



**Aluku v Kariuki & another (Civil Appeal E452 of 2021)
[2024] KEHC 12096 (KLR) (Civ) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E452 OF 2021

RC RUTTO, J

OCTOBER 11, 2024

BETWEEN

EDITH MUTHONI ALUKU APPELLANT

AND

PAUL KARIUKI 1ST RESPONDENT

RADHESHYAM TRANSPORT LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment delivered on 23/7/2021
at the Chief Magistrates court (Hon. A.N Makau (PM)))*

JUDGMENT

1. This appeal arises from Nairobi CMCC No. 9262 of 2017 in which the Appellant sued the Respondents claiming for general and special damages arising from injuries sustained in a road traffic accident on 21/9/2017 along the Eastern Bypass.
2. According to the amended plaint dated 20/5/2019 the Appellant was lawfully travelling as a pillion passenger along the Eastern bypass when Motor vehicle registration KBP 148K owned by the 2nd Respondent, was so recklessly and carelessly driven at high speed by the 1st Respondent that it lost control veered off the its lane knocking the Appellant's motor cycle thus causing an accident and occasioning injury to the Appellant.
3. The Respondents filed their defence, dated 17/3/2018 in which they denied the Appellant's claim. In the alternative, they pleaded that the Appellant and the motor cycle rider were the sole cause of the accident or substantially contributed to it.



4. The parties recorded a consent on liability at 80:20 in favour of the Appellant and agreed to file submissions on quantum. The trial court proceeded with assessment of damages and rendered judgment on 23/7/2021 where it awarded the Appellant Kshs. 200,000.00 and Kshs. 11,250.00 as general and special damages respectively less 20% as well as costs of the suit and interest from the date of judgement until payment in full.
5. Aggrieved by the said determination, the Appellant filed this Appeal on the following grounds;
 - a. The learned trial magistrate erred in law and in fact by failing to consider the appellant's submission on record thereby arriving at a finding that was untenable and unjust to the appellant;
 - b. The learned trial magistrate erred in law and in fact in awarding a sum in respect of general damages which was inordinately low in the circumstance hence occasioning miscarriage of justice.
6. Appellant thus prays for this appeal to be allowed with Costs and the trial Court's judgement on quantum be reviewed varied and or set aside entirely and award of general damages be freshly assessed. The Appeal was canvassed by way of written submissions.

Appellant's submissions

6. The Appellant's submitted that the trial court failed to take into account the findings of the medical reports on the severity of the injuries sustained by the Appellant. It is her submission that the trial Court erred in arriving at the conclusion that the Appellant did not prove to have sustained a fracture yet the medical reports by both doctors indicated that she suffered a fracture.
7. The Appellant submitted that, the injuries she suffered and treatment undergone are set out in the treatment notes, P3 form and medical reports by Dr. George Kungu Mwaura and Dr. Modi. Further, that the report by Dr Modi did confirm that the Appellant not only sustained soft tissue injuries but also suffered fracture of tibia fibula on the right leg contrary to the Respondents assertions.
8. The Appellant contends that the general damages of Kshs 200,000 awarded by the trial court was inordinately low and unreasonable compared to the severity of the injuries suffered. It is her submission that an award of Ksh. 1,500,000 would be commensurate with the severity of injuries sustained. Reference was made to the decision in Embu HCCA 62 of 2017 Francis Ndungu Wambui & 2 others v VK (minor suing through mother MCWK).
9. It is the Appellant's submission that the trial Court applied the wrong principles in awarding the general damages thus it is justifiable for this Court to interfere with the trial Court's discretion. Reliance was made to the decision in Kemfro Africa Ltd t/a Meru Express services & another v A.M Lubia & another (1982-88)KLR 727.
10. She further submits that the trial Court failed to consider her submissions on account that the same had not been filed yet the same were filed on 1/6/2021. Consequently, the trial Court only relied on the Respondents submissions and disregarded all other evidence before the Court.

Respondent's submissions

11. The Respondents submitted that the Appellant's submissions were not available on the court's electronic portal and it was upon the Appellant to demonstrate that the submissions were filed within the requisite timelines. It was their submission that, the trial Court considered all the evidence presented including the two medical reports as well as the treatment notes and that submissions are



not evidence. They relied on Court of Appeal decision in Daniel Toroitich Arap Moi – v- Mwangi Stephen Murithii & another (2014) eKLR.

12. On quantum it is the Respondents' submission that the trial Court did not apply any wrong principle in awarding general damages of Ksh. 200,000. That taking into account the nature of injuries sustained, their effect on the Appellant, extent of disability and the inflation rate the award of Ksh. 200,000 was sufficient compensation to the Appellant.
13. The Respondent submitted that the trial Magistrate arrived at the award of damages upon consideration of awards given in other decided cases where there were similar injuries. The Respondents referred to the decisions in Eva Karimi & 5 others v Koskei Kieng & another (2020) eKLR; and HB (Minor suing through the mother and next friend DKM –V- Jasper Nchonga Magari & another (2021).
14. They further contended that the report of Dr. Modi ruled out the existence of a fracture but in the event the Court considers the report a fracture of tibia and fibula bones can be adequately compensated with an award of Ksh. 400,000. They relied on the case of Jitan Nagra v- Abidnego Nyandusi Oigo(2018) eKLR and Civicon Ltd v Richard Njomo Omwancha (2018)eKLR .

Analysis and Determination

15. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions. See the Court of Appeal case Gitobu Imanyara & 2 Others – vs- Attorney General [2016] eKLR.
16. I have considered the appeal in the light of the material before the court and the issues for determination are: whether the evidence on record did prove that the Appellant sustained a fracture; and whether the award of general damages of Ksh. 200,000 in light of the injuries sustained was inordinately low.

Injuries sustained by the Appellant

17. One of the issues in contestation was the injuries sustained by the Appellant. The Appellant submitted that the treatment notes from Komarock Modern Health care, the P3 form and medical reports by Dr. Mwangi and Dr. Modi all showed that she sustained soft tissue injuries and a fracture of the right tibia.
18. The Respondents on the other hand argued that the Appellant did not sustain any fracture and the report by Dr. Modi denied the existence of any such fracture.
19. I have considered the treatment notes and the two medical reports on record and do not find any material difference as regards the nature of injuries sustained by the Appellant. The Appellant was first treated at Komarock Modern Hospital where an x-ray was taken which revealed a fractured upper third right fibula and an intra-articular fracture lateral tibia plateau necessitating application of a Plaster of Paris on the right leg.
20. The medical report prepared by Dr. Mwangi dated 11/12/2017 restated the injuries pleaded as lifted from the treatment documents. The medical examination was conducted three months after the accident and noted that the Appellant was experiencing pain on the right leg and was on crutches. It further noted that she had soft tissue injuries which were expected to heal within a year and assessed permanent incapacity of 5% in the right lower limb.
21. The second medical report by Dr. Modi dated 7th May 2018, almost eight months after the accident, indicates that the Appellant sustained cut wounds and fractures which fracture was treated conservatively with application of plaster cast. The Doctor concluded that the fractures had completely



healed and the Appellant could walk without any support. However, that she was prone to develop arthritis of right knee joint due to the fracture lateral tibia plateau that was intra articular.

22. Therefore, both medical reports noted that the Appellant did suffer a fracture of the tibia/fibula bone and soft tissue injuries. The treatment notes of Komarock Modern Hospital where the Appellant was first treated, and an x-ray was taken also revealed a fracture on the upper third right fibula and an intra-articular fracture lateral tibia plateau. Consequently, it is not clear how the trial Court while relying on the evidence on record arrived at the finding that the Appellant provided no tangible evidence to support that he suffered a fracture and yet the same was pleaded and supported by the medical reports as explained above. The result of which I do find that from the evidence on record it is clear that the Appellant suffered a fracture of the right tibia and soft tissue injuries with no resulting disability thus the trial Court erred in finding that the Appellant had not proven the fracture as pleaded in the amended plaint.

Assessment of Quantum

23. The assessment of damages is a discretion that an appellate court will not lightly interfere with unless: the award is inordinately high or low as to represent an entirely erroneous estimate; it is shown that the court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. (See *Butt v Khan* Civil Appeal No. 40 of 1977 [1978] eKLR)
24. In the instant appeal, the Appellant contends that the award was unjust and that the trial court finding was against the weight of the evidence on record.
25. The factors that a Court considers in determining the award to give in damages include the nature and extent of the injuries, the awards made for comparable injuries as well as inflation rates. A court must however bear in mind that no two cases are exactly the same. In *Stanley Maore vs Geoffrey Mwenda Nyeri* CA No. 147 of 2002 the Court of Appeal had the following to say on the assessment of general damages;
- “It has been stated now and again that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases.”
26. From the evidence on record, it is clear that the Appellant sustained the injuries as pleaded. Therefore, the issue for determination is whether the award of damages to was inordinately low to warrant this Court’s interference with the award.
27. The Appellant has sought an award of Ksh. 1,500,000 and relies on the decision in *Embu HCCA 62 of 2017 Francis Ndungu Wambui & 2 others v VK (minor suing through mother MCWK)* where the plaintiff was awarded Ksh. 1,000,000 general damages for soft tissue injuries to the upper knee, compound fracture of distal tibia fibula at risk of secondary stress fractures, loss of unconsciousness for more than 30 minutes. I find that the injuries in the authority referred to were more severe than those sustained by the Appellant in the instant case.
28. The Respondents on their part urged that if indeed the Appellant suffered a fracture injury, then an award of ksh. 400,000 would be sufficient compensation they relied on the following cases: *HCCA No. 74 of 2016 Jitan Nagra-v-KAbidnego Nyandusi Oigo* (2018) eKLR where the High Court reduced an award of Ksh. 1,000,000 to 450, 000 for a compound fracture of the right tibia and fibula, distal fracture of the right femur and hand internal fixation for removal. The case was determined in 2018.



29. In Kisii HCCC No. 115 of 2018 Civicon Limited v Richard Njomo Omwancha (2018) the trial Court's awards of Ksh. 1,000,000 and 1,300,000 were substituted with awards of Ksh. 450,000 and 500,000 respectively for several soft injuries, fracture of the left tibia and fibula bones, dislocation of the shoulder and hip joint and permanent disability of 30%. The case was determined in 2019.
30. In her judgement the trial Magistrate considered the case laws cited by the parties and awarded general damages of Ksh. 200,000 for the soft tissue injuries upon finding that the Appellant had not proven that she sustained a fracture. As I have held in paragraph 25 and 26 above the Appellant suffered a fracture of the tibia and related soft tissue injuries. From the subsequent medical report of Dr. Modi the Appellant's injuries had fully healed without any disability save for the probability of developing arthritis of the right knee in the future.
31. In the case of Herbart Otara Marube v Dankan Ochora [2022] eKLR the court awarded Kshs 450,000/- for a plaintiff that sustained fracture of right tibia, right ankle dislocation, chest contusion, laceration and cut wounds on the right lower limb.
32. In the circumstances, having found that the Appellant sustained a fracture and with due regard to the aforesaid cases I am inclined to find that the award of Ksh. 200,000 by the trial court was inordinately low in comparison to the injuries suffered by the Appellant. Accordingly, I am persuaded that this is a suitable case for the exercise of my discretion to interfere with the trial Court's finding on general damages for the reason that the quantum awarded was on the lower side.
33. Consequently, this Court is of the of the considered view that an award of Ksh. 500,000 in general damages is sufficient compensation for the injuries sustained by the Appellant. Accordingly, the award of Kshs. 200,000/= on general damages is hereby set aside and replaced with an award of Kshs. 500,000/= on general damages.
34. The upshot of the above is that the appeal succeeds on the award of general damages and the trial Court's award of general damages of Ksh. 200,000 is hereby set aside and substituted with an award of Ksh. 500,000 subject to the agreed liability of 20%. The Appellant is awarded Costs in the trial Court and of this Appeal.
35. It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant:

