



JNK (Minor suing through her mother and next friend CMN) v Mombamba Secondary School (Civil Appeal 95 of 2022) [2024] KEHC 2651 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 95 OF 2022
HI ONG'UDI, J
MARCH 12, 2024**

BETWEEN

**JNK (MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND
CMN) APPELLANT**

AND

MOMBAMBA SECONDARY SCHOOL RESPONDENT

(Being an appeal from the Judgment and decree of Honourable G.N Barasa Resident Magistrate in Kisii PMCC No. 195 of 2020, delivered on 18th October 2023)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Kisii Chief Magistrate's Civil Suit No. 195 of 2020. In the said suit, the appellant (who was the plaintiff) sued the respondent (who was the defendant) for both general and special damages arising from a road traffic accident in which the appellant sustained severe bodily injuries.
2. The respondent is the owner of the motor vehicle registration No. KBW 171V which was in its control or that of its driver, agent, servant and/or employee when it allegedly collided with of motorcycle registration number KMEK. The appellant was lawfully travelling as a pillion passenger on the said motorcycle. The claim was fully defended and the trial Magistrate delivered Judgment on 18th October, 2023 in which liability was agreed on in the ratio of 70:30 in favour of the appellant. On quantum she awarded a sum of kshs. 1,000,000/= for general damages subject to 30% contribution and special damages kshs.150,000/=
3. The appellant being aggrieved by the judgment on quantum lodged this appeal dated 15th November, 2022 on 25th August, 2023 raising the following grounds:



- i. That the learned trial magistrate erred in law and fact by awarding the appellant a sum of kshs. 1,000,000/= as general damages for pain and suffering which award is so inordinately low as to amount to an erroneous estimate of loss and damage suffered by the appellant considering the nature of injuries she sustained.
 - ii. That the learned trial magistrate erred in law and fact in failing to evaluate the injuries sustained by the appellant on the medical documents and/or report availed by the appellant.
 - iii. That the learned trial magistrate's decision on quantum albeit a discretionary one was plainly wrong.
4. The Appeal was canvassed through written submissions.

The Appellant's Submissions

5. The appellant's submissions were filed by Ben K. Advocates and are dated 22nd November, 2023. Counsel identified one issue for determination which is whether the trial court based its general damages award on correct principles and consideration. He submitted that the trial court's award on general damages was not only inordinately low and non-commensurate with the nature of injuries but also manifestly inconsistent with precedent awards made in similar cases.
6. Counsel submitted further that the extent and gravity of the appellant-minor's injuries as pleaded were fully confirmed by the evidence on record including that of the respondent. He added that the appellant after the accident sustained permanent disability assessed at 60%-75%. He referred to the P3, discharge summary and medical report.
7. He urged the court to be guided by several cases in disturbing the award on general damages for kshs. 1,000,000/= and substitute it with kshs. 2,000,000/=. The said authorities include: -
 - i. W v Peter Muriithi Ngari [2017] eklr, where the plaintiff sustained fracture of the tibia, fibula, pelvis and femur. The high court awarded kshs.1,600,000/= as general damages.
 - ii. In George William Awuor v Beryl Awour Ochieng [2020] eklr, where the plaintiff sustained fractures of the right femur and left tibia fibula. The high court awarded kshs.1,200,000/= as general damages.
 - iii. Zachary Kiriithi v Jashon Otieno Ochola KSM HCCA No. 153 of 2012 [2016] eklr, where the plaintiff sustained chest pains, injuries to the waist, compound fracture of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone. The high court awarded kshs.1,500,000/=.
8. He thus urged the court to allow the appeal.

The Respondent's submissions

9. The respondent's submissions were filed by Masire & Mogusu advocates and are dated 11th December, 2023. Counsel identified two issues for determination.
10. On the first issue on whether the award on quantum was inordinately high or low as to represent an entirely erroneous estimate, counsel submitted that according to the doctor the appellant's injuries had healed though she had scars and deformations on the injured sites. He added that it was the doctor's conclusion that the appellant had sustained 60% permanent disability and therefore the award of kshs. 1,000,000/= was sufficient compensation.



11. In support of that position, counsel placed reliance on the following cases: -
 - i. EWO (Suing as the next friend of a minor COW) v Chairman Board of Governors Agoro Yombe Secondary School [2018] eKLR, where the court upheld an award of kshs. 800,000/= where the plaintiff had suffered femur fractures and fractures of the tibia fibula.
 - ii. Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support and the court awarded kshs. 700,000/= as general damages.
12. Counsel urged the court to uphold the award by the trial court and dismiss the appeal with costs to the respondent.

Analysis and Determination

13. This being a first appeal the court has a duty to re-evaluate and reconsider the evidence that was tendered before the trial court and arrive at its own conclusions. See *Selle Vs Associated Motor Boat Co. Ltd* [1965] E.A
14. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court, 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 reanalyse 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”
15. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following are the issues that arise for determination;
 - i. Whether the quantum of damages should be disturbed.
 - ii. Who should bear the costs.
16. This being an appeal on quantum, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30, where it was held 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, in 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages.”
17. The Respondent pleaded the injuries which were confirmed by Dr. Morebu in his report dated 5th July, 2020 as follows:
 - i. Right femur fracture.
 - ii. Left femur fracture.
 - iii. Compound right tibia fracture.



- iv. Compound right fibula fracture.
 - v. Chest contusion.
 - vi. Cut wound on the face.
 - vii. Bruises on the left upper limb.
 - viii. Bruises on the right upper limb.
18. In *Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015* [2015] eKLR, D.S Majanja J. expressed himself thus: -
- “The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”.
19. Additionally, the Court of Appeal in *Odinga Jackton Ouma vs Moureen Achieng Odera* [2016] Eklr stated that:
- “comparable injuries should attract comparable awards”
20. The learned trial magistrate relied on the case of *KWS V Godfrey Karimu Mwitw* [2018] eKLR in awarding damages. The respondent in that case suffered the following injuries: -
- i. Left zygotic fracture.
 - ii. Nasal septum and lower orbital fractures.
 - iii. Distal left radius fracture.
21. The trial magistrate noted that the injuries suffered by the appellant were less serious than those sustained by the respondent in that case who was awarded kshs. 2,000,000/=. He went ahead and awarded general damages to a tune of kshs. 1,000,000/=.
22. The appellant on his part relied on the cases of *Lucy Waruguru Gatundu v Miriam Nyamburu Mwangi* [2017] eKLR, and *Dorcus Wangithi Nderi v Samuel Kiburi Mwaura & Another* [2015] eKLR where the claimants were awarded kshs. 2,000,000/= and 2,500,000/= respectively.
23. This court takes note of the fact that at no point would two accidents ever result in exactly similar injuries or similar set of injuries. In the instant case, I find that the injuries sustained in the cases relied on by the appellant were almost similar in nature and related well with the injuries she sustained unlike those in the case relied on by the trial magistrate.
24. Additionally, the appellant was assessed to have developed permanent disability at 60% -70%. This is in the reports by the appellant’s and respondent’s doctors.
25. The learned trial magistrate in awarding damages failed to take into account a number of things namely: The minor was admitted in hospital for almost one (1) year. The discharge summary PEXB 3 shows it was from 8/6/2019 to 26/5/2020. Upon discharge she was to use a walking frame. She required physiotherapy and occupational therapy. Recovery was expected to take a very long time. Permanent disability was assessed at 60-70%.



All this is in the two medical reports by Dr. Adegu William and Dr. Morebu Peter Momanyi (PEXB4a). All the above would require a lot of financial undertakings in order to support the victim.

26. Given the above scenario, I am convinced beyond doubt that the award by the learned trial magistrate was inordinately low and this court ought to interfere with it. I therefore allow the Appeal and make the following orders.

- i. The decision on liability is upheld
- ii. The award on general damages is set aside and substituted with an award of Ksh 2,000,000/= less 30% contribution
- iii. Special damages of Ksh 150,000/= upheld
- iv. Interest on the awards to run from the date of Judgment by the lower court.
- v. Costs to the appellant.

27. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

