



REPUBLIC OF KENYA



KENYA LAW
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**Elijah v Nyabuto (Civil Appeal 48 of 2021)
[2024] KEHC 1119 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 48 OF 2021
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

PHILIP OGANDA OMWORO O. ELIJAH APPELLANT

AND

DOUGLAS ONKUNDI NYABUTO RESPONDENT

JUDGMENT

1. This is Judgment on the cross Appeal dated 14/07/2021 pursuant to an order given on 27/4/2021. The appeal is from the decision of the hon. G N Barasa in Ogembo PMCC 227 OF 2017.
2. It is unnecessary to go into pleadings in full as the Appeal is on quantum only. The plaintiff filed suit on 24/11/2017 and sought damages for pain and suffering. He stated that he had been injured as follows: -
 - i. Compound comminuted fracture of the right femur
 - ii. Undisplaced fracture of the right fibular proximal 3rd
 - iii. Fracture of the right scapular near the articular surface of the right shoulder from inferior side.
 - iv. Deep cut wound on the right knee – stitched
 - v. Laceration on the right shoulder.
3. The Plaintiff testified on 14/5/2019 and set forth his injuries. Parties record a consent on liability at 0:30 on 3/9/2019 and produced documents. The 2nd medical report by Dr. Janepher Kahuthu dated 12/10/2017 was produced as plaintiff's exhibits ones [though it was for the Defendant and exhibit one already existed. It could be a slip of the pen. Judgment was entered on liability as per the consent. General damages were awarded as follows: -
 - a. General damages 600,000/=



- b. Special damages 180,000/=
- 4. There is no Appeal on special Damages.

Analysis

Duty of the first Appellate court

- 5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
- 6. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial 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 on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
- 7. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
- 8. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
- 9. In the case of Peters v Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
- 10. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”



11. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same court stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.”

12. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.
13. Dr. Ezekiel Ogonda’s report was produced at Plaintiffs Exhibit No. 4. He did not indicate degree of Disability save to state that they were expected to heal well with time. He proposed 75,000/= to remove the implant in situ.
14. Dr. Jenipher Kahuthu examined the plaintiff on 12/10/2017 and ‘recommended’ Right fracture femur. Whatever the recommendation means is only known to the Doctor. She estimated 60,000/= for removal of implants.
15. In the lower court submissions, the plaintiff proposed a sum of Kshs. 3,500,000. They relied on the case of *Regina Mwikali Wilson v Stephen M. Gichuhi & another* [2015] eKLR, where the court awarded 2,500,000/= as general damages for several fractures and immobility.
16. In *Alex Wachira Njagua v Gathuthi Tea Factory & another* [2010] eKLR, the court stated as doth: -

“The plaintiff suffered,

- a. Blunt injury of the head with a contusion
- b. Fracture of the left tibia
- c. Fracture of the right fibula
- d. Cut wound of the forehead
- e. Bruised elbow.
- f. Bruised knee.

The Plaintiff beseeched this court to make an award of Kshs. 3,000,000 as damages for pain and suffering in view of the fact that the plaintiff was said to be 100% incapacitated. I have carefully considered the plea. There is evidence that the plaintiff became mentally ill due to the injuries he sustained in the accident. I have considered the case of *Duncan Maina VS Anthony Macharia Mburugu* NBI H.C.C.C. No. 2289 of 1996 in which this court awarded Kshs. 3,000,000/= for pain and suffering for near similar injuries. This court also in *Nakuru H.C.C.C. NO. 64 of 2001 Susan Wanjiru Njuguna =vs= Keringet flowers Ltd & 2 others* awarded a sum of Kshs. 3,000,000/= as general damages for pain and suffering for similar injuries. “

17. In *Regina Mwikali Wilson v Stephen M. Gichuhi & another* [2015] eKLR, the respondent sustained multiple skeletal fractures and soft tissue injuries which occasioned her pains and prolonged ongoing mobility and was awarded Kshs. 2.5 million. In general damages. Her estimated incapacitation was assessed at 20%.”



18. The Appellant proposed Kshs. 300,000/= for loss of Amenities. They relied on cases from 2008 which I cannot quote the same in this judgment, all these 16 years later. For all practical purposes they did not quote any liability. The nearest approximation of an authority was Reamic Investment Limited v Joaz Amenyua Samuel [2021] eKLR, the court in that matter awarded Ksh 350,000/- for open left femur fracture, abrasion on the left knees, face, neck, right upper imp and left upper lip as well as a contusion on the anterior chest. This in my respectful view is a case that tuned on its own facts.
19. They requested the court to set aside the findings on quantum and substitute with Ksh 350,000/=. Reliance was also placed on the case of Samuel Kipkemoi Kirui v Ibra him Shero Husein & 2 others [2016] eKLR. In that case the claimant Fracture of the left femur, Severe soft tissue injuries of the left knee joint that has haemarthrosis and bruises on the anterior aspect Xrays of the left femur showed open reduced and internal fixation was done. The court dismissed an appeal by the defendant against the award given on 19/6/2012 of Ksh 400,000/ -, 12 years ago. The court stated as doth: -
- “I (have) come to the conclusion that the award of Kshs. 400,000/=was neither inordinately too low as to have been a wrong estimate of the damages and therefore call for this court's interference. Current trend in awards of damages coupled with the recent precedent justify the trial court's award of Kshs. 400,000/=.”
20. The Respondent then the plaintiff in the lower court filed submission on 30/3/2022. They indicated that the appeal had been dismissed pursuant to the court orders of 9/11/2021.
21. The court had given 30 days in default, the appeal shall stand dismissed.
22. The appellant argued that the award of 600,000/= be set aside and in lieu thereof be substituted with an award of 1,600,000. reliance was placed on Francis Ndungu WAMBUI & 2 others V VK (A minor suing through next friend and mother MCWK [2019] eKLR;
- “In this case the court upheld an award of Kshs. 1,00,00/= made in 2017 where the Plaintiff had sustained, soft tissue injuries of the upper limbs, compound fracture of distal tibia fibula as well as loss of consciousness for more 30 minutes after the accident.
23. The appellant filed submissions on 14/11/2023. They relied on the case of Power and Lighting Co. Ltd and another v Zakayo Saitoti Naingola & another [2008] eKLR cited in the case Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR. The Court held: -
- “Damages should not be inordinately too high or too low
1. They are meant to compensate a party, for the loss surfed but not to enrich a party, and as such they should be commensurate to the injuries surfed.
 2. Where past decision are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 3. Where past awards are taken into consideration as guides an element of inflation should taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.... -



24. The Court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

25. They pray that a sums of 350,000/= be set aside and substituted with 350,00/-. They do not dwell on the Appeal or the order of 9/11/2021. The Record of appeal was filed on 10/3/2022. The Appellant never sought to review or set aside the order of 9/11/2022. The court directed on 22/3/2022 that the directions given are in relation to the cross appeal.

26. The injury suffered are fairly serious however they were to heal well with time. The nature of the injuries though serious are not as serious as the cross appellant want us to believe.

27. In the case of *Godfrey Mugnicholas Mwitwi Mwirebua v Marcella Mpaka Kiambi* [2022] eKLR, the court confirmed an award for Ksh 900,000 given on 30/6/2021 in a matter where The Appellant suffered multiple comminuted fracture of right femur, right tibio-fibular fracture and blunt abdominal trauma injuries which were confirmed by a discharge summary. The Physiotherapy report reveals that as a result of the injuries, Appellant suffered muscle loss on right leg,ii. joint range was reduced to 75%, weak ligaments and walks with a limp and may require collective surgery.

28. In *John Njenga Maina v Humphrey Kinyua Rukeria* [2016] eKLR, awarded Kshs. 750,000/- as general damages for pain and suffering for a plaintiff who suffered compound fractures of the right tibia and fibula, fracture of the distal 1/3 of the left tibia and fibula, laceration of the scalp, friction burns on the left hand and elbow, bruises on the left knee and blood loss, physical and psychological pains.

29. In the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR, justice D O Chepkwony maintained an award for less severe injuries being 50. The injuries suffered are therefore fractures of the right tibia and fibula leg bones (lower 1/3rd bimalleolar ankle fracture); dislocation of the right ankle and bruise on the right leg. The court has also taken note that the Appellant was walking with the assistance of crutches and that he suffered a permanent disability of 18% who awards 18% disability?

30. In *Savco Stores Ltd v David Mwangi Kamotho* [2008] eKLR, the plaintiff suffered less serious injuries, inter alia fracture of the left tibia and left fibula, fracture of the left elbow, deep cut wound on the left forehead and consequently suffered 20% disability. The court, on appeal, upheld an award of Kshs. 800,000/= for general damage together with future medical expenses.

31. I am aware of the duty related to damages. This was beautifully captured by the court of Appeal in the case of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR in 2016 as doth: -

“It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H. West & Son Ltd vs. Shephard* [1964]AC 326 at page 353- ‘The difficult task of awarding money compensation in a case



of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

32. So my duty as the appellate court is threefold regarding quantum of damages: -
 - a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
 - b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
 - c. The award is simply not justified from evidence.
33. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
34. My humble view is that such injuries attract modest sum of Kshs. 1,000,000/=. I am guided by the current trend, inflation and nature of the injuries. A sum of Ksh 600,000/= was not just low but inordinately low. In the circumstances award of 600,000/= is on the lower side. It is not just low but inordinately low.
35. In the circumstances I set aside the award of Kshs. 600,000 and substitute with Kshs. 1,000,000/= subject to liability. The Respondent will have costs of 125,0000 for the cross Appeal and Kshs. 90,000/= for the dismissed appeal a. The file is closed.

Determination

36. In the circumstances I make the following determination: -
 - SUBPARA a.
The Cross Appeal is allowed. The award of General damages of Ksh. 600,000/= is set aside and in lieu thereof, I substitute the same with General damages of Kshs. 1,000,000/= subject to liability.
 - SUBPARA b.
All the other awards remain.
 - SUBPARA c.
The respondent to have costs of Kshs. 125,000/= for the cross Appeal and costs of Kshs. 90,000/= for the dismissed Appeal.
 - SUBPARA d.
30 days stay of execution.
 - SUBPARA e.
The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the parties

Court Assistant - Brian

