



Mbaluto v Board of Governors Kithingiisyo Secondary School & another (Civil Appeal E044 of 2021) [2024] KEHC 4538 (KLR) (19 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E044 OF 2021
MN MWANGI, J
APRIL 19, 2024**

BETWEEN

UMAZI MULINGE MBALUTO APPELLANT

AND

**THE BOARD OF GOVERNORS KITHINGIISYO SECONDARY
SCHOOL 1ST RESPONDENT**

KITHINGIISYO SECONDARY SCHOOL 2ND RESPONDENT

*(An Appeal from the judgment of Hon. F.M. Nyakundi, Senior Principal
Magistrate, delivered on 22nd July, 2021 in Voi PMCC No. 211 of 2017)*

JUDGMENT

1. In the lower Court, the appellant sued the respondent through a plaint dated 28th July, 2017 for special damages in the sum of Kshs.6,050/=, general damages for pain, suffering, and loss of amenities, Costs and interest of the suit at Court rates. The appellant's suit was that on or about 14th April, 2017, while she was lawfully travelling as an authorized passenger aboard motor vehicle registration No. KCE 365D, along the Nairobi-Mombasa road at Ndara area, the said motor vehicle was so carelessly, recklessly, and/or negligently driven, managed and/or controlled by the respondent's authorized driver, agent and/or servant, that it was allowed to lose control and fall (sic), thereby occasioning the appellant severe and extensive injuries, as a result of which she suffered loss and damage.
2. She asserted that at all material times relevant to the instant suit, the respondent was the sole registered owner of motor vehicle registration No. KCE 365D, making it vicariously liable. She averred that she relied on the doctrine of res ipsa loquitur, the Traffic Act Cap 403, and the Highway Code.
3. The respondent filed a statement of defence dated 1st September, 2017, where it denied all averments contained in the plaint and averred that if an accident occurred as alleged, then the same was inevitable, and it could not have been avoided by any driving skill, care, maneuver and/or prudence on the part of



- its driver, agent and/or servant. It further averred that if any accident occurred as alleged, it was caused and/or substantially contributed to by the negligent and willful acts and omissions on the appellant's part. It was further alleged that the appellant was travelling in the suit motor vehicle as an unauthorized and unlawful passenger.
4. Judgment in the lower Court was delivered on 22nd July, 2021. The Trial Court held that the suit herein was part of a series, in a self-involving road traffic accident that took place on 14th April, 2017 along Nairobi-Mombasa highway involving a school bus belonging to the respondent, in which the appellant among others who were in the said bus got injured, and as a consequence thereof, the issue of liability was determined in the test suit Voi PMCC No. 171 of 2017 at 100% against the defendants jointly and severally. The Court went further and awarded the appellant Kshs.90,000/= in general damages for pain, suffering and loss of amenities, Kshs.5,000/= as special damages, costs of the suit and interest from the date of judgment until payment in full.
 5. The appellant being dissatisfied with the judgment on quantum, filed a Memorandum of Appeal dated 16th August, 2021 raising the following Grounds of Appeal-
 - i. That the learned Senior Resident Magistrate erred in law and fact by making an award in general damages of Kshs. 95,500/= to the appellant which award was inordinately low;
 - ii. That the learned Senior Resident Magistrate erred in law and fact in applying the wrong principles of law in assessing general damages hence arriving at manifestly low damages;
 - iii. That the learned Senior Resident Magistrate erred in law and fact in failing to appreciate and be guided by the prevailing range of comparable awards in cases of a similar nature;
 - iv. That the learned Magistrate erred in law and fact in failing to take into account the appellant Advocate's written submissions and authorities whilst making the award; and
 - v. That the learned Magistrate erred in law and fact and misdirected himself when he failed to consider the appellant's supporting documents adduced as evidence whilst making the award.
 6. The appellant's prayer is for this Court to allow the appeal with costs, and set aside the judgment on quantum delivered on 22nd July, 2021 by Hon. F.M Nyakundi (SRM) in Voi PMCC No. 211 of 2017 and for the award made therein be re-assessed and substituted with a fair and just one. The appellant also prays for the costs of the case in Trial Court and the costs of this appeal.
 7. The Appeal was canvassed by way of written submissions. The appellant's submissions were filed on 16th September, 2022 by the law firm of Annie W. Thoronjo & Co. Advocates whereas the respondent's submissions were filed by the law firm of Mogaka, Omwenga & Mabeya Advocates on 4th October, 2022.
 8. Ms. Gicharu, learned Counsel for the appellant submitted that the issue of liability was settled in a test suit being, Voi PMCC No. 171 of 2019, wherein the respondent was held 100% liable for the occurrence of the accident. Counsel contended that as a result of the accident, the appellant sustained a crush injury on her right hand with loss of soft tissue. That she was treated as an inpatient at Moi County Referral Hospital from 14th April, 2017 to 18th April, 2017 and thereafter at Makueni Referral Hospital from 19th April, 2017 to 25th May, 2017.
 9. Ms Gicharu submitted that the appellant was examined by Dr. Kimuyu on 26th May, 2017 who stated that at the time of examination, the appellant complained of mild pain on the right hand with difficulty handling things hence she was unable to use her right hand maximally. Counsel stated that it was the Doctor's opinion that the appellant would benefit from physiotherapy of the affected hand. She urged



this Court to hold Dr. Kimuyu's report as uncontroverted since no contrary report was produced by the respondent.

10. In submitting that an award of Kshs.600,000/= would be sufficient in compensating the appellant for the injuries sustained as a result of the accident herein, Counsel relied on the case of Habiba Abdi Mohamed v Peter Maleve Civil Appeal No. 950 of 1998, where the plaintiff therein sustained similar injuries and was awarded Kshs.400,000/= as general damages, and the case of Francis Ochieng & another v Alice Kajimba Civil Case No. 23 of 2015, where the plaintiff was awarded Kshs.350,000/= for similar injuries. Ms. Gicharu urged this Court to uphold the Trial Court's finding on special damages.
11. Mr. Abaja, learned Counsel for the respondent cited the case of Arrow Car Limited v Elijah Shamalla Bimomo & 2 others [2004] eKLR and submitted that when it comes to assessment of general damages, the legal principle is comparable injuries should as far as possible get comparable compensatory award. He submitted that the appellant sustained a crush injury on the right hand with loss of soft tissue, which injuries were classified as soft tissue injuries. Counsel was of the view that the Trial Court's award of Kshs. 90,000/= in general damages was reasonable. Mr. Abaja relied on the case of Alex Ogutu v P.N.M.N (minor suing through the next friend and mother E.N.P) [2017] eKLR, where the appellate Court made an award of Kshs. 80,000/= in general damages for a cut wound on the left 1st & 2nd fingers which injuries are almost similar to those suffered by the appellant herein.
12. He also relied on the case of Simon Kimani Kuria v Transpares (K) Ltd [2015] eKLR, where the appellate Court made an award of Kshs.90,000/= in general damages for soft tissue injuries to both hands amongst other injuries. Mr. Abaja submitted that the authorities cited by the appellant to justify an award of Kshs.600,000/= in general damages entail severe injuries hence they not comparable to the injuries sustained by the appellant herein.

Analysis and Determination.

13. I have re-examined the entire Record of Appeal and given due consideration to the submissions by Counsel for the parties. This being a first appeal, I am alive to my duty as the first appellate Court to analyze and re-assess the evidence afresh and reach my own conclusion, while always bearing in mind that I neither saw nor heard the witnesses testify and make allowance for the said fact. The Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, stated as hereunder on the duty of the first appellate Court-

“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 make due allowances in this respect”

14. The appeal herein is only on the issue of quantum of damages, and more more particularly, the award of general damages for pain, suffering, and loss of amenities. An appellate court will however only interfere with the Trial Court's judgment if the same is founded on wrong principles of law, or if the said Court misguided itself on issues of fact and/or misunderstood the same. I am bound by the Court of Appeal's holding in Bashir Ahmed Butt vs Uwais Ahmed Khan [1982-88] KAR where it was held as follows-

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely 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..”

15. The respondent submitted that the Trial Court’s award of Kshs.90,000/= in general damages is reasonable, whereas the appellant submitted that an award of Kshs.600,000/= would be sufficient. In support of this amount, Counsel for the appellant relied on the cases of *Habiba Abdi Mohamed v Peter Maleve Civil Appeal No. 950 of 1998* and *Francis Ochieng & another v Alice Kajimba [2015] eKLR*. A perusal of the said authorities reveals that the injuries sustained by the plaintiffs therein were much more severe than the injuries sustained by the appellant herein therefore not comparable.

16. I agree with the Court’s holding in *Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR*, where it was held that comparable injuries should attract comparable awards. Additionally, the Court of Appeal in *Jabane v Olenja [1986] KLR 661*, laid down the principles that guide the Court in assessing general damages as hereunder-

“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.”

17. It is not disputed that the appellant sustained a crush injury on her right hand with loss of soft tissue as a result of the accident in issue. From the record, Dr. Kimuyu examined the appellant on 26th May, 2017, approximately six weeks from the date when the accident occurred. At that time, the appellant complained of mild pain on the right hand with difficulty handling things. He also observed that the appellant was not able to use her right hand maximally and was of the opinion that she would benefit from physiotherapy of the affected hand.

18. The Trial Magistrate in arriving at the award of Kshs.90,000/= in general damages, relied on several authorities such as the case of *Odinga Jactune Ouma v Moureen Achieng Odera [2016] eKLR*, *Kamenju Charles v Gideon Muia Mutisya [2014] eKLR*, & *Patrick Mwitii Manene & another V Kevin Mugambi Nkuja [2013] eKLR*, and stated that Courts awarded Kshs.180,000/=, Kshs.170,000/= and Kshs.170,000/=, respectively, for similar injuries. On perusal of the said decisions, it is evident that the plaintiffs therein suffered multiple soft tissue injuries including concussion.

19. According to the report by Dr. Kimuyu, the appellant’s right hand was expected to improve and make a full recovery after being subjected to physiotherapy with no permanent disability. It is however noted that the appellant suffered loss of soft tissue due to the crush injury. That will be something she will have to live with for the rest of her life. It is therefore this Court’s finding that the Trial Court erred by giving an award which was slightly low compared to the injuries sustained by the appellant. The award of Kshs.90,000/= therefore calls for interference by this Court.



20. For the reasons explained hereinabove, it is this Court's finding that the appeal herein is merited and the same is allowed. I set aside the award of Kshs. 90,000/= in general damages for pain, suffering, and loss of amenities and substitute thereof with an award of Kshs.220,000/=. In the plaint, the appellant had pleaded special damages of Kshs.6,050/=. The Trial Court however found that Kshs.5,500/= was proved. The award for special damages is hereby upheld. The amount awarded by this Court inclusive of special damages is Kshs.225,500/=. Costs of this appeal and of the case before the Trial Court shall be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF APRIL, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Gicharu for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

