



**Itumbi v Musyimi & another (Civil Appeal 160 of 2022)
[2024] KEHC 6568 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 160 OF 2022**

MW MUIGAI, J

MAY 21, 2024

BETWEEN

MARGARET ITUMBI APPELLANT

AND

DOYEN MUSYIMI 1ST RESPONDENT

JEDIDAH MUTUKU 2ND RESPONDENT

(Being an Appeal arising out of the Decree emanating from the judgment of Hon. B.A LUOVA (RM) delivered on 19TH October, 2022 in Machakos SCCC No.E311 of 2022)

JUDGMENT

Background

Proceedings in the Trial Court

The Statement of Claim

1. By a Statement of claim, the claimant averred that on 10/6/2022, he was travelling as a passenger aboard three wheeler registration number KTWB 552S when near Machakos boys School along Machakos – Makutano Road, the rider of the said three wheeler moving at high speed failed to keep distance and rammed onto the rear of motor vehicle registration number KAW 893 M thereby causing an accident where the claimant sustained injuries as a result of which the claimant sustained injuries. Particulars of the injuries to claimant were:
 - a. Blunt injury to the head
 - b. Blunt injury to the nose with nose bleeding
 - c. Blunt injury to the chest



- d. Blunt injury to the back
 - e. Blunt injury to both shoulders
 - f. Blunt injury to the left leg
 - g. Blunt injury to the left hip joint
2. Claimant sought the following relief against the respondents
 - a. General damages for pain, suffering and loss of amenities
 - b. Special damages- Kshs. 12,000
 - c. Costs of the suit and interest
 - d. Any other relief that the court may deem fit to grant.

The defence

3. The Respondent in his response to the statement of claim dated 24th August, 2022 admitted the whole of the claimant's claim and that he had paid the claimant all the sum claimed in the statement of claim. The respondent claimed the claimant was negligent as he failed to take any adequate precaution for his own safety when travelling and failing to heed to traffic rules when travelling.

Hearing in the Trial Court

4. CW2 was Donyen Musyimi. He testified that he was involved in a road traffic accident and that he wished to adopt his statement as his evidence in chief and requested the court to admit his bundle of documents as exhibits.
5. In cross-examination, he stated that he was involved in a road traffic accident on 10/6/22 he was from Machakos headed to the junction. He had boarded a tuktuk KTWB 552s which was over speeding and did not keep distance and hit a vehicle which had indicated to enter the junction. He did not contribute to the accident and got injured in the head, nose, back, chest, shoulders left leg and hip joint. His nose bled and had muscle pains. He paid for medical expenses through cash. He blamed the rider of the tuktuk for over speeding and not keeping a safe distance.

Trial Court Judgment

6. By a judgment dated 19th October 2022, the trial court entered judgement for the claimant as against the respondent with liability at 100% The Trial Court went ahead and entered judgment in the following terms:
 1. General damages Kshs 250,000/=
 2. Special damages Kshs 12,000

The Appeal

7. Dissatisfied with the Judgment, the Appellant filed Memorandum of Appeal dated 18th November 2022.
8. The Appeal is brought on the grounds that:



- a. The learned trial Magistrate erred in law and in fact in awarding general damages at Kshs 250,000 which award was excessive and manifestly too high in view of the injuries suffered by the respondent and evidence adduced.
 - b. The learned trial Magistrate erred in law and in fact in failing to accord due regard to the Appellants submissions and authorities on quantum on applicable principles on assessment of damages
 - c. That the learned magistrate's finding and decision were against the wright of the evidence adduced.
9. The Appeal was canvassed by way of written submissions.

Submissions

The Appellant's Submissions

10. The Appellant in her submissions dated 20th September 2023 submitted that she took issue with quantum awarded.
11. It was submitted that the P3 form dated 13/6/22 and medical report from Machakos Level 5 Hospital indicates the same injuries as in the statement of claim and that an award of Kshs 100,000 would be reasonable and sufficient compensation for the injuries sustained by the Respondent.
12. Reliance was placed in the case of *Power Lighting Company limited & another versus Zakayo Saitoti Naingola & another* (2008) eKLR on the grounds the court considers on whether to interfere with quantum bearing in mind the principles of assessment of damages.
13. The court was invited to place reliance on the following cases in determining the matter: *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR and *HB (minor suing through mother and next friend)(DKM)v Jasper Nchonga Magari& Another* [2021] eKLR.
14. It was submitted that the sum of Kshs 250,000 be substituted with the sum of Kshs 100,000.
15. Reliance was placed on section 27 (1) of the *Civil procedure Act* on costs
16. The Court was urged to set aside the judgement of the trial court and re assess the quantum based on submissions and that the appeal be allowed as prayed and cost of the appeal be awarded.

Respondent's Submissions

17. The Respondent in his submissions dated 25th July 2023 wherein it was submitted that the appeal is only on quantum.
18. Reliance was made to the case of *Selle & Another vs Associated Motor Boat Co. Ltd* on the issue of the duty of the first appellate Court
19. Reliance was also made to the case of *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001(2004) which set out the principles which an appellate court can interfere with an award of damages, the case of *Jabane vs Olenja* Civil Appeal No. 2 of 1986.
20. It was submitted that the Appellant failed to establish the principles upon which the court can interfere with the trial courts award. The appellant had not shown how the Trial Court considered irrelevant facts, how the court based the award on wrong principles of law and failed to show that the award was not commensurate to the injuries sustained.



21. The Court was urged to dismiss the appeal with costs to the respondent.

Determination/analysis

22. This Court have considered the Appeal, the lower court record and the submissions of parties.

23. This being a 1st Appeal, in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 it states that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 allowance in this respect, in particular the court is not bound 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

24. The Appellant took issue with quantum. in *Woodruff vs. Dupont* [1964] EA 404 it was held by the East African court of appeal that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”

25. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate 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 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 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.



26. In *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 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...”

27. In this case from the medical report prepared by Dr. Mutunga confirmed the injuries as enumerated in the statement of claim by the Respondent

28. I have considered the authorities and while I find the authorities relied on by the appellant are not exactly similar in terms of the injuries sustained, on the other hand I find that the award by the Trial Court was neither high nor excessive considering the injuries sustained by the Respondent.

29. In the premises, I uphold the award made by the Trial Court. While the costs of the trial court are awarded to the Respondent, each party will bear own costs of this appeal.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 21/5/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

