



REPUBLIC OF KENYA



**Mutua & another v Mzee (Civil Appeal E146 of 2023)
[2024] KEHC 16934 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 16934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E146 OF 2023**

F WANGARI, J

MAY 9, 2024

BETWEEN

KAUMBUTHI ERIC MUTUA 1ST APPELLANT

JOSHUA MULI WAMBUA 2ND APPELLANT

AND

SAUMU ABDALLA MZEE RESPONDENT

(An Appeal from the Judgment and Decree of Hon. D.O Mbeja, Principal Magistrate dated 14/1/2020 arising from Mombasa CMCC No. 431 of 2019.)

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. D.O Mbeja, Principal Magistrate dated 14/1/2020 arising from Mombasa CMCC No. 431 of 2019.
2. The Appeal is on quantum only. It is based substantially on the grounds in the Memorandum of Appeal dated 30th June 2023 that the trial court erred in the assessment of general damages and awarded excessive and inordinately high award.
3. The Plaintiff dated 18th March 2019 the Plaintiff claimed damages for an accident that occurred on 20/12/2018 involving Motor Vehicle Registration Number KCL 390Q when the Plaintiff was a pedestrian along Mbuyuni area.
4. The Plaintiff pleaded Special Damages as well as General Damages. The appeal is on general damages only. The injuries were pleaded as follows: fracture of the pelvic pubic bones (right superior and right inferior bones).
5. The Appellants entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaintiff.



6. The Trial Court heard the parties and proceeded to render judgement on 14th January 2020. In the Judgement, the Court entered as consented by the parties at 85:15 in favour of the Respondent against the Defendants and awarded the Respondent Kshs. 1,000,000/- in general damages.
7. Aggrieved by the finding of the Trial Court, the Appellant lodged the Memorandum of Appeal hence this Appeal.
8. The Plaintiff testified in court and relied on her witness statement and bundle of documents. in cross examination, it was her case that she had not healed and continued with treatment.
9. The Respondent produced the medical report by Dr. Udaya and did not call witnesses.
10. The Appellants submitted that the award of Kshs. 1,000,000/= in general damages was inordinately high and erroneous estimate of damages for the injuries suffered.
11. Counsel cited authorities which I have considered.
12. Relying on Peter Gakere Ndiangui v Sarah Wangari Maina (2021) eKLR, it was submitted that the court substituted Kshs. 1,000,000 to Kshs. 500,000/= for bilateral superior and inferior pubic rami fractures.
13. It was submitted that an award of Kshs. 300,000/- would be appropriate compensation for the injuries suffered by the Respondent.
14. On the part of the Respondent, it was submitted that the award by the Trial Court was proper and not excessive. This court was urged to dismiss the Appeal.

Analysis

15. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
16. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:
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“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
17. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure.
18. Where damages are found to be at large I will interfere. They must be commensurate with similar injuries.
19. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.



20. Furthermore, in *Parvin Singh Dhalay vs. Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:-
"Because this is the evidence of an expert, I believe it.”

21. There is no dispute that the Respondent suffered a fracture of the pelvic pubic bones (right superior and right inferior bones).

22. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”

23. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high.

24. I now analyze similar fact cases on quantum.

25. The Plaintiff in this case suffered fracture of the pelvic pubic bones (right superior and right inferior bones). The court awarded Kshs. 1,000,000/= for General Damage.

26. In *Ali Malik Brothers Motor (K) Limited and Another v Emmanuel Oduor Onyango* NRB HCCA No. 252 of 2016 [2018] eKLR, the plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs. 700,000/- which was affirmed by the High Court.



27. In Joseph Njeru Luke & 3 others v Stellah Muki Kioko [2020] eKLR, the Plaintiff sustained pelvic fractures and soft tissue injuries, the High Court reduced the Lower Court's award of Kshs. 1,700,000 to Kshs. 750,000.
28. All these authorities pose similar and comparable injuries and suggest that the award by the Trial Court of Kshs. 1,000,000/= was inordinately high in the circumstances.
29. Considering the lapse of time and inflation, an Award of Kshs. 800,000/- for the Plaintiff herein is adequate compensation for General Damages. I therefore interfere with the award by the Trial Court to this extent.

Determination

30. In the upshot, I make the following orders: -
 - i. Judgement of the Lower Court on General Damages is set aside and substituted with an Award of Kshs. 800,000/=.
 - ii. As the Appeal partially succeeds, each party shall bear their own costs in the Appeal

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024.

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F. WANGARI

JUDGE

In the presence of;

M/S Munene Advocate for the Appellant

Kioko h/b for Jengo Advocate for the Respondent

Court Assistant- Barile

