



**Muli v Nyoike & another (Civil Appeal E011 of 2020)
[2024] KEHC 4656 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E011 OF 2020**

SM MOHOCHI, J

MAY 7, 2024

BETWEEN

NAOMI MUTHEU MULI APPELLANT

AND

CATHERINE WAMBUI NYOIKE 1ST RESPONDENT

MARTHA LORRAINE OCHWADA 2ND RESPONDENT

(Being an appeal arising from the judgment of Honourable W. K. Kitur dated 12th March 2020 and delivered by Honourable R. Ombata on 13th May, 2020 in Nakuru CCMCC 110 of 2018)

JUDGMENT

Background

1. The two (2) appeals herein arise as a result of the judgement and decree of the Honourable Court in Nakuru CMCC No. 110 of 2018 delivered on 13th May, 2020. The Appellants were the Defendants while the Respondent was the Plaintiff before the Trial Court.
2. By a Plaint dated 18th January, 2018 and filed on 8th February, 2018 the Respondent sued the Appellants herein for damages arising from injuries sustained from a road traffic accident. The Respondent pleaded that the 1st Appellant was the registered owner of Motor Vehicle Registration No. KBX 478B and the 2nd Appellant was his authorized driver or agent.
3. The facts were that on or 22nd October, 2017 the Respondent was lawfully standing along the Nakuru Nairobi Highway at a stage near Kenya Power when the 2nd Appellant negligently and or carelessly drove the suit motor vehicle thereby causing it to hit the Respondent and as a result of which the Respondent sustained severe injuries.



4. The Appellants filed their statement of defence dated 11th March, 2019 and filed on 12th March, 2019 denying the occurrence of the accident as well as the particulars of negligence. They blamed the Respondent for the injuries sustained.
5. By the consent of 2nd July, 2019: liability had been agreed and apportioned in the ratio of 20%:80% in favour of the Respondent, the evidence adduced on 5th February, 2019 adopted as Respondent's testimony and the Respondent's further list of documents filed on 2nd July, 2019 was deemed as properly filed and the letter dated 20th May, 2019 be admitted as PEXH 12.
6. The trial Court then entered judgment, on liability on the said agreed terms and proceeded to enter judgement on quantum as follows:
 - a. General damages Kshs. 1,800,000/-
 - b. Cost of future operations Kshs. 200,000/-
 - c. Special damages Kshs. 850,435/-
Total Kshs 2,850,435/-
 - d. Less 20% contribution - Kshs. 570,087/-

Total award Kshs. 2,280,348/-

Appeal

7. Being dissatisfied with the judgement and decree of the Trial Court the Appellants have preferred this appeal vide Nakuru Civil Appeal No 11 of 2020, through the Memorandum of Appeal dated 17th November, 2020 filed in Court on 18th November, 2020. The six (6) grounds of appeal are: -
 - i. That the Learned Magistrate erred in law and in fact, by making an award that was excessive, inordinately high and failed to pay due regard to the circumstances of the case and the applicable precedents.
 - ii. That the Learned Trial Magistrate erred in law and in fact, in awarding an award of general damages of Kshs. 1,800,00/- which amount was inordinately high and/or excessive considering the injuries suffered.
 - iii. That the Trial Magistrate erred in law and in fact, by failing to consider awards in comparable cases when he awarded Kshs. 1,800,000 as general damages which is excessive considering the circumstances of the case.
 - iv. That the Trial Magistrate erred in law and in fact by, giving an award of Kshs. 200,000 for future operation without giving any basis as to how the same was arrived at.
 - v. That the Learned Trial Magistrate erred in law and in fact, by awarding special damages of Kshs. 843,435 that were not strictly proven as required in law.
 - vi. That the Learned Trial Magistrate erred in law and in fact, by failing to properly evaluate the evidence on record and apply the applicable principles in assessing damages thus reaching an erroneous decision.
8. The Appellants sought that the appeal be allowed and that the Judgement of the Trial Court be set aside and the Court does find in favour of a lower award on general damages and special damages.



9. The *Respondent, vide Nakuru Civil Appeal No 102 of 2020*, filed the appeal based on the grounds in the Memorandum of Appeal dated 27th May, 2020 and filed on 8th June, 2020 as follows:
- i. That the Learned Trial Magistrate erred in law and fact, in awarding Kshs. 1,800,000 in general damages which is inordinately too low as to represent an erroneous estimate of damages payable.
 - ii. That the Learned Trial Magistrate erred in law and fact, in awarding half amount of the medical expenses in special damages instead of the full amount which was pleaded and approved.
 - iii. That the Learned Trial Magistrate erred in law and fact in applying wrong principles and failing to take into account material facts arriving at an erroneous award in general damages and medical expenses.
 - iv. That the Learned Trial Magistrate erred in law and fact in disregarding the Appellant's submissions and on all points of fact and law in as far as the award of damages is concerned.
10. On the above grounds of appeal, the Respondent asked that the judgement of the Trial Court be set aside by the Court in its entirety with costs.
11. On 8th December, 2023 the Court directed that High Court Civil Appeal No. 11 of 2020 and High Court Civil Appeal No. 102 of 2020 be consolidated and the former be the lead file. Further, that the appeal be canvassed by way of written submissions. The Respondent has on record submissions dated 10th January, 2020 and filed on 12th January, 2020. The Appellant's submissions are not on record.

Respondent's Submissions

11. The Respondent through her counsel submitted that the Court should be guided by the principles set out by the Court of Appeal in *Henry Hidayallanga v Munyema Manyioka* [1961] 1, EA 705 (CAD) to further the argument that comparable injuries attract comparable awards and relied on the award in *Duncan Kimathi Karagania vs Ngugu David & Others* (2016) eKLR where the Plaintiff was awarded Kshs. 4, 000,000/-
12. According to the Respondent the award was too low vis-a-vis the injuries sustained and thus proposed an award of Kshs. 5,000,000 the same amount she had proposed in the Trial Court.
13. Counsel also submitted that this being a first appeal the Court is obligated to re-evaluate the evidence on record and determine whether the Trial Court's decision should stand or be disturbed. On this reliance was placed on the case of Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424. On comparable injuries being a yardstick in awarding general damages he relied on the Court of Appeal case in *Odinga Jackton Ouma v Moureen Achieng Odera* [2016] eKLR.
14. Respondent also relied on the decisions in *Gitobu Imanyara & 2 Others vs attorney General* [2016] eKLR and *Bashir Ahmed Khan* [1982-88] KAR 5 and *Simon Tavera v Mercy Mutitu Njeru* [2014] eKLR to submit on the justification for the Court to disturb the trial Court's award while still appreciating that the award of general damages is an exercise of discretion by the Trial Court.
15. The Respondent also submitted that the authorities that the Trial Court relied on, had injuries that were not comparable to the ones sustained by the Respondent and that the judgment lacked the concise statement, points for determination and the reasons whereof contrary to the provisions of Order 20, Rule 4 of the Civil Procedure Rules.



Analysis and Determination

16. As a result of the accident, the Respondent sustained the following injuries;
 - a. Comminuted of the left tibia and fibula (secured with external fixators clamp);
 - b. Comminuted fracture of the right tibia and fibula (secured with external fixators clamp);
 - c. Large oblique fracture of the left scapula slitting into two;
 - d. Fracture to the posterior ribs 6th and 7th (accompanied by surgical emphysema)
 - e. Collapse of the left lung (consolidation)
 - f. A large pneumothorax occupying the left thorax (causing mediastinal shift to the left);
 - g. Severe soft tissue injuries to the left hand
17. The injuries were confirmed by the medical report of Dr. Obed Omuyoma dated 18th January, 2018. The medical examination was conducted about a month after the accident. The doctor opined that the Respondent was still on treatment and the issue of permanent disability could not be addresses but classified the degree of injury as grievous harm.
18. The Respondent underwent another medical examination and in the report by Dr. George W. O. Mugenya dated 20th June, 2019 about 2 and a half years later, the doctor noted that she has not resumed work as at then. He opined that the Respondent suffered eighteen (18) months of total temporary disability and thirty (30) percent (%) permanent disability.
19. From the record, the Respondent was admitted to Mediheal Hospital on 22nd October, 2017 and discharged on 10th December, 2017. She was admitted in the ICU for 3 days, underwent bilateral external fixation on both lower limbs on 22nd October, 2017, surgical debridement of the wounds on 4th November, 2017 and shortening of a bone on 10th November, 2017. Dr. George W. O. Mugenya observed that she had irregular swelling and skin with shortening on both lower limbs. She was confirmed to a wheel chair for one year and later walked with the assistance of 2 crutches and one for short distances.
20. This being a first appeal I am obligated to re-evaluate the evidence on record and determine whether the Trial Court's decision should stand or be disturbed.
21. The Court has refined three (3) issue from the two conflicting Appeals under consideration as;
 - i. Whether the award of general damages was excessive and inordinately high or inordinately too low as to represent an erroneous estimate of damages payable?
 - ii. Whether Special damages were proved fully or partially?
 - iii. Whether there was validity for an award of Kshs. 200,000 for future medical treatment?
22. The principles which ought to guide a Court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant



to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. 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 and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably 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... It is inevitable in any system of law that there will be disparity in awards made by different Courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award... it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in Court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

23. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and Courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See *Tayab vs. Kinanu* [1983] KLR 114; *West (H) & Son Ltd vs. Shephard* [1964] AC 326 at 345.
24. In the case of *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 The Court of Appeal 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.”



25. It was therefore held by the same Court 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...”

26. Similarly, in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the Court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate Court is to interfere, whether on the ground of excess or insufficiency.”

27. With regards to the first issue for consideration and in light of the conflicting positions where both the Appellants and the Respondent contends the award of general damages was erroneous excessive and inordinately high or inordinately too low as to represent an erroneous estimate of damages payable, this Court has to re-evaluate whether the learned magistrate proceeded on a wrong principle or misapprehended the evidence in some material respect...

28. In arriving at the general damages awarded the Trial Magistrate relied on the case of *James Thiongo Githiri – Versus - Nduati Niuguna Ngugi, Nakuru HCC No.344 of 2010, (2012) eKLR*, where the plaintiff sustained serious injuries including a fracture of his right leg in three places and the left leg was broken in one place and he was awarded general damaged Ksh 1,800,000/=.

29. And the case, *Teresia Ngugi and Leaky Gichungu Kinuthia-Versus Michael Masia Kimende, Makueni HCCA No. 158 of 2017, (2018) eKLR*, where an award of general damages of Kshs. 1, 500,000 by the Trial Court was upheld. In a case where the respondent had suffered the following injuries: mild head injury with facial bruises, blunt chest injury with fractured ribs and a compound fracture of the right tibia fibula.

30. The Honorable Court took into consideration the age of the authorities, effects of inflation on the shilling and nature of injuries and awarded general damages of Ksh.1, 700,000 in page 103 of the Record of Appeal and subsequently enhanced the figure to kshs1,800,000/- in the final orders without any discernable rationale.

31. With regards to the Authorities relied upon this Court finds that injuries sustained the Authorities were incomparable to the injuries the Respondent suffered and as such this Court is of the considered view that it is thus safe to consider authorities with similar degree of injuries suffered.

32. In *Subati Flowers Limited v Walter Wanyonyi Wekesa* [2019] eKLR, the Court upheld an award of Kshs. 1,600,000.00 as general damages for the plaintiff who suffered a fracture of the right and left tibia and fibula, fracture of L2 of the lumbar spine and blunt injury to the right side of the chest.



33. Lastly, in *Porim Insurance Brokers Limited v Patrick Rugendo Mugambi* [2021] eKLR, the plaintiff suffered a fracture of the left femur, right tibia, pro lapse of vertebra C6, head injury blunt injuries to the chest, right shoulder and cut on the left knee and whose disability was assessed at 16% and was awarded 1,600,000.00.
34. Finally, in *Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd & Another* [2014] eKLR where the plaintiff sustained extensive fractures of the left tibia and fibula, soft tissue injuries on the left leg and fracture of the collar bone, he was awarded Kshs. 2,500,000.00 in general damages.
35. This Court equally finds that the award of general damages was not excessive as alleged by the Appellant and that while the same appears within the precedents by this Court the same in fact was not inordinately low inordinately too low as to represent an erroneous estimate of damages payable.
36. Having found that the Award in general damages was neither excessive and inordinately high or inordinately too low as to represent an erroneous estimate of damages payable this Court is this unable to interfere or disturb the award granted by the trial Court.
37. With regard to the 2nd issue as to whether special damages were fully proved and if the trial magistrate was in error to award kshs 850,435/- instead of ksh 1,696,620 as pleaded, it is a well settled principle of law that an invoice is not proof of payment. Special damages can only be proved by producing actual receipts or invoices endorsed with the word “Paid” (See: *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR.)
38. This Court finds that the trial magistrate did consider the receipts availed in support and found that the Respondent had produced invoices rather than receipts which he correctly disallowed thereby arriving at the reduced sum in special damages. This Court is thus unable to interfere with the trial Courts finding on this limb.
39. On the final issue of award of costs for future medical treatment, this Court finds that the same was pleaded at Kenya shillings 500,000/- in the plaint, however it is this Court’s contention that the Respondent had the onus to specifically prove this.
40. In *Mbaka Nguru & Another v James George Rakwaro* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR, the Court of Appeal put it this way;

“We come now to the claim under the heading “Future Medical Expenses”. There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances’ simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head
41. While the Court notes the finding by the Trial Court that the same was not proved but nonetheless acknowledged the medical report indicating that the Respondent would require a future surgical operation and proceeded to make an arbitrary award of Kenya shillings 200,000/- this Court considers the trial Court to have erred and misapprehended the fact and that, in the absence of proof, this claim falls flat on its face. I am thus persuaded that no basis or validity prevailed warranting an award under this head.



Conclusion

42. Accordingly, the appeal partially succeeds. The same is dismissed as regards assessment of general damages and cost for future medical expenses are concerned. Accordingly, the awards for general damages and special damages is upheld. It is however allowed to the extent that the award for damages for future treatment is disallowed.
43. For avoidance of doubt this Court makes the following determination on quantum as follows:
- i. General damages Kshs. 1,800,000/-
 - ii. Special damages Kshs. 850,435/-
 - a. Total Kshs 2,650,435/-
 - iii. Less 20% contribution - Kshs. 530,087/-
 - a. Total award Kshs. 2,120,349/-
44. With both the Appellant and the Respondent partially succeeding, there shall be no order as to costs. It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 7TH DAY OF MAY 2024

MOHOCHI S. M.

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

