



Musembi v INM (A minor suing through his mother and next friend JMN) (Civil Appeal E005 of 2021) [2023] KEHC 17325 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 17325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E005 OF 2021
HM NYAGA, J
MARCH 23, 2023**

BETWEEN

SALOME KALONDU MUSEMBI APPELLANT

AND

**INM (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND
JMN) RESPONDENT**

*(Being an appeal from the judgment of the Honourable Martha Opanga,
delivered on 21st January 2021, in Kangundo SPMCC No. 206 of 2019)*

JUDGMENT

1. The Respondent, a minor, had brought a claim against the Appellant seeking general and special damages for injuries he sustained in a road traffic accident on 8th May 2019 along Machakos-Kangundo Road.
2. After hearing the parties the trial magistrate found that the Appellant was wholly to blame for the accident and proceeded to award the minor Plaintiff Kshs. 1,000,000/= as general damages, special damages of Kshs. 5,300/= plus costs and interest.
3. Aggrieved by the said decision, the Appellant filed a Memorandum of Appeal dated 25th January 2021 which has four (4) grounds of appeal namely;
 - a. That the Honourable Learned Magistrate erred in law and in fact in awarding general damages to the Respondent amounting to Kshs. 1,005,300/=
 - b. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the respondent with due regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.



- c. That the learned magistrate misdirected herself by failing to consider the evidence and the submissions of the Appellant while arriving at the judgment.
 - d. That the Honourable Learned Magistrate erred in law and facts in relying on extraneous evidence in arriving at the decision on the general damages.
4. The Appellant thus seeks orders;-
1. That the appeal be allowed.
 2. That this Honourable Court be pleased to assess downwards the quantum of damages that may be awarded to the respondent.
 3. That the respondent does pay the costs of this appeal and the costs in the lower court.
 4. That such further relief as may appear just to the Honourable Court.
5. The parties filed Written Submissions.

Appellant's Submissions

6. The Appellant's appeal was limited to the award of general damages made by the trial magistrate.
7. It is submitted that the duty of the appellate court is limited to the grounds set out in *Butt vs Khan* [1981] 1 KAR 1.
8. Counsel for the Appellant also referred me to the decision in *Gitobu Imanyara and 2 Others vs Attorney General* [2016] eKLR. Also cited was *Odinga Jackton Ouma vs Maureen Achieng Odera* [2016] eKLR where the court was categorical that comparable injuries should attract comparable awards.
9. It is the Appellant's case that the award made by the trial magistrate was manifestly excessive and it ought to be interfered with and the award brought down to the region of Kshs. 450,000/=
10. To buttress their submissions, the Appellant cited *Theresia Nyelo Ngugi vs Michael Masia Kimende* [2018] eKLR, where the Plaintiff had a permanent incapacity of 70% and did require corrective surgery.

Respondent's Submissions

11. It is the Respondent's case that the Respondent suffered severe injuries and that the award made by the trial court was reasonable and should not be interfered with. I was referred to several authorities including:-
 1. *Theresia Ngugi vs Michael Masia Kimende (supra)*
 2. *PW (suing through next friend) vs Peter Muriithi* HCCA No. 54 of 2013
 3. *Joseph Musee Mua vs Julius Mbogo Mugi & 3 Others* HCCA 86 of 2008.
 4. *Tarmal Wire Products Limited vs Ramadhan Fondo Ndegwa* HCCA 243 of 2010.
 5. *Spin Knit Limited vs Johnstone Otara* HCCA 9 of 2004

Determination

12. As has been correctly submitted this court will not interfere within a discretionary order/award of the trial court unless it is satisfied that the trial court proceeded on the wrong principles or that the award was manifestly/ excessively high or low.



13. In *Gitobu Imanyara & 2 Others vs. Attorney General* [supra], the Court of Appeal 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, J.A 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.” (Emphasis my own).
14. Similarly, the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 1 held 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”
15. Lastly, in the case of *Savanna Saw Mills Ltd vs George Mwale Mudomo* (2005) eKLR the court stated as follows: -
- “It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ...”
16. In other words, the mere fact that the appellate court may have made a different award is not good reason to interfere with a discretionary order of a trial court. This court must be satisfied that the award was excessively high or excessively low.
17. In the instant case, the minor respondent sustained the following injuries;-
- a. Cut wounds on the lips
 - b. Apical swelling and fracture of upper right incisor tooth
 - c. Swelling and bruises on the left foot
 - d. Fracture of the distal fibia
18. The Respondent was examined by Dr. J. Muoki on 30th August 2019 slightly over 2 months after the accident. The doctor noted that there was a visible break of the incisor tooth and that the Respondent was walking with a limp. He did not indicate if there was any permanent incapacity expected.



19. The Respondent was subjected to a 2nd medical examination by Dr. Maina Ruga, at the instance of the Appellant. Unsurprisingly, the doctor found that the Respondent's walk was normal. The injured tooth was said to be of the milk set that would be replaced by a permanent tooth.
20. The 2 doctors are in agreement as to the nature of the injury sustained by the Respondent. The point of departure is the long term effect of the injury, especially that on the leg. Naturally, a report done one year later would be different and that has been the case. In both reports, there is no reference to any permanent incapacity.
21. The complaint by the Appellant is that the award of Kshs. 1,000,000/= was excessive. The Respondent urges me not to disturb the award.
22. I have looked at the cited authorities, noting their respective ages and the nature of injuries sustained by the claimants.
23. In *Theresia Ngugi's case (supra)*, cited by both sides, the Plaintiff herein sustained:-
 1. Mild head injury with facial bruises
 2. Blunt chest injury with fractured ribs
 3. Cut wound on the right leg below the knee
 4. Compound fracture of the right tibia/fibula
24. The Plaintiff was left with a permanent incapacity assessed at 70%. In his judgment delivered on 3rd October 2018 the Judge awarded the claimant Kshs.1,500,000/= as general damages.
25. Clearly the injuries that the Respondent sustained are less severe than those in *Theresia's case*.
26. Having looked at the nature of the injuries and the authorities cited, I find that the award of Kshs. 1,000,000/= was manifestly excessive and ought to be interfered with. This plaintiff was not left with any permanent incapacity. The milk tooth would definitely undergo the natural replacement that occurs in humans.
27. Needless to state, hefty awards will have a negative effect on the economy, much to the detriment of everyone.
28. I am also of the view that the proposal of Kshs. 450,000/= by the appellant is on lower side.
29. I award the Respondent a reviewed figure of Kshs. 700,000/= as general damages. The same is subject to the agreed liability.
30. The rest of the award by the lower court was not contested so I will not delve into that matter.
31. Each party shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MARCH, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Bosire for Appellant



Mr. Mutinda for Ms. Mutunga for Respondent

Stay of execution – 30 days

