



REPUBLIC OF KENYA



KENYA LAW
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**Munene v Chemos (Civil Appeal E332 of 2022)
[2024] KEHC 8994 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8994 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E332 OF 2022
MA OTIENO, J
JULY 19, 2024**

BETWEEN

PENINAH WAMUYU MUNENE APPELLANT

AND

JOB KWEMBOI CHEMOS RESPONDENT

*(Being an appeal from the Judgment/decree of Honourable J. Orwa, S.P.M)
delivered 22nd November 2022 in Kiambu CMCC No.147 of 2020)*

JUDGMENT

1. This appeal arises from the Judgment delivered on 22nd November 2022 in the Kiambu Chief Magistrate’s court civil case No. 147 of 2020 where the learned magistrate awarded to the plaintiff a sum of Ksh 600,000/- as general damages and Ksh. 7,050/- in special damages.
2. The claim arose as a result of a road traffic accident that occurred on 29.11.2019 along Naivasha – Nairobi Road, where the Respondent herein, being a fare paying passenger suffered injuries. The accident involved motor vehicle registration No. KCB 328, Toyota Hiace which lost control and rolled. The Respondent blamed the Appellant, who was then the registered owner of the vehicle.
3. Dissatisfied with the decision of the trial magistrate court, the Appellant appealed to this court raising the following grounds of appeal in his memorandum of appeal; -
 - i. That the learned trial magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 600,000/- in general damages and Kshs. 7,050 in special damages, which amount was exorbitantly high in the circumstances of the injuries suffered by the Respondent.
 - ii. The learned magistrate erred in law and in fact in holding that the respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.



- iii. The learned magistrate erred in law and in fact when he failed to consider the appellants evidence on points of law and facts with regard to quantum based on the injuries sustained by the Respondent.
 - iv. That learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned miscarriage of justice.
 - v. The learned trial magistrate erred in law and in fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding the amount of quantum that is appropriate an applicable on similar injuries as the case he was deciding.
 - vi. The learned trial magistrate erred in law and in fact in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the plaintiff.
4. The appellant urged this court to allow the appeal and consequently set aside the judgment of the trial court as well as the resultant decree. That the Respondent also prayed for the costs of the appeal.

Submissions

5. The appeal was canvassed by way of written submissions. The Respondent through his Advocates filed his submissions on 28th May 2024. The Appellant failed to file his submissions despite having had sufficient notice. The appeal therefore proceeded on the basis the documents in the record of appeal and the Respondent's submissions.
6. According to the memorandum of appeal, the substratum of the appeal was the Appellant's dissatisfaction with the award of Kshs 600,000/- in general damages by the trial court as well as Kshs. 7,050/- in special damages.
7. The Appellant stated in his memorandum of appeal that the award was excessive, that the magistrate proceeded on wrong principles in assessing damages by failing to take into account the appellant's submissions on quantum. That the trial court also failed to take into account the nature of the injuries and comparable awards in assessing damages the subject of this appeal.
8. The Respondent on the other hand took the position that the sum of Kshs. 600,000/- awarded by the trial court in general damages was merited and therefore ought not to be disturbed. That equally sound in law is the award of Kshs. Kshs. 7,050/- in special damages.
9. The Respondent asked this court to dismiss the appeal with costs in his favour.

Analysis and determination

10. This appeal is limited only on the measure of quantum of damages awarded by the trial magistrate. In considering this appeal, this court will therefore have at the back of its mind the principle that the assessment of damages is within the discretion of the trial court and that the appellate court should only interfere in instances where trial court 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 Shab* (1968) EA 93 and *Kemfro Africa Ltd t/a Meru Express & another v A. M. Lubia and another* [1982-88] 1 KAR 727).
11. Further, this being a first appeal I will also bear in mind the fact that I am enjoined to reconsider evidence submitted at the trial court, reevaluate the same and draw my own conclusions. In doing so, I am further enjoined to bear in mind that I did not have the advantage of seeing and hearing the



witnesses testify. See 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 in mind the two principles, I shall now proceed and reevaluate the nature of the injuries suffered by the Respondent as pleaded in the plaint as well as the evidence adduced at the trial in support thereof. According to the Plaint, the Respondent suffered the following injuries; -
 - i. Tenderness, swelling and lacerations left wrist and left elbow
 - ii. Fracture of the left elbow
13. I have reviewed the medical reports, including the initial treatment notes and find that the injuries as pleaded in the plaint are in congruence with those established by Dr. G.K Mwaura who testified for the plaintiff and produced his medical report dated 15.12.2019. The Plaintiff was not subjected to a second medical examination and no report was produced in that regard.
14. Having noted the nature of the injuries suffered, which are not contested in this appeal, I will then proceed and consider the reasonableness of the quantum of damages awarded by the trial court, taking into account the awards for comparable injuries and inflationary trends in the country.
15. This court in evaluating the reasonableness of the damages awarded by the trial court will be guided by the decision in *Power Lighting Company Ltd & another v Zakayo Saitoti Naingola & another* [2008] eKLR where the court outlined the following as a guide;
 - i. Damages should not be inordinately too high or too low.
 - ii. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
 - iii. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 - iv. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.
16. Additionally, this court in considering whether the amount awarded by the trial court is reasonable in the circumstances of the case will be guided by the case of *Cecilia W. Mwangi & another vs Ruth W. Mwangi* [1997] eKLR where the Court of Appeal stated that:

“We would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West(H) & Son Ltd. v Shephard* [1964] AC 326 at page 345:

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent



awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

17. In the instant case, the Respondent urged the court to maintain the award of Kshs. 600,000/- by the trial court on the basis that it was not inordinately high in the circumstances of the case. In support of his position, he cited the following three cases: *Wainaina v Wagacha* (Civil Appeal 16 of 2019) [2023] KEHC 26226 (KLR) where a sum of Kshs. 500,000 was awarded for a fracture of the left distal radius and laceration; *Mary Akinyi Atella v Omondi Beatrice Monica* [2021] eKLR where a sum of Kshs. 500,000 for Left elbow comminuted fracture, Right Ulnar shaft fracture and Multiple lacerations. Finally in *Lawrence Musyoka Mulonzi & another v Daniel John Kato Ndambuki* [2020] eKLR where a sum of Kshs. 750,000 was awarded for subdural hematoma, fracture left olecranon process and bruises on right knee and chest.
18. I have reviewed the injuries sustained by the Respondent as particularized in the plaint and proved in evidence. I have also considered the submissions and the authorities cited. I find that the injuries in the case of *Wainaina v Wagacha* (Civil Appeal 16 of 2019) [2023] KEHC 26226 (KLR) where an award of Kshs. 500,000/- was made in November 2023 closely relates to the injuries in the present case. I therefore award Kshs. 500,000/- in this case as well.
19. In the circumstances, I find the sum of Kshs. 600,000 awarded by the learned magistrate in general damages to be inordinately high and that the same failed to take into account the nature of injuries suffered in this case.
20. On the issue of special damages, the guiding principle is that the same ought not only to be pleaded but must be proven as well. The Appellant stated as ground of appeal that the learned trial magistrate erred in fact and in law in awarding a sum of Kshs. 7,050/- under the same.
21. I have looked at the proceedings in the trial court and established that despite the Respondent having pleaded a sum of Kshs. 25,550/-, only an amount of Kshs. 7,180/- was proved by production of the relevant receipts. The appellant admitted to this figure at the trial court as well. I therefore find no reason to depart from the learned trial court's finding on this.
22. In view of the above, I find the appeal partially merited and therefore award the following; -
 - a. General damages for pain and suffering – Kshs. 500,000/-
 - b. Special damages – Kshs 7,180/-
23. Each party to bear their own costs.
24. It so ordered.

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

ADO MOSES

JUDGE

Moses – Court Assistant

Ms. Onacha.....for the Appellant.

Ituka For the Respondent.

