



REPUBLIC OF KENYA



KENYA LAW
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**Mutuku v Mohammed (Civil Appeal 39 of 2022)
[2024] KEHC 3814 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 39 OF 2022**

**FR OLEL, J
APRIL 12, 2024**

BETWEEN

MESHACK ILIA MUTUKU APPELLANT

AND

ABDI KHERI MOHAMMED RESPONDENT

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Hon M. Opanga (SRM) dated 22nd March 2020, delivered in Kangundo CMCC No. 76 of 2017 where she awarded the Respondent a sum of Ksh. 854,550/=, plus costs and interest.

B. The Pleadings

2. The Respondent vide his plaint dated 24th May 2017 sought for General and Special damages arising out of severe injuries sustained arising from a road accident which occurred on 25th February 2017. It was alleged that on the material day, at about 13.50hrs, he was lawfully walking off the road at Tala stage area, when the Appellant, himself, his driver and/or agent so carelessly and/or recklessly drove, managed and/or controlled motor vehicle registration number KCH 129P Toyota Van (hereinafter referred to as the suit motor vehicle) and caused it to loose control and knocked him down, thereby causing him to suffer/sustain serious injuries. The respondent particularized the negligence alleged as against the Appellant and prayed that he be awarded damages as prayed for in the plaint.
3. The appellant in response filed his statement of defence wherein he denied liability for this accident either directly and/or vicariously and put the respondent to strict proof thereof. The appellant further denied owning the suit motor vehicle and/or the fact that an accident did occur. In the alternative and without prejudice to the above the appellant did aver that if indeed an accident did occur then it was



caused by the negligence of the respondent, which negligence was particularized in the statement of defence. The Appellant therefore prayed that the suit filed as against him be dismissed with costs.

C. Evidence at trial

4. PW1, the Respondent herein did testify that he resided at Nguluni, Tala and worked at the stage as a contractor. He adopted his witness statement, wherein he did aver that on 25th February 2017 at about 13.50 hrs he was standing at Tala stage, when the suit motor vehicle was recklessly and negligently driven, that it violently knocked him down as well as other passengers who were waiting to board different matatus. As a result of this accident, he did sustain serious bodily injury including tender and swollen foot, and fracture of the left distal tibia/tibula. After the accident he was rushed to Kangundo level 4 Hospital where he was admitted for one week. Upon discharge he reported this incident to the police and was given a police abstract, which he produced into evidence alongside other claim supporting documents. He had not fully healed and blamed the driver of the suit motor vehicle for causing this accident as he drove into the stage at high speed and lost control of the suit motor vehicle thereby causing this accident. In cross examination, the respondent reiterated that he suffered a fracture on his foot
5. The Appellant did not call any witness to testify on his behalf. The trial magistrate did consider the evidence presented and proceeded to find that the Appellant was 100% liable for the accident and proceeded to award the respondent a sum of Kshs.850,000/= as General damages and Special damages of Kshs.4,550/=, plus costs and interest of the suit. Being wholly aggrieved and dissatisfied by the judgment/decreed issued, the appellant did prefer this appeal and raised five (5) grounds of Appeal namely;
 - a. The learned magistrate erred in fact and in law in finding that the respondent was entitled to liability Apportionment of 100%.
 - b. The learned trial magistrate erred in fact and in law by finding that the respondent was entitled to General damages of Kshs.850,000/=.
 - c. The learned magistrate erred in fact and in law in finding that the respondent was entitled to General damages that were too high in view of the evidence tendered. The same was too high and the same is not justified.
 - d. The learned Magistrate erred in fact and in law in failing to consider the Appellants evidence and submissions.
 - e. The learned Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
6. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect to quantum and liability be set aside and this court be pleased to reassess the said judgment and substitute it with a reasonable award.

D. Submissions

(i) Appellant's Submissions

7. The appellant filed their submission dated 27th October 2023 wherein It was stated that this Appeal was against the quantum awarded and that the damages awarded by the trial magistrate were excessive given the nature of injuries sustained by the respondent. The injuries sustained were; Tender swollen left foot with limited movement, Fractured metatarsal of the left foot, Fracture of left distal tibia. These injuries



were confirmed by the P3 form dated 13.03.2017 and medical report by Dr Muoki dated 03.05.2017. It was clear that when compared to similar injury awards, the general damages awarded was excessively high and should have been reduced to Kshs.400,000/=. Reliance was placed [*Power lighting company limited & Ano v Zakayo Saitoti Naigola & Another, Anyango Oyugi & Another v Dorothy Adhaimbo ogana*](#) (2022) eKLR, [*Daniel Otieno owino & Another v Elizabeth Atieno owuor*](#) (2020) eKLR & [*George Atunga v Moffat Onsare Aunga*](#) (2021) eKLR.

(ii) The Respondent Submissions.

8. The respondent filed his submissions on 17th May 2023, and reiterated that the award of damages was proper and within limits when considered with similar awards. The award of Ksh 850,000/= was therefore reasonable given the serious nature of the injuries which the respondent suffered. The respondent placed reliance on [*Jospeph Musee Mua v Julius Mbogo & 3 others*](#), Civil Appeal No 86 of 2008 Nairobi, [*Teresiah Ngugi & leaky Gichungu Kinuthia v Micheal Masia Kimende*](#) Civil Appeal No 158 of 2017- Makeni, [*PW \(A Minor suing through her next friend and mother PW\) v Peter Murrithi Ngari*](#), Civil Appeal No 54 of 2013 & [*Moi Teaching and Referral Hospital Board & Another v Leonard Kibiwott Kasgei*](#), Civil Appeal No 162 of 2016, which cases were of similar nature and an award averaging Kshs 1,500,000/= was awarded.
9. The respondent urged this court to find that the quantum arrived at was proper and finds that this Appeal lacks Merit and it be dismissed with costs.

Analysis and Determination

10. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See [*Santosh Hazari v Purushottam Tiwari \(Deceased\) by L.Rs*](#) (2001) 3 SCC 179.
11. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the [*civil procedure Act*](#) a court of first appeal can appreciate the entire evidence and come to a different conclusion. See [*Kurian Chacko v Varkey Ouseph*](#) AIR 1969 Keral 316.
12. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties. The Appellant expressly abandon his grounds of Appeal relating to liability and expressly stated as much in his submissions. This court will therefore proceed to make a determination as to quantum awarded.



Whether Quantum Awarded was Excessive.

13. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case *Khambi & Another v Mahitu & Another* (supra). Further the Court of Appeal in the case *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others* Civil Appeal Case No. 192 of 1992 Stated:

“Those principles were well stated by Law, J.A in *Bashir Ahmed Butt v. Uwais Ahmed Khan*, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-

“An Appellate Court will not 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 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 ...”

14. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellat court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage’s awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate”.

15. The Appellant faulted the trial Magistrates finding on quantum on the basis that it was excessive and prayed that the same be reduced to Kshs.400,000/=. He did rely on *Anyango Oyugi & Another v Dorothy Adhaimbo ogana*(2022) eKLR, *Daniel Otiemo owino & Another v Elizabeth Atieno owuor* (2020) eKLR & *George Atunga v Moffat Onsare Aunga* (2021) eKLR, where the average awards were Kshs.400,000/=. The respondent on the other hand did submit that the award was appropriate and should not be overturned.
16. The issue for determination in this appeal is whether the award for pain, suffering and loss of amenities was so inordinately high as to represent an entirely erroneous estimate of the damage. The principles which must guide this court in determining this appeal have been well articulated by Counsel for the parties and I need not restate the same.
17. In the more recent case with similar fracture injuries, In the case of *Akamba Public Bus services v Abdikadir Adan Galgalo* (2016) eKLR, the respondent’s award of Ksh.800,000/= was reduced to Ksh 500,000/=. In *Godfrey Wamalwa Wamba & Another v Kyalo Wambu*, (2018) eKLR, for similar fracture injuries and soft tissue injuries the court awarded maintained the award of Ksh.700,000/=. Also in *SBI International Holding (AG) Kneya v William Ambuga Ongeri* (2018) eKLR, The court also maintained the award of Kshs.800,000/= for similar fracture Injury.

Disposition

18. Having exhaustively considered the injuries suffered by the respondent as reflected in the plaint and proved by the medical evidence tendered in the court below, and being guided by the afore-



stated principles, I do not find that the trial Magistrate made any error in awarding the respondent Kshs.850,000/= as damages. It should not be forgotten that the Respondent suffered two fracture injuries to the metatarsal of the left foot, and fracture of left distal tibia. The said award therefore cannot be said to be inordinately high to call for interference by this court.

19. The upshot is that I find that this Appeal lacks merit and proceed to dismiss the same with costs to the respondent.
20. The Respondent is awarded costs of this Appeal which is determined at Kshs.150,000/= all inclusive.
21. It is so ordered.

JUDGMENT WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 12TH DAY OF April, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 12TH DAY OF APRIL, 2024

In the presence of: -

No appearance for Appellant

Mr. Mutinda for Respondent

Sam Court Assistant

