



REPUBLIC OF KENYA



**Kihara v Kihungi (Civil Appeal E169 of 2022)
[2024] KEHC 9076 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E169 OF 2022
BM MUSYOKI, J
JULY 22, 2024**

BETWEEN

LUCY WANGARI KIHARA APPELLANT

AND

THOMAS KARANJA KIHUNGI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. O. Wanyaga SRM in Thika
Chief Magistrate's Court civil case number 333 of 2021 dated 22nd June 2022)*

JUDGMENT

1. The appellant approached the Chief Magistrate Court at Thika vide plaint dated 26-04-2021 praying for award of damages against the respondent. The cause of action was based on negligence which was said to have resulted to an accident which occurred on 8-10-2020 involving motor vehicle registration number KAU 540H. According to the plaint, the appellant sustained the following injuries;
 - a. Loss of teeth;
 - b. Deep cut on the upper lip;
 - c. Avulsion of right lower 2nd molar;
 - d. Blunt injury to the left leg; and
 - e. Blunt chest injury.
2. The respondent was served with summons to enter appearance and other suit documents but he never defended the suit. Judgement was entered against the respondent on 16-02-2022 and the matter went for formal proof. The presiding magistrate entered judgment for the appellant by awarding Kshs 130,000.00 for pain and suffering and loss of amenities, Kshs 5,650.00 as special damages, cost of the



suit and interest. The appellant was dissatisfied with the award for damages for pain and suffering and preferred this appeal.

3. This being a first appeal, I have a duty to re-evaluate the evidence produced in the lower court and come to my own conclusion. It has been held that a first appeal is in a form of a re-trial and the appellate court should evaluate the evidence afresh and reach its own conclusion based on what is on record. However, the appellate court should always bear in mind that it did not have the benefit of seeing the demeanour of the witnesses or a chance of taking the evidence of the witnesses.
4. I have read through the proceedings before the lower court alongside the appellant's pleadings and submissions both in the lower court and in this appeal. The appellant has in faulting the honorable magistrate raised four grounds of appeal. In her memorandum of appeal, she faults the magistrate for awarding general damages which were inordinately too low such that it amounted to wrong estimation in comparison to similar cases and that she failed to consider the nature of injuries sustained by the appellant and thus failed to apply the doctrine of stare decisis.
5. I have formed opinion that the grounds of appeal do not call for separate consideration for each. All of them oscillate around the claim that the general damages for pain and suffering awarded by the magistrate were too low compared to the nature of injuries *vis a vis* other decided case. As far as I can discern, this is the only issue for determination in this appeal.
6. Before I go to the issue of the quantum of damages, I believe it is important that I address the complaint by the appellant especially in her submissions that the magistrate did not analyze or evaluate the evidence produced before him. In its rather short judgement, it would appear that the court did not say much about the evidence produced by the appellant. The magistrate stated that;

“the court has considered the nature of injuries and submissions on the same. Injuries sustained are confirmed by the medical report. The court finds an award of Kshs 120,000/= being fair compensation. An additional Kshs 10,000.00 is awarded for replacement of the lost tooth.”
7. The magistrate may not have said as much as the appellant would have expected. However, it is clear from the magistrate's aforesaid statement that he considered the evidence and the nature of injuries. There is no standard measure of how many words or how long should the court's mind or consideration be turned to words. I am persuaded that the magistrate gave due consideration of the evidence and nature of injuries sustained by the appellant. I will not fault him on this front.
8. I now turn to the other complaint by the appellant that the amount awarded was inordinately too low as to amount to the erroneous estimate. It appears to me that the Honourable Magistrate awarded a sum of Kshs 120,000.00 for general damages for pain and suffering and loss of amenities and added Kshs 10,000.00 for replacement of the lost tooth. From the wording, there is no doubt that the court awarded the amount for the lost tooth as part of general damages for pain and suffering and loss of amenities. This is evident from the summary he gave at the end of the judgment where he indicated that the amount awarded under the head of general damages was Kshs 130,000.00.
9. Whereas the magistrate was right in awarding damages for the replacement of the tooth, he was plainly wrong in categorising the same under general damages for pain and suffering. The appellant had correctly pleaded the cost of replacement of the tooth which was supported by his exhibit number 9 being the medical report. This kind of award should be given under the future medical expenses which are in the nature of special damages. I chose to handle this issue for purpose of future references and clarity in the judgement.



10. The plaintiff had pleaded and particularised the nature of injuries as outlined in the opening paragraph of this judgment. Proof of injuries in cases of this nature of cases is through the medical reports and the treatment records. The appellant produced medical report by Dr Cyprianus Okere dated 16-11-2020 as her exhibit number 9. According to the doctor's report the plaintiff sustained the following injuries;
 - a. Loose teeth;
 - b. Deep cut on the upper lip;
 - c. Avulsion of a molar tooth; and
 - d. Blunt injury to the left leg.
11. The injuries in the medical report slightly differed with what was pleaded. The court must go with what was proved through medical report or documents. The loose teeth were splinted while the lost molar was to be replaced at cost of Kshs 10,000.00. It is said that the appellant underwent treatment in two different hospitals. The appellant has cited three authorities which he submits are comparable to her case;
 1. *Multiple Hauliers vs Patricia Anyango & 2 Others* (2012) eKLR in which the respondent had lost three teeth and other injuries and the court upheld an award of Kshs 300,000.00; and
 2. *IA vs Kariuki Jane & Another* (2018) eKLR which involved loss of two upper incisors, a degloving injury on the left ankle and bruise below the right eye and the plaintiff awarded Kshs 400,000.00.
 3. *Henry Mbogo Gitau vs Edwin Mukera* (2016) eKLR where the respondent who had sustained deep cut wounds and lacerations on the upper and lower lips, multiple lacerations of the gum and mouth, loss of lower incisor and molars and loose upper and lower incisors 22, 31 and 32 was awarded a sum of Kshs 500,000.00
12. Based on these authorities and others the appellant cited before the lower court, the appellant pleads that the court awards a sum of Kshs 600,000.00. I have compared the cited authorities with the appellant's case and in my considered opinion the injuries in the same were more serious than those sustained by the appellant herein.
13. I have evaluated the nature of injuries sustained by the appellant. I find *Justine Nyamweya Ochoki & Another vs Prudence Anna Mwambu* (2020) eKLR more comparable to the appellant's case although it involved slightly more serious injuries. In this case, the appellant had sustained loss of upper front incisor tooth, deep cut on the chin, cut on the lips, loosening of the upper teeth, injury to the right forearm and loss of consciousness. The Honourable Judge reduced the damages for pain and suffering and loss of amenities to Kshs 300,000.00
14. Considering the above, I hold that the quantum proposed by the appellant is not commensurate with the injuries she sustained. In the same breath, I find that the award by the lower court deserves disturbance. It was low in the circumstances noting that the appellant lost a tooth although the same was replaceable and did not have cosmetic significance. In my assessment, I find that an award of a sum of Kshs 250,000.00 is adequate and fair compensation to the appellant and I enter judgment to that extent.
15. The respondent did not participate in the lower court case and this appeal. I will not award costs of the appeal. The appeal is therefore allowed and judgement of the lower court in Thika Chief Magistrate's



Court Civil Case Number 333 of 2022 is set aside and substituted for the judgment of this court against the respondent in the following terms;

- a. General damages for pain and suffering Kshs 250,000.00
- b. Future medical expences Kshs 10,000.00
- c. Special damages Kshs 5,650.00
- d. Interest on (a) and (b) above at court rates from the date of the lower court's judgment until payment in full.
- e. Costs of the suit in the lower court.
- f. Each party to bear their own costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

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JUDGE OF THE HIGH COURT

