



REPUBLIC OF KENYA



**Chemwolo & another v Chichir (Civil Appeal 19 of 2023)
[2024] KEHC 161 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 161 (KLR)

FORMERLY ELDORET CIVIL APPEAL NO. E014 OF 2023

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN**

CIVIL APPEAL 19 OF 2023

JRA WANANDA, J

JANUARY 19, 2024

BETWEEN

CHRISTOPHER CHEMWOLO 1ST APPELLANT

JANE JEPKEMOI 2ND APPELLANT

AND

HILLARY KIBET CHICHIR RESPONDENT

JUDGMENT

1. This Appeal is in respect to the assessment and/or award of quantum arising from injuries suffered as a result of a road accident.
2. By the Complaint filed on 31/05/2021 in Iten Senior Principal Magistrate's Court Case No. 5 of 2021, the Respondent alleged that on 24/03/2021 he was a pillion rider of a motor-cycle when along the Iten-Eldoret Road the Appellants' driver negligently or carelessly managed the Appellants' motor vehicle registration number KBY 994K causing it to lose control, veer of the road and knock down the Respondent. The Respondent alleged further that as a result of the accident, he suffered injuries and also incurred medical expenses. He therefore sought special and general damages.
3. From the Medical Report prepared by Dr. Joseph Sokobe dated 19/04/2021 and which was relied upon by the Respondent, the Respondent is stated to have suffered bruises on the forehead, cut wound on the left supra-orbital region, and blunt injuries on the right shoulder and right knee.
4. The case went through a full trial after which the Court entered Judgment on liability at 90:10 in favour of the Respondent against the Appellants. On damages, the award was made at Kshs 400,000/- in general damages and Kshs 7,660/- in special damages. Costs and interest were also awarded.



Appeal

5. Aggrieved by the Kshs 400,000/- award in general damages, the Appellants filed this Appeal on 25/01/2023. He instituted this Appeal against this said one item.
6. With the establishment of the High Court sub-Registry at Iten, which however is still under the High Court at Eldoret, this Appeal was transferred to Iten for hearing and determination.
7. It was then directed that the Appeal be canvassed by way of written submissions. Pursuant thereto, the Appellants, through Messrs Onyinkwa & Co. Advocates, filed their Submissions on 7/08/20203 while the Respondent, through Messrs Morgan Omusundi Law Firm Advocates & Co., filed his on 23/10/2023.

Appellants' submissions

8. Counsel for the Appellant submitted that from the Medical Report of Dr. J. Sokobe, the Respondent sustained soft tissue injuries from which he had recovered well, and that the Respondent was re-examined by Dr. Gaya who made similar findings.
9. Regarding the law on instances when an appellate Court may interfere with assessment and/or award of damages by a trial Court, Counsel cited the cases of *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v A.M. Lubia and Olive Lubia* (1987) KLR 30 and *Barnabas Ombati*, Civil Appeal No. E43 of 2021 and submitted that the general principle is that comparable injuries should as far as possible be compensated by comparable awards. He also cited the case of *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR.
10. Counsel added that the gist of the Appeal is that the trial Magistrate used the wrong principles in making a determination on the damages awardable to the Respondent, failed to take into account relevant factors and failed to consider recent and relevant authorities with comparable injuries to those sustained by the Respondent thereby arriving at an excessive amount, that the Magistrate misquoted the Medical Report by Dr. Sokobe by stating that the Respondent sustained severe injuries from which he was recovering well, that a reading of the Report shows that that the Respondent sustained minor soft tissue injuries and he had recovered well by the time he was examined, being barely a month after the accident since that the same occurred on 24/03/2021 and the Respondent was examined on 19/04/2021
11. Counsel submitted further that the trial Magistrate relied on the case of Hayer Bishan Singh & Sons Construction vs Paul Oduor Ogola [2009] eKLR in computing general damages, that in that case, the Plaintiff sustained multiple soft tissue injuries and dislocation of the left knee joint and was awarded Kshs 120,000/-, that the injuries sustained in that case are more severe than those sustained by the Respondent herein, that the Magistrate therefore erred in relying on a case that had no comparable injuries to those sustained herein thus awarding an excessive amount. Counsel Submitted further that the Magistrate failed to consider recent and relevant authorities especially the case cited by the Appellants, namely, *Eva Karemi & 5 Others v Koskei Kieng & Another* [2020] eKLR. He therefore contended that this appellate Court is espoused with the power to interfere and set aside the award that is inordinately high in the circumstances.
12. According to Counsel, an award of Kshs 80,000/- to Kshs 100,000/- would suffice. He cited the cases of *Godwin Ireri v Francline Gitonga*, Meru HCCA 47/2015 [2018] eKLR where the Plaintiff was awarded Kshs 90,000/- and *Ephraim Wagura Muthui & 2 Others v Toyota Kenya Limited & 2 Others* [2019] eKLR where the Court awarded Kshs 100,000/-



Respondent's Submissions

13. Counsel for the Respondent also cited the case of *Kemfro Africa Limited* (*supra*) and submitted that for an appellate Court to interfere with trial Court's findings, it must be proved that the trial Court took into account irrelevant factors or gave an inordinately high/low amount. He argued that an appellate Court is therefore not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at first instance. He also cited the case of *Kisumu v Sophia Achieng Tete*, Civil Appeal No. 248 of 2001 [2004] 2KLR 55 and also *Daniel Gatana Ndungu & Another v Harrison Angore Katana* [2020] eKLR HCCA No. 72 of 2019.
14. Counsel submitted further that in assessment of damages, comparable injuries should, as far as possible, be compensated by comparable awards. He cited the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR and contended that the general damages awarded corresponded with the severe injuries which were confirmed by Dr. Sokobe. He submitted further that the injuries were also supported by the initial treatment notes. He cited the case of *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouma* [2022] eKLR where the Plaintiff was awarded Kshs 500,000/-.

Analysis & Determination

15. The duty of a first appellate Court was set out in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. As aforesaid, this Appeal is only against the award of general damages. The only issue that therefore arises for determination is “whether the trial Court's assessment and award of general damages at Kshs 400,000/- was excessive and/or inordinately high”.
17. Instances when an appellate Court is entitled to interfere with and/or disturb the assessment or award of general damages by the trial Court are now well settled. In the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, the Court of Appeal pronounced itself on the issue as follows:

“... it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

18. An appellate Court will not therefore 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 trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.



19. Kneller, JA in the Court of Appeal decision in *Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] eKLR also gave the following guidelines:
- “The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.
1. Each case depends on its own facts;
 2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
 3. comparable injuries should attract comparable awards.
 4. inflation should be taken into account; and
 5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”
20. From the above, it is clear that in awarding damages, some degree of uniformity must be sought depending on the facts and the best guide would be to consider recent awards on comparable injuries. Indeed, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards.”
21. From the Medical Report of Dr. Joseph C. Sokobe dated 19/04/2021 and treatment notes produced in evidence, the Respondent suffered multiple soft tissue injuries with no resulting disability. He is said to have healed from the injuries sustained save that he has some scars on the forehead and face.
22. I have perused various previous cases involving similar or comparable injuries and analyzed the awards therein. I find that most awards for similar multiple soft injuries range at between Kshs 100,000/- and Kshs 200,000/- each depending on the severity of the injuries.
23. For instance, in *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR, Joel Ngugi J reduced an award of Kshs 300,000/- to Kshs 100,000/-. The decision was delivered on 1/2/2018.
24. In *JFM (Minor suing through Mother and next friend MWM) v INM & another* [2020] eKLR, R. Nyakundi J increased an award of Kshs 60,000/- to Kshs 100,000/-. The decision was delivered on 30/12/2020.
25. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR, R. Nyakundi J reduced an award of Kshs 350,000/- to Kshs 140,000/-. The decision was delivered on 15/04/2020.
26. In *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD)* [2021] eKLR, E. Maina J reduced an award of Kshs 230,000/- to Kshs 180,000/-. The decision was delivered in 28/10/2021.
27. Counsel for the Respondent urged me to rely on the case of *Elizaphen Mokaya Bogonko vs Fredrick Omondi Ouma* [2022] eKLR where the Plaintiff was awarded Kshs 500,000/-. I have perused that authority and noted that the injuries therein included a head injury with loss of consciousness, fracture of the right zygoma (facial bone), multiple facial lacerations, and multiple blunt injuries and bruises. The trial Court had awarded a sum of Kshs 850,000/- which Aburili J reduced to Kshs 500,000/- on appeal. It is however evident that the severity of the injuries suffered therein are not and cannot by any stretch of imagination be compared with those suffered by the Respondent herein.



28. I have also perused the decision of Karanja J in the case of *Hayer Bisban Singh & Sons Construction vs Paul Oduor Ogola* [2009] eKLR which is the one that the trial Magistrate relied on. The injuries are comparable and the Judge retained the amount of 120,000/- awarded by the trial Court in general damages. The award of Kshs 400,000/- made by the trial Magistrate in this instant case is therefore not comparable to the amount of Kshs 120,000/- awarded in that case.
29. While the prevailing status of our currency and economy have to be taken into account in awarding damages, astronomical awards must be avoided. The Court must therefore ensure that awards result in fair compensation.
30. In light of the said comparable awards and the principles referred to, I find the sum of Kshs 400,000/- for general damages as awarded by the trial Magistrate to be considerably high and substantially excessive to justify interference by this Court. Accordingly, I set aside the award of Kshs 400,000/- awarded in general damages and substitute it with an award of Kshs 180,000/-.

Final Orders

31. The upshot of my findings is that this Appeal is merited and succeeds. Accordingly, I order as follows:
 - i) The award of Kshs 400,000/- made to the Respondent in general damages vide the Judgment delivered in Iten Senior Principal Magistrate's Court Civil Case No. 16 of 2021 on 19/03/2018 is hereby set aside and substituted with an award of Kshs 180,000/- in general damages.
 - ii) The Appellants are awarded costs of this Appeal.
 - iii) Save for the above, the rest of the Judgment remains undisturbed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JANURAY 2024

WANANDA J.R. ANURO

JUDGE

