



**Mwangi & another v Gachui (Civil Appeal 60 of 2023)  
[2024] KEHC 10978 (KLR) (9 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10978 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 60 OF 2023  
AC BETT, J  
SEPTEMBER 9, 2024**

**BETWEEN**

**ARTHUR WAITARA MWANGI ..... 1<sup>ST</sup> APPELLANT**

**PESTONY LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MICHAEL NDUATI GACHUI ..... RESPONDENT**

*(Being an appeal from the judgement of the Honorable J.A. Ogonda, Principal Magistrate delivered on 13th October 2021 in Ruiru SPMCC No. 65 of 2020)*

**JUDGMENT**

1. This is an appeal on quantum of damages awarded in respect of injuries sustained by the respondent after a road traffic accident which occurred on 10<sup>th</sup> October 2019. The respondent was a lawful passenger in motor vehicle registration no. KCF 187Y Toyota matatu which was being driven along Thika-Nairobi Road when motor vehicle registration no. KCV 025P Tata lorry was so negligently and recklessly driven by the 1<sup>st</sup> appellant that it lost control and collided with motor vehicle registration no. KCF 187Y. As a result of the accident, the respondent sustained injuries which he set out in the plaint dated 24<sup>th</sup> February 2020 as:-
  - (a) Soft tissue injuries to the left knee.
  - (b) Soft tissue injury to the chest.
  - (c) Fracture and subluxation of wrist ulna bone.
2. After hearing the parties' and reading their submissions, the trial magistrate awarded the respondent general damages of Ksh.500,000/= less contribution of 20% which had been agreed upon by the parties



at commencement of the hearing. It is the award of general damages of Ksh.500,000/= that led to the instant appeal.

3. In their memorandum of appeal dated 3<sup>rd</sup> November 2021, the appellants faulted the trial magistrate for giving an award that is an excessive and erroneous estimate of the damages that may be awarded in similar circumstances. The appellants also faulted the trial magistrate for failing to consider the evidence and their submissions before arriving at the judgement and for relying on extraneous evidence in arriving at his decision.
4. In their submissions, the appellants reiterate that the appeal is on quantum. They submit that the duty of the court is as held in *Selle and Another -vs- Associated Motorboat Co. Ltd* [1986] EA 123. They further submit that the court ought to consider the principle of law that comparable injuries should receive comparable awards as seen in the case of *Arrow Car Limited -vs- Elijah Shamall Bimomo and 2 Others* [2004] eKLR.
5. It is the appellants' submissions that the duty of the court in re-assessing damages was well set out the case of *Butt -vs- Khan* [1981] KLR 349 when Law JA said: -

“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 the 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.”

6. In this particular case, the appellants argue that the trial magistrate acted upon wrong principles and made an award that is inordinately high that it would warrant the disturbance of the court. It is their argument that the trial magistrate failed to consider cases of comparable or similar injuries. The appellants relied on the case of *Patrisia Adhiambo Omolo -vs- Emily Mandala* [2020] eKLR where the injuries were:-
  - (a) Fracture of the left forearm radius and ulna bones.
  - (b) Colles fracture of the left forearm.
  - (c) Swollen deformed distal aspect of the left forearm.

The court made an award of Ksh.180,000/=.

Based on the foretasted authority, the appellants now urge the court to review the award downwards to Ksh.180,000/=.

7. The respondent in opposing the appeal reiterates that the *BUTT -VS- KHAN* case (supra) is a guiding authority on questions similar to the present case. He further relies on *Peters -vs- Sunday Post* (1958) EA where the former court of appeal, in applying *Watt -vs- Thomas* [194] 1 ALL ER 582; [1947] A.C. 484, observed that: -

“...whilst the appellate court has jurisdiction to review evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it shown that the trial judge has failed to appreciate the weight or the bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide.”

8. The respondent submits that since the appellants did not adduce any evidence discounting the injuries suffered by the respondent, the injuries were sufficiently proved. He states that the court was guided



by the case of Florence Njoki Mwangi -vs- Chege Mbitiru [2014] eKLR where on appeal, the court awarded Ksh.700,000/= for similar injuries comparable to the current one.

9. Two issues emerge from the parties' submissions: -
  - (1) Were the injuries sustained by the respondent proven?
  - (2) Did the trial magistrate exercise wrong principles in awarding Ksh.500,000/=?
10. Both parties produced medical reports. Dr. G.K. Karanja, whose letterhead shows that he is an Obstetrics and Gynecology doctor, produced the first report. According to him the respondent sustained the injuries listed above as particularized in the plaint but had recovered with a slight swelling on the right wrist joint. Dr. Karanja examined the respondent on 1<sup>st</sup> December 2019 two months after the accident. In his opinion, the respondent suffered soft tissue and skeletal injuries. In his report, he classifies the injury as "harm injury" and states that the respondent had recovered since the trauma was mainly soft tissue.
11. On his part, the appellant produced a medical report written by Dr. W.M. Wokabi, a consultant surgeon. According to him, the Respondent sustained the following injuries: -
  - (a) Fracture to the right ulna.
  - (b) Blunt soft tissue injuries to the right knee.

The injury to the knee had completely healed at the time of the examination which was on 13<sup>th</sup> May 2021. He confirmed that the fracture of the distal end of the left ulna had united. He noted that the respondent was complaining of pain in the right forearm.
12. Both doctors noted in their medical reports that they referred to the treatment notes from Kayole Hospital Ultimate Medical clinic. Although Dr. Karanja does not record the radiologist report as one of his sources of information, he alluded to the x-ray reports. In general, both doctor reports are in agreement except that Dr. Wokabi omitted the soft tissue injuries to the chest. I have perused the treatment notes which were the source documents and find that the same are consistent with the report by Dr. Karanja.
13. I have carefully read the judgement and noted that the trial magistrate made reference only to Dr. Karanja's medical report and totally ignored Dr. Wokabi's report even though it had been produced by consent. However, Dr. Wokabi's report is not so vastly different from Dr. Karanja's report except for the failure by Dr. Wokabi to note that the respondent also sustained soft tissue injuries to the chest. Both doctors are in consensus that the respondent fully recovered from the injuries. Since Dr. Wokabi did not attend court to produce his report, his report carries less weight than that of Dr. Karanja who attended court and was cross-examined on his findings. I am therefore in concurrence with the trial magistrate that the injuries suffered by the respondent were as stated by Dr. Karanja. My finding is that the respondent did prove that he sustained the injuries referred to in the plaint.
14. Turning to the second issue, this court needs to decide whether the award was so inordinately high as to justify a review. In making the award, the trial magistrate relied on the case of Haron Cheron -vs- Eastern Produce [2014] eKLR where the appellate court reviewed general damages from Ksh.800,000/= to Ksh.450,000/= for a fracture to the right ulna, fracture to the right olecranon of right ulna at the elbow joint and where some plates were fixed to deal with the fracture. The plates were later replaced with pins and screws after open reduction was done. The trial magistrate also cited the case of Florence Njoki Mwangi -vs- Chege Mbitiru [2014] eKLR where an award of Ksh.700,000/= was made to the plaintiff who had suffered broken femurs, bilaterally (to the left and right thighs) two degloving injuries



- of the right knee and right ankle and multiple cuts to the forehead. The plaintiff required skin grafting and fixing of k-nails and screws for which a future surgery to remove would be necessary.
15. Several decisions have been rendered by the courts in which they have set guidelines on the principles to be observed in making an award for general damages. In *Gitobu Imanyara And 2 Others -vs- Attorney General* [2016] eKLR, the Court of Appeal held: -
- “It is firmly established that his court will be disinclined to disturb the findings as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgement of this court an erroneous estimate of the damage to which the plaintiff is entitled.”
16. The award of damages for pain, loss and suffering in personal injury claims is a discretionary exercise. The court needs to be guided by past and current awards of comparative nature. In *Simon Taveta -vs- Mercy Mutitu Njeru* [2014] eKLR, the Court of Appeal had this to say: -
- “The context in which the compensation for a respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
17. In order for the court to make a proper finding in this appeal, we need to consider the nature, extent and prognosis of the injuries sustained by the respondent vis-à-vis the award and compare the same with past awards made by courts in respect of as similar injuries as is possible to the respondent’s injuries. The court must also be guided by other relevant factors such as inflation. In *Mbaka Nguru And Another -vs- James George Rakwar* [1998] eKLR, the Court of Appeal stated: -
- “The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”
- Such an award is meant to compensate, not to enrich the plaintiff.
18. In making the award, the trial court clearly relied on two precedents where the injuries were far much more serious than the ones sustained by the respondent in this matter. So serious were the fractures sustained by the claimants in the two aforementioned matters, that the claimants had to have implants surgically inserted in order for the fractures to heal. Conversely, the respondent herein was managed conservatively by way of a plaster cast. The three claimants cannot therefore be said by any stretch of imagination, to have suffered comparable injuries that should attract comparable awards.
19. Accordingly, I do find that the trial magistrate did err in awarding damages of Ksh.500,000/= as he relied on precedents where the injuries were far more grievous than the injuries sustained by the respondent in this appeal. In relying on incomparable cases, the trial magistrate acted upon the wrong principles and his award must be reviewed downwards for being manifestly excessive.
20. I have carefully considered the respective submissions by the appellant and respondent on quantum. The appellants have cited an authority whose injuries are less severe than those suffered by the respondent and urged this court to award Ksh.180,000/=. They cited the case of *Patrisia Adhiambo Omolo -vs- Emily Mandawa* (supra) where the appellate court discounted the injuries stated in the plaint and made a finding that the plaintiff had suffered a colles fracture which is a fracture of the



left forearm radius and ulna bones but which the plaintiff had cunningly presented as four different injuries.

21. I have endeavoured to search for precedents that are more relevant in this appeal. In the case of Philip Musyoka Mutua -vs- Leonard Kyalo Mutisya [2018] eKLR, the plaintiff was awarded Ksh.300,000/= for a fracture of the distal left radius, bruises on the chest and left hand, cut wound on the face near the right eye, and blunt injury to the chest and both shoulders. In Paul Karimi Kithinji -vs- Joseph Mutai Kaberia [2018] eKLR, the sum of Ksh.150,000/= was awarded for segmental fracture of the right proximal ulna and minor lacerations of the face.
22. Upon careful consideration of the authorities cited, the age of the authorities and the nature and extent of the injuries sustained by the respondent, I find that a sum of Ksh.300,000/= is adequate compensation as general damages for the injuries sustained by the respondent.
23. Accordingly, I do set aside the award of Ksh.500,000/= and substitute it with an award of Ksh.300,000/=. When subjected to 20% contribution, the final award comes to Ksh.240,000/=.
24. The respondent is therefore entitled to the sum of Ksh.240,000/=, special damages in the sum of Ksh.4050, costs of the lower court plus interest.
25. Since the appellants partially succeeded, I order that each party shall bear their costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 9TH DAY OF SEPTEMBER, 2024.**

**A. C. BETT**

**JUDGE**

**In the presence of:-**

Bosire for appellant

No appearance for respondent

Court Assistant: Polycap

