



**Njenga & another v Kinyanjui (Civil Appeal E117 of 2021)
[2024] KEHC 3810 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E117 OF 2021**

**FROO OLEL, J
APRIL 12, 2024**

BETWEEN

ANNE WAMBUI NJENGA 1ST APPELLANT

SAMSON GITHINJI MBURU 2ND APPELLANT

AND

ANTHONY KARANJA KINYANJUI RESPONDENT

JUDGMENT

A. Introduction

1. This appeal arises from the judgment delivered on 7th July 2021 in Mavoko CMCC no. 358 of 2019, where in the appellants were held liable for the accident involving motor vehicle registration no KBV 554E Isuzu Bus/Coach (hereinafter referred to as the suit motor vehicle) a self-involving accident, which occurred on 5th February 2019 and as a result of which the Respondent, who was a passenger therein sustain serious injuries.
2. After considering the evidence tendered, the trial court vide its judgement dated 7th July 2021, did award the Respondent a sum of Ksh.400,000/= as general damages, future medical expenses Kshs.120,000/= & special damages of Kshs.42,900/=, all totaling to Kshs.562,900/= plus costs and interests.

B. Evidence at trial

3. PW1 Dr. Antony Karanja did testify and produced his medical report as exhibit 17(c). The said medical report confirmed that as a result of the accident the Respondent sustained soft tissue injury to the Right fore arm, fractured right ulna bone, fractured right radius bone, multiple bruises on the right leg from the thigh extending to the right knee and multiple bruises on left thigh. In his opinion, the Respondent sustained severe soft tissue injuries and multiple fractures and had metal plates inserted



- to hold the fractures and which plates had to be removed once the fractures have adequately united. In cross examination, PW1 confirmed that the Respondent would require ksh.100,000/- to remove the metal implants in a public hospital.
4. PW2 Anthony Karanja Kinyanjui adopted his witness statement and produced all the documents filed in the list of Documents. In his witness statement he did aver that 5th February 2019 at about 11.30am he was lawfully travelling as fare paying passenger in the suit which was being driven along Syokimau when the driver of the said motor vehicle suddenly drove off while he was alighting at a designated stage causing him to fall down as a result sustained serious bodily injury. He was rushed to Athi River Shalom Community Hospital and later sought further treatment at different hospitals. The Respondent wholly blamed the driver of the suit motor vehicle for causing this accident as he was reckless and negligent by disregarding Road Safety rules. He therefore prayed for compensation for injuries suffered.
 5. PW3 P.C Muthengi produced the police abstract with respect to this accident which occurred on 05.02.2019 at around 11.30am. The Respondent was a passenger in the suit motor vehicle and fell off as he alighted and sustained bodily injury. The said witness produced the police abstract as Exhibit P-11. In cross examination the witness confirmed that he was not the investigating officer and did not have photographs for the accident scene but under the *traffic Act*, it was the duty of the driver to take care and precaution to ensure the safety of passengers together with the conductor.
 6. The Appellant did not call any witness to testify on his behalf and the defence case was closed. After considering the submission made by the parties, the trial court did enter judgment in favour of the Respondent in the sum of ksh.562,900/= plus costs and interests. The appellant being aggrieved and dissatisfied with the said judgment did file their memorandum of Appeal and raised the following ground of Appeal namely;
 - a. The learned magistrate erred in fact and in law in awarding the Respondent ksh.400,000/- for general damages ksh.42,700/- for special damages and ksh.120,000/- for future medical expense which amount was exorbitantly high in the circumstances of the injuries suffered by the Respondent.
 - b. The learned magistrate erred in fact and in law in holding that the Respondent had proved his case on a balance of probabilities which finding was against the weight of the evidence on record.
 - c. The learned magistrate erred in law and in fact when he failed to consider the appellant's evidence on points of law and facts with regard to liability and quantum based on the injuries sustained by the Respondent.
 - d. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and he occasioned a miscarriage of justice.
 - e. The learned trial magistrate erred in law and in fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
 - f. The learned magistrate erred in fact and law in finding that the Respondent was entitled to general damages that were too high to view of the injuries suffered by the plaintiff.
 7. The Appellant therefore prayed that this appeal be allowed and the trial court finding on quantum be set aside and replaced with this court's own assessment of damages due and awardable.



C. Submissions

8. The appellant did file their submissions on 9th October 2023 wherein they confirmed that the Appeal was majorly on one issue, being that of quantum. It was not disputed that the Respondent was involved in a Road Traffic Accident on 05.02.2019 and sustained soft tissue injuries to the right forearm, fracture of the right ulna, fracture of the right radius bone and multiple bruises on the right leg from the thigh extending to the right knee.
9. It was clear that the above injuries could be classified as soft tissue injuries and fracture injuries. The award of ksh.400,000/= awarded was high and this court was asked to reconsider the same and reduce it to between ksh.250,000/= and ksh.300,000/=: which would be adequate compensation for injuries suffered. Reliance was placed on Robert Kithinji Kitheka versus Attorney General (2018) eKLR and Harum Muyoma Boga versus Daniel Otieno Agulo (2015)eKLR and Daniel Otieno Owino and another versus Elizabeth Athanas Owuor (2020)eKLR.
10. The Respondent on the other hand filed their submissions opposing this appeal on 21st June 2023 and stated that in law the appellate court would not disturb an award for damages unless it was inordinately high or low so to represent an entirely erroneous estimate of injuries suffered and past decision of similar injuries. The Respondent was not in control of the suit motor vehicle and could not be penalized for negligence of its driver. Further the Appellants had not adduced any evidence before the trial court and therefore the Respondent's evidence remained uncontroverted.
11. On account of similar injury awards, the general damages awarded was not inconsistent and /or too high and there was therefore no basis upon which the appellate court could interfere with the said award. Reliance was placed on Kihara and another versus Mutuku (Civil Appeal no. 27 of 2018)2022 KEHC 15626 (KLR) where a sum of ksh.700,000/= was awarded for similar injuries. The respondent therefore prayed that this appeal be dismissed with costs.

D. Analysis and Determination

12. I have considered the entire proceedings of the trial court, the entire record of Appeal and the submissions of the parties herein. I note that this is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor, however the court will analyze the evidence before it and arrive at its own independent conclusion. I am therefore guided by the case of *Selle & Another Vs Associated Motor Boat Company Limited & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270.



13. In *Coghlan vs. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

14. In this Appeal, the Appellant is clear that he is only challenging the award under General Damages for pain and suffering and the amount awarded for cost of future medical treatment. Basically, the Appeal is against the quantum awarded.

15. With regards to interference of the award of damages, it was observed in the case of *H. West & Son Ltd vs. Shephard* [1964] AC 326, 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.”

16. The Court of Appeal in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 held that:

“ The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

17. According to the Medical report from Kiambu county referral level 5 hospital, the Respondent right hand was deformed as he had fracture of the radius and ulna exidit/bone. He also suffered bruises over the right thigh and knee which and moxal leg, 20 x 30 cm and also had bruises on the left thigh. These injuries were confirmed by Dr T. Ndeti who also captured the same injuries in his medical report dated 11th March 2019. He confirmed that the respondent sustained sever soft tissue injuries and also suffered multiple fracture injuries to his right hand causing him to suffer pain. Further he would require further



surgery to remove the plates once the fractures had adequately united. The final assessment was that the respondent suffered Grievous harm.

18. The award in my opinion was adequate considering the nature of injuries sustained, cost of future surgery to remove the metal plate placed on the fractured hand, similar injury awards and inflationary rates. I do not find that the award arrived at is so inordinately high that it represents an entirely erroneous estimate of what would suffice for adequate compensation, nor has it been shown that the trial magistrate acted on a wrong principle or misapprehended the evidence in some material respect.

E. Disposition

19. The upshot and from analysis of the pleading and the law I do find that this Appeal lacks Merit and proceed to dismiss the same with costs to the respondent.
20. The costs are hereby assessed at kshs.150,000/= all inclusive
21. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 12th day of April, 2024.

In the presence of;

No appearance for Appellant

Mrs Mia for Respondent

Sam Court Assistant

