



**Kago & another v Karoki & another (Civil Appeal 337 of 2023)
[2024] KEHC 5828 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 337 OF 2023**

FN MUCHEMI, J

MAY 23, 2024

BETWEEN

JOSEPH KINYA KAGO 1ST APPELLANT

JOHN NDUNGU MWANIKI 2ND APPELLANT

AND

RICHARD MWANGI KAROKI 1ST RESPONDENT

CAROLINE WARUGURU WANJA 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. V. A. Ogotu (SRM) delivered on 24th August 2023 in Thika Small Claims Court Civil Claim No. E419 of 2023)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate/Adjudicator Small Claims Court Civil Claim No. E419 of 2023 a claim that arose from a road traffic accident. The Magistrate/Adjudicator found the appellants and 2nd respondent 100% liable and awarded the 1st respondent general damages of Kshs. 700,000/- for pain, suffering and loss of amenities and special damages of Kshs. 6,550/-
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 8 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law in awarding Kshs. 700,000/- as general damages for pain & suffering which amount is inordinately high;
3. Parties put in written submissions to dispose of the appeal.



Appellants' Submissions

4. The appellants submit that the 1st respondent sustained a compound fracture of the humerus and the court awarded Kshs. 700,000/- as general damages for pain suffering and loss of amenities which was inordinately high. The appellants rely on the cases of *Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd* [2013] eKLR and *Kigaraari vs Aya* (1982-88) 1 KAR 768 as quoted in *Godfrey Wamalwa Wamba & Another vs Kyalo Wambua* [2018] eKLR and submit that damages awarded ought to be must be within consistent limbs keeping in mind that comparable injuries ought to be compensated by comparable awards.
5. The appellants urge the court to revise the award given by the trial court and rely on the cases of *Maina Onesmus vs Charles Wanjohi Gitbome* [2018] eKLR. The plaintiff in that case sustained a fracture of the midshaft humerus, fracture of the condyles, fracture of the shoulder grid and pain and psychological trauma injuries. The High Court reduced the award of Kshs. 600,000/- to Kshs. 350,000/-. The appellants further rely on the case of *Boniface Waiti & Another vs Michael Kariuki Kamau* [2007] eKLR where the plaintiff sustained similar injuries and was awarded Kshs. 295,000/- as general damages. Thus, the appellants submit that the 1st respondent's injuries are similar to the plaintiff's and urge the court to award a sum within a similar range as the cases cited.

The 1st Respondent's Submissions

6. The 1st respondent submits that according to the medical report by Dr. Okere he sustained a compound fracture of the left humerus which was classified as grievous harm and assessed at 20% permanent incapacity. The respondent further submits that the injuries he sustained are serious and are thus proportionate to the damages awarded by the trial court.
7. The respondent further submits that the trial court relied on the case of *Bernard Muli Kinyili vs DHL Worldwide Express & Another* [2018] eKLR in making its decision as the plaintiff in that case sustained a compound fracture of the left humerus, bruises on the right shoulder, multiple soft tissue injuries with left permanent disability of 20% and was awarded Kshs. 600,000/-. The 1st respondent argues that he sustained similar injuries which the trial court took into consideration. The trial court further took into account the current inflation trends and since the case was decided in 2018 the trial court awarded a sum of Kshs. 700,000/- which the 1st respondent contends is fair and justified in the circumstances.
8. The 1st respondent submits that the appellants have not shown how the trial court proceeded on the wrong principles in awarding the damages to warrant the court disturbing the award of damages. The 1st respondent contends that the award is proportionate and ought not to be disturbed.
9. The 1st respondent further submits that the appellants did not tender any evidence to support their case and proceeded to close their case without calling any witnesses to testify. Neither did the appellants file any submissions for consideration by the trial court. Thus the 1st respondent argues that he proved his case on a balance of probabilities. As for the appellants, they closed their case without tendering any evidence thus the trial court entered judgment in his favour.

Issue for determination

10. The main issue for determination is whether the award of general damages was inordinately high.



The Law

11. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 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 into account of particular circumstances or probabilities materially to estimate the evidence.”

12. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

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 allowance in this respect.

13. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the award of general damages was inordinately high.

14. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele* 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.”



15. Similarly in *Sbeikh 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.”

16. The statement of the claim shows that the 1st respondent suffered a compound fracture of the left humerus. Dr. Cyprian Okere in his report said that the respondent suffered 20% permanent incapacity and classified the injuries as grievous harm. The magistrate awarded a sum of Kshs. 700,000/- for general damages for pain and suffering. The appellants submit that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the 1st respondent. On the contrary, the 1st respondent submits that the award is justifiable and comparable to the injuries he sustained.
17. The record shows that the injuries sustained by the 1st respondent were confirmed by Dr. Cyprianus Okoth Okere in his medical report dated 11th May 2023. The doctor classified the 1st respondent’s injuries as grievous harm and assessed the degree of permanent incapacitation as 20%. The medical report was produced by consent of both of the parties and this is clear on record.
18. In the case of *Maina Onesmus vs Charles Wanjohi Githome* [2019] eKLR relied on by the appellant, the respondent sustained a fracture of the midshaft humerus, fracture of the condyles, fracture of the shoulder grid and pain and psychological trauma. The High Court substituted the sum of Kshs. 600,00/- with Kshs. 350,000/- in 2019. However, the plaintiff therein suffered 10% disability while in this case the 1st respondent suffered 20% disability. In the 2nd case of *Bernard Muli Kinyili vs DHL Worldwide Express & Another* [2018] eKLR where the appellant suffered a compound fracture of the left humerus, bruises on the right shoulder and multiple soft tissue injuries but did not suffer permanent incapacity. In my view, the cases cited by the appellant have less serious injuries which were not comparable to those of the respondent in this case.
19. It is also important to note that the appellant did not file any submissions in the lower court while he was afforded the opportunity to do so. As such, he did not give the court material to compare with what the respondent presented. Further to that, the appellant did not adduce any evidence to counter that of the 1st respondent. It is not in dispute that the 1st respondent suffered 20% disability that diminished the use of his left arm to that extent.
20. It is on record that the learned trial magistrate in arriving at the award of Kshs. 700,000/- took into account the severity of the injuries, the degree of incapacitation and the current inflation trends. It is also noted that the cases relied on by the respondent were decided about five (5) years before this case. The magistrate must have taken into account inflation factors in making the award. In my view, the award was reasonable and commensurate with the injuries suffered. The appellant did not demonstrate that the magistrate took into account irrelevant factors in awarding general damages.
21. In view of the foregoing, the award of Kshs. 700,000/- was not inordinately high and was reasonable.
22. I find no merit in this appeal and hereby dismiss it with costs to the respondents.



23. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF MAY 2024.

F. MUCHEMI

JUDGE

