



REPUBLIC OF KENYA



KENYA LAW
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**Wasike v Maiyo (Civil Appeal E017 of 2023)
[2024] KEHC 9993 (KLR) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E017 OF 2023
RN NYAKUNDI, J
AUGUST 9, 2024**

BETWEEN

GODFREY BARASA WASIKE APPELLANT

AND

LEWIS LIMUTAI MAIYO RESPONDENT

(Being an appeal from the judgment and decree of Hon. B. Kiptoo delivered on 27.01.2023 in Eldoret CMCC No. E236/2022; between Lewis Kimutai Maiyo versus Godfrey Barasa Wasike)

JUDGMENT

Representation:

M/s Onyinkwa & Company Advocates

M/s Morgan Omusundi & Company Advocates

1. The instant appeal is only on quantum. At the trial court, the Respondent filed a claim against the appellant seeking general damages, special damages and costs and interests of the suit arising from road accident that occurred on 31.12.2021, wherein it is alleged that the Respondent was lawful pillion rider of motor cycle registration No. KMFY 466A at Shell Petrol Station road when the defendant, his agent, driver and/or employees i.e. so negligently drove, controlled or otherwise carelessly managed motor vehicle registration No. KAQ 355F causing it to lose control veering off the road and causing an accident and as a result of which the Plaintiff suffered severe injuries, loss of amenity and damages and the defendant directly and or vicariously liable for the omission and/or the actions
2. The appellant in response to the claim denied the manner in which the alleged accident occurred as put by the Respondent. In the alternative, he blamed the Respondent for being negligent.



3. After trial Judgment was delivered on 27/01/2023 and the Appellant was found 80% liable as per the consent recorded and damages assessed as hereunder: -
 - a. General Damages..... Kshs. 1,500,000/=
 - b. Special Damages..... Kshs. 115,665/=
 - c. Less 20% Kshs. 323,133/=
 - d. Total Kshs. 1,292,532/=
 - e. Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal only on quantum on (4) grounds: -
 - i. That the learned trial magistrate erred in law and fact by applying the wrong principles in the assessment of damages thereby arriving at an erroneous decision on the quantum payable.
 - ii. That the learned trial magistrate erred in law and fact by awarding general damages that were excessive in the circumstances thereby arriving at a wholly erroneous decision on quantum.
 - iii. That the learned trial magistrate erred in law and fact by failing to consider the submissions by the appellant on the issue of quantum.
 - iv. That the learned trial magistrate erred in law and act by failing to adequately evaluate the evidence and exhibits in reference to the injuries sustained by the respondent.
5. The appeal was canvassed vide written submissions. The Appellant on 23/10/2023 filed submissions dated 13/10/2023 while the Respondent on 02/11/2023 filed submissions dated 1/11/2023.

The Appellant's Submission

6. The only issue couched for determination on the part of the appellant is whether the general damages awarded by the trial magistrate were excessive in the circumstances. On this count, Learned Counsel Mr. Onyinkwa submitted that it is a well-established principle that suits brought in respect of bodily injuries, the measure of damage is governed by the principle of restitution in integrum, that is; an award for bodily injuries is intended to be compensatory in nature such that the Plaintiff should receive in monetary terms no more and no less than the injuries sustained. Learned counsel cited the decision in [*Barnabas v Ombati \(Civil Appeal E043 of 2021\)*](#), which essentially puts emphasis on the fact that when the appellate court is handling an appeal on quantum, the court should not ordinarily interfere with the findings of a trial court unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
7. Learned Counsel added that an award for general damages must reflect the trend of previous, recent, and comparable awards. Courts should be guided by the relevant authorities and/or precedents with comparable injuries keeping in mind that the award should fairly compensate the injured within Kenyan conditions. On this, he relied on the decision on *Mbaka Nguru and Another v James George Rakwar (1998) eKLR*.



8. According to counsel, the trial magistrate court relied on the decision of James Mbugua & another v John Mbugua (2020) eKLR, a decision where the Plaintiff sustained more severe injuries such as comminuted fracture of the left femur, comminuted fracture of the right acetabulum and dislocation of the right hip joint, fracture of the right inferior ramus of pelvis and loss of 2 upper incisors, broken 3 upper molars, 1 canine tooth and 2 lower molars leading to disability of 50%. That in the present case, the Respondent sustained permanent disability of 5% to 10% as per two medical reports. Counsel concluded that the learned magistrate made a decision on the basis of a decision that did not have comparable injuries hence leading to an erroneous decision.
9. In the appellant's view through counsel, the nature of the injuries sustained by the Respondent, an award of Kshs. 400,000/= to 500,000/= would be sufficient. In support of this position, counsel relied on the decisions in Paul Kithinji Kirimi & another v Gatwiri Murithi (2018) eKLR and Benard Musuu John v Jesman Distributors Limited & another (2020) eKLR.
10. In concluding, learned counsel Mr. Onyinkwa urged the court to set aside the award and re-assess the award downwards. He equally prayed for the costs of the appeal.

The Respondent's Submissions

11. Learned Counsel Mr. Omusundi started by reminding this court of its duty as an appellate court as held in the case of Selle –vs- Associated Motor Boat Co. (1968) EA 123.
12. The crux of the appeal being on quantum, the Respondent submitted that in assessing damages under the limb on personal injuries, loss and damage, the trial court considered the evidence of the Plaintiff and the evidence in the medical reports on record. Learned Counsel Mr. Omusundi urged the court to refer to the medical reports by Dr. Sokobe which formed the opinion as to the nature of injuries suffered by the Respondent.
13. It was counsel's submission that in the instant case, the trial court properly applied its mind in coming up with the award on general damages that was guided by the injuries the Respondent suffered in the accident and the relevant authorities that the parties put at the court's disposal. He urged this court not to interfere with the findings of the trial court on general damages.

Analysis & Determination

14. This being the first appeal and on the authority of the decision in Peters Vs Sunday Post Ltd. [19581 EA 424 my function and duty as an appellate court is to subject the evidence to fresh and exhaustive review and draw inferences and conclusions making allowance only for the fact that I have not had the advantage of seeing and hearing the witnesses. The Court in held as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”



15. As stated above the appeal is only on quantum. The issue for determination here is whether the award of general damages of Kshs. 1,500,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
16. It has been stated times without number that an appellate Court can only interfere with the sum awarded where an appellant demonstrates that the award is too high or so low as to amount to an outright error in assessment of damages, or that in coming to that assessment the Court took into account an irrelevant matter or that it failed to take into account a relevant matter. The Court of Appeal in *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates* [2013] eKLR held as follows-

“We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled... This principle was adopted with approval by this Court in *Butt v Khan* [1981] KLR 349 where it was held per Law, JA:

“... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low...”
17. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.
18. To start with, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical report by Dr. Joseph Sokobe as:
 - a. Multiple bruises on the face
 - b. Blunt injury chest
 - c. Bruises on the right elbow joint
 - d. Fracture on the mandible
 - e. Loss of 4 lower molar teeth on the left side
 - f. Fracture of the left patella
 - g. Fracture of the left femur
19. Learned Counsel Mr. Onyinkwa took issue with the fact the trial court relied on a decision that is not comparable to the circumstances in the instant case.



20. At this point it is important to highlight that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable to the other person's injuries, and the after effects. Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
21. The report adduced in evidence by Dr. Joseph Sokobe is sufficient evidence on the sustained injuries. the report further concluded that the Respondent's permanent disability is at 10%. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.
22. It is trite that when it comes to the issue of assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are usually similar in terms of the nature and extent of the injuries sustained. The Court of Appeal in Stanley Maore vs Geoffrey Mwenda [2004] eKLR stated as follows-
- “ Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
23. I have considered the authorities relied on by the Respondent and the injuries therein are far much more serious than the ones sustained by the Respondent herein.
24. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that the trial court's award was inordinately high.
25. I have considered the awards in the following cases. In Joseph Njeru Luke & 3 others v Stellah Muki Kioko [2020] eKLR the court awarded a respondent who sustained pelvic fractures and soft tissue injuries Kshs. 750,000/-.
26. In Daneva Heavy Trucks & another v Chrispine Otieno [2022] eKLR the plaintiff therein sustained a fracture of the pelvis and fracture of tibia and fibula and was awarded Kshs 800,000/-.
27. In Easy Coach Limited v Emily Nyangasi (2017) eKLR the respondent had sustained facial injuries, injury to chest, injury to back, injury to right hand with cut wound and injury to right leg with cut wounds. The court upheld an award of Kshs. 700,000/=.
28. I have looked at the authorities cited by both parties in the case herein, whereas it is impossible to find authorities with exact injuries. I find the award of Kshs. 1,500,000/= to have been excessive. I consider a sum of Kshs. 800,000/= to be adequate compensation for the injuries sustained.

In the end the Court finds merit in this appeal and therefore proceeds to enter judgment in favour of the Appellant in the following terms;

- a. General Damages..... Kshs. 800,000/=
- b. Special Damages..... Kshs. 115,665/=



- c. TotalKshs. 915,665/=
- d. Less 20% Kshs. 183,133/=
- e. Total Kshs. 732,532/=

It is ordered so.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST 2024.

In the Presence of:

Mr. Nyaleko for the Appellant

.....

R.NYAKUNDI

JUDGE

