



REPUBLIC OF KENYA



KENYA LAW
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Matuthu alias Mwendwa Mathuk v Mwinzi & another (Civil Appeal E029 of 2022) [2024] KEHC 17247 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 17247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E029 OF 2022
TM MATHEKA, J
APRIL 5, 2024**

BETWEEN

MWENDWA MATUTHU ALIAS MWENDWA MATHUK APPELLANT

AND

GABRIEL KAUNGA MWINZI 1ST RESPONDENT

JACKSON MUSEMBI 2ND RESPONDENT

JUDGMENT

- 1 On 20/2/2021 the Plaintiff/Appellant was a passenger in Motor Vehicle Registration No. KCL 792G -when it got to Mbuvo area along Wote Makindu Road, the Motor Vehicle was involved in an accident where it lost control veered off the road, rolled severally and the Plaintiff sustained body injuries to wit:
 - a. Soft tissue injuries to the right side of scalp.
 - b. Soft tissue injuries to right forearm.
 - c. Soft tissue injuries to left elbow
 - d. Soft tissue injuries to right elbow joint.
 - e. Soft tissue injuries to right and left lower limbs.
 - f. soft tissue injuries on both ankle joints.
 - g. soft tissue injuries on back.
2. The Plaintiff blamed the driver of the motor vehicle for the accident and filed Makueni PMCC E122/2021 seeking judgment against the Defendant for;
 - a. Special damages aforesaid of Kshs. 3,950/=



- b. General damages of pain and suffering and loss of amenities.
 - c. Costs of this suit.
 - d. Interest of (a), (b) and (c) above at court rate
 - e. Any other or further relief that this Honourable court may deem just to grant.
- 3 The Defendant denied the claim and put the Plaintiff to strict proof thereof.
- 4 When the matter was heard the Plaintiff adopted her statement as evidence. The Defendant did not call any witness and the case was closed.
- 5 Parties submitted on both liability and quantum.
- 6 In a judgment delivered on 26/5/2022, the learned trial magistrate awarded the Plaintiff
General damages - Ksh. 80,000
Special Damage - Ksh. 3,950
And liability 100% against the Defendant - plus costs and interest.
- 7 The Plaintiff was aggrieved and filed this appeal on the following grounds:
- a. That the learned magistrate erred in law and in fact in awarding general damages of Ksh. 80,000/=, which is manifestly and inordinately low bearing in mind the injuries sustained by the Appellant.
 - b. That the learned magistrate misdirected herself in law and in fact by failing to appreciate that the injuries the Appellant sustained were not mere soft tissue injuries as to attract a higher award.
 - c. That the learned magistrate erred in law and in fact by failing to consider the Appellant's authorities on awards made in relation to similar injuries.
 - d. That the learned magistrate misdirected herself in law and in fact by failing to appreciate that similar injuries should, so far as possible, attract similar awards and thereby arriving at an erroneous award.
- 8 The appeal was canvassed by way of written submissions.
- 9 The only issue for determination is whether the award for general damages calls for an upward review by this court.
- 10 It is the Appellant's position and the award went against the principles for award of general damages by failing to adhere to the authorities cited for similar injuries.
- 11 The Appellant cited *Kemfro Africa Ltd & Another Vs Lubia & Another* (1982 - 88) KLR. Where Court of Appeal rendered itself thus: -

“In deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge, an appellate court must be satisfied that the judge in assessing the damage, 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 damage."

"In assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping the correct level of awards in similar cases.

12. The court of Appeal restated these principles in *Catholic Dioceses of Kisumu -v- Sophia Achieng Tete - Kisumu Civil Appeal No. 284 Of 2001* as follows: -

"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 at first instance. The appellate court can justifiably interfere with the quantum of damages 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 factor 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."

13. The Appellant urged the court, guided by *Selle v Associated Motor Beat Co. Ltd (1986) EA 123* to re-evaluate the evidence and review the award of damages.

14. It was submitted that the trial court had not applied its mind to the evidence of injuries sustained by the appellant and the authorities cited as was stated by Ngaah J. in: - *Swiss Contact Ltd & Peter Munguti Kieti - v- Esther Another (2019) eKLR* where the Learned Judge states thus: -

"While I appreciate no similar injuries can be sustained by different claimants in varied or even in similar circumstances (for instance where they are in the same accident vehicle) the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions: this comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award is made are relatively similar, of course, bearing in mind such other factors as incidence of inflation.

15. That the authorities court cited were: -

- a. *YusufM. Hamza & Another-Vs- Farida Pendo Kapumu [2016] eKLR* the Respondent sustained bruises and cuts on the left forearm. The wounds had completely healed by the time she was testifying. The trial court awarded Kshs.180, 000 as general damages. In affirming the trial court's award, the learned Judge held thus:

"The medical evidence shows that the Respondent suffered soft tissue injuries on her left hand. These injuries healed leaving permanent keloid scars. Dr. Adede opined that the scars are causing grave cosmetic disfiguring. These scars are permanent remnants of the healing process. They are visible and therefore the Respondent did not recover 100% after the accident. She has now been left with permanent scars on her left hand. I do find that these injuries cannot be treated as so minor that they cannot attract an award of Kshs. 180,000. The injuries are not mere soft tissue injuries. They have left permanent scars on the Respondent. With the current



inflationary trends, an award of Ksh. 180,000 for such soft tissue injuries which have left permanent scars should not be considered as excessive."

- b. Swiss Contact Ltd & Peter Munguti Kieti -v- Esther Another (Supra);
- "The Respondent sustained soft tissue injuries to the forehead, back, and right gluteal region. The court assessed general damages for pain, suffering, and loss of amenities at Kshs.200, 000 on the 18th October, 2019."
- c. Catherine Wanjiru Kingori & 3 Others -Vs- Gibson Theuri Gichuhi (2005] eKLR.
- "In that case, the third Plaintiff suffered injuries, multiple soft tissue injuries, injury on the left elbow joint, and injuries on both ankles. The court awarded Ksh. 350,000 as general damages."
16. It was argued for the plaintiff in the subordinate court that he ought to have been awarded Ksh. 300,000 as general damages for pain and suffering.
17. In response the Respondent submitted that the that the injuries pleaded by the Plaintiff/Appellant were "Soft tissue injury to elbows, Lower limbs and back". The respondent reminded the court of its duty in appeal with respect to assessment of quantum of damages stating that it is trite law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. However, the law has set dimensions for an exercise of discretion; must be exercised judicially, with wise circumspect and upon some legal principles. The said dimensions are vital such that when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. The discretion in assessing the amount of general damages payable will be disturbed if the trial court:
- i. Took into account an irrelevant factor or
 - ii. Let out of account a relevant factor or, short of this
 - iii. The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.
18. On this the Respondent relies on Densire Muteti Wambua Vs. Kenya Power and Lighting Co. Ltd [2013] eKLR. Kigaraari Vs Aya (1982 - 1988) 1 KAR 768 cited in Godfrey Wamalwa Wamba & Others Vs. Kyalo Wambua (2018) eKLR-that:
- "Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees"
19. To support the quantum of Kshs. 80,000 the Respondent relies on George Mugo & Another v AKM _ [2018] eKLR where the sum of Kshs. 90,000 was awarded for soft tissue injuries. George Kinyanjui t/a Climax Coaches and another v Hussein Mahed Kuyala [2016] eKLR where the High Court awarded Kshs. 109,890 from Kshs. 650,000 for soft tissue injuries, Ndungu Dennis v Anne Ndirangu & Another [2018] eKLR where the High Court reduced award from Kshs. 300,000 to Kshs. 100,000 for general damage. PF (suing as next friend and father of SK (Minor) v Victor O. Kamedi & another [2018] eKLR where the sum of Kshs. 50,000 general damage was raised to Kshs. 100,000, and cases as quoted in Blue Horizon Travel Co. Ltd Vs Kenneth Njoroge [2020] eKLR: Godwin Ireri -Vs- Franklin



Gitonga [2018] eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs.300, 000 was reduced to Kshs. 90,000 on appeal.: Lamu Bus Services & A.nor -Vs- Caren Adhiambo Okello [2018] eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cutwound on the left chin, a deep cutwound on the left thigh and a blunt injury to the left thigh. An award of Ksh. 200,000 was reduced to Kshs.130, 000 on appeal.

20. I have carefully considered the submissions by both counsel.

It is noteworthy that liability is not contested - as there was no cross appeal on that.

21. The only issue is whether general damage awarded for the injuries sustained were so inordinately low as to require the intervention of this court. The submissions by the Respondent refer only to injuries on the elbows, lower limbs and the back as the injuries pleaded and the basis for their support of the award of Kshs. 80,000. A perusal of the plaint indicates that this is not so as the injuries are set out in both the medical report and the plaint indicate a slightly different scenario; Soft tissue injuries to right side of the scalp, right forearm, both elbows, right and left lower limbs, and both ankle joints. He had healed scars on the right side of the scalp and both elbow joints.

22. Like Ngaah J in the case above I have perused the judgment of the subordinate court and do not see the process of arriving at the award through an analysis of the authorities cited by parties. I have looked at the authorities cited, the range of damages for similar injuries and it is my considered view that the learned trial court did not take into account this principle hence arriving at inordinately low damages.

23. In the circumstances the appeal succeeds. The judgment of the subordinate court is set aside and substituted with an award of Ksh. 120,000 for general damages, the award for special damages and liability remains the same.

24. The appellant will have costs and interest here and below.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH APRIL 2024

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MUMBUA T MATHEKA

JUDGE

