



REPUBLIC OF KENYA



Muchoki v NN (Suing as the Next Friend of JN - Minor) (Civil Appeal E243 of 2022) [2024] KEHC 8992 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E243 OF 2022
MA OTIENO, J
JULY 19, 2024**

BETWEEN

MOSES GITANGA MUCHOKI APPELLANT

AND

NN (SUING AS THE NEXT FRIEND OF JN - MINOR) RESPONDENT

(Being an appeal from the Judgment of Hon. Rading Senior Resident Magistrate (SRM) delivered on 15th September 2022 in Nairobi CMCC No. E313 of 2021))

JUDGMENT

1. This is an Appeal from the decision of the court in Chief Magistrate's court civil case No. E313 of 2021 in which the Respondent sued the Appellant seeking damages for injuries suffered by the minor in a road traffic accident which occurred on 21st November 2020 along Kiambu-Banana Road involving motor vehicle registration No. KCF 200M.
2. The learned trial court by its judgment dated 15th September 2022, issued the following awards in favour of the Respondent which has now triggered this appeal; -
 - a. General damages at Kshs. 2,000,000/- minus the 20% agreed liability (net being Kshs. 1,600,000)
 - b. Special damages of Kshs. 23,650/-
 - c. Costs
 - d. Interest on (a) from the date of delivery of the Judgment and on (b) from the date filing the suit.



The Appeal

3. Vide memorandum of appeal dated 14th October 2022, the Appellant appealed against the decision of the trial court on the following grounds; -
 - i. That the trial magistrate erred in law and in fact in awarding general damages that was excessive in the circumstances.
 - ii. That the learned magistrate erred in law and in fact in awarding general damages
 - iii. That the learned magistrate erred in law and in fact in not considering that the injuries sustained by the plaintiff could not have warranted an award of Kshs. 2,000,000/-
 - iv. That the learned magistrate erred in law and in fact in not considering the authorities cited by the defendant/appellant.
4. The grounds of appeal as enumerated above largely speaks to two things. First, that the award of general damages was excessive and was not in tandem with the injuries suffered by the Respondent. That the magistrate proceeded on wrong principles in awarding Kshs. 2,000,000 in general damages.

Submissions

5. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 27th October 2023 while the Respondent's submissions are dated 21st August 2023.
6. The Appellant challenged the award of Kshs. 2,000,000/- in general damages as excessive on the basis that the same was not in tandem with the injuries suffered by the Respondent. Relying on the two medical reports, one by Dr. G.K. Mwaura and the other by Dr. Ashwin Madhiwalla dated 3rd April 2021 and 2nd December 2021 respectively, enumerated the salient injuries suffered by the Respondent as a result of the accident. According to the Appellant, those injuries were minor and did not in any way warrant the award of Kshs. 2,000,000/- in general damages as issued by the trial magistrate.
7. The Appellant argued and proposed that in the circumstances of the case and taking into account the injuries suffered by the Respondent an award not exceeding a sum of Kshs. 1,000,000/- would be reasonable.
8. On the other hand, the Respondent in their submissions maintained that the award by the trial court was reasonable and justifiable in the circumstances of the case. Relying on the two authorities cited in their submissions, the Respondent urged this court to uphold the award.

Analysis and determination

9. This appeal is limited to the measure of quantum of damages awarded by the trial court. A consent on liability had been recorded at the trial stage in the ratio of 80:20 in favour of the Respondent in this Appeal.
10. Since this is an appeal on quantum of damages, this court will be guided by the principal that the assessment of damages is within the discretion of the trial court and that an appellate court should only interfere in instances where trial court, in assessing damages, erred in principle and either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see *Mbogo vs Shah* (1968) EA 93 and *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727),



11. At the same time, I will also bear in mind the fact that this being a first appeal, this appeal will be way of retrial and this court is to reconsider evidence tendered at the trial court, reevaluate the same and draw its own conclusions, noting that I did not have the advantage of seeing and hearing the witness testify as was held in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
12. Having the two principles in mind, I shall now proceed and re-value the nature of the injuries suffered by the Respondent as pleaded and proved in evidence and draw my own conclusion, as an appellate court, as to whether the learned trial magistrate exercised his discretion judiciously in assessing the general damages in the circumstances of the case.
13. From the parties’ respective submissions, it is apparent that the parties are in agreement on the nature of the injuries suffered by the Respondent as a result of the accident. Their only point of departure is the quantum of damages that would be reasonable to compensate the injuries.
14. Both the Appellant and the Respondent agree that the Respondent suffered the following injuries; -
 - a. Fracture of the left tibia- fibula
 - b. Compound Fracture of left malleolus
 - c. Mild head injury
 - d. Fracture of the occipital bone
 - e. cerebral oedema
 - f. Right ear otorrhea
15. As stated above, the duty of this court is primarily to re-evaluate the evidence of the injuries suffered and assess whether or not the quantum on general damages as awarded by the trial court was in tandem with the injuries suffered by the minor and therefore reasonable in the circumstances.
16. The Appellant argued that a sum not exceeding Kshs. 1,000,000/- would be reasonable. He placed reliance on *Regina Mpinda V Reuben Muthiora Johny* [2022] eKLR where general damages were reduced from Kshs. 3,000,000- to Kshs. 1,000,000/- for oblique fracture on mid third ulna, nerve injury, wounds on both knees and 100% loss of function of the right upper limb.
17. The Appellant also cited the case of *Kimathi Muturi Donald V Kevin Ochieng Aseso* [2021] eKLR where general damages were reduced from Kshs. 1,500,000/- to Kshs. 1,200,00 for a fracture of the upper right tibia, a fracture of the floor of the socket of the left hip joint (acetabulum) and 20% disability for both legs.
18. The Respondent in urging the court not to disturb the award of Kshs. 2,000,000/- for the injuries suffered cited the case of *Zachary Kariithi vs Joshon Otieno Ochola* [2016] eKLR where an award of Kshs. 1,500,000/- was made for compound fracture of the right tibia/fibula, compound fracture of



- the left femur bone mid shaft, fracture of the right femur bone and fracture of the 3rd, 4th 5th ribs of the right side.
19. The respondent argued that taking into account the inflation, the appropriate sum in damages for injuries are these ought to be Kshs. 2,000,000/- as was awarded by the learned trial magistrate.
 20. In awarding general damages, courts ought to give an award that reflects the nature and gravity of the injuries. The principle applicable in the assessment of damages is that comparable injuries should as far as possible, be compensated by comparable awards, always bearing in mind that not two cases are precisely alike. See the Court of Appeal decision in the case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR.
 21. I have reviewed the injuries sustained by the Respondent, the parties' respective submissions together with the authorities cited. In note that the Respondent suffered multiple fractures as a result of the accident which resulted in hospitalization for a period of about one month. I also note that there is also the residual effect, including that of possible loss of hearing on the right ear.
 22. Taking into account the above injuries and taking into account the decisions cited by the parties, I find that the injuries in the case of Zachary Kariithi vs Joshon Otieno Ochola [2016] eKLR are more comparable to those suffered by the Respondent in the present case.
 23. Taking into account the time difference and inflation, I will allow 10% adjustment and award a sum of Kshs. 1,650,000/- as opposed to Kshs. 2,000,000/- awarded by the trial court.
 24. For the reasons I have set out above, I allow the appeal and set aside the award of general damages by the trial court and substitute the same with a sum of Kshs. 1,650,000/-. Allowing the 20% contribution agreed at the trial court (Less 20% agreed liability), the net amount will be Kshs. 1,320,000.
 25. The sum shall accrue interest from the date of judgment in the lower court.
 26. The Appellant shall have the costs of this Appeal which is assessed at Kshs. 50,000/-, all inclusive.
 27. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Mwangi for the Appellant.

N/A for the Respondent.

