



REPUBLIC OF KENYA



**Mulwa & another v Nzai (Civil Appeal E072 of 2023)
[2024] KEHC 6898 (KLR) (10 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E072 OF 2023
SM GITHINJI, J
JUNE 10, 2024**

BETWEEN

JANET MBAKA MULWA 1ST APPELLANT

REUBEN KIOKO 2ND APPELLANT

AND

GLORIA KADZO NZAI RESPONDENT

JUDGMENT

1. The appeal before me is against the award of damages by the trial court in the sum of Kshs. 400,000/= for general damages with liability agreed at ratio of 10:90%. The judgment was delivered on 25/4/2023. Aggrieved by the judgment, the Appellants filed a memorandum of appeal on 25/5/2023. The appeal is on the Trial Court's finding on quantum. The grounds of appeal are that: -
 1. The learned trial magistrate erred in law and in fact in awarding Kshs. 400,000/- (Kenya Shillings Four Hundred Thousand only) to the Respondent which award when viewed against comparable claim is manifestly excessive and inordinately high as to amount to a miscarriage of justice.
 2. The learned magistrate erred in law and in fact by failing to apply the relevant and pertinent judicial principles, precedents and trends regarding the award of quantum.
 3. The learned trial magistrate erred grossly and misdirected himself by treating the evidence and submissions before him on quantum superficially and consequently arrived at a wrong decision without any basis in law or fact.
 4. The learned trial magistrate erred in law and in fact in failing to exercise his discretion judiciously and proceeded to arbitrarily awarding damages that were inordinately too high in the circumstances of the case.



5. The learned trial court treated the submissions of the Appellants lightly and disregarded the Appellants' evidence on record.
2. The Appellants sought the following orders: -
 - a. The appeal to be allowed with costs.
 - b. The decision of the subordinate court and/or the judgment and orders issued on 25/4/2023 be set aside and the court herein be pleased to reassess liability and the general damages payable to the Respondent if any.
3. At the hearing of this appeal, directions were given to have both counsel file their respective submissions. This being the first appeal I am required to re-evaluate the evidence adduced and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see *Selle & Another V Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Background

4. The Respondent filed suit against the Appellants through a plaint dated 12/9/2022 seeking general and special damages and costs for injuries sustained in a road traffic accident which occurred on 14/7/2022 along Majengo Cabros Road at Thome Bar Area within Malindi Town. The Respondent was lawfully traveling as a passenger aboard Motor Cycle Registration Number KMFY 224W when the 2nd Appellant's authorized driver so negligently drove, managed and or controlled Motor Vehicle Registration No. KCY 374F that the same lost control and hit Motor Cycle Registration Number KMFY 224W as a result whereof the Respondent sustained blunt injury to the lower back and right lower limb and bruises on the right lower limb.
5. From the P3 form and the medical report by Dr. Ajoni Adede, the Respondent suffered soft tissue injuries on lower back and right lower limb. The Appellants filed a defence dated 17/11/2022 denying the allegations in the Plaint. On 21/3/2023 parties arrived at a consent on liability at a ratio of 10:90% in favour of the Respondent against the Appellants. The same was adopted as judgment on the issue.
6. Thereafter, parties were directed to file written submissions on quantum which they did. A perusal of both submissions reveal that parties agreed to have the documents filed be admitted as exhibits without calling their makers.
7. The Respondent filed submissions dated 22/3/2023 wherein she submitted that an award for Kshs. 400,000/- would adequately compensate her as general damages for pain and suffering. She relied on the case of *Poa Link Services Co. Ltd & another v Sindani Boaz Bonzemo* [2021] eKLR where she stated that the victim suffered soft tissue injury and blunt injury to the chest, bruises of the lower abdomen, bruised of the right hip joint, bruises of the thigh and bruises on the knee and was awarded Kshs. 350,000/-.
8. The Appellants filed written submissions on 4/4/2023 wherein they submitted that an award of Kshs. 130,000/- for pain and suffering would suffice. They relied on the cases of *Ndungu Dennis v Ann Wangari Ndirangu* [2018] eKLR where the court awarded Kshs. 100,000/- for comparable injuries as general damages for pain and suffering. They also relied on the case of *Maimuna Kilungya v Motrex Transporters Ltd* [2019] eKLR where the court awarded Kshs. 125,000/-.
9. Notably, special damages were not contested and were awarded at Kshs. 4,250/- as prayed. The trial court decided on the issue of quantum in favour of the Respondent. The learned trial magistrate observed that the injuries sustained in the cases cited by the Appellants were less severe compared to



the Respondent herein. He found the case cited by the Respondent more comparable to the instant case and proceeded to award KShs. 400,000/- bearing in mind the inflation tendencies.

10. As already stated, this appeal was canvassed by way of written submissions, which only the Appellants filed on 2/5/2024. I have perused the said submission and find that they are a replica of those presented before the trial court. I will therefore not reproduce the same. I have nonetheless considered them in this judgment.
11. The sole issue for determination is whether the award of KShs. 400,000/- as general damages for pain and suffering is inordinately high in light of the injuries sustained, so as to occasion a miscarriage of justice.

Analysis and Determination

12. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
13. Further, in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal held that; -

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

14. Similarly, in the case of *Savanna Saw Mills Ltd v Gorge Mwale Mudomo* (2005) eKLR the court stated as follows: -

“It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ...”

15. The injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical report by Dr. Ajoni Adede as:
 - a. Small bruise on the right ankle.
 - b. Soft tissue injuries on lower back and right lower limb.
 - c. blunt object injury to the lower and right limb



- d. bruises on the right lower limb.
16. Dr. Ajoni Adede observed on 7/8/2022, approximately one month after the accident, that the right lower limb has a 3cm by 2cm scar while the injured areas were no longer tender. His conclusion is that the Respondent had sustained soft tissue injuries with no permanent injury.
17. Looking at the cases relied upon by parties at trial, I am convinced that the learned trial magistrate proceeded on wrong principles to arrive at an award that was inordinately high. I say so because in the case of *Poa Link Services Co. Ltd & Another v Sindano Boaz Bonzemo*, [supra] Riechi J upheld the general damages of Kshs. 350,000/- for the plaintiff, who had sustained the following injuries: -
- a. Blunt injury to the chest.
 - b. Bruises to lower abdomen.
 - c. Bruises of the right hip joint.
 - d. Bruises of the thigh; and
 - e. Bruises on the knee.
18. And in *Ndungu Dennis v Ann Wangari Ndirangu* [supra], the court reassessed the award to Kshs. 100,000/- for soft tissue injuries to the lower right leg and soft tissue injuries to the back.
19. Taking into consideration the actual injuries suffered by the Respondent herein it becomes obvious that the injuries she sustained were less serious to those in *Poa Link Services Co. Ltd & Another v Sindano Boaz Bonzemo* [supra] and more similar to the respondent in *Ndungu Dennis v Ann Wangari Ndirangu*.
20. In the case of *Justine Nyamweya Ocboki & another v Jumaa Karisa Kipingwa* [2020] eKLR the court awarded the sum of Kshs. 150,000/- for blunt object injury to the lower lip, blunt object injury to the chest, and blunt object injury to the left wrist.
21. Similarly, in *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd* {2015} eKLR, the award of Kshs. 700,000/= was reduced to Kshs. 150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.
22. It is also trite that in assessing compensatory damages, the Law seeks at most to indemnify the victim for the loss suffered, but not to nobble the tortfeasor for the injury he has caused. The court in *Ramadhan Kamora Dhadbo v John Kariuki & another* Civil Appeal No. 27 of 2015 [2017] eKLR opined thus:
- “There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”
23. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2)* (1987) KLR 30 stated that: -
- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages



took into account an irrelevant factor or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

24. In light of the above, I am persuaded that the award made by the learned trial magistrate was on the higher side. Accordingly, and for reasons stated, I would allow the appeal, and set aside the award of Kshs. 400,000.00/= by substituting it with Kshs. 250,000.00/=, considering the salvage of inflation as an additional factor. Each party shall bear its own costs for this appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF JUNE, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

PARA 1. Mr Ndambuki holding brief for Mr Weloba for the Appellant

PARA 2. Ms Nyambuto for the Respondent

