



**Kamau & 2 others v JMO (Minor suing through his father and as next friend of BOA)
(Civil Appeal E005 of 2021) [2023] KEHC 2366 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E005 OF 2021**

**FR OLEL, J
MARCH 23, 2023**

BETWEEN

**DANIEL KAMAU 1ST APPELLANT
SAMUEL NGANGA THUO 2ND APPELLANT
JULIUS NJUGUNA KANGETHE 3RD APPELLANT**

AND

**JMO (MINOR SUING THROUGH HIS FATHER AND AS NEXT FRIEND OF
BOA) RESPONDENT**

*(being an appeal from the judgment and decree of Hon Martin Muya
(R.M) delivered on 29th May 2020 in Naivasha CMCC 639 of 2016)*

JUDGMENT

1. The Appellant's were sued for compensation arising from a Road Traffic Accident which occurred on April 16, 2016. The 1st appellant was sued as the owner of the suit motor vehicle, the 2nd appellant as the user and/or insured and the 3rd appellant was sued as the driver of the suit motor vehicle registration Number xxxx. It was alleged that the said motor vehicle was negligently and carelessly driven along Nairobi – Nakuru highway, that it was allowed to make an illegal U Turn on the road and be hit motor vehicle xxxx, wherein the respondent was a passenger and as a result the said accident, plaintiff/respondent sustained serious bodily injury for which he filed a claim. The court awarded him damages of Kshs 500,000/=, special damages of Kshs 7,550/= plus costs and interest.
2. The Appellant being dissatisfied by the quantum awarded did file their memorandum of Appeal on February 2, 2021. This was pursuant to leave granted by the High court on January 29, 2021 in Naivasha Misc Application Number E002 of 2021 and raised 7 grounds of appeal namely:-



- a. That the learned trial magistrate erred in law and misdirected himself when he failed to consider the appellants submissions on both points of law and facts.
 - b. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - c. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented by the appellants.
 - d. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of law applicably.
 - e. The learned trial magistrate erred in law and fact in awarding the plaintiff general damages of Ksh 500,000/= and special damages of Ksh 7,550/= subject to liability apportionment of 90:10 plus costs and interest at court rates for injuries sustained by the plaintiff from the said accident, when the plaintiff had not proved his case beyond reasonable doubt as required by law.
 - f. The learned trial magistrate erred in law and in fact in unduly disregarding the appellant's evidence and facts produced in assessing quantum to the respondent.
3. The Appellant herein prayed that the award of damages be set aside and substituted with an award commensurate with the injuries sustained.

Background Facts

4. The respondent in the proceeding before the magistrate called two witnesses. PW1 CPL Daniel Kemboi testified that he was attached to Mai Mahiu traffic base. He had the OB for Mai Mahiu police station for the year 2016 in court. He stated that on February 16, 2016 motor vehicle xxxx Toyota matatu was heading to Naivasha from Mai Mahiu. On reaching Mogas petrol station about 1km from Mai Mahiu town, the driver Julius Njuguna Kangethe made an illegal U turn on the road, which made the matatu following from behind xxxx Toyota matatu to ram into xxxx thereby causing injuries to several passenger's, the plaintiff included. He produced the OB extract and police abstract as P Exhibit 1(a) &(b)
5. PW2 was the father of the minor BOA . He adopted his witness statement and testified that they were heading to Naivasha when the appellants matatu xxxx overtook the matatu in which they were travelling xxxx at high speed. After a short while the appellants motor vehicle xxxx made a u turn on the road and their matatu xxxx rammed in xxxx and the plaintiff who was his son got injured He produced the other documents in support of his claim.
6. On November 25, 2019 the parties did record a consent on liability and the same was endorsed in the ratio of 90:10 (in favour of the plaintiff). They further admitted by consent the two medical reports authored by Dr WK Kiamba dated May 21, 2016 and October 18, 2018 as P- Exhibit 5(a) and 8 respectively. The compromise was accordingly adopted by the trial court and judgment on liability entered in accordance with provisions of Order 25, Rule 5 of the *Civil Procedure Rules*.
7. The trial court proceeded to make a determination on quantum payable and awarded Kshs 500,000/= less 10% contributory liability. The plaintiff was also awarded special damages of Kshs 7,550/= plus costs and interest of the suit. Being dissatisfied by the said award the appellants did file this appeal.
8. The Respondent elected not to call any witness and closed their case.



Appellants Submissions

9. The appellant did submit that the court has wide discretion in awarding damages and that each case must be looked at in its peculiar circumstance, more so with regard to accident cases where injuries suffered differed from person to person. Such discretion was to be exercised judicially with wise circumspect and upon some legal principle's
10. The appellant's further stated that the appellant court can interfere with an award if the trial court;
 - i. Took into account an irrelevant factor or,
 - ii. Left out of account a relevant factor, or short of this
 - iii. The amount is so inordinately low or so inordinately high that it must be erroneous estimate of damages.
 - iv. Such award must also be consistent with limits awarded for similar/ comparable injuries. See [Denshire Muteti wambua Vrs Kenya power & lighting co ltd\(2013\) eKLR](#) & [Godfrey wamalwa wamba Vs Kyalo Wambua \(2018\) eKLR](#)
11. The appellant submitted that the injuries suffered by the appellant in short could be summarized as cut wound on the forehead, multiple small abrasion to the face, blunt injuries to the head leading to loss of consciousness for some time, abrasion on the back and cut wound on the leg. The appellant referred the court to several citations where comparable awards were made to comparable injuries and the awards were in the range of Kshs 90,000 to 120,00,000/=. The appellant relied several citations outlined in the written submissions and urged court to reduce the award to Kshs 80,000/=. The appellants prayed that this appeal be allowed with costs.

Respondent's Submissions

12. The respondent opposed this appeal and stated that the quantum awarded was in order. It was not excessive and/or inordinately high so as to represent an error of estimate in the compensation awarded to the respondent.
13. Further the respondent submitted that the award was in order when compared to similar injury awards. In particular they referred this court to the award in [Fred Ben Okoth V Equator bottlers limited \(2015\) eKLR](#). Where the court awarded the plaintiff Kshs 650,000/= for soft tissue injury and blindness of the left eye.)
14. The respondent submitted that the minor sustained severe injuries to the eye. In particular he stated that the minor suffered right eye laceration on the cornea subconjunctival hemorrhage, lids blesphalaspms and soft tissue injuries of the fore head. PW2 testified as to these injuries and the two reports by Dr WK Kiamba also confirmed the same. The doctor classified the degree of injury as 'Grevious Harm' and assessed the disability at 30% (Permanent disability).
15. The respondent stated that the award cannot be faulted as the court took into consideration the factors of inflation, age of the child and similar citation's regarding similar injuries. The court also at page 43 of the record of appeal considered both parties submissions and therefor it was not correct to allege that the appellant's submissions were not considered. Finally the court was guided by the principles of proportionality in awarding general damages as decided in the celebrated case of [West \(H\) & Sons Ltd Vs Shepard \(1964\) AC 326](#)



16. The respondent finally stated that they had proved their case to the required standard, the injuries sustained were confirmed by the doctor and the appellant did not bring forth any evidence to controvert the same. The special damage's too were proved by the receipt for the medical report by Dr WK Kiama for ksh 7,000 and motor vehicle search Kshs 550/=

17. The upshot of their submissions was that this appeal had no merit and should be dismissed with costs

Determination

18. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

19. As held in *Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123* where it was stated that;

' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 EACA 270

20. In *Cogblan V Cumberland (1898) 1 Ch, 704* , the court of appeal of England stated as follows;

' Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong when the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.'

21. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

22. In this appeal, the Appellant is only challenging the quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No 284 of 2001[2004]eKLR 55* set out



circumstances under which an appellate court can interfere with an award of damages in the following terms:-

' It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate'.

23. Similarly, in *Woodruff Vs Dupoint(1964) EA 404* it was held by the East Africa court of Appeal that:-

' The question as to quantum of damages is one of the facts for the trial court judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them. The quantum of damages being a question of fact for the trial judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damages claimed by the plaintiff but whether the damages awarded are 'such as may fairly and reasonably be considered as arising according to the usual course of things, from the breach of the contract itself.' The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.'

24. It was also held by the court of appeal in [*Epantus Mwangi & Ano Vs Duncan Mwangi Civil Appeal No 77 of 1982\(1982 -1988} 1KAR 278*](#) that;

' A member of an appellate court is not bound to accept the learned Judge's finding of fact if it appears either that (a) he has clearly failed on some point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'

25. Finally in the decision of *West(H) and Sons Limited vs Shepherd [1964] AC 326 at 345* it was appreciated that ;-

' The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously'.

26. The Appellant submitted that taking into account similar award for similar injuries the award of general damages should be reduced to Kshs 80,000/= . The Respondents on the other hand in their submissions supported the findings of the trial magistrate and stated that the sum should be upheld.



27. I have carefully considered all the pleadings filed, and evidence tendered in court especially on the issue of injuries sustained by the appellant. It is clear he suffered Subconjunctival haemorrhage and laceration of the cornea plus other soft tissue injuries on the head. An assessment by the ophthalmologist showed complete loss of vision of the left eye. The degree of injury was classified as Grievous harm and had permanent disability of thirty (30%) percent. The Appellant indeed proved that was injured and therefore entitled to adequate compensation.
28. The appellant seem to base their submissions on the injuries pleaded in the plaint and deliberately did not consider the major injury to the respondent's eye. Having admitted the two medical reports by Dr WK Kiama by consent on November 12, 2019, which reports specified the nature and extent of the injuries sustained, the appellants are estopped from ignoring the same. The respondent's injuries especially eye injury had to be determined as an issue arising at trial .see *Chalice FCS Ltd V Odhiambo & 9 others (1987)* where the court held that
- ' Cases must be decided on the issues on record. The court has no power to make and order unless by consent, which is outside the pleadings.'
29. Also in *Odd jobs V Mubea (1970) EA 476* the court held that
- ' A court may validly determine an un-pleaded issue where evidence is led by the parties and if from the course followed at trial it appears that the unpleaded issue has been left to the court to decide.'
30. The question which then arises is if for the award of damages of Kshs 500,000/= was adequate or was it excessive. In Fred Ben Okoth Vs Equator Bottlers Ltd (2015)Eklr, *Peter Gichuri Mwangi Vs James Kabathi Mwangi(2007) eKLR*, & *Laban Buyole Mamboleo Vs Rift valley textiles (1998) eKLR* the courts awarded average damages of between Kshs 600,000/= to Kshs 650,000/=, while in *David Omuteleva Opon Vs Dela Rue currency & security Print Ltd (2017) eKLR* the court awarded Kshs 1,200,000/= for eye injury leading to 30% disability.
31. I do find that given the inflationary rates and comparable awards awarded for similar injuries the award here was proportionate, if not slightly on the lower side and thus there is no basis of interfering with the same. In arriving at this finding, I have considered the respondents injuries, all the medical reports, the comparable citations by both the parties as submitted in the trial court and those filed in this appeal as well as other citations as outlined above.
32. The Appellants also raised an issue that the trial court failed to consider their submissions filed in the lower court. This ground of appeal has no basis as it is clear from the said judgment at paragraph 5 & paragraph 8 (page 43 and 44 of the record of appeal) that the same was considered by the trial court.

Disposition

33. The upshot is that this appeal is unmerited and the same is dismissed with costs to the respondent which is assessed as Kshs 120,000/= all-inclusive.
34. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 23RD DAY OF MARCH, 2023.

FRANCIS RAYOLA

JUDGE



No appearance by the parties

