



Kiruma v Chege (Civil Appeal 95 of 2021) [2024] KEHC 5998 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 95 OF 2021
PN GICHOHI, J
MAY 23, 2024**

BETWEEN

MARY MURANIA KIRUMA APPELLANT

AND

DIANAH KWAMBOKA CHEGE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D.O. Mac'Andere (RM)
delivered on 06/08/2021 in Kisii CMCC No.357 of 2019 349 of 20192021)*

JUDGMENT

1. This appeal from the judgement delivered on 06/08/2021 in Kisii CMCC No. 357 of 2019 where parties entered into a consent of liability at 85:15 in favour of the Plaintiff Dianah Kwamboka Chege (herein referred to as the Respondent) as against the Defendant Mary Murania Kiruma (hereafter referred to as the Appellant).
2. The Respondent was awarded Kshs. 250,000/= as general damages and special damages of Kshs. 7,220/= for injuries she sustained on 11/01/2019 when the driver of the motor vehicle being registration No. KCQ 471D along Kisii- Migori Road lost control and veered off the Road thus causing an accident.
3. Aggrieved by the quantum, the Appellant filed this appeal on 21/12/2022 vide a Memorandum Appeal and on several grounds. The gist of which is that considering the nature of the injuries suffered by the Respondent the general damages for pain, suffering and loss of amenities are inordinately excessive, disproportionate and unfair and the same should be set aside and substituted with a sum of Kshs.80,000/=.
4. In support of that amount, counsel for the Appellant relied in several cases including *Michael Okello v Prisca Atieno* [2021] eKLR, *Blue Horizon Travel Co. Ltd vs Kenneth Njoroge* [2020] eKLR and *PF (Suing as next friend and father of SK (Minor) v Victor O. Kamada & another* [2018]eKLR and urged the Court to disturb the award. He also sought costs.



5. Counsel for the Respondent opposed the appeal and submitted that this is not an appropriate case for this Court to interfere on this award which he termed reasonable in light of comparable cases and that the learned trial magistrate considered the law and evidence in assessing the damages.
6. Counsel submitted that if at all this Court were to interfere with the award, it should be enhanced given the prevailing circumstances as pertains to the economic circumstances in the country.
7. Counsel contended that the award was fair and reasonable and that whilst this Court has jurisdiction to interfere with the award, no basis had been laid in this case. He urged this court to dismiss this appeal with costs to the Respondent.

Analysis and Determination

8. To start, it need not be emphasised that the only issue in this appeal is on the award of general damages. Therefore, the issue for determination is whether this Court should interfere with the award of the trial magistrate.
9. It is now settled that the duty of a first appellate court is to analyse and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See *Selle & Another -vs- Associated Motor Boat Company Limited & Others* 1968 E.A 123.
10. The medical report by Dr. Morebu Peter Momanyi dated 19/02/2019 shows that the Respondent sustained :- bruises on the right hand, left knee, right side of the chest and on the right ear. The prognosis by Dr Morebu was that “the respondent suffered multiple severe soft tissue injuries that were in the process of healing with permanent ugly scars. She was given Analgesics, Antibiotics and T.T. Injection for treatment.”
11. Though it was alleged that the Respondent was also examined by the Respondent’s their doctor, that is Dr. Jenipher Kahuthu who confirmed that the Respondent had sustained soft tissue injuries which had healed, the report was not availed before the court.
12. Before the trial court, the Appellant relied on the case of *T.M. & 2 others v Moses Kinyua Muriuki* [2016]eKLR and *Shalimar Flowers ltd v Noah Muriango Matianyi* [2011]eKLR to support his proposal for an award of Kshs. 80,000/- as adequate compensation for the Respondent herein.
13. In *T.M. & 2 others (supra)* the Plaintiffs sustained injuries as follows:-1st Plaintiff- Deep cut wound on upper lip, bruises on the face, laceration on the tongue, loss of 3 upper milk teeth and was admitted for 8 days.2nd Plaintiff- Traumatic torticollis and pain in the neck.3rd Plaintiff- complained of chest pains and pain on the right hand, found with right parietal scar measuring 5cm, found with limited right shoulder movement producing a partial incapacitation.
14. The Court awarded the 1st and 2nd Plaintiff Kshs. 60,000/= each while the 3rd Plaintiff was awarded Kshs. 70,000/= as general damages.
15. In *Shalimar Flowers Ltd (supra)* the Respondent therein had sustained a deep cut on the left wrist joint which had healed leaving a scar, soft tissue to the same joint and blunt injury to the anterior chest wall. The Court set aside the award of Kshs. 120,000/- and substituted it with an award of Kshs. 80,000/-.
16. On the other hand, the Respondent had proposed an award of Kshs. 500,000/- while citing the case of *Vincent Cheruiyot Rono v Mombasa Maize Millers Ltd* [2006]eKLR and *Pan Paper Mills (EA) Ltd & another v Asha Hassan* [2007]eKLR where the Court is said to have awarded the Plaintiff Kshs. 300,000/-. These authorities were never availed to court and neither were the nature of the injuries



stated other than Counsel stating that “the injuries were more or less similar to those sustained by the Plaintiff herein.”

17. In her judgment, the trial court found none of the cases cited by both parties not comparable to the case at hand. The court therefore relied on the case of *Michael Okello v Prisca Atieno* [2021 eKLR] where “court awarded a sum of Kshs. 250,000/= for injuries more or less similar to the present one.” The trial court however did not state what injuries were sustained therein so as to compare with the injuries sustained by the Respondent.
18. This Court has taken the liberty to look at the High Court finding in *Michael Okello* case (*supra*) The Respondent had pleaded in the Plaintiff that he had sustained: -
 - a) Blunt injury to the head
 - b) Blunt injury to the forehead
 - c) Blunt injury to the neck
 - d) Blunt injury to the chest with fracture of the 1st anterior rib
 - e) Bruises and blunt injury to the left shoulder
 - f) Bruises to the left shoulder
 - g) Bruises and blunt injury to the left upper limb
 - h) Bruises and blunt injury to the right upper limb
 - i) Cut wound and blunt injury to the right lower limb
19. In that case, the Court found that all the injuries sustained by the Respondent were soft tissue injuries. The Court set aside the award of Kshs. 500,000/= general damages awarded to the Plaintiff/ Respondent by the trial court and substituted it with an award of Kshs. 250,000/=.
20. In *Blue Horizon Travel Co. Ltd* (*supra*) that the Appellant relies on in this Appeal, the injuries the Respondent had sustained :-
 - a) Bruises on the scalp
 - b) Bruises on the neck
 - c) Bruises on the abdomen
 - d) Bruises on the lower back
 - e) Cut wound on the left thumb
 - f) Cut wound on the left palm
 - g) Subluxation of the left shoulder joint
21. In the judgment, the trial court included fracture of 3rd and 9th ribs and also cut wound on the left foot near the ankle without amendment of the plaint. On appeal, High Court substituted the award of Kshs. 650,000/= with Kshs. 400,000/-.
22. In *PF (Suing as next friend and father of SK (Minor))* (*supra*), the Appellant had sustained:- Cut wound on the forehead, multiple small abrasions to the face, blunt injury to the head leading to loss of



consciousness for some time, abrasions to the back, abrasion wounds to the dorsum of the right hand and cut wound to the right leg.

23. On appeal, High Court substituted the lower court's award of Kshs. 50,000/= with an award of Kshs. 100,00/= as general damages.
24. It is a fact that no injuries are exactly the same for any given case and an award of damages is within the discretion of the trial court. Further, the Court of Appeal in *Catholic Diocese of Kisumu v Tete* [2004] eKLR, had this to say:-

“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 present an entirely erroneous estimate.”

25. Having analysed the material before this Court and considered the nature of the injuries sustained by the Respondent, comparable awards and inflation, this Court is satisfied that indeed, the trial magistrate was properly guided by principles of awarding damages when she found the damages in *Michael Okello case (supra)* more comparable and arrived at the impugned award.
26. The injuries sustained by the Respondent herein are indeed more or less comparable to those sustained by the Respondent in Michael Okello case (supra). This Court finds no reason to disturb it.
27. In Conclusion, this Court makes the following orders:-
 1. The Appellant's appeal is devoid of merit and therefore dismissed.
 2. The Respondent is awarded costs of this Appeal.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 23RD DAY OF MAY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:-

N/A for Appellant

N/A for Respondent

Ruto/ Aphline - Court Assistant

