



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Kahunga & another (Civil Appeal 27 of 2022)
[2023] KEHC 597 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 27 OF 2022
CM KARIUKI, J
FEBRUARY 9, 2023**

BETWEEN

PETER NJOROGE KAMAU APPELLANT

AND

JOSHUA MWANGI KAHUNGA 1ST RESPONDENT

WILSON MUTURI MWANGI 2ND RESPONDENT

(Being an Appeal from the Judgement of the Honourable Vincent Kiplagat, Senior Resident Magistrate in CMCC No. 104 of 2020 delivered on 22nd July 2022.)

JUDGMENT

1. The appeal before me is against the award of damages by the trial court in the sum of Kshs 306,472/= for general and special damages with liability at 100%. The judgment was delivered on July 22, 2022. Aggrieved by the judgment, the appellant filed a memorandum of appeal dated August 17, 2022. The appeal is mainly on the trial court's finding on quantum of damages. The grounds of appeal are that: -
 - i. The learned magistrate erred in law and in fact in awarding quantum of general damages for pain and suffering and loss of amenities that is inordinately low, erroneous, oppressive and inadequate and amounted to a miscarriage of justice.
 - ii. The learned magistrate erred in law and fact by ignoring the appellant's submissions, paid lip service had failed to consider all the precedents on general damages cited thus coming to a wrong decision on quantum.
 - iii. The learned magistrate erred in law and in fact in failing to appreciate the principles governing the award of damages, namely that like cases attract similar awards and ignoring completely the appellant's submissions.



- iv. That the learned trial magistrate erred in law and in fact in making an award of kshs 100,000/- in general damages for pain and suffering and loss of amenities without giving reasons for such an award thus making an award arbitrary, capricious and inordinately low, erroneous and which amounted to a miscarriage of justice.
2. It is proposed to ask the court for the following orders that:-
 3. The appeal be allowed.
 4. The subordinate court's finding on quantum of general damages for pain and suffering and loss of amenities be set aside, overturned and/or varied and substituted with a finding of the court.
 5. This honourable court be pleased to asses upwards the quantum of damages for pain and suffering
 6. The respondent does pay the costs of this appeal and the costs in the lower court
 7. Such further relief as may appear just to the honourable court.
 8. appellant's submissions
9. The appellant urged the court to enhance the award of general damages from kshs 100,000 to 1,000,000 based on the pleaded injuries as testified by dr Obed Omuyoma at 100% liability. From the appellant's testimony, he proved that she was injured in the following areas:-
 10. Compound fracture right tibia
 11. Soft tissue injuries of the right side of the face and right elbow joint
12. These injuries kept him in the hospital for 13 days. It was contended that the appellant had discharged his duty of proving the injuries sustained of a balance of probabilities. The appellant submitted that having found that the appellant proved that he sustained the said injuries the same should be enhanced for being inordinately low and the fact the trial magistrate proceeded on a wrong principle or misapprehended the evidence in some material respect.
13. Reliance was placed on *Leonard Njenga Ng'ang'a & Another v Lawrence Maingi Ndeta* [2018] eKLR, *Southern Engineering Company Ltd v Musingi Mutia* [1985] KLR 730
14. Further reliance was placed on *Synohydro Corporation Ltd v Hellen Omondi* [2016] eKLR, *Alphonza Wothaya Warutu v Joseph Muema* [2017] eKLR, *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR and *Godfrey Wamalwa Wamba & Anor v Kyalo Wambua* [2018] eKLR
15. Lastly, the appellant asserted that on the issue of costs they have demonstrated that this appeal is merited and would warrant an interference from the court and as such the appellant is entitled to costs of this appeal.
16. Respondents' submissions
17. The respondent stated that the award by trial court was not inordinately low to warrant interference by this court. That the plaintiff is only entitled to what is fair, just and reasonable and that whenever assessments such as this are necessary, they must be done in moderation; they should neither be seen to be enriching the plaintiff or punishing the defendant.
18. Reliance was placed on *Catholic Diocese of Kisumu Vs Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55



19. It was asserted that is this court is of the opinion that the award is inordinately low then the court should look at the cases cited by the respondents in the lower court ie *Third Engineering Bureau China Construction Group Limited v Edwin Kinanga Atuya* [2021] eKLR, *Aloise Mwangi Kahari v Martin Muiya & Another* [2020] eKLR
20. The respondents urged the court to dismiss the appeal with costs to the respondents but proposed a sum of kshs 500,000 as general damages should this court be of the opinion that the award is not comparable to the injuries.
21. Analysis and determination
22. The issue for determination here is whether the award of general damages for pain and suffering of Kshs 100,000.00/= in light of the injuries stated above is inordinately low to persuade this court to interfere with it.
23. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
24. First and foremost, he injuries suffered by the appellant were listed in the Medical report dated July 9, 2020 as:Compound fracture right tibia fibulaSoft tissue injuries right side of the faceSoft tissue injuries right elbow joint
25. On the issue of quantum, I will rely on the Court of Appeal’s decision in the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, held that :-

“...it is firmly established that this court will be disinclined to disturb the finding of a trial judge 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 larger 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 judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, JA that:

‘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.’

26. Further, in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR the Court of Appeal stated that in an appeal against assessment of damages, an appellate court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined thus:Where an irrelevant factor was taken into accountWhere a relevant factor was disregarded.Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.
27. Notably, the rationale for award of damages for pain and suffering is explained in paragraph 883 in *Halsbury’s Laws of England* 4th Ed, vol 12(1) page 348-883:-

Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury



itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.

The appellant urged the court to enhance the award of general damages from kshs 100,000 to 1,000,000 based on the pleaded injuries. I have scrutinized the authorities cited by the appellant as comparable awards previously made in following cases: *Alphonza Wothaya Warutu v Joseph Muema* [2017] eKLR In this case the respondent sustained the following injuries:

Deep cut wound on the forehead. Compound fracture on midshaft of the right humerus. Compound fracture of the right tibia. Deep cut wound on the right lower leg

The court upheld the award of kshs 800,000 for general damages awarded by the trial court in this case.

28. In my view, there is a disparity between the injuries suffered by the respondent in this case and the appellant in the instant appeal. The injuries herein were evidently more severe as the respondent suffered two compound fractures and deep cut wounds. The same is not comparable to the injuries suffered by the appellant.
29. Similarly *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR where the appellant had sustained a fracture of the right femur and a proximal fracture of the left tibia and his leg was shortened. The court reduced the award on general damages to Kshs 800, 000.00 from 1,600,000/- subject to contribution and *Godfrey Wamalwa Wamba & Anor v Kyalo Wambua* [2018] eKLR where the appellant had sustained a compound fracture of the right distal tibia and fibula, cut wounds on the scalp and chest and a cut on the lower lip. He underwent surgery for repair of the fibula. His leg was also shortened. An award of general damages at Kshs 700, 000.00 was upheld on appeal.
30. In both of these cases, I have noted that the injuries cited in these cases were a lot more serious and extensive than the ones experienced by the appellant herein.
31. However, I took the step of finding authorities that are more relevant to this case and the injuries suffered were comparable to the ones suffered by the appellant herein i.e.-
 - a. *Zacharia Mwangi Njeru Vs Joseph Wachira Kanoga* (2014) eKLR where the plaintiff was awarded Kshs 400,000/= the injury was stated to be "...a fracture of the tibia/fibula". Equally, there was neither shortening of the leg nor incapacity.
 - b. In *Vincent Mbogholi vs Harrison Tunje Chilyalya* [2017] eKLR, the claimant had sustained a fracture of the left tibia leg bone, blunt injury to chest and lower limb and bruises, and was awarded Kshs 500, 000.00/- which was upheld by the appellate court.
 - c. In *Tarbo Transporters Ltd v Absalom Dova Lumbasi* [2015] eKLR the plaintiff sustained fracture of the tibia fibula which resulted to a permanent deformity assessed at 3%. The other injuries were soft tissue. The appellate court set aside the award of Kshs 500,000/= and substituted it for Kshs 400,000/=.
 - d. Similarly, I will rely on the cases cited by the Respondent that is *Third Engineering Bureau China Construction Group Limited v Edwin Kinanga Atuya* [2021] eKLR where the plaintiff suffered bruises on the scalp, hands, and right leg, compound left and right tibia fracture. The court awarded kshs 500,000/- as general damages.
 - e. Moreover in the case of *Aloise Mwangi Kabari v Martin Muitya & Another* [2020] eKLR, the plaintiff suffered a compound fracture of right tibia and fibula, bleeding from the lower limb and swollen leg and the appellate enhanced the award from kshs 300,000/- to kshs 500,000/-



32. Although it is almost impossible to find an authority where one person's injuries are fully comparable to another person's injuries. However, a court is to consider what is as far as possible comparable" to the other person's injuries, and the after effects. I am inclined to find that the trial court made an award that was inordinately low in comparison to the injuries suffered by the respondent thus calling for interference by this court.
33. In the case *Jesky Enterprises Limited & another v Nancy Wachinga Wanjiru & another* [2019] eKLR the court cited the case of *Kigaraari vs Aya* [1982-88] 1 KAR 768 where it was stated as follows: -
- “Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”
34. In view of the above analysis and taking the above comparable authorities into account as well as the nature and extent of the injuries sustained by the appellant, I therefore enhance the award under general damages for pain and suffering from kshs, 100,000 to kshs 500,000.
35. Accordingly, the final orders are as follows: -
- i. Appeal on quantum is allowed.
 - ii. Trial magistrate's award under pain and suffering is set aside.
 - iii. The appellant is awarded kshs 500,000 as general damages for pain and suffering.
 - iv. The respondent to bear the costs of appeal

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 9TH DAY OF February 2023.

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CHARLES KARIUKI

JUDGE

