



REPUBLIC OF KENYA



KENYA LAW
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**Ochoki & another v Thoya (Civil Appeal 27 of 2020)
[2020] KEHC 10488 (KLR) (18 December 2020) (Judgment)**

Neutral citation: [2020] KEHC 10488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 27 OF 2020
RN NYAKUNDI, J
DECEMBER 18, 2020**

BETWEEN

JUSTINE NYAMWEYA OCHOKI 1ST APPELLANT

JARED NYANG'AU OBINO 2ND APPELLANT

AND

**FRANCIS NDURYA THOYA ALIAS FRANCIS NDURY THOYA ALIAS
FRANCIS NDURI THOYA 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. 161 of 2019 by Hon. S. D. Sitati (RM))

JUDGMENT

1. This appeal concerns the quantum of damages awarded by the trial court.
2. Justine Nyamweya Ochoki and Jared Nyangau Obino, the Appellants herein were sued in SPMCC No. 161 of 2019 for general damages, special damages, costs of the suit and interest. The basis of the Plaintiff/Respondent's claim at trial is a road traffic accident that occurred on 6th December, 2018 at Chumani area along the Malindi Kilifi road. The Respondent was a passenger travelling in 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 to sustain injuries identified as fracture of the chest center bone (manubrium sternum), blunt object injury to the chest and bruises on the neck.



3. On liability, the trial court upon analysis of the Plaintiff's evidence, found it cogent and consistent and coupled with the failure of the Defendants' to offer any rebuttal, had found the driver of the errant motor vehicle, the 2nd Defendant, 100% liable. The 1st Defendant was found vicariously liable.
 4. 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. 500,000/- and Ksh. 2,550/- respectively totaling to an award of Ksh. 502,550/-. The Plaintiff/Respondent was also awarded the costs of the suit.
 5. In reaching this decision, the Learned Trial Magistrate considered that the Plaintiff had proposed the sum of Ksh. 700,000/- as general damages based on the case of Nyeri HCCA No. 5 of 2016 Samson Macharia Mwangi & Another v Abdifatah Mohamed Khalif where the court had awarded Ksh. 500,000/- as damages for fracture of the nasal bone, bruises on the face and blunt object injury on the lower spine. The court found the injuries not comparable and instead chose to rely on Machakos HCCA No. 180 of 2013 Dorcas Mututho Ilevu v Muithya Lydia where the court had awarded Ksh. 600,000/- for head injury with loss of consciousness and intracranial bleeding, fracture of right radius-distal end, fracture of the cervical and thoracic vertebral bones and fracture of the sternum and right 6th rib. Considering the injuries of the Plaintiff and the 3% disability as well as inflation, the trial court proceeded to award Ksh. 500,000/- as general damages for pain and suffering.
 6. It was further noted that the Appellants' advocates did not file any submissions despite the Court's direction to do so.
 7. The Appellants' aggrieved by the decision of Hon SD Sitati in SPMCC No. 161 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. 502, 550/- which is excessive.
 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. 502,550/- for soft issue injuries.
 4. The learned Trial Magistrate erred in law and principle by failure to consider the guidelines of awarding damages.
 8. It is upon these grounds that the Appellants' pray:
 - 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.
 9. The Parties agreed to canvass the appeal was by way of written submissions which respective Counsels filed.
- The Submissions on Appeal
10. On behalf of the Appellants,' it was submitted 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. According to Counsel, they had filed submissions as directed and these were on record.

11. Addressing the pertinent question in the Appeal, the Appellants' advocate submitted that the award of Ksh. 500,000/- as general damages was excessive. He contended that the Plaintiff sustained fracture of the chest center bone), blunt object injury to the chest and bruises on the neck thus an award of between Ksh. 300,000-400,000 would have sufficed.
12. Counsel posited 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.
13. The Court was referred to Civil Appeal No. 50 of 2018 Akemo Valley Hospital and Maternity vs Napoleon Mecha Ogaki where the Court awarded Ksh. 400,000/- and set aside the trial court award of Ksh. 700,000/= for segmented fracture of the right leg, cut wound on the right forehead, bruises on the right and left hand, contusion on the left elbow and permanent disability of 5%.
14. Reliance was also placed on Mombasa Maize Millers (ksm) Ltd & Another v Rengo Joshua Wafula (2017) eKLR where the High Court reduced an award of Ksh. 600,000/- to Ksh. 400,000/- for facial injury with fracture, injury to right jaw and teeth, injury to chest and fracture of the right condylar (mandible)
15. As to the issue of interest on the decretal sum, 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.
16. Counsel for the Respondent outlined the injuries sustained by the Respondent to be fracture of the chest centre bone, blunt object injury to the chest and bruises on the neck. He went on to submit that according to the doctor's evidence, the Plaintiff suffered grievous harm with permanent disability of 3%.
17. It was hence submitted that on account of the injuries sustained and the Respondent's pain and suffering, the award of Ksh. 500,000/- was fair and reasonable and should not be interfered with. Reliance was placed on Kapenguria HCCA 5 of 2016 Samson Macharia Mwangi vs Abdifatah Mohamed Khalif where the Court awarded Ksh. 500,000/=.
18. Regarding 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

19. On a first appeal such as this one, the Court is mandated to appraise itself of the evidence on the record afresh while remembering that it does not have the benefit of a live testimony from the witnesses. This was stated in the case of Oluoch Eric Gogo –vs- Universal Corporation Ltd (2015) eKLR where the court stated:

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER –VS ASSOCIATED MOTOR BOAT CO. LTD &



ANOTHER 91968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....”

.....From the above decisions which echo section 78 of the *Civil Procedure Act*, it is clear that this court is not bound to follow the trial court’s finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally”.

20. Three witnesses testified on behalf of the Plaintiff at trial. The Defence did not call any witnesses.
21. Testifying as PW1, the Plaintiff explained that he was an employee of Coast Water Services Company Limited. In his view, the accident occurred at about 12:30 pm, on a clear weather day. He stated that he was seated in the outer front seat in motor vehicle registration number KBU 396T when motor vehicle registration number KCK 338X driven from the Mombasa general direction approached at high speed before veering off its lane and ramming into motor vehicle registration number KBU 396T. It was his testimony that he was injured when the safety belt that he was wearing cut his throat on impact. That he was rushed to Kilifi County Hospital where he was treated and discharged. The Plaintiff produced treatment notes as Plaintiff’s Exhibit No. 1 as well as a letter from Tawfique Hospital and Xray results as Plaintiff’s Exhibit No. 2 and No. 3 respectively.
22. According to PW1 the seriousness of the accident was magnified by the death of one passenger who was in their motor vehicle registration number KBU 396T. His evidence was that the collision occurred in a matter of seconds and their driver could have done nothing about it. He reported the matter to Kilifi Police Station. PW1 produced the P3 form as Plaintiff’s Exhibit No. 4 and the Motor Vehicle Copy of Records for motor vehicle registration number KCK 338X as Plaintiff’s Exhibit No. 6, together with a receipt therefor for Kshs. 550/- as Plaintiff’s Exhibit No. 6(a). The Plaintiff averred that he was examined by Dr. Ajoni Adede and produced a receipt for Kshs. 2,000/- as Plaintiff’s Exhibit No. 8 being the cost of obtaining the Medical Report, which he identified as PMF1-7. Finally, he produced the letter of demand dated 25th February, 2019 as Plaintiff’s Exhibit No. 9. It was his evidence that he had not fully recovered and that he felt occasional chest pains.
23. When cross-examined, PW1 averred that he was seated in the front seat, together with Prudence and then Jumwa, the driver. According to him, it was a straight road and their driver could see oncoming traffic. He testified that while the driver could see the oncoming motor vehicle registration number KCK 338X, there was little that the driver could do in the circumstances.
24. In as much as the Plaintiff averred that he had no knowledge in matters driving, he pointed out that that though in the Plaintiff it was indicated that motor vehicle registration number KBU 369T was hit from behind by motor vehicle registration number KCB 553Y, the blame for his injuries squarely lay at the feet of the driver of motor vehicle registration number KCK 338X.
25. The investigating officer, No. 76960 PC Ondera stationed at Kilifi Police Station Traffic Department, testified as PW2. His testimony was the accident involved three motor vehicles, KCK 338X a Toyota Allion, KBU 369T a Toyota pick-up and KCB 553Y a Nissan Matatu. That motor vehicle KCK 338X was headed in the general direction of Malindi from Kilifi when it lost control and veered into the opposite lane ramming into motor vehicle registration number KBU 396T which had among its passengers the Plaintiff herein, Prudence Wambui (the Plaintiff in CC No. 151 of 2019) and Juma Karisa (the Plaintiff in CC No. 150 of 2019), all being employees of Coast Water Services Company limited.



26. PW2 produced their respective Police abstracts as Plaintiffs' Exhibit Nos. 5, 5(a) and 5(b). According to him, the section of the road where the accident occurred was at a corner and narrow such that had the driver of the Nissan motor vehicle registration number KCB 553Y swerved, the motor vehicle would have overturned. He stated that after his investigations he charged the driver of motor vehicle registration number KCK 338X for, among other offences, causing death by dangerous driving in Kilifi Criminal Case No. 185 of 2019 and Kilifi Traffic Case No. 100 of 2019, both of which he stated were
27. It was his further testimony that the driver of motor vehicle registration number KBU 396T could not be blamed as the accident occurred on his rightful Lane. That from his investigations, the driver of motor vehicle registration number KCK 338X claimed to have experienced a tyre burst, hence he veered off his lane but which explanation PW2 stated that he found unbelievable He produced the P3 forms issued to Prudence Wambui (the Plaintiff in CC No. 151 of 2019) as Plaintiffs Exhibit No. 10(a) and that issued to Juma Karisa (the Plaintiff in CC No. 150 of 2019) as Plaintiff's Exhibit No. 10(b)
28. In cross-examination, PW2 admitted that he had no sketch maps of the scene of the accident. He also stated the hearing in Criminal Case No. 185 of 2019 and Kilifi Traffic Case No. 100 of 2019, against the driver of motor vehicle registration number KCK 338X, were yet to take off. He also stated that the accident occurred at about 6:45 a.m.
29. PW3 Dr. Ajoni Adede testified that he examined the Plaintiff. He produced the medical report as Plaintiff's Exhibit No. 7 and a receipt for Kshs. 12,000/- court attendance charges as Plaintiff's Exhibit No. 11. He stated that the Plaintiff suffered fracture of the chest centre bone as well as blunt object injury to the chest and bruises on the neck. That when he examined the Plaintiff after two months, he found the right edge of the chest centre bone tender and swollen, reduced chest expansion on the right side.
30. On cross-examination, he stated that the Plaintiff was expected to heal with 3% residual disability and of consequence would feel pain and his workmanship had been reduced by 3%.
31. As a segue into the gravamen in this appeal, I find it appropriate to consider the issue raised by the advocate in conduct of the matter on behalf of the Appellants' that the learned trial magistrate, in delivering judgment, found that despite directions being issued that parties file submissions, the Appellants did not comply. I have perused the record, I find that indeed there were submissions dated 7th May and filed on 21st May 2020. Nonetheless, this Court has sanction to appreciate the case at trial afresh, considering all the evidence and submissions relied on at the trial stage.
32. The foregoing analysis of the evidence and the submissions by the parties' advocates serves as the appropriate prelude to the crux of the appeal, whether this court should interfere with the award of general damages by the trial court. I am guided in this endeavour by the findings of the court in *Butt v Khan* 1982 -1988 1 KAR on when an appellate court may disturb a lower court's assessment of damages. In that instance, the Court had stated:

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.



33. The Court of Appeal echoed the sentiments set out in Butt (supra) in the case of Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini vs A M Lubia & Olive Lubia, where it stated:

“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”

34. The Plaintiff/Respondent in the instant appeal suffered injuries of the nature described below:

- a. fracture of the chest centre bone
- b. blunt object injury to the chest
- c. bruises on the neck
- d. Permanent disability at 3%

35. 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 Machakos HCCA No. 180 of 2013 Dorcas Mututho Ilevu v Muithya Lydia where the court had awarded Ksh. 600,000/- for head injury with loss of consciousness and intracranial bleeding, fracture of right radius-distal end, fracture of the cervical and thoracic vertebral bones and fracture of the sternum and right 6th rib. Consequently, the learned trial magistrate awarded Ksh. 500,000/- as general damages for pain and suffering.

36. In the English Court in the case of West (H) & Son Ltd v Shephard [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.”

37. In tandem with the foregoing authority is the decision by the Court in Ramadhan Kamora Dhadho v John Kariuki & another Civil Appeal No. 27 of 2015 [2017] eKLR where it rendered itself in the following terms:

“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.”

38. With the above authorities in mind, I find that the learned trial magistrate by using the case of Dorcas Mututho Ilevu v Muithya Lydia (supra) relied on a case that had grievous injuries as compared to the Respondent's. For me, closer comparative authorities include Akamba Public Road Services v Abdikadir Adan Galgalo VOI HCCA 21 of 2015 [2016] eKLR where the plaintiff sustained a fracture



right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle and permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain. The doctor assessed permanent partial disability at 3%. The court awarded Kshs. 500,000/- in 2015.

39. Likewise, in Vincent Mbogholi v Harrison Tunje Chilyalya MLD HCCA No. 32 of 2015 [2017] eKLR the plaintiff sustained a fracture of the left tibia leg bone (medial malleolus), blunt object injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe and was awarded Kshs. 500,000/- in 2017.
40. Finally, in Paul Kithinji Kirimi & another v Gatwiri Murithi MRU HCCA No. 84 of 2017 [2018] eKLR the Court awarded Kshs. 450,000/- in 2018 where the plaintiff sustained a fracture of the mandible and of the femur.
41. In light of these authorities, I am agreeable to the proposition by counsel for the Respondent that the award of quantum of Ksh. 500,000/- for general damages by the trial magistrate was appropriate and commensurate to the injuries suffered by the Respondent.
42. For the appellate court to interfere with exercise of discretion by the trial court, the award ought to have been inordinately high, based on extraneous considerations or having overlooked crucial issues. That is not the case in this appeal. In the premises, this court declines to interfere with the discretion of the learned trial magistrate and instead finds that the same was properly exercised.
43. The upshot of the foregoing is that this Appeal is dismissed in its entirety. The judgement of the lower court awarding the Plaintiff/Respondent Ksh. 500,000/- general damages for pain and suffering is hereby affirmed.
44. The Respondent shall have the costs of the appeal.

It is so ordered.

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

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Kariuki for the Appellant

