



REPUBLIC OF KENYA



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Kihara & another v Situma (Civil Appeal 36 of 2018)
[2022] KEHC 15666 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15666 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 36 OF 2018
RM MWONGO, J
NOVEMBER 17, 2022

BETWEEN

RUTH WAIRIMU KIHARA 1ST APPELLANT

KIHARA RAGAE 2ND APPELLANT

AND

SARAH PERUCE OLISA SITUMA RESPONDENT

(An appeal against the judgment of Hon. E. K. Nyutu in PMCC No. 152 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 152 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; Rukia Khakasa Namaswa 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, by consent of the parties, determined in CMCC No150/2015.



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 as follows: general damages, Kshs 2,000,000/- special damages of Kshs 16,564/- and costs of the suit and interest.
7. The award was for the following injuries specified in Dr W.M Wokabi's report who examined the plaintiff on September 21, 2015:
 - i. Fractures of the superior and inferior pubic ramii on the left side.
 - ii. Fracture of the 3rd lumbar vertebrae.
 - iii. Blunt injuries on the left leg.The doctor opined that the injuries will rehabilitate reasonably but with residual pains that will persist for indefinite period of time.
8. I have seen at pages 91-92 of the record of appeal a medical report by Dr M S Malik, addressed to E M Juma & Ombui Advocates for the appellant. That report however did not feature as an exhibit in the proceedings in the lower court and I shall ignore the said document

The Appeal

9. This appeal challenges the quantum of damages awarded as being disproportionately high, and seeks that the finding of the trial magistrate on quantum be set aside or reviewed.
10. 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 2,000,000/= for general, special damages of Kshs 16,564 which are excessive and unrealistic in the circumstances against injuries allegedly sustained.
11. Parties filed written submissions as directed but did not highlight them.



12. 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.....”

13. 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.

14. Neither the evidence of the plaintiff as to her injuries, nor that of Dr Wokabi was seriously contested. In their submissions, the appellants assert that the awards under each head were inordinately and manifestly high.

15. In the trial court the plaintiff proposed an award of Kshs 1,500,000 for general damages and relied on these cases: *Gilbert Nicholas Otieno v Oil Crop Development Co Ltd & Anor* Nairobi HCCC 1224 of 1999 and *Peace Kemuma Nyangera v Michael Thuo 7 Anor* Nairobi HCCC 209 of 2013

16. The defendant on the other hand proposed an award of Kshs 250, 000 and relied on the case of *Hassan Noor Mahmoud v Tae Youn Ann* (2004) eKLR

17. In making its award the trial court was guided by the following decisions:

- *Peace Kemuma Nyangera v Michael Thuo & Another* civil suit No 209 of 2013 [2014] eKLR where the plaintiff sustained a fracture of the sacrum bone (transforaminal fracture), fracture of the right superior pubic ramus of the pubic bone,, fracture of the right ischium/inferior pubic ramus of the pubic bone, haematoma on both thigh and lumbo-sacral hematoma.

- *Florence Hare Mkaba v Pwani Tawakal Mini Coach & another*, civil suit 85 of 2010 (2012) there, the plaintiff suffered:

- a) Fracture of the sacrum bone – lowest back bone spine
- b) Fracture of the right superior pubic ramus of the pubic bone – right hip bone
- c) Fracture of the right ischium bone part of the pelvis – lower part as one sits down
- d) Haematoma on both thighs
- e) Haematoma in the lumbar - sacral – lower part of spine between the 2 buttocks.

According to the doctor, the plaintiff had been treated and operated on at Mater hospital, X-rays taken. She had three operations which involved:



Evacuation of haematoma Open reduction and internal fixation on the right side of the pelvis Ilio sacral screw fixation of the sacrum she was given anti coagulants because she was at risk of getting blood clots – thrombosis. She was admitted in hospital for three weeks.

At the time of examining the plaintiff, she had deformities which included a limping gait, tender right hip and when bend in the back which was painful. She had various scars confirming areas of surgery, one measuring 22 cm on the right inguinal region, 18 cm on the left side lower back and another scar on the lower back, scars on both hips measuring 3 cm each.

The doctor concluded that the plaintiff had sustained multiple fractures and several haematoma. The injuries caused a lot of physical, psychological pain, blood loss and suffering. He classified the injuries as grievous harm and consistent with being ran over by a motor vehicle. She remains with large scars of cosmetic significance.

She is consequently at high risk of having difficulties during pregnancy and child birth. She already had contracted arthritis of the right hip.

18. In *Florence Hare Mkaba's case*, Aburili J awarded general damages of Kshs 2,400,000.
19. At the hearing of the trial in this case, the respondent testified that she had not healed as she was in crutches and had a corset for her back and had residual pain and was unable to work.
20. The only authority cited by the appellants on appeal was that of *Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & Anor* [2010] eKLR which I have carefully perused. There the High Court in Embu awarded Kshs 300,000/- to a plaintiff who sustained the following injuries:
 - a. Fracture of the right superior and inferior pubic rami of the pelvis
 - b. central dislocation of the hip
 - c. Cuts on the right leg.

In that case, permanent disability was assessed to be 5%. The accident occurred in 2006 and the case was determined on June 7, 2010, eight years before the present case was determined in the lower court.

21. The court in *Jane Muthoni's case* stated that the plaintiff:

“... sustained the following injuries:

- (a) Cut 6 cm long on the right side on the head (temporal region).
- (b) Bruises behind the right ear.
- (c) huge bruise on the right flank
- (d) Fracture of the right superior and inferior remi of the pelvic bone
- (e) Fracture and dislocation of the right hip joint.
- (f) A big cut behind the right knee cut approximately 10 cm long.

These are the injuries which are reflected in her doctor's medical report dated July 7, 2007 about 1 year after the accident. When she was examined by Dr R.P Shah 1½ years later, he found the following injuries:-

- (1) Fracture of the right superior and inferior pubic rami of pelvis.



- (2) A cut on the right leg
- (3) Central dislocation of the hip (which he said was claimed but could not be seen from the X-rays taken).

According to Dr Shah, the injuries had healed well. Permanent disability was assessed at 5%. While Dr Maina Wambugu had opined that the plaintiff would be “unable to deliver vaginally and can only deliver through a caesarian section and this constitutes a permanent disability.” Dr Shah was of the opinion that;

“It is well established medical knowledge that such distortion of the pelvis as seen on X-rays of December 18, 2008 is very unlikely to cause any significant difficulty in vaginal delivery of baby during her future pregnancies. So the distortion of pelvis caused by her accident in (sic) very unlikely indeed to cause her need caesarian section operation in any future deliveries of babies.”

Since this report reflects the more recent assessment of the plaintiff’s condition, in my view it should reflect the correct position as far as the extent of the plaintiff’s recovery or disability is concerned.”

22. W Karanja, J (as she then was) in *Muthini’s case* relied on the Court of Appeal case No 251/1996 (*Cecilia Mwangi and another v Ruth W Mwangi*), where the respondent had suffered the following injuries.

- “1. Head injury (cerebral concussion)
2. Cut wound over the vertex of the scalp.
3. Cut wounds over the right lower leg.
4. Injury to the pelvis resulting in fractures of the right superior and inferior pubic rami Injury No 4 was exactly the same as the main injury sustained by the plaintiff herein. Her other injuries were actually less severe than those of the respondent in that case which included a cerebral concussion. An award of 450,000 was found to be excessive and the amount was reduced to 280,000/=”

23. Dr Wokabi’s report in the present case showed more severe suffered injuries, ten years later than those referred to in *Muthini’s case* (supra), and stated that:

“She (plaintiff) sustained major pelvic injuries. She could not walk or stand without support...

At the time he examined the plaintiff on September 30, 2015:

“...she was walking with aid of crutches. She is wearing a lumbar corset...

x-rays reviewed showed fracture of the left inferior and superior pubic ramus



24. Clearly, there is inconsistency in the awards for injuries of the lumbar spine and pubic ramus. It is not unusual to have such inconsistencies as noted in *Penina Waitihira Kaburu v LP* Nyr HCCA 59 of 2016 [2019] eKLR where Ngaah J, stated as follows:

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar”

25. In *Joseph Njeru Luke & 3 others v Stellab Muki Kioko* [2020] eKLR. .Majanja J reviewed considered several authorities on pelvic injury and stated:

“The High Court has decided several cases where the plaintiff has sustained a fracture of the pelvis. In *Muthamiah Isaac v Leah Wangui Kanyingi* Nrb HCCA No 653 of 2011 [2016] eKLR, the plaintiff sustained a fracture of the right superior and inferior pubic ramii and blunt injury to the left leg. The court awarded Kshs. 400,000/- as general damages in 2015. In *Lilian Wanja v Cyprian Mugendi Igonga and 2 others* CKA HCCA No 24 of 2015 [2016] eKLR the plaintiff sustained a fracture/dislocation of the hip and multiple soft tissue injuries and the court awarded Kshs 500,000/- in 2016. In *George Osewe Osawa v Sukari Industries Limited* [2015] eKLR the plaintiff sustained a fracture of the pelvis and was awarded Kshs 400,000/= in general damages in 2015. In *Jane Muthoni Nyaga v Nicholas Wanjobi Thuo & Another* [2010] eKLR the court awarded Kshs 300,000/ as general damages for a fracture of the right superior and inferior pubic rami of the pelvis; a cut on the right leg and central dislocation of the hip. In *Ali Malik Brothers Motor (K) Limited and another v Emmanuel Oduor Onyango* Nrb HCCA No 252 of 2016 [2018] eKLR, the plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs 700,000/- which was affirmed by the High Court.”

26. Thus, on average, it appears that for pelvic injury awards ranged between 300,000/- and 700.000/-
27. For injuries to L2 or L3 of lower spine, I have seen other authorities not referred to by counsel, such as the following:
28. *Abdi Haji Gulleid v Auto Selection (K) Ltd & another* [2015] eKLR the plaintiff sustained grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture at the back of L1 spine. The permanent incapacity was assessed at 25% general damages was assessed and awarded at shs 925,757/= in place of the Kshs 300,000/= awarded by the lower court.
29. In *Nicholas Njue Njuki v Eliud Mbugua Kaburo* [2014] eKLR, Ngaah J awarded Kshs 3,800,000/= in general damages for pain, suffering and loss of amenity for: unstable fracture dislocation of lumbar vertebrae leading to spinal cord damage; complete paralysis in the lower limbs; incontinence of stool and urine. permanent incapacity was assessed at 100%.
30. Admittedly, the injuries in these cases are compound and far more serious than those sustained by the plaintiff in the present case. They do however give an idea that lumbar spine injuries by the fact that they involve the spine and the spinal nervous system tend to be very severe injuries.



31. The range of awards for these compound fracture injuries involving the lumbar spine was 925,750/- to around 3,800,000/- with incapacity at between 25% to 100%.
32. Taking the compensation for a pelvic fracture injury at around 400,000/- on average, plus a lumbar fracture injury with no incapacity as in the present case, at around 700,000/- on average, and adding 200,000/- for the other blunt and soft tissue injuries suffered by the plaintiff herein, I get a total award of about 1,300,000/-.
33. As has been stated repeatedly in numerous authorities, the assessment and calculation of damages is not an exact science, and no one accident produces exactly similar injuries as another. The object of awarding damages has both a compensatory value and also meets a public interest element of consistency. Thus, doing the best I can in the circumstances, I would award Kshs 1,300,000/- for the injuries suffered by the respondent in this case. I think and find that the trial court had over-estimated the damage based on the comparative cases.

Disposal

34. Accordingly, I do hereby substitute the award of general damages of 2,000,000/- with an award of Kshs 1,300,000/-.
35. As the appellant did not submit on the special damages, there is no basis to disturb the award thereon.
36. In the result, the lower court award on general damages is set aside and substituted for an award of 1,300,000/-. The other aspects of the award remain undisturbed.
37. Each party shall bear its costs of the appeal.
38. Orders accordingly.

DATED AT KERUGOYA THIS 17TH DAY OF NOVEMBER, 2022

.....

R. MWONGO

JUDGE

In the presence of:

Mr. Ombui for the Appellants

Mr. Khayega for the Respondent

Quinter Ogutu Court Assistant

