Nyang'au v Choi & 2 others (Civil Appeal E088 of 2021)
[2024] KEHC 3165 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3165 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E088 OF 2021

WA OKWANY, J

MARCH 7, 2024

BETWEEN

VICTORIA MANYISA NYANG'AU ..... APPELLANT

AND

EDINAH BONARERI CHOI ..... 1ST RESPONDENT

JEREMIAH ONGERI SAMBA ..... 2ND RESPONDENT

KEITH SAMBA ..... 3RD RESPONDENT

(Being an Appeal against the Judgment of Hon. W. C. Waswa – SRM Nyamira dated and delivered on the 8th day of November 2022 in the original Nyamira CM's Court Civil Case No. 49 of 2020)

JUDGMENT

1. The appeal herein relates on the twin issues of quantum and liability.
2. This court already rendered itself on the issue of liability in a related matter being Nyamira HCCA E087 where it upheld the trial court's decision on liability and directed that the said finding be adopted as the judgment on liability in this matter. This court rendered itself as follows: -

> "I find that, in the circumstances of this case, the trial court made the correct finding in apportioning liability equally between the Third Parties and the 2nd & 3rd Respondents in view of the fact that the accident occurred right in the middle of a cross (plus) junction and that none of the drivers was charged with a traffic offence following the said accident.
>
> I therefore uphold the trial court's findings on liability."

3. I will therefore not belabour the parties arguments on liability but will proceed to determine the issue of whether the trial court made the correct finding on quantum.

4. A brief background of the case is that the 1st Respondent was the Plaintiff before the trial court where she sued the 2nd and 3rd Respondents (1st & 2nd Defendants) seeking both special and general damages arising out of a road traffic accident that occurred along Kericho – Kisii Road on December 3, 2019. The 1st Respondent's case was that she was a lawful fare-paying passenger traveling aboard the Appellant's motor vehicle Registration No. KBK xxxx (hereinafter "Matatu") at the time of the accident.

5. According to the 1st Respondent, the 3rd Respondent drove the 2nd Respondent's motor vehicle Registration No. KCH xxxx (hereinafter "Prado") so recklessly and negligently thus permitting it to collide with the Appellant's said motor vehicle thereby causing an accident in which she sustained serious injuries. The 1st Respondent attributed the accident to the 2nd and 3rd Respondents' negligence. The 2nd and 3rd Respondents, on their part, blamed the Third Parties for the accident.

6. The matter proceeded for hearing before the trial court which subsequently entered judgment in favour of the 1st Respondent for general damages of Kshs. 150,000/=.

7. As I have already stated in this judgment, this court upheld the decision of the trial court on liability at 50:50 as against the Appellant and the 2nd and 3rd Respondent herein.

8. Turning to the issue of quantum, it was not disputed that the 1st Respondent/Claimant sustained the following injuries in the accident: -

   a. Blunt trauma to the neck.

   b. Tenderness on the neck.

   c. Blunt trauma to the lower back.

   d. Chest contusion.

   e. Tenderness on the chest and lower back; and

   f. Bruises on the right knee and left knee.

9. The trial court rendered itself on quantum as follows: -

> The plaintiff submitted for a sum of Kshs. 500,000.00 as general damages. The defendants submitted for a sum of Kshs. 100,000.00 while the third party submitted for an award of Kshs. 70,000.00. This court has considered the authorities relied upon by the respective parties.
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> In assessing damages, the general approach should be that comparable injuries should as far as possible be compensated by comparable awards. However, it must be recalled that no two (2) cases are exactly alike.
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> The Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that: -
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> > " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

The Court of Appeal observed in the case of *Stanley Maore v Geoffrey Mwenda*, Nyr CA Civil Appeal No. 147 of 2002 [2004] eKLR that: -

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

Having considered the injuries sustained by the plaintiff herein, this court awards the plaintiff the sum of Kshs. 150,000.00 as general damages. This court relies on the following authorities:

a. *Cyprian Jairo Odhiambo v Robin Gitanda* [2021] eKLR; and

b. *Ahmed Said Amadi v Jacob Fundi Mugo* [2021] eKLR."

10. I must reiterate, at the outset, that assessment of damages is a matter of discretion. In this regard, an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. For instance, in *H. West & Son Ltd vs. Shephard* [1964] AC 326, it was held that: -

> " ...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 as 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."

11. Similarly, in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal held that:- -

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on 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. The Court 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 high that it must be a wholly erroneous estimate of the damages."
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> (Also see *Butt vs. Khan* [1981] KLR 349)

12. In the instant case, I note that the even though the injuries that the 1st Respondent sustained in the accident were soft tissue in nature, the same were serious and extensive. I am therefore not persuaded by the Appellant's argument that the award of Kshs. 150,000 general damages can is excessive or inordinately high. I therefore uphold the trial court's findings on quantum. I find guidance in the following decided cases where the claimants suffered similar injuries: -

a. *Fast Choice Company Ltd & Another vs Joseph Wanyiri* [2011] eKLR, in which the appellant sustained injuries on the forehead, wrists, arm, knee and loose incisor tooth. The High Court

in Nakuru set aside the lower court's award of Kshs. 450,000/= and substituted it with an award of Kshs. 150,000/= as general damages for pain, suffering and loss of amenities.

b. *Baloch Faisal & Another vs Elloy Kawira Nthiiri* [2019] eKLR in which the respondent sustained soft tissue injuries to the head, knees, chest, back and injury to upper incisor teeth. The High Court allowed the appeal on quantum and substituted the award of Kshs. 360,000/= with an award of Kshs. 200,000/= as general damages.

13. Having regard to the findings that I have made in this judgment, I find that the instant appeal is not merited. I therefore dismiss the appeal with costs to the 1st Respondent which costs I hereby assess at Kshs. 30,000. For avoidance of doubt, the costs shall be paid by the Appellant.

14. Orders accordingly.

JUDGMENT, DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

W. A. OKWANY

JUDGE