



**Mugoye v Siso t/a Jogoce's Group (Civil Appeal E147 of 2023)
[2024] KEHC 13031 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E147 OF 2023
RE ABURILI, J
OCTOBER 22, 2024**

BETWEEN

CHRISTINE ANYANGO MUGOYE APPELLANT

AND

CELINE ANYANGO SISO T/A JOGOCE'S GROUP RESPONDENT

(An appeal arising out of the Judgment of the Honourable A.K. Markoross in the Principal Magistrate's Court in Tamu delivered on the 1st August 2023 in Tamu PMCC No. E048 of 2021)

JUDGMENT

Introduction

1. The appellant filed suit against the respondent vide an amended plaint dated 20th May 2021 seeking general damages and special damages of Kshs. 746,225 for injuries sustained following a road traffic accident that occurred on the 28.5.2021.
2. The appellant averred that whilst travelling as a passenger aboard motor vehicle registration number KCJ 583N Toyota Hiace, along Koru – Muhoroni road at Murram area, the respondent's motor vehicle registration number KCY 162N Isuzu Lorry was so negligently and/or carelessly and/or recklessly driven and/or controlled by the respondent, his driver, servant or agent as to cause the alleged accident.
3. The respondent filed an amended statement of defence dated 20th June 2022 denying the appellant's allegations and putting her to strict proof. The respondent further averred that the appellant contributed to the alleged accident.
4. As the case was part of a series, the issue of liability was determined in Tamu PMCC No. E084 of 2021 wherein the respondent was held 100% liable for causing the accident. Subsequently, the trial



magistrate proceeded to award the appellant general damages of Kshs. 1,500,000 and special damages of Kshs. 80,000.

5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 17th August 2023 raising the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and in fact in making an award in respect of general damages of Kshs. 1,500,000 that was too low in view of the injuries sustained by the appellant and presents a miscarriage of justice to the appellant.
 - b. That the learned trial magistrate erred in law and in fact in failing to completely evaluate the appellant's pleadings and evidence on quantum and special damages.
 - c. That the learned trial magistrate erred in law and in fact in failing to consider submissions of the appellant thereby arriving at an erroneous and low award for general damages and special damages.
 - d. That the award by the learned trial magistrate on general damages goes against established and prevailing judicial precedents and inflationary tendencies.
6. The respondent filed a cross appeal vide a memorandum dated 30th August 2023 in which she raised the following grounds:
 - a. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.
 - b. The learned trial magistrate misdirected herself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
 - c. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
 - d. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
 - e. The learned trial magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
7. The parties were directed to file submissions to canvass the appeal but only the appellant complied.

The Appellant's Submissions

8. The appellant submitted that the trial magistrate failed to appreciate his pleadings on injuries sustained in making the award for quantum as he paid heed to the fact that the appellant was identified by the police and first responders as a victim of the accident. It was submitted that had the trial court read through or summarised the pleaded injuries it would have appreciated not just the sheer multiplicity of injuries but the severe nature of the said injuries and subsequent excruciating and extensive pain and suffering the appellant must have undergone.



9. It was further submitted that had the trial court appreciated the documentary evidence led on her injuries it would have come to the conclusion that she warranted damages of Kshs. 3,000,000 as well as Kshs. 450,000 in special damages being the costs of cosmetic surgery as pleaded as special damage.
10. The appellant further submitted that the trial magistrate dismissed the finding of 20% disability by Dr. Neema whilst solely relying on the 2nd medical report that indicated no permanent disability which 2nd medical report ought to have been completely disregarded.
11. The appellant relied on the case of P N M [Suing as Next Friend and Father of N W N & Another v Synohydro Co. Ltd & 2 Others [2017] eKLR where the 1st plaintiff sustained a compound comminuted fracture supraorbital and naso ethmoid complex fractures, avulsive comminuted fracture of the left frontal bone, extensive degloving of the frontal and parietal bones and extensive mid-frontal and left medial orbital laceration. The Judge awarded Kshs 3,000,000/-for pain and suffering.
12. On special damages, it was submitted that the trial court erred in denying the appellant future medical treatment for cosmetic surgery assessed by Dr. Neema at Kshs. 450,000.

Analysis and Determination

13. 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, bear in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“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.”
14. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where *Kneller JA & Hancox Ag JJA* held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
15. I have considered the pleadings, evidence adduced before the trial court and the submissions by both parties in the lower court and by the appellant in this appeal. It is my view that the issue for determination herein is simply whether this court should interfere with the award of general and damages.
16. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab v Kinanu* [1983] KLR 114 and *West (H) & Son Ltd v Shephard* [1964] AC 326, 345).



17. It is not in dispute that the appellant was injured, hence the question is what was the nature and extent of the injuries and what award should they should attract. In her amended plaint dated 20th May 2021 the appellant pleaded that she sustained the following injuries;

- i. Facial lacerations
- ii. Right upper arm friction wound
- iii. Maxillary borne fracture
- iv. Loss of 1st mandible molar tooth
- v. Right maxillary sinus opacity
- vi. Bruises lower limbs
- vii. Abdominal pains
- viii. Swollen right eye with inability to open eye
- ix. Cut wounds right eye area
- x. Abdominal tenderness
- xi. Bleeding from head
- xii. Comminuted fractures of the anterior and lateral walls of the maxillary sinus
- xiii. Displaced comminuted fracture of the right lateral orbital wall
- xiv. Inferiorly displaced fracture of the right orbital floor
- xv. Comminuted fracture of the right zygomatic arch
- xvi. Steep deformity on the right lateral wall of the orbit
- xvii. Diastasis of the right fronto-zygomatic suture
- xviii. Herniation of orbital fat on right maxillary sinus
- xix. Cosmetic distress caused by facial scarring
- xx. Reduced visual acuity right eye
- xxi. Psychological distress owing to injuries to face and trauma from accident
- xxii. Increase in the right orbital volume
- xxiii. Scarring to the face
- xxiv. Disability owing to injury 20%

18. The nature of the injuries sustained by the appellant as pleaded was corroborated in the treatment card produced as PExh 1, the P3 form produced as PExh 3, X-ray report produced as PExh 7, Discharge summary from KNH produced as PExh 10 and Medical Report from KNH produced as PExh 11, Medical report from Dr. Neema Mbaruk produced as PExh 12 and CT Scan by Vital Ray Medical Imaging produced as PExh 22 which all reiterated the injuries suffered by the appellant as those pleaded in the plaint.



19. At the hearing, the plaintiff/appellant adopted her witness statement filed in court in which she reiterated the averments in her plaint regarding the occurrence of the accident on the 28.5.2021. In cross-examination, the plaintiff/appellant reiterated her claim and stated that she had not pleaded that she had a fracture to the leg.
20. I have considered the Appellant's submissions on the quantum of damages, the authorities cited in their submissions for this appeal. I have also considered the medical report filed by the plaintiff/appellant and produced as PExh 12 in which Dr. Neema Mbaruk in reiterating the respondent's injuries as pleaded in her plaint went on to assess the appellant's disability at 20%. Dr. Mbaruk further testified that the appellant would require reconstructive surgery at a cost of Kshs. 450,000.
21. On their part, the respondent did not call any witness but rather adopted the testimony of their witness given in Criminal Case No. 84 of 2021. The respondent also had the medical report by Dr. Walter Adero dated 10.11.2022 produced as PExh 2.
22. In the medical report by Dr. Adero, the doctor noted that the respondent had sustained complex maxillofacial fractures of her viscerocranium and that the respondent had to undergo open reduction and internal fixation. In his conclusion Dr. Adero noted that the respondent had not sustained any permanent disability but that she suffered temporary disability.
23. I have considered the two medical reports produced by both parties herein as PExh 2 and PExh 12 respectively. Dr. Mbaruk testified that she assessed disability at 20% because of the respondent's inability to use the right eye and her ability to function with the diminished function of the eye. She testified that the injury was permanent.
24. Dr. Adero dismissed any permanent disability on the part of the respondent but stated that she had suffered temporary disability. He further noted that the respondent was yet to resume any vocational or avocational activity due to the same.
25. It is undeniable that the appellant has not been able to undertake her vocation due to the injury to her eye. I am thus inclined to agree with the appellant that she sustained a disability assessed at 20%.
26. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case *Khambi & Another v Mahitu & Another* [1968] EACA 8. Further the Court of Appeal in the case *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others* Civil Appeal Case No. 192 Of 1992 Stated:

“Those principles were well stated by Law, J.A in *Bashir Ahmed Butt vs. Uwais Ahmed Khan*, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-

‘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”

27. In *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR the Court of Appeal stated that:

“It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in *H. West & Son Ltd vs. Shephard*



[1964]AC 326 at page 353- ‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.’”

28. Having examined the injuries sustained by the respondent, am satisfied that the injuries were severe. The injuries consisted of multiple facial fractures. The injuries are evidenced by the discharge summary, P3 form, treatment notes and medical reports produced in evidence, the appellant was a married lady with a family. She not only sustained loss of the left first tooth but also suffered very severe and multiple facial injuries which are a combination of fractures and serious soft tissues injuries.
29. The injuries sustained by the appellant herein are similar to those sustained by the respondent in *Duncan Kimathi Karagania v Ngugi David & 3 Others*, [2016] eKLR where the court awarded general damages in the sum of Kshs.4,000,000 to a plaintiff who sustained blunt head injury with the loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fracture of the maxilla bilaterally at the Le /fort 11 level, compound fracture of the mandible, comminuted fracture of the right humerus, articular region of the elbow surface of radio carpal and multiple lacerations of the hands and forearms.
30. In *James Wambua Kimila v Sinohydro Corporation Limited & another* [2020] eKLR where the plaintiff sustained injuries involving:
 - i. Fracture, compound, comminuted, depressed frontal bone of the skull
 - ii. Fracture of the left orbital bone of the skull
 - iii. Fracture of the left maxilla
 - iv. Extradural haemorrhage
 - v. Injuries to the left eye evidenced by contusion of the optic nerve and bilateral subconjunctival haemorrhage.The court awarded the plaintiff general damages in the sum of Kshs. 6,000,000.
31. The appellant relied on the case of *P.N.M supra* case where the plaintiff was awarded Kshs 3,000,000 in a 2017 decision and the injuries sustained by the 1st plaintiff were a compound comminuted fracture supraorbital and naso ethmoid complex fractures, avulsive comminuted fracture of the left frontal bone, extensive degloving of the frontal and parietal bones and extensive mid-frontal and left medial orbital laceration. sustained injuries similar to the appellant herein.
32. This Court is alive to the fact that no two injuries can be the same and that damages ought to be commensurate with the injuries suffered and comparable awards made in similar cases. In the circumstances of this case and taking into account the serious nature of the injuries sustained by the appellant as well as the fact that her disability was assessed at 20%, I am inclined to find that the trial court made an award which was inordinately low in comparison to the injuries suffered by the appellant. The cross appeal was never prosecuted.



33. I thus find that an award of Kshs. 4,000,000 would be sufficient general damages. I hereby set aside the trial court's award of Kshs. 1,500,000 as general damages and substitute it with an award of Kshs. 4,000,000.
34. Turning to the issue of special damages, specifically, the cost for reconstructive/cosmetic surgery of Kshs. 450,000 pleaded by the appellant herein, Section 107 of the *Evidence Act* (Cap 80) Laws of Kenya provides:
- “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
35. It is settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.
36. The appellant herein pleaded in the amended plaint the cost of future treatment being reconstructive surgery and also produced a medical report (PEXh 12) from one Dr. Mbaruk dated 24.11.2021 in which she recommended reconstructive surgery for the appellant at a cost of Kshs. 450,000.
37. On their part, the respondent produced a medical report by Dr. Adero (PEXh 2) dated 10.11.2022 that was prepared a year after the initial report by Dr. Mbaruk did not address anything about the appellant's reconstructive surgery.
38. Both Dr. Mbaruk and Dr. Adero are Orthopedic Surgeons. In my view, the appellant proved on a balance of probabilities that she was entitled to special damages for reconstructive surgery. I will therefore to grant the same. I am fortified by the Court of Appeal decisions in *Tracom Limited & Another –vs- Hassan Mohammed Adan* [2009] eKLR where the Court of Appeal affirmed the trial court's view that the appellant having pleaded for cost of future medical expenses, and stated that the cost would be ascertained later, the claim for future medical expenses was properly pleaded. See also in *Joseph Wang'ethe v Ew* [2019] eKLR where this Court had awarded the plaintiff Kshs 5,000,000 as the cost of future medical care as pleaded by the plaintiff. On appeal by the defendant, the Court of Appeal sustained the award.
39. The upshot of the above is that I hereby set aside the trial court award on general and special damages for reconstructive surgery as follows;
- i. General damages 4,000,000
 - ii. Special damages for corrective surgery Kshs. 450,000.
40. General damages will earn interest at court rates from the date of judgment in the lower court until payment in full. Although the costs of reconstructive surgery was pleaded in the amended plaint, the expense being a future expense, interest will accrue from the date of judgment in the lower court until payment in full.
41. Interest on special damages awarded in the lower court shall be at court rates from the date of filing suit until payment in full.
42. Costs of this appeal and cross appeal are assessed at Kshs 60,000 in favour of the appellant/plaintiff.
43. Subject to the payment of the already assessed costs of this appeal, this file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF OCTOBER, 2024



R.E. ABURILI
JUDGE

