



REPUBLIC OF KENYA



**Ochoki & another v Kipingwa alias Juma Karisa Kipingwa (Civil Appeal
25 of 2020) [2020] KEHC 10486 (KLR) (18 December 2020) (Judgment)**

Neutral citation: [2020] KEHC 10486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 25 OF 2020
RN NYAKUNDI, J
DECEMBER 18, 2020**

BETWEEN

JUSTINE NYAMWEYA OCHOKI 1ST APPELLANT

JARED NYANG'AU OBINO 2ND APPELLANT

AND

**JUMAA KARISA KIPINGWA ALIAS JUMA KARISA
KIPINGWA RESPONDENT**

*(Being an appeal from the Judgment and decree of the Senior Principal Magistrate's Court
at Kilifi dated 3rd June 2020 in SPMCC No. 150 of 2019 by Hon. S. D. Sitati (RM))*

JUDGMENT

1. This is an appeal on quantum of damages awarded by the trial court.
2. Justine Nyamweya Ochoki and Jared Nyangau Obino, the Appellants herein were sued in SPMCC No. 150 of 2019 for general damages, special damages, costs of the suit and interest. The Plaintiff/Respondent's claim at trial was formed on the basis of a road traffic accident that occurred on 6th December, 2018 at Chumani area along the Malindi Kilifi road. The Respondent was travelling as a passenger aboard motor vehicle registration number KBU 396T when the 2nd Defendant/Appellant negligently drove motor vehicle registration number KCK 338X, belonging to the 1st Defendant/Appellant, and caused it to lose control, veer off its lane and ram into motor vehicle registration number KBU 396T. The impact pushed motor vehicle registration number KBU 396T backwards that the same was in turn hit by motor vehicle registration number KCB 553Y hence causing the Plaintiff/Respondent's injuries.
3. On liability, the trial court considered that it had already determined another related matter namely Kilifi SPMCC No. 161 of 2019 where it had found the Defendants 100% liable. It thus adopted



the same Judgment on liability. After consideration of the evidence on hand and submissions by the respective advocates, the learned trial magistrate awarded both General and Special damages of Ksh. 300,000/- and Ksh. 2,550/- respectively totaling to an award of Ksh. 302,550/-. The Plaintiff/ Respondent was also awarded the costs of the suit. In reaching this decision, the learned trial magistrate relied on the case of Mombasa HCCA No. 56 of 2011 Johnstone Mutuku Kilango vs Elijah Wambu as cited by the Plaintiff/Respondent. It was further noted that the Appellants' advocates did not file any submissions despite the Court's direction to do so.

4. The Appellants' being dissatisfied with the decision of Hon SD Sitati in SPMCC No. 150 of 2019 delivered on 3rd June 2020 appealed against said decision on the following grounds:
 1. That the learned Trial Magistrate misdirected himself in law and principle by making an award of General Damages at Ksh. 302, 550/- which is excessive considering that the respondent suffered a blunt object injury on the lower lip, chest and left wrist.
 2. That the Learned Trial Magistrate erred in law and in fact in stating that as at the time of writing the judgement, the Appellants had not filed submissions when the appellant's filed submissions on 22nd May 2020 against the deadline of 25th May 2020 and hence failed to consider the appellant's submissions.
 3. The Learned Trial Magistrate erred in law and principle by awarding a sum of Ksh. 302,550/- for soft issue injuries when the respondent had already healed after two months from the date of accident without permanent disability.
 4. The learned Trial Magistrate erred in law and principle by failure to consider the guidelines of awarding damages and the previous precedent on comparable injuries which provided by the Appellant's in their submissions that were not considered by the learned magistrate.

Based on these grounds, the Appellants seek for orders:

- a. That the Appeal herein be allowed and the judgment and decree of the Trial Magistrate on quantum dated 3rd June 2020, be set aside.
 - b. That the Honourable Court do proceed to assess just and reasonable quantum of damages.
5. The matter was prosecuted by way of written submissions which respective Counsels filed.
 6. The Submissions on Appeal Counsel for the Appellants' begun by submitting that it was erroneous for the trial magistrate to hold the position that the Appellants' did not file submissions which casts aspersions on the appellant's advocates professional integrity and professionalism. They contended that they had filed submissions as directed and these were on record.
 7. Turning to the core of the Appeal, it was submitted that the award of Ksh. 300,000/- as general damages was excessive since the Plaintiff sustained blunt injury to the lower lip, chest and left wrist; which are mainly soft tissue injuries that ordinarily attract damages of Ksh. 80,000/- to -100,000/-
 8. It was submitted that the trial magistrate did not consider the gravity of the injuries, the fact that the Respondent did not undergo extensive medication, there was no permanent disability, that the Respondent had healed and failed to appreciate a plethora of precedents on this issue, including the authorities annexed to the submissions which were not considered.
 9. The Court was referred to Makueni HCA No.25 of 2018 as consolidated with HCCA No. 16 of 2016 JAP Quality Motors vs F.K Wambua where the Court awarded Ksh. 80,000/= for blunt injury to the chest, bruises to right lower limb and left upper arm and soft tissue injury to the chin.



10. Further reliance was placed on Civil Appeal No. 54 OF 2016: *Ndung'u Dennis v Ann Wangari Ndirangu & another* (2018) eKLR where the Respondent suffered bruises on the neck, tenderness on the right leg, blunt injury to the chest and both hands, back and chest pains. The trial court awarded Ksh. 300,000/= which was reduced to Ksh. 100,000/= on appeal.
11. On the question of interest on the decretal that was raised on appeal, it was submitted that the Respondent having frustrated the efforts to open a joint interest earning account should therefore not burden the Appellant with interest on the decretal sum.
12. As for the Respondent, Counsel appearing on his behalf urged that considering the injuries sustained and the Respondent's pain and suffering, the award of Ksh. 300,000/- was fair and reasonable and should not be interfered with. Counsel cited *Mombasa HCCA 56 OF 2011 Johnstone Mutuku Kilango -Vs- Elijah Wambu* used in the trial court. The Respondent further buttressed their argument by referring the Court to Civil Case 320 Of 1998 *Catherine Wanjiru Kingo'ri & 3 Others Vs. Gibson Theuri Gichubi* (2005) eKLR where the 1st Plaintiff suffered soft tissue injuries on the left ankle, on the leg and on the chest and was awarded Ksh. 300,000/= by the High Court
13. On the question of interest, it was submitted that the Plaintiff/Respondent was entitled to the same based on the provisions of Section 26 of the *Civil Procedure Act*. In pursuit of this line of argument, Counsel cited *Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others* (2014) eKLR and *Mukisa Biscuit Co. Limited v West End Distributors Limited* (1970) E.A 469.

The Law, Analysis and Determinations

14. As this is an initial appeal, as enjoined by *Selle vs Associated Motor Boat & Another* [1968] EA 123, I have to appreciate the evidence on the record afresh while remembering that I do not have the benefit of a live testimony from the witnesses.
15. Two witnesses testified on behalf of the Plaintiff at trial. The Plaintiff as PW2 and a doctor as PW1. The Defence did not call any witnesses.
16. PW2 adopted his statement testifying that he was involved in a road traffic accident that occurred on the 6th December 2018 at Chumani area along the Malindi Kilifi road. That the accident occurred when the vehicle he was travelling in, motor vehicle registration number KBU 396T, was hit by motor vehicle registration number KCK 338X which was being driven by the 2nd Defendant/Appellant at a very high speed and overtaking when it was unsafe to do so hence lost control, veer off its lane and rammed into motor vehicle registration number KBU 396T. That the impact pushed motor vehicle registration number KBU 396T backwards and it was in turn hit by motor vehicle registration number KCB 553Y hence causing him injuries on his lower lip, chest and wrist.
17. On cross examination, PW2 stated that he had not healed properly and felt pain on his chest and hand. He blamed motor vehicle registration number KCK 338X for the accident stating that the vehicle had veered off its lane and hit the car he was in.
18. PW1 Dr. Ajoni Adede testimony was that the Plaintiff had suffered blunt injury to the chest, left wrist and lower lip; all being soft tissue injuries that the Plaintiff had fully recovered from after 2 months exams.
19. On cross examination he confirmed that there was no permanent disability and the Plaintiff was able to do work properly.



20. Before going any further, I first address myself to the issue raised by Counsel for the Appellants' that the learned trial magistrate's position that the Appellants' failed to file submissions was erroneous. Upon perusal of the record, I find that indeed there were submissions dated 7th May and filed on 21st May 2020. Be that as it may, as I shall shortly advert to, this Court has the mandate to reconsider the case at trial afresh, taking into account all the evidence and submissions relied on at the trial stage.
21. With the above position, and having reconsidered the evidence and the submissions by the parties' advocates, my point of departure is to restate the legal principle on exercise of discretion by a superior court over jurisdiction of a subordinate court or inferior tribunal. This principle is best summed up by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows;
- “I think it is well settled that this court will not interfered with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”
22. Regarding the circumstances under which an appellate court will disturb a lower court's assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows:
- “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 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.
23. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini vs A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:
- “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 is 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 high that it must be wholly erroneous estimate of the damages”
24. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017 [2018] eKLR* rendered itself on the matter of assessment of quantum as below:
- “... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”
25. In the present appeal, the Plaintiff/Respondent suffered injuries of the nature described below:
- a. blunt object injury to the lower lip
 - b. blunt object injury to the chest



- c. blunt object injury to the left wrist
26. The learned Trial Magistrate having found that the Plaintiff proved the damages he had sustained by way of the treatment notes on record, P3 form and the medical report, relied on the authority of Mombasa HCCA 56 OF 2011 Johnstone Mutuku Kilango -Vs- Elijah Wambu as cited by the Plaintiff/ Respondent. It was found that the case presented comparable injuries to wit: blunt trauma on the right knee, blunt trauma on the right ankle, 3 x 4 cm bruise on the right shin just below the knee, blunt trauma on the right hip and blunt trauma on the lower back. The trial court thus found the award of Ksh. 300,000/- was sufficient as general damages.
27. In the English Court in the case of West (H) & Son Ltd v Stephard [1964] AC 345 it stated as follows:
- “But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated, by comparable awards when all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”
28. Similarly, the Court in Ramadhan Kamora Dhadho v John Kariuki & another Civil Appeal No. 27 of 2015 [2017] eKLR opined thus:
- “There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”
29. In recent matter with comparable injuries, the Courts have ruled as follows:
30. In Jyoti Structures Limited & another v Truphena Chepkoech Too & another [2020] eKLR for a Respondent that had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs. 250,000/=. For the Respondent that had sustained bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand, general damages were assessed at Kshs. 200,000/=. On appeal, the court set aside both awards and substituted them with Ksh. 125,000/= each.
31. Looking at the case of Maimuna Kilungwa vs Motrex Transporters Ltd [2019] eKLR Makueni Civil Appeal No. 11 of 2017, the court awarded Kshs. 125,000/= for injuries to the neck, left ear and left shoulder.
32. Similarly, in the matter referenced by Counsel for the Appellant, Civil Appeal No. 54 OF 2016: Ndung'u Dennis v Ann Wangari Ndirangu & another (2018) eKLR where the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands, the trial court awarded Ksh. 300,000/= which was reduced to Ksh. 100,000/= on appeal.



33. In *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers. The trial court assessed general damages for pain and suffering in the sum of Ksh. 120,000/- and this was affirmed by the High Court.
34. Taking my cue from the above, I agree with Counsel for the Appellants' that the award of quantum by the trial magistrate was on the higher side and did not take into consideration the fact that the Respondent sustained soft tissue injuries, which according to the medical evidence had healed without causing any form of disability and did not affect the Respondent's ability to work.
35. In the premises, this court is inclined to interfere with the discretion of the learned trial magistrate and does so by setting aside the award of Ksh. 300,000/- as general damages and substituting it with one of Ksh. 150,000/-.
36. The upshot of the foregoing is that this Appeal succeeds. Judgment is entered for the Respondent against the Appellants' at Ksh. 152, 550/- and interest at court rates from the date of the judgment of the subordinate court.

The Appellants' shall have the costs of the appeal.

It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT MALINDI THIS 18TH DAY OF DECEMBER, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Kariuki for the Appellant

