



**NIC Bank (K) PLC & others v Mugure (Civil Appeal E265 of 2023)
[2024] KEHC 7482 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E265 OF 2023
RC RUTTO, J
JUNE 21, 2024**

BETWEEN

NIC BANK (K) PLC & OTHERS APPELLANT

AND

JOY MUGURE RESPONDENT

(Being an appeal against the judgment/decree of the Chief Magistrate's Court at Kiambu (Hon. E Ominde) dated 4th July 2023 in Kiambu CMCC No E181 of 2021)

JUDGMENT

1. This appeal contests the quantum of damages awarded by the trial court. Liability was settled by a consent of the parties recorded on 25th April 2023. The trial court subsequently heard the case for purpose of assessment of damages and delivered a judgment in which the respondent was awarded general damages of Kshs.500,000/- less 20% liability making it Kshs. 400,000/- and special damages of Kshs 5,550/-.
2. The appellant aggrieved by the said judgment, proceeded to file a Memorandum of Appeal dated 23rd July 2023. The appeal is premised of the following grounds;
 - a. The trial magistrate acted in error when she failed to properly evaluate evidence on record thus reaching erroneous decision on the issue of quantum.
 - b. The trial court erred when she failed to properly evaluate the expert evidence on record, on the nature of injuries suffered by the respondent thus reaching erroneous decision on the issue of quantum of damages payable to the respondent and there by arriving manifestly at an excessive award.



- c. The learned trial magistrate erred in law and in fact by basing her decision on extraneous matters and failing to base her said decision on the facts, evidence on record and principle of stare decisis.
3. The matter was prosecuted by way of written submissions filed by the respective counsels.

The appellant's submissions

4. Counsel for the appellant submits that the 2nd medical report conducted by Dr. Aswin Mudhiwala on its behalf contradicts the respondent's claim of sustaining any fracture or receiving treatment by way of an application of Plaster of Paris (P.O.P). Dr. Madhiwala, indicated in his report, that he reviewed the X-ray and found no evidence of a fracture. Additionally, the doctor confirmed that no P.O.P was applied. Further, the appellant contends that the respondent was examined by Dr. G.K Mwaura of Kinoo medical clinic who based his evaluation on the P3 form and the treatment card from Kiambu level 5 hospital. That Dr. Mwaura did not indicate that he looked at the X – ray form or the initial treatment notes from St. Mary's mother and child hospital which indicated 'review HX Trauma'.
5. It is the appellant evidence that the respondent only sustained injuries over both feet, this did not include any fractures and an award of Kshs 100,000/- would have been sufficient compensation.
6. To support his argument, counsel relied on the case of Ephraim Wagura Muthui & 2 others v Toyota Kenya Ltd & 2 Others (2019) eKLR where the court substituted award of Kshs 55,000 with kshs 100,000 for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back.
7. Further reliance was placed on the case of Nyambati Nyasabwa Eric Vs Toyota Kenya Limited and 2 others (2019) eKLR where an award of Ksh 90,000 was awarded for deep cut on the scalp extending to the left maxillary area, blunt injury to the left side of the chest contusion on the back and contusion on both legs.
8. Counsel for the appellant thus urged the court to reduce the decretal amount to Kshs. 300,000 in the event it finds that the respondent sustained a fracture. He relied on the following authorities Mwavita Jonathan Vs Silivia Onunga (2017) eKLR where the court substituted an award of Kshs 1,000,000 with Kshs 400,000 for the left hip commuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at cervical spine of the neck and the lumbar – sacral spine of the back and deep wound on the left lower leg causing loss of blood.
9. Also relied upon by the appellant is the case of Reamic Muinde Kilonzo Vs Andrea M. Maiko Mogi & another [2021] eKLR, where the High Court at Kisii substituted an award of Kshs 600,000/= with an award of Kshs 350,000/= for an open left femur, abrasion on the left knees, face, neck, right upper limb and left upper lip as well as a contusion on the anterior chest and Benard Muindi Kilonzo Mogi 7 another [2021] EKLR, where the trial court awarded the sum of Ksh 500,000 for pain and suffering for more serious injuries and a high degree of incapacity. The injuries sustained were a fracture of the right humerus with permanent incapacity assessed at 20%.
10. In conclusion, counsel urged that an award of Kshs 100,000 would be sufficient if the court is persuaded that there was no fracture. However, if the court finds that there was a fracture, an award of Ksh 300,000 would be appropriate.



The respondent's submission.

11. In response, the respondent made reference to the x ray request from Kiambu level 5, the P3 form filled at Kiambu level 5 hospital and medical report from Kinoo that particularized her injuries as wounds on both feet and fracture of the left fibular.
12. According to the respondent, the trial court sufficiently addressed itself on the issue of the medical reports by Dr. Kungu Mwaura and Dr. Ashwin Madhiwala. Therefore, this matter should not be an issue for appeal.
13. The respondent also urged the court to take into consideration that the medical reports and the supporting documentation for the claim were produced by consent. Consequently, if the appellant had any issue with them, he would have requested to cross examine the authors.
14. The respondent made reference to the case of *Kemfro Africa Limited T/A Meru Express 1976 & another Vs Lubia & another* (No 2 Civil Appeal No 21 of 1984 (1985) ELR and *Gitobu Imanyara & 2 others Vs Attorney General* (2016) eKLR and urged the court not to interfere with the award of general damages awarded by the trial court.

The issue for determination

15. The issue of contention is whether the trial court erred in determining the quantum of damages.
16. Section 78(2) of *Civil procedure Act*, provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein. Therefore, my duty as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR and in *Selle & Anor –Vs- Associate Motor Boat Co. Ltd* 1968 EA 123.
17. Besides, the circumstances in which an appellate court should interfere with trial court's discretion on assessment of damages were stated in the case of *Kemfro Africa Ltd v Lubia & another* , where:

“...its [trial court] decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
18. Also, 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...”



19. 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.”

20. In this case, the appellant relies upon a medical report conducted by Dr. Ashwin Madhiwala. The report dated 9th February 2022 provided that the respondent sustained injuries over both feet. That the injuries had healed well but the left foot was swollen and in pain (tissue damage). Dr. Madhiwala assessed the injury to a permanent disability of 5% and temporal disability of two months.

21. Dr. Madhiwala in his report further stated that, he reviewed the x ray report and did not find any evidence of a fracture and that Plaster of Paris was not applied. On the list of documents available, the Doctor listed the copy of I.D photocopy and treatment summary from St Mary’s Mother and Child hospital.

22. On her part, the respondent relied upon the treatment notes from Kiambu level 5 and St Mary Mother and Child hospital as well as the medical report by Dr. G.K Mwaura dated 15th August 2020 to show that the injuries sustained were wounds on both feet and fracture of the left fibular.

23. Dr. Mwaura also found that, healing was incomplete since the plaster cast was in situ. He classified the injuries as grievous harm and soft tissue injuries. The degree of incapacity was assessed at 5% permanent disability on the left lower limb.

24. Notably the trial court addressed itself on the two conflicting medical report and decided to rely on the treatment sheets and x ray from Kiambu Level 5 hospital dated 7th June 2020. The trial court considered this report to be neutral, as it was made at hospital during the treatment of the plaintiff solely for purposes of ensuring she was properly and professionally attended to. The trial court proceeded to hold that the treatment records were a true reflection of the injuries sustained immediately after the accident and based the award of damages on these injuries.

25. In this instance case I agree with the reasoning of the trial court in relying upon the medical report from Kiambu Level 5 hospital a independent documents to resolve the conflict arising from the two medical reports. In the case of, *Civil Appeal No. 194 of 2011 - China Wu Yi Company -vs- Andrea Githinji Gitonga and Monica Kori Ndunda v Malindi taxis limited* [1997] eKLR the court, while facing a similar situation affirmed itself that there are other independent documents that the court can rely on to resolve differences in two medical reports. The court noted that such independent documents could be treatment notes and discharge summaries from the hospitals where the respondent was treated before the two medical reports were prepared to ascertain the nature of the injuries.

26. Having dispensed on the issue of the medical records, it is important to restate the duty of a first appellate in an appeal such as this. In this case is that the general principle is that is that an appellate court should not be quick to disturb an award of a trial court unless on exceptional cases. In *Butt vs Khan, Civil Appeal No. 40 of 1997, [1982-88]1KAR 1*, the court pronounced itself as follows:

“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.”

27. The trial court after taking into consideration the injuries sustained by the respondent, the degree of permanent incapacity as well as comparable authorities awarded the respondent Kshs.500,000.00 as general damages.
28. The Appellant urges the court to find that if there was a fracture an award of Kshs. 300,000 is appropriate, if no fracture, the court should award Kshs. 100,000. As I have stated earlier, I agree with the reasoning of the trial court in adopting the medical report of Kiambu Level 5 hospital which indicated that the respondent sustained wounds at both feet and fracture of the left fibular.
29. In support of their claim, the Appellant cited the case of Mwavita Jonathan v Silivia Onunga [2017] eKLR where the respondent sustained a fracture at the hip point and soft tissue injuries and the court reduced the amount awarded from Kshs 1,000,000 to Kshs 400,000. The other cases cited by the Appellant would have been applicable if the court was to be convinced that no fracture was suffered by the Respondent.
30. Upon considering all the cases cited by the parties, as well as other comparable authorities, it is noted that as a principle, comparable injuries should be compensated with comparable awards taking into consideration the cost of inflation. The case of Mwavita (supra) relied upon by the Appellant where the Respondent was awarded Kshs.400,000 was delivered on 20th November 2017.
31. Taking into consideration the effluxion of time, and other comparable awards, it cannot be said that the amount of Kshs. 500,000 awarded by the trial court was inordinately high or even extremely low to warrant this court’s interference with the discretion of the trial court. The trial court’s decision was based on the evidence in record and no misapprehension of evidence has been found.
32. Having said so, it is my finding that the trial court applied the right principles in arriving at its determination. Consequently, I decline to interfere with the trial court’s award of general damages and I find that the sum of Ksh. 500,000/= appropriate.
33. The appeal is dismissed with costs to the Respondent.
34. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 21ST DAY OF JUNE 2024

For Appellants: Ms. Muguku H/b For Mr. Ochieng

For Respondent: N/a

Court Assistant: Peter Wabwire

