi-Naivasha road at Kariko area at around 8.00am.
2. The plaintiff/respondent in the case that relates to this appeal (CMCC No 151 of 2015) was a lawful passenger in motor vehicle GKB 367E Toyota Land Cruiser, when the defendants' vehicle Reg No KBZ 799Z Isuzu Canter, was driven so negligently and recklessly by their driver, that he caused it to collide with the said GKB 367E. This resulted in the plaintiff sustaining serious injury, loss and damage.
3. The driver and other passengers in vehicle Reg No GKB 367E were: Sammy Kiprotich Chebon, Chief Inspector Victoria Mutuku; Sgt Sarah Situma; PC and Wilson Ndolo Mwangangi, who, having been injured, also sued. The suits in the series were CMCC case Nos 151, 152, 153 and 165 of 2015. It was indicated that CMCC No 150/2015 was the lead file. Mr Khayega was for all the plaintiffs and Mr Ombui was for the defendants. The trial magistrate rendered individual judgments on each file rather than formally consolidating the suits, but liability was determined in CMCC No 150/2015.



4. At the hearing, the plaintiffs in case Nos 150; 151; 152, 153 and 165 tendered their evidence. It was agreed that the evidence of PC Meshack Ngugi and the driver Sammy Kiprotich Chebon would apply to all the suits. Dr WM Wokabi filed a medical report in respect of each plaintiff, which was produced as an exhibit by the respective plaintiffs in their testimony without objection. The defendants closed their cases without tendering any evidence.
5. It was agreed that liability be dealt with in CMCC No 150/2015. On appeal the same arrangement pertained. Thus, in the appeal therefrom, HCCA No 35 of 2018, the question of liability has been discussed in great detail and dispensed with. In the result this court found the driver and the appellants 100% liable for the accident. In the absence of evidence. no liability could be apportioned to the respondent.
6. Following the hearing, the trial court made an award of damages in the sum of general damages, Kshs 1,500,000/- special damages of Kshs 30,457/- future medical expenses of Kshs 120,000/- and costs of the suit and interest.
7. The award was for the following injuries specified in Dr W.M Wokabi's report:
 - a. Blunt injuries to the right shoulder and right side of chest.
 - b. Fracture of the distal end of the left radius near the wrist joint
 - c. Fracture of the lower third of the left fibula.
 - d. Fracture of the medial tibial melleolus.
 - e. Dislocation of the lower tibia fibula joint.

The Appeal

8. This appeal challenges the quantum of damages awarded as being disproportionately high.
9. The grounds of appeal are that:
 1. The learned trial magistrate erred in law and in fact in finding the appellant liable contrary to the evidence on record.
 2. The learned trial magistrate erred in making a finding and arriving at an award damages which is inordinately high as to represent an erroneous estimate of the damages payable.
 3. The learned trial magistrate erred in applying wrong principles and failing to take into account material facts arriving at an erroneous award.
 4. The learned trial magistrate erred in law and in disregarding the appellant's submissions and on all points of facts and law in as far as the award of damages is concerned.
 5. The learned trial magistrate erred in law and in fact in awarding Kshs 1,500,000/- for general damages, special damages of Kshs 30,457/- which are excessive and unrealistic in the circumstances against injuries allegedly sustained.
10. Parties filed written submissions as directed but did not highlight them.



11. The applicable principles for determination of this matter as a first appeal are set out in the case of *Peters v Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.....”

12. The court's duty is further amplified in *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123, pursuant to which the court is essentially required to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not hear or see the witnesses who testified. If the court comes to different conclusions, it must state them and consider whether the trial court relied on wrong principles or applied principles that were inappropriate.

13. Neither the evidence of the plaintiff as to her injuries, nor that of Dr Wokabi was seriously contested. In their brief submissions, the appellants assert that the awards under each head were inordinately and manifestly high. Counsel cited *Tayab v Kinany* (1983) to the effect that comparable injuries should be compensated by comparable awards.

14. Further, the appellants submitted on and relied on the following authorities:

- *Mwavita Jonathan v Silvia Onunga* [2017 eKLR where Kshs 400,000/- was awarded for left hip comminuted intertrochantric fracture, blunt chest injury, dislocated right kneejoint, sprains at the cervical spine of the neck, and lumbar sacral spine of the back, and deep wound on the lower left leg;

- *Morris Miriti v Nabashon Muriuki & Anor* [2018]eKLR where the High Court in Meru awarded Kshs 300,000/- for tender chest on the anterior and posterior; multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lug contusionand fracture of the right scapula.

15. Counsel for the appellants finally argues that the special damages awarded were not deserved as only those that were proved should be payable.

16. The question is whether the court will interfere with the findings of fact or the discretion of the trial court. The Court of Appeal in *Ephantus Mwangi and another v Duncan Mwangi Wambugu* (1982) – 88) IKAR 278 stated as follows:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”

17. As earlier noted, the point of contention in this appeal is the quantum of damages awarded in the lower court, which is viewed as inordinately high by appellants. The court, in determining the matter will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987)KLR 30 where it was held that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.”

The same position is found in *Butt v Khan* (1981)KLR 349; *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; and *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu civil appeal No 284 of 2001 [2004]eKLR.

18. In effect, this court would not be justified in substituting an award of its own for that in the court below simply because it would have arrived at a different figure.

Quantum Of Damages

19. The evidence of PW1 the respondent herein at the lower court, was that she sustained multiple fracture of left ankle. Her hand got fractured, also right shoulder which was dislocated. Soft tissue injuries on her chest. She was in pain all over my body. She stated visits clinic at Elda Ma Ravine District Hospital. She receives Physiotherapy at her left hand and left leg which has 2 metals implants,1 key wire and screws. At every visit she pays Kshs 150/= for physiotherapy.
20. She testified that the accident had really affected her life; that she had been wearing slippers even at her work, which really affected her. She is only stationed in the office and depends on other people for her daily activities.
21. After the accident, she was taken to Kijabe Mission Hospital where she was given first aid and later transferred to Nairobi West Hospital. All documents contained in the list of documents dated November 16, 2015, apart from document No 9 police Abstract, marked as MF 1 “9” were produced as plaintiff exhibits 1-12. She prayed for special damages of Kshs 27 807,00/=. She stated that he accident was reported at Magumu Sub-base According police abstract, the driver of the canter KBZ 799Z Isuzu Canter was blamed and charged, she prayed for damages and costs.
22. On the issue of quantum the court relied on the medical report by Dr W.M Wokabi who examined the plaintiff on November 16, 2015 and reported on her injuries.
23. The injuries are not disputed. The trial court took into consideration the doctor’s opinion; and noted the fact that the plaintiff proposed general damages of 2,500,000/- relying on the decisions in *Michael Njagi Karimi v Gideon Ndungu Nguribu & another* Nairobi HCCC 889 of 2004 and *James Gatbirwa Ngungi v Multiple Hauliers (EA) Ltd & another* Nairobi HCCC 658 of 2009.
24. The trial court also noted that the defendants proposed an award of Kshs 300,000 general damages in the lower court and relied on the case of *Ruth Awuor v Kenya Bus Services* [2004] eKLR.
25. The trial court awarded general damages of Kshs 1,500,000/- having considered the parties’ submissions. In so doing, it relied on the following cases:
- Margaret Aoko Diero v African Line Transport Company Limited & another* (2004) where the plaintiff sustained dislocation of the right ankle with fractures of Malleoli of both the tibia and fibula with a 5”x 4” cut lacerated wound on medial side. She was awarded Kshs 1,250,000 general damages and Kshs 250,000 for loss of earning capacity.
 - Samuel Mwangi Kamau v Joseph M. Kimemia & another* HCCC No 192 of 2001 where the plaintiff sustained depressed fracture of the skull (on the right temporal region), fracture of the right tibia and fibula. He was awarded Kshs 1,000,000



26. In their submissions of the appellants concentrated on the question of liability, which is addressed as agreed by the parties in appeal No 35, and need not be repeated here.
27. As regards general damages the appellants referred to *Mwavita Jonathan v Silivia Onunga* HCCA No 17 of 2017 [2017] eKLR where the claimant sustained a left hip comminuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar- sacral spine of the back and deep wound on the left lower leg which cause lot of blood. He was awarded Kshs 400,000/- In 2017.
28. The appellants also referred to *Morris Miriti v Nabashon Muriuki and another* Mru HCCA No 43 of [2018] eKLR where the plaintiff sustained a tender chest on the anterior and posterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula. The court affirmed an award of Kshs 300,000/-.
29. The court awarded future medical expenses of Kshs 120,000 as proved by the plaintiff.
30. I have carefully considered the evidence and documents availed in this matter together with the parties' representations and authorities. It is clear that the injuries in the cases cited by the appellant are less severe than those suffered by the respondent. The respondent had three fractures and a dislocation, not to mention other injuries to the shoulders and chest. the injuries at the wrist and lower tibia fibula were at joints. which can tend to be complicated because of the constant movement necessary in joints , which is what they are designed for..
31. In my view, the cases cited by the respondent were more in line with the respondent's injuries, They were: *Gideon Ndungu Ngubiru & Another v Michael Njagi Karimi* Nrb CACA No 294 of 2016 where the High Court awarded Kshs 2,000,000/-J, and *James Gathuri Ngungi v Multiple Hauliers (EA)Ltd & Anor* [2015]eKLR where Kshs 1,500,000/- was awarded. In each of these the plaintiff had four fractures plus other injuries.
32. I therefore see no basis for finding that in appreciating the injuries and assessing the quantum of damages awarded, the trial court took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.
33. In the result I see no basis laid out by the appellant for interfering with the trial court's decision on general damages.
34. As for future medical expenses, the appellants made no specific claim in their submissions that the same was inordinately high. In any event, the trial court made an award of 120,000/- under this head on the basis that the said expense was pleaded and supported by Dr Wokabi's unchallenged medical report where he said:

“...residual permanent disability will settle at 18% (eighteen percent)

The metal implants she (plaintiff) has will require to be removed later at a cost of sh 120,000/- (one hundred and twenty thousand shillings)”
35. Accordingly, there is no basis in the evidence for this figure to be impugned. I therefore uphold the award of this figure.
36. With regard to the award of special damages, these were proved by receipts of the expenses which the respondent incurred as exhibited by her. I would not disturb the award of special damages.



37. In the result, there is no basis to interfere with the trial court's judgment, which is hereby upheld.
38. The appeal is dismissed with costs.
39. Orders accordingly.

DATED AT KERUGOYA THIS 17TH DAY OF NOVEMBER, 2022.

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R. MWONGO

JUDGE

In the presence of:

1. Mr. Ombui for the Appellants
2. Mr. Khayega for the Respondent
- 3. Quinter Ogutu Court Assistant**

