



**Osman & another v Mwarialie (Civil Appeal E201 of 2021)
[2024] KEHC 9115 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E201 OF 2021
DKN MAGARE, J
JULY 16, 2024**

BETWEEN

NUHU ABDI OSMAN 1ST APPELLANT

AL HUSNAIN MOTORS LIMITED 2ND APPELLANT

AND

SAUMU HAMADI MWARIALIE RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Sandra Ogot – SRM dated 15/10/2021 arising from Msambweni SRMCC No. 41 of 2019. The Appeal is stated to be on liability and quantum.
2. The Memorandum of Appeal dated 27/10/2021 raised the following Grounds:
 - a. The learned magistrate erred in law and fact if finding liability at 100% against the Appellant.
 - b. The learned magistrate misdirected herself on principles of law when assessing general damages.
 - c. The learned magistrate erred in awarding damages that were inordinately high.
 - d. The learned magistrate erred in failing to consider the submissions by the Appellant.
 - e. The learned magistrate erred by not considering the evidence by the Appellant in the Medical Report.
3. The Memorandum of Appeal thus raises only two issues, that is: -
 - a. Liability
 - b. The quantum of damages



Pleadings

4. The plaint dated 1/7/2019 and amended on 21/9/2020 claimed damages for an accident involving motor vehicle Registration No. KCS 299H and the Respondent. The 1st Appellant was the driver and the 2nd Appellant the owner of the said motor vehicle. The Respondent was a passenger in the motor vehicle. The motor vehicle lost control and rolled severally causing the plaintiff severe injuries.
5. The Respondent was plaintiff in the lower court suit. She blamed the driver of motor vehicle Registration No. KCS 299H for the accident for overspeeding. The plaintiff set forth particulars of negligence. She claimed special damages of Kshs. 2,500/-, cost of future medication of Kshs. 350,000/- and General damages.
6. The Appellants entered appearance and filed defence denying the particulars of negligence and injuries pleaded in the plaint.
7. The Respondent also pleaded the following injuries:
 - a. Compressed fracture of the vertebrae thorax back bone No. T11 and No. 12.
 - b. Blunt injury to the back.
8. The lower court heard the parties and proceeded to render judgment on 15/10/2021. In the Judgment, the Court found 90:10 liability as consented by the parties. The court also awarded damages as follows:
 - i. General damages Kshs. 350,000/=
 - ii. Cost of future medication Kshs. 350,000/=
 - iii. Special damages Kshs. 2,500/=

Evidence

9. The Plaintiff testified as PW1 and adopted her witness statement and bundle of documents. It was her testimony on cross examination that she was treated at Msambweni Hospital where she was treated and discharged.
10. PW2 was the Medical doctor, one Ajoni Adede. He testified for the Plaintiff and produced the medical report dated 28/4/2019. He stated that the backbone would require surgery at a cost of Kshs. 350,000/- and assessed permanent disability at 7%. That the backbone was unstable and would present pain with risk of spinal injury. That the site would remain a weak point for life even after inserting metal implants.
11. On cross examination, it was his case that the percentage of permanent disability would deviate by increasing or decreasing by 2%.
12. On the part of the Appellants, they produced the medical report dated 31/1/2020 by Dr. Ruth Ichamwenge. It was her case that an x-ray revealed no fractures.

Submissions

13. The Appellants submitted that the award of general damages and damages for future medical expenses were excessive. It was submitted that an award of Kshs. 50,000/- would be adequate for general damages. They relied inter alia on Kipkebe Limited v Peterson Ondieki Tai (2016) eKLR.
14. On future medical expenses, it was submitted that the Respondent's doctor's report was misleading and ought to have been disregarded by the lower court.



15. For the Respondent, it was submitted that the trial court correctly analyzed the pleadings and evidence and arrived at a proper finding on damages. I was urged to dismiss the appeal.

Analysis

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
17. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
18. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-
- “.. 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
19. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
20. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-
- “It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
21. On liability, I note that though stated in the memorandum of appeal, the Appellants did not submit on how the finding on liability was not correct. The court finds that as liability was agreed by consent at 90:10 in favour of the Respondent, the same stands.
22. On quantum, in David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177, where he that:
- [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.



in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

23. Similarly, in Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

24. Therefore, it follows that the initial burden to prove the quantum of damages lies on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case.

25. The injuries pleaded by the Respondent were as follows:

- a. Compressed fracture of the vertebrae thorax backbone No. T11 and No. 12.
- b. Blunt injury to the back.

26. The trial court awarded General damages of Kshs. 350,000/-. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

27. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S. Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

28. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree ofis to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”

29. Therefore, in deciding whether to disturb quantum given by the lower court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.



30. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

31. Furthermore, in *Parvin Singh Dhalay vs. Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:-
“Because this is the evidence of an expert, I believe it.”...”

32. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

33. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”

34. I note that the court declined the projected general damages as proposed by the Respondent at Ksh. 700,000/ based on *Charles Kamunya & Another v Rose Mueni Maina* (2019) eKLR and *Abdi Hajji Gulleid v Autoselection K Ltd & Another* (2015) eKLR as the injuries therein were more severe. The court then assessed Kshs. 350,000/- as commensurate award. However, the court did not cite any authority in support thereof.

35. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.



- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
36. Consequently, in my reevaluation, I have to analyze similar fact authorities to arrive at a conclusion as to whether the award of general damages was excessive in the circumstances.
37. In *Wabome v Lupran Manpower and HRM Services & another (Cause 924 of 2017)* [2023] KEELRC 3091 (KLR) (30 November 2023) (Judgment), the Claimant suffered work injury of a stiff back and X-ray showed major wedge compression fracture of the 12th thoracic (T12) vertebra. The Employment and Labour Relations Court awarded Kshs. Kshs.750,000/=
38. Further, in *Charles Kimunya & Daniel Ndung'u Gitau V Rose Mueni Maina* (2019) eKLR, the plaintiff suffered intra-abdominal injuries causing a tear of the Mesentery and collapse of disc T11 and T12 occasioned by a major back injury, permanent disability was assessed at 20% and the injuries described as grievous harm, the court awarded Kshs.650,000/=.
39. The injuries in the said case are slightly more severe than the instant case. Therefore, the award of Kshs. 350,000/- in general damages was proportionate to the injuries suffered by the Respondent. It cannot be said to be inordinately low or high. I uphold it.
40. On future medical expenses, I note the Appellants' medical doctor proposed that x-ray revealed that the Respondent had healed without need for any future medical expenses. The Respondent's medical doctor proposed Ksh. 350,000/- and which the court awarded. In my view, I do not find the award by the learned magistrate to be baseless.
41. This Court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in *Shah and Another vs. Shah and Others* [2003] 1 EA 290:
- “The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.”
42. Further, the Court of Appeal, on its part in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:
- “... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”
43. Furthermore, in *Parvin Singh Dhalay vs. Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:
- “It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is



proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

44. I find and hold that the fact that there would be need for the decompression to put titanium metal implants in the fractured backbone was not rebutted as was found by the lower court. No x-ray film alleged to have established no fractures was indeed produced in court. The Appellants' medical doctor was also not cross examined on his report. The cost of the surgery would certainly vary depending on the facility where the implant is to be removed. I find that the award of Kshs. 350,000/- by the learned magistrate was based on the projection by the Respondent's medical doctor and which I consequently have no basis to interfere with for the reasons already stated above.

45. Consequently, the Appeal is devoid of merit.

Determination

46. In the circumstances, I make the following orders: -

- a. The Appeal is dismissed.
- b. The Respondent shall have costs of the Appeal assessed at Kshs. 85,000/-.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16TH DAY OF JULY, 2024.

Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Jedidah

