



REPUBLIC OF KENYA



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**Gikunju & another v Njoki (Civil Appeal E041 of 2021)
[2024] KEHC 16745 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E041 OF 2021
NIO ADAGI, J
OCTOBER 3, 2024**

BETWEEN

GRACE WANGECHI GIKUNJU 1ST APPELLANT

SIMON MURIITHI GIKUNJU 2ND APPELLANT

AND

SAMUEL KINGÓRI NJOKI RESPONDENT

*(Being an Appeal from the Judgment of Hon. H. Adika (PM)
in Nyeri PMCC. No. 110 of 2020 delivered on 19/07/2021)*

JUDGMENT

Background

1. The Respondent commenced the suit vide a Complaint dated 6th July 2020 claiming that the 1st Appellant being the registered owner of motor vehicle registration number KCJ 906L Toyota Saloon and the 2nd Appellant the actual driver of the motor vehicle as driver managed the said vehicle so negligently knocking the Respondent down along the Nyeri-Ndugamano road at Gathuthi area on 26/05/2020 at about 1900hrs.
2. As a result of the accident the Respondent blamed the 2nd Appellant as particularized in paragraph 5 of the Complaint.
3. The Respondent sought for judgment against the Appellant for:
 - a) General damages for pain, sufferings and loss of amenities.
 - b) Special damages of Kshs.33,800/-.
 - c) Costs and interest on (a) and (b).



- d) Any other relief the court would deem fit
4. The Respondent's claim was opposed by the Appellants vide a statement of defence dated the 18th August 2020 in which the Defendants denied negligence on their part.

Evidence

5. PW1, No.82433 P.C. Anthony Opiyo the investigating officer stated that there was an accident that occurred on 26/5/2020 at around 1900hours along Nyeri-Ndugamano road at a place called Gathaihi involving motor vehicle registration No. KCJ 906L driven by the 2nd Appellant and the Respondent. The 2nd Appellant was from Nyeri towards Ndugamano general direction. At the location of the accident, he knocked down the Appellant who was crossing from left to right from the Nyeri direction. He stated that the Respondent was seriously injured. He stated that the driver of KCJ 906L was to blame because the pedestrian was crossing from left to right. He stated that the pedestrian was moving from left to right. He stated that he drew a rough, fair sketch plan of the scene. He stated that the Respondent had done 80% of the road from the point of impact and that from the point of impact to where the motor vehicle stopped is 16.6meters. He stated that the accident happened at the bus stage and is designated at 50KPH. He stated the 2nd Appellant was speeding and that he never braked. He stated that the driver ought to have seen him and would have stopped if he was within the designated speed limit. He stated that he issued a P3 form and police abstract which he produced as evidence together with an OB extract and sketch plans. He stated that the pedestrian is not to blame. He stated that the area is for pedestrians to cross as it is at stage.
5. In cross-examination he stated that there was no road sign that showed the speed limit. He stated that the victim was knocked on the straight line. He stated that there were zebra crossing marks but were faded. He stated that the pedestrian is the only person who recorded a statement. In re-examination he stated that there were crossing markings but were faded. He stated that the impact was on the extreme left as one faces Ndugamano.
5. PW2 Samuel Kimani stated that he wished to adopt his statement as his examination in chief and the documents filed. (Exhibits 3-10). He stated that he was not to blame for the accident. He stated that he looked on both sides and that there was no motor vehicle and when he was almost finishing, he was hit and that the vehicle was moving at a high speed.
5. In cross-examination he stated that he was hit on the left side of the road and that the road is straight and that he saw the motor vehicle just before it hit him. He stated that he has not healed properly and that he was dizzy, an issue he suffers after the accident. In re-examination he stated that he did not have speech impediment.
5. DW1, Simon Mureithi Gikunju stated that he wished to adopt his statement and use it as his evidence. He stated that the Respondent went for a second medical examination and that he wishes to adopt it. He stated that he has never been charged in court with the accident nor did he receive a notice. In cross-examination he stated that he was a driver with 12 years' experience. He stated that he was from Nyeri heading to Ndugamano on the left lane. He stated that the accident was at Mathaihi village and has no shopping Centre and has quite a number of people along the road. He stated that he was doing 60-80 KPH and that he was not over speeding. He stated that the accident happened on his side as the pedestrian came from the right side. He stated that the pedestrian ran across the road. That he tried to hoot brake and swerve but he was too close. In re-examination he stated that the pedestrian was about to cross from his side and suddenly ran onto the road.



5. Judgment was delivered on 19th July 2021 where the court found the Appellants 100% liable in negligence and awarded the Respondent Kshs.500,000/- in general damages and KShs.33,800/- for special damages plus costs and interest.

The appeal

5. Being aggrieved by the said judgment, the Appellants lodged the appeal herein vide the Memorandum of Appeal dated the 31st October, 2022. The appeal is on the Trial Court's finding on both liability and quantum and is based on 6 grounds, that:
 1. The Learned trial Magistrate erred in law by finding the Appellant wholly liable in negligence in disregard of the sum of evidence adduced at the hearing in regard to the Respondent's evident contributory roles in the accident.
 2. The Learned trial magistrate erred in law and in fact in failing to properly analyze the evidence before him which clearly established that the Respondent was substantially to blame for the subject accident for crossing the road unexpectedly and when it was not clear thereby causing the subject accident.
 3. That the learned magistrate erred in law and fact in failing to consider the evidence and the witness testimonies presented at the hearing the written submissions of the Appellants and find that the Respondent herein contributed to the accident.
 - A4. That the Learned trial Magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence.
 5. That the learned magistrate erred in law and in fact in the manner that the assed damages for pain and suffering and in awarding damages that were excessive in the circumstances.
 6. That the judgment of the learned magistrate is against the law and weight of the evidence on record.
12. The Appellant prayed for Orders:
 - i. That the Appeal be allowed and the judgment/decreed of 19th July 2021 be set aside.
 - ii. That costs of the appeal be awarded to the Appellants

Analysis and Determination

13. This being the first appellate court, this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. This position was emphasized in the case *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No.161of 1999) in the following manner:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

13. In this appeal, the Appellants have challenged the trial court award on liability and quantum of damages.



13. The Appellants have urged this court to set aside the judgment of the lower court and vary the quantum of damages for being inordinately too high and manifestly excessive.
16. This court thus considers the following two major issues as proper for determination:-
- Whether the trial court erred in apportioning liability at 100% on the Appellants
 - Awarding an inordinately high award for general damages.
17. On the issue of liability, the lower court apportioned 100% liability against the Appellants. It was the evidence of PW1 that the Respondent was crossing from left to right and had covered at least 80% of the road when he was hit by the 2nd Appellant. It was the testimony of all the witnesses that the road was straight. This court takes judicial notice that a straight road has clear visibility of oncoming traffic from either direction and further that the Respondent claimed that there was no traffic only for him to get hit, is improbable. The fact that he dashed onto the road begs the question, if there was no traffic on the left lane, why dash if not to avoid some perceived danger, to wit, an oncoming vehicle? On this, this court finds that the trial court erred in apportioning 100% liability against the Appellants. The court of appeal in *Patrick Mutie Kamau & Another V Judy Wambui Ndurumo* (1997) eKLR had this to say on the pedestrian's duty on the road:-

“That pedestrians too owe a duty of care to other road users, and they ought to move with due care and follow the Highway Code, they should too take care of their own safety and not to run across the road when it is not safe to do so. If they do so, it is at their own peril and cannot blame an oncoming vehicle which is unable to avoid the accident due to the short distance”

18. The Appellant driver further stated that he was doing 60-80KPH. He stated that the area had a lot of people as his testimony. He ought to have exercised due care and slowed down despite the fact that there was no signage of designated speed.

On the above, this court shall disturb Liability and apportion the same on the basis of 90% : 10% between the Appellants and the Respondent respectively

19. The court is also tasked with making a determination as to whether the awards of Kshs. 500,000/- in general damages for pain and suffering was inordinately too high to warrant the interference by this court having in mind that comparable injuries should attract comparable awards as was the position in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR.
20. The court takes note of the doctrine that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the learned trial magistrate which advantage an appeal court by its mode of delivery lacks. See: *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR.
21. It is crucial to note that in order for the appellate court to interfere with the award of the trial court, there has to be sufficient grounds and principles as was held in *Butt v Khan* {1981} KLR 470 and *Kitavi v Coastal Bottlers Ltd* {1985} KLR 470) that:

“Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on these areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low



as to represent an entirety 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 a figure which was either inordinately high or low.”

22. This court is guided by the principles on interfering with judicial discretion as laid down in the case of *Price and Another v Hilder* {1996} KLR 95 which laid down the following guidelines that:

“In considering the exercise of judicial discretion, as to whether or not to set aside a judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless it’s satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

23. Having considered the rival submissions by parties, the evidence on record and the authorities cited by both counsel and appreciating 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.

24. The Respondent’s medical report showed that he suffered the following injuries:-

- i. loss of consciousness;
- ii. moderate head injury and otorrhoea (oozing of CSF) from the ear,
- iii. CT scan of the head demonstrated intraparenchymal hemorrhage.
- iv. At examination, the Respondent still complained of headache.

25. The Respondent’s counsel submitted for Kshs.1,000,000/= as general damages for pain and suffering and loss of amenities and cited two cases. I have considered the cases as cited in the Respondent’s written submissions dated 6th May 2021 and the general damages awarded as follows:

1. In Mombasa Civil Appeal 131 of 2016, Prem Gupta Varun Gupta V Grimley Otieno & 3 Others where on 10th August 2028, the court awarded the Plaintiff Kshs.800,000/- for injuries in the nature of moderate head injury with otorrhoea, mouth bleeding, raccoon eyes and was in a semicomatose state after the accident.
2. In Kiambu HCCC No. 83 of 2017 Gabriel Maina Mungai V Jane Wanjiku Mwaura where on 15th May 2019, the court awarded the Plaintiff Kshs.750,000/- where the Plaintiff sustained a scalp injury accompanied by traumatic subarachnoid haemorrhage.

26. The Appellant submitted for Kshs.300,000/= as general damages and cited two cases.

1. In Duncan Mwenda & 2 Others v Silas Kinyua Kithela (2018) eKLR , the Plaintiff sustained severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger, soft tissue injuries on the chest wall and was admitted for 5 months and in unconscious state for that period. The trial court awarded Kshs.600,000/- which was reduced to Kshs.350,000/- on appeal.
2. In Grace Mwhiki Ngugi V A N O (2019) eKLR, The Plaintiff suffered total incapacity of temporary nature for a period of three weeks followed by partial incapacity of a temporary nature for a further period of one week. The Doctor observed that the Plaintiff still had



episodes of confusion and amnesia which are permanent disabilities given the duration of comatose. The court of appeal set aside the trial court's award of Kshs.450,000/- and substituted it with an award of Kshs.350,000/- as general damages.

27. In its judgment, the trial court did not cite any precedent case or authority that guided it in arriving at an award of Ksh.500,000/=.
28. Having given due consideration to the injuries sustained by the Respondent and being alive to the fact that no two injuries can be exactly the same. I find the following more recent authorities to be more comparable on the aspect of general damages in this case:-
 1. In *Duncan Mwenda & 2 others v Silas Kinyua Kithela* [2018] eKLR the Respondent sustained the following injuries; severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall and the court reviewed downward the award of the lower court from 600,000/-to 350,000/-in general damages.
 2. In *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna* [2022] eKLR, the Respondent sustained a) Head injury with loss of consciousness, b) Fracture of the right zygoma (facial bone), c) Multiple facial lacerations, d) Blunt injury to the shoulders and e) Blunt injury and bruises to both lower limbs. The appellate court set aside the award of Kshs.850,000/- and substituted with the award of Kshs.500,000 general damages. This award was subject to contribution of 30% consented to in the lower court leaving a balance of Kshs.350,000 general damages for pain, suffering and loss of amenities.
29. On the foregoing comparison, the lower court's award of Kshs.500,000/= as general damages for pain suffering and loss of amenities can be said to be manifestly excessive as to amount to a wrong assessment. In the premises, there is sufficient cause, in my view, for disturbing the award made by the lower court under the general damages head.
30. I set aside the award by the trial court of Ksh.500,000/- and substitute it with an award of Kshs.350,000.00 less 10% liability = Kshs.315,000/- in general damages.
31. Special damages of Kshs.33,800/- as pleaded were proved. I sustain the award.
32. Total award is Ksh.315,000.00 + 33,800.00 = Ksh.348,800/- plus costs and interest at court rates. The interest on general damages accrues from date of judgment in the lower court until payment in full while interest on special damages accrues from date of filing suit in the lower court until payment in full.
33. The Respondent will have costs of the suit in the lower court. Each party will bear their own costs of this appeal.
34. File closed.
35. I so order.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 3RD OCTOBER 2024.

NOEL I. ADAGI

JUDGE

