



**Mutisya & another v Khaemba (Civil Appeal E183 of 2023)
[2024] KEHC 9019 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E183 OF 2023
EM MURIITHI, J
JULY 25, 2024**

BETWEEN

BONIFACE MUTHINI MUTISYA 1ST APPELLANT

WAK CONSTRUCTION LTD 2ND APPELLANT

AND

ABIGAELE NAFULA KHAEMBA RESPONDENT

((Being an appeal from the judgment delivered by Hon. J.M. Njoroge (CM) on 2/10/2023 at Meru CMCC No. E345 of 2022))

JUDGMENT

1. By a plaint dated 13/12/2022, the Respondent sued the Appellants seeking general damages for pain, suffering and loss of amenities, special damages and costs of the suit plus interest. She pleaded that on or about 30/9/2022, she was travelling along the Meru-Chaaria Road as a pillion passenger in motor cycle registration No. KMKF 370 Y Captain when the Appellant so negligently drove motor vehicle registration No. KCU 062 A Toyota Tipper that it rammed into the motor cycle thereby injuring her. She contended that the 2nd Appellant was vicariously liable for the negligence of the 1st Appellant. As a consequence of the accident, she will require dental implants and follow up at a cost of Ksh. 600,000.
2. The Appellants denied the claim by their statement of defence dated 6/2/2023 and prayed for the Respondent's suit to be dismissed.
3. Upon full hearing of the case, the trial court found the Appellants to have been 100% liable and awarded general damages of Ksh. 1,500,000, future medical costs of Ksh. 500,000 and special damages of Ksh. 21,750 totaling to Ksh. 2,021,750 together with costs and interest.



The Appeal

4. On appeal, the Appellants filed their memorandum of appeal on 30/10/2023 raising 9 grounds as follows:
 1. The Learned Chief Magistrate misdirected himself in law by assessing general damages for pain, suffering and loss of amenities that were manifestly excessive and incomparable to the common judicial awards.
 2. The Learned Magistrate erred in awarding the sum of Kshs. 1,500,000/= by way of general damages for pain, suffering and loss of amenities to the Respondent.
 3. The award in Quantum of general damages for pain, suffering and loss of amenities in the circumstances is so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the Respondent.
 4. The award in Quantum of general damages for pain, suffering and loss of amenities is altogether disproportionate and is not in keeping with other comparable awards made in respect of similar circumstances.
 5. The Learned Chief Magistrate erred in law and fact by giving a very high award in quantum of damages for pain, suffering and loss of amenities contrary to the evidence given in court.
 6. The Learned Chief Magistrate erred in law in making such a high award as to show that the magistrate acted on wrong principles of law.
 7. The Learned Chief Magistrate's award on general damages for pain, suffering and loss of amenities was inordinately high as to be entirely erroneous.
 8. The Learned Chief Magistrate erred in law and fact by totally disregarding the Appellants' submissions and authorities in making a finding on quantum of damages for pain, suffering and loss of amenities.
 9. The judgment on quantum of general damages for pain, suffering and loss of amenities was against the weight of evidence before the court.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

Evidence

6. PW1 Abigael Nafula Khaemba testified that, "I stay at Meru and have a bookseller on 30/9/2022. I was involved in a Road Traffic Accident. I recorded my statement dated 12/12/2021 as my evidence in chief. I rely on my costs and documents dated 13/12/2021 as my Plaintiffs exhibits for Police Abstract – Mfi3. Motor vehicle copy of records - P. Exh. 1. PA – PMF3. Driving Licence – P. Exh.4. Police report – P. Exh. 5. Receipt of medical report Ksh. 20,000. Bundle of receipts of Ksh. 21,750/= - Exh. 9. I was injured on the teeth. I lost 8, head, face, left hand and knees. Billing is different. The motor



vehicle driver was over-speeding the motor vehicle that was from behind. Dental implants would cost Ksh. 600,000/= I pray for costs and compensation.”

7. On cross examination by counsel for the 1st Appellant, she stated that, “I was a pillion passenger along the Gachanka Market, the road was was.....the lorry caused the accident. The motor cycle was moved to the edge of the road to avoid the accident. The road traffic accident occurred at 6:30 PM it was about dark. The lights were on. I had a reflector jacket and a helmet. I have dental implants which are temporary. I can only get artificial pods.”
8. On cross examination by counsel for the 2nd Appellant, she stated that, “The lorry hooted and being driven at a high speed.”
9. PW2 No. 77247 Robert Tomino testified that, “The accident was reported at Meru Police Station on 30/9/2022. The accident occurred at 6:30 PM along Meru – Chaaria Road, Gachanka area involving KCU 062 A, Tipper driven by 1st defendant and KMFC 370 Y driven by Anthony Gitonga. Both were.....to Medical Chaaria. Lorry driver tried to overtake and hit the motorcycle. The motor cycle had a passenger who is the plaintiff and a child Daniel Mwenda. The driver of the lorry was to blame for the accident. Police Abstract marked as P. Exh. 3.”
10. On cross examination, he stated that, “The lorry driver hit the victims to the police station. The matter is part heard. The road is this way. You only overtake when the road is clear.”
11. The Appellants closed their cases without calling any witnesses.

Submissions

12. The Appellants urge that an award of Ksh. 400,000 for pain, suffering and loss of amenities is fair, and cite *Mombasa Maize Millers (Ksm) Ltd & another v Rengo Joshua Wafula (2017) eKLR*, *BK Suing Thro’ his mother and next friend EM v Wilson Gitari Mburugu (2020) eKLR* and *Moiz Motors Limited & another v Harun Ngethe Wanjiru (2021) eKLR*. They urge the court to allow the appeal with costs and reassess downwards the trial court’s award for pain, suffering and loss of amenities, and cite *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others (2014) eKLR*.
13. The Respondent cites *Simon Taveta v Mercy Mutitu Njeru (2014) eKLR* on the circumstances under which an appellate court can interfere with an award of damages. She urges that the trial court was alive to the well known principle that comparable injuries should as far as possible be compensated by comparable awards, and cites *Denshire Muteti Wambua v Kenya Power & Lighting Company Limited (2013) eKLR*. She urges that the trial court considered the authorities cited by both parties and the award of Ksh. 1,500,000 was within the limits set in *Boniface Njeru, Alphonse Mwatsuma Mwagamchi and Azhar Ali v Sheikha Mohamed (2020) eKLR*. She urges that the Appellants have not demonstrated that the award of Ksh. 1,500,000 was too high as to make it a wholly erroneous estimate of the damage, and prays for the dismissal of the appeal with costs.

Analysis and Determination

14. From the grounds of appeal, the 2 issues that isolate themselves for determination are whether the award of general damages of Ksh. 1,500,000 was inordinately high and whether the Appellant’s submissions and authorities were considered.



15. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR 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. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470)”

16. The trial court awarded the Respondent general damages of Ksh. 1,500,000, which the Appellants contend is inordinately high. The injuries sustained by the Respondent are particularized in the plaint and the medical report by Dr. Kimathi Kioga as loss of 8 teeth (upper 4, 4 lower), head injury with brain edema, left orbital hematoma, lacerations on the facial region more on the left side, right hand and both knees.
17. The Respondent testified that, “I was injured on the teeth. I lost 8, head, face, left hand and knees.” That evidence remained uncontroverted as it was not challenged during cross examination.
18. When doctor Kimathi examined the Respondent on 23/11/2022, he noted that, “The patient still suffering from complications sustained. It is important to note that the patient has got complications of constant pain and inability to use the lost teeth. There is decreased ability of biting, chewing food, manipulation, difficulties swallowing and speech. Dento alveolar traumas involving multiple teeth occur mostly after severe trauma. Appropriate and timely diagnosis and interventions as well as long term follow up are crucial for the success of the treatment. Cost of future medical treatment is estimated to be ksh 600,000/= (Dental implants and appropriate follow up). The degree of permanent incapacity sustained as a result of injury is estimated to be 20%.”
19. Dr. Waithaka Mwaura, in his medical report dated 7/6/2023 noted that, “Ms. Khaemba sustained grievous injuries as outline and was managed appropriately. She will require permanent dentures at an estimated cost of shillings five hundred thousand (500,000/-) with reconstruction of the mandibles. I assess the degree of residual permanent disability at thirty percentage (30%) points.”
20. In justifying the award of Ksh. 1,500,000 for pain, suffering and loss of amenities, the trial court relied on *Kenya Wildlife Services v Godfrey Kirimi Mwit* (2018) eKLR, *Joseph Mwanza v Eldoret Express Ltd KSM HCCC No. 160 of 2004 (UR)*, *Alphonse Mwatsuma Mwangamchi v Joseph Mwanzi A. Mwanzi & Another* (2005) eKLR and *Azhar Alia v Sheikh Mohamed* (2020) eKLR. The question that begs is whether the injuries in those cases are comparable to the ones sustained by the Respondent herein, to attract comparable awards? The answer is in the negative, as illustrated herein below.
21. In *Kenya Wildlife Services v Godfrey Kirimi Mwit* (2018) eKLR, an award of Ksh. 2,000,000 was made, where the claimant sustained more serious injuries which included a maxillar fracture, bone injuries, nasal septum, loss of 6 teeth and left radius fracture.
22. In *Alphonse Mwatsuma Mwangamchi v Joseph Mwanzi A. Mwanzi & Another* (2005) eKLR, an award of Ksh. 1,200,000 was made, where the claimant sustained loss of 6 teeth and 7 others broken, fracture of mandible, contusion chest and severe back injury which involved the spinal cord.



23. In Joseph Mwanza v Eldoret Express Ltd KSM HCCC No. 160 of 2004 (UR), an award of Ksh. 1,200,000 was made, where the claimant sustained serious injuries which included a head injury with multiple facial injuries, diplopia of the right eye, craniomaxillofacial fractures and a compound depresses frontal bone fracture.
24. In Azhar Alia v Sheikha Mohamed (2020) eKLR, an award of Ksh. 1,500,000 was made, where the claimant sustained head injury, loss of upper 4 incisors, fracture right humerus arm bone, fracture of the pelvis (right superior and inferior pubic bones) and cuts on the lips and nasal bridge.
25. Taking into account the injuries sustained by the Respondent, the inflationary trends and the compensatory purpose of the award as opposed to enrichment of the Respondent, this court finds that the award of Ksh. 1,500,000 represented an erroneous estimate of the pain suffered by the Respondent.
26. In BK Suing Thro' his mother and next friend EM v Wilson Gitari Mburugu (2020) eKLR, cited by the Appellants, the court awarded Ksh. 400,000 for multiple facial injuries, soft tissue injury to the thorax, abdomen and upper limbs, severe injuries to the maxilla and mandible resulting to loss of 5 teeth and cuts on the lip.
27. The injuries sustained by the Respondent were soft tissue in nature, save for the head injury and the loss of 8 teeth, and this court considers that an award of Ksh. 750,000 would be adequate compensation. The cases where an award of Ksh. 1,500,000 for pain, suffering and loss of amenities was made involved more serious injuries which included several fractures.

Non-consideration of the Appellants' submissions and authorities

28. Submissions are a mere guide to the court as they are not pleadings, and their non-consideration cannot in itself be a basis to overturn a trial court's decision, as was aptly put by the Court (Patrick J.O Otieno J.) in Charles Mutuma M'kanake v Diocese of Meru Trustees Registered [2021] eKLR thus:

“This court takes the view and position that such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision.”

ORDERS

29. Accordingly, for the reasons set out above, the appeal is allowed in the following terms:
 1. The trial court's award of Ksh.1,500,000 for pain, suffering and loss of amenities is hereby set aside and substituted with an award of Ksh.750,000.
 2. The other awards remain unchanged.
 3. The Appellants shall have costs of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 25TH DAY OF JULY 2024.

EDWARD M. MURIITHI

JUDGE

Apperances

Mr. Olunga for Appellant.

Ms. Kiema for Mr. Kaberia for the Respondent.

