Wanje v Samwel (Civil Appeal E095 of 2023)
[2025] KEHC 3478 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E095 OF 2023

M THANDE, J

FEBRUARY 21, 2025

BETWEEN

KENGA SULUBU WANJE ..... APPELLANT

AND

ISAACK NTONGAI SAMWEL ..... RESPONDENT

(An Appeal from the judgment of Hon. Irene Thamara R. M. delivered on 29.5.23 in Malindi Civil Suit No. E021 of 2022)

JUDGMENT

1. The Appellant herein filed Malindi PMCC No. E21 of 2023 against the Respondent, seeking both general and special damages arising from injuries sustained in a road traffic accident that occurred on 5.10.21 at Malindi-Casuarina Road. The injuries pleaded in the plaint are:

    > Fracture midshaft right femur bone Cut wound posterior ankle area exposing tendon cut wound on the head.

2. Following hearing the trial magistrate entered judgment on 29.5.23 in favour of the Appellant as follows:

    > Liability against the Respondent 90%
    >
    > General damages Kshs. 450,000/=
    >
    > Special damages Kshs. 31,560/=
    >
    > Future medical expenses Kshs. 60,000/=
    >
    > Total Kshs. 541,560/=
    >
    > Less 10% contribution Kshs. 54,156/=

Balance Kshs. 487,404/=

Costs and interest at court rate from date of judgment.

3. Being aggrieved by the quantum of damages, the Appellant preferred the Appeal herein, the grounds of which are reproduced hereunder:

    1. The Learned Trial Magistrate erred in fact and in law in making an award for General damages for pain, suffering and loss of amenities which is so inordinately low such as to present a wholly erroneous estimate of the damage payable.

    2. The Learned Trial Magistrate erred in fact and in law in departing from the principles governing the award for General damages for pain, suffering and loss of amenities when she assessed it in the sum of Kshs. 450,000.00/= which sum is so inordinately low. Had she applied the proper principles, she would have given much higher and reasonable award.

    3. The Learned Trial Magistrate misdirected herself in fact and in law by failing to appreciate the oral and documentary evidence tendered by the Plaintiff/Appellant in support of the claim for General damages for pain, suffering and loss of amenities.

    4. The Learned Trial Magistrate misdirected herself in fact and in law by failing to consider Plaintiff/Appellant's submissions and Judicial authorities on awarded made in similar cases tendered by the Plaintiff's counsel with regard to the award for General damages for pain, suffering and loss of amenities.

    5. The Learned Trial Magistrate erred in fact and in law in acting in complete disregard to the principle of stare decisis and in particular in failing and/or refusing to follow the principles laid down by the High Court of Kenya and the Court of Appeal in regard to assessment of General damages for pain, suffering and loss of amenities.

4. The Appellant prayed that the appeal be allowed with costs and that the quantum of general damages be set aside and the Court do proceed to reassess the same upwards and make appropriate awards on general damages for pain, suffering and loss of amenities commensurate with the injuries sustained by the Appellant as the Court deems fit.

5. This being a first appeal, the Court has reconsidered and re-evaluated the evidence parties' respective submissions. As the Court draws its own conclusions, it has made due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd. & Others (1968) EA 123 by Sir Clement De Lestang, V. P. 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 itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect.

6. The Appellant's complaint is that the trial court failed to take into consideration the injuries suffered by the Appellant leading to diminished capacity and how his day to day life was affected thereby. Further that the trial court failed to take into account comparable injuries and thereby arriving at an award for general damages that was inordinately low. The Appellant thus urged this Court to review the same upwards.

7. The Respondent submitted that the trial Magistrate considered all the pleadings, all the evidence on record, saw the demcanor of the witnesses as they testified, scrutinized the documents produced before her, considered the written submissions of all the parties together with the authorities cited and arrived at a fair and reasonable assessment of damages in the circumstances.

8. In her judgment that the trial Magistrate was guided by the case of Jitan, Nagra v Abidnego Nyandusi Oigo [2018] eKLR, Majanja, J. set aside an award of Kshs. 1,000,000/= and substituted therefor an award of Kshs. 450,000/=. The learned judge stated:

> 10. I find that a compound fracture of the right femur is more serious than a simple fracture coupled with further fractures of the metacarpal bones. Considering the general trend of awards in comparable cases and the need to maintain consistency, I find the award of Kshs. 1,000,000/- inordinately high.

9. I have considered that the injuries sustained by the Appellant. He suffered a simple fracture. Indeed, he did not have any metal implants as in a compound fracture. In his testimony, Dr. Kiema stated that healing takes 8 to 12 weeks to heal. Further that the Appellant could now work.

10. The Court is aware that assessment of damages is a matter of discretion of the trial court that should not be interfered with, unless the quantum of damages awarded is inordinately high or low. This was stated by the Court of Appeal in Catholic Diocese of Kisumu v Tete [2004] eKLR as follows:

> It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985]KLR 470).

11. The Court has considered the decision in the Jitan Nagra case (supra) and notes that the same was rendered in 2018, which is 5 years before the impugned decision. My view is that taking inflation into account, as guided by the principles set out by the Court of Appeal in Mohamed Mahmoud Jabane V Highstone Butty Tongoi Olenja [1986] eKLR the award of Kshs. 450,000/= is manifestly low. In the case of Martin Mwirigi Mbaya & another v Abdulrahman Salim Mwakumbuko [2022] eKLR, Chepkwony, J. upheld an award of Kshs. 1,000,000/= for a bruise on the scalp, soft tissue injuries to the right thigh and fractured right femur. And in Joseph Kirubi Nganga v Keneth Oketch [2009] eKLR Koome, J. (as she then was) awarded the sum of Kshs. 1,100,000/= for head-scratches/bruises of face, fracture left scapula and fracture left femur. Having considered the cited authorities, my view is that the sum of Kshs. 700,000/= would be reasonable compensation for the Appellant.

12. The upshot is that the Appeal succeeds. I set aside the award of general damages and substitute therefor an award of Kshs. 700,000/= which shall attract interest from the date of judgment before the subordinate court. The Appellant shall have costs.

DATED AND DELIVERED IN MALINDI THIS 21ST DAY OF FEBRUARY 2025

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M. THANDE

JUDGE