



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngoya v Maingi (Civil Appeal E020 of 2022)  
[2023] KEHC 17323 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 17323 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E020 OF 2022**

**HM NYAGA, J  
MARCH 23, 2023**

**BETWEEN**

**ODONGO IBRAHIM NGOYA ..... APPELLANT**

**AND**

**JOHN MUTISYA MAINGI ..... RESPONDENT**

*(Being an appeal from the judgment and/decreed of the Senior  
Resident Magistrate Court at Kangundo delivered on 02/02/2022  
by the Honourable M. Opanga (Mrs) in CMCC No. 229 OF 2019)*

**JUDGMENT**

1. This appeal arises out of the judgment delivered by Hon. M. Opanga Senior Resident Magistrate on 2<sup>nd</sup> February 2022.

**Background**

2. The Respondent had filed a claim vide CMCC No. 229 of 2019 at Kangundo Senior Principal Magistrate's Court seeking general and special damages arising out of a road traffic accident that occurred on 2<sup>nd</sup> July 2019. The Respondent was a pillion passenger aboard motor cycle registration number KMCS 481G which was involved in an accident that also involved motor vehicle registration number KCE 601Y.
3. By consent, liability was agreed at 80% - 20% against the Appellant and Respondent respectively. In her judgment, the trial magistrate awarded the Respondent Kshs. 1,800,000/= as general damages and Kshs. 15,550/= as special damages less 20% contribution, leaving a net sum of Kshs. 1,452,440/=. The Respondent was also awarded costs of the suit.
4. Dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 22<sup>nd</sup> February 2022. It set out 7 grounds of appeal namely;-



1. That the learned Trial Magistrate erred in fact and law in awarding the Respondent a sum of Kshs. 1,800,000/= on General Damages which award was inordinately excessive considering the injuries sustained by the Respondent in existing Court awards in similar cases.
  2. That the learned Trial Magistrate misdirected herself in failing to consider the Appellant's submissions, both parties doctors medical reports and the evidence adduced at the Trial of the suit by the Respondent.
  3. That the learned Trial Magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.
  4. 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 the law applicable thereby arriving at a figure which is manifestly excessive.
  5. That the learned Trial Magistrate erred in law and in fact thus disregarded the Appellant's Submissions and cited authorities on record thereby arriving at a wrong decision on quantum which has occasioned miscarriage of Justice.
  6. That the learned Trial Magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstances occasioning miscarriage of justice by deviating from existing and established Judicial Principle on accident Claims.
  7. That the learned Trial Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
5. The Appellant thus seeks the following orders;-
- i. The appeal herein be allowed, the Judgment and or Decree on quantum of the Trial Magistrate dated 1<sup>st</sup> February 2022 be set aside in its entirety.
  - ii. The Honourable Court be pleased to hold the General Damages on quantum to the Respondent was excessive and that the same be revised to favourable amount.
  - iii. The costs of this appeal be borne by the Respondent.
  - iv. Any such further relief as this Honourable Court may deem necessary to grant.
6. The Appeal was canvassed by way of Written Submissions.
7. It is important, at this juncture to note that the Appeal is only on quantum of damages as awarded by the lower court.

### **Appellant's Submissions**

8. The Appellant submitted that the Respondent's Plaintiff in the lower court, at paragraph 6, pleaded just one injury namely an open fracture, pelvis (open book fracture). That there was no amendment of the Plaintiff.
9. It is further submitted that at the trial, the parties agreed that there was no fracture sustained by the Respondent and as such, the award of Kshs. 1,800,000/= was manifestly excessive and it caused a miscarriage of justice to the Appellant. That the award was not in tandem with authorities of cases which had similar injuries.



10. It is further submitted that the trial magistrate did not consider the medical report filed by the Appellant, which confirmed that the Respondent did not suffer any fractures, but a dislocation. That this being the case, the award was excessive. I was referred to the authorities of [\*Veronicah Mkanjala Mnyapara vs Patrick Nyasinga Amenya \[2021\]\*](#) eKLR.
11. Counsel for the Appellant also cited [\*Mara Tea Factory Limited vs Joshua Makoro Onkoba \[2021\]\*](#) eKLR which set out the principles to guide the court in an appeal against an award of general damages.
12. In conclusion, the Appellant urges the court to set aside the award of Kshs. 1,800,000/= and substitute it with an award of Kshs. 300,000/=. The Appellant also seeks costs of this Appeal.

### **Respondent's Submissions**

13. It was submitted that it is well settled law that as a general rule, the appellate court ought to be slow to interfere with an award of general damages made by a trial court. That such awards are discretionary and the appellate court ought only to interfere with them if satisfied that;
  - a. The trial court considered irrelevant factors in arriving at its decision.
  - b. The trial court failed to consider relevant factors in arriving at its decision.
  - c. The trial court misapprehended the evidence.
  - d. The trial court applied the wrong legal principles.
  - e. The award by the trial court was either too low or too high as to lead to an inference that it was based on an erroneous estimate of the damage suffered.
14. Counsel referred me to [\*Simon Taveta vs Mercy Mutitu Njeru \[2014\]\*](#) eKLR.
15. It was further submitted that the injuries sustained by the Respondent were severe in nature and were classified as grievous harm. Therefore, they are not soft tissue injuries as alleged by the Appellant. Counsel asked the court to look at the period that the Respondent spent in hospital and the medical procedures done on him before he was discharged and the degree of incapacity assessed at 20%.
16. Counsel further submits that there was no consent between the parties as to the type of injury sustained by the Respondent.
17. It is further submitted that assessment of damages is not an exact science and the trial court had the discretion to award damages that it felt were reasonable after considering the injuries amongst other factors. That in these circumstances, the award by the trial court cannot be said to have been excessive.
18. Counsel also referred me to 3 authorities namely:-
  1. [\*Peninah Waithera Kabiro vs LP \[2019\]\*](#) eKLR
  2. [\*Peace Kamunan Nyangeria vs Michael Thuo and Another \[2014\]\*](#) eKLR
  3. [\*Kiru Tea Factory and Another vs Peterson Waithaka Wanjobi \[2008\]\*](#) eKLR
19. In conclusion counsel for the Respondent urged me to dismiss the Appeal with costs.

### **Determination**

20. As has been correctly stated by the parties, this court can only interfere with the award of general damages if it finds that the trial court proceeded on a wrong principle or if the award was excessively



high or low . In this respect, I am minded to rely on the decision of Butt v Khan [1981] KLR 349 where it was held 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”

21. Similarly, in the case of Savanna Saw Mills Ltd v Gorge 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 ...”

22. Therefore this court will not interfere with an award of damages by the lower court merely because it would have arrived at a different decision.

23. The bone of contention is the nature of the injuries sustained by the Plaintiff. It is pleaded that he sustained an open book fracture of the pelvis. At the trial, the Respondent produced a medical report dated 9/9/2019, 2 months after the accident. Also produced was a discharge summary from Kangundo District Hospital which confirmed that the Respondent was admitted there from 2<sup>nd</sup> July 2019 to 8<sup>th</sup> August 2019. The P3 form filled by the police surgeon also confirmed the injury as an open book fracture of the pelvis.

24. The Appellant’s appeal is premised upon the argument that it was agreed between the parties that the Respondent did not suffer any fracture as pleaded. That argument was vehemently opposed by the Respondent.

25. The Appellant further relied on a report prepared by the Dr. P. M. Wambugu dated 15<sup>th</sup> December 2020. He described the injuries sustained by the Respondent as being; Diastasis of the pubic symphysis Blunt trauma right shoulder joint

26. In essence, the Appellant is urging the court to rely on the 2<sup>nd</sup> medical report prepared nearly 1 ½ years after the accident, at the expense of the earlier reports.

27. At the hearing, the Plaintiff/Respondent on cross-examination by the advocate for the Appellant/Defendant did state that what he suffered was a dislocation and not a fracture.

28. In her judgment, the learned magistrate did state as follows;

The parties were in agreement that the Plaintiff suffered a dislocation and not fracture injuries in addition to other injuries.”

29. The trial magistrate then proceeded to make the award of damages that led to this appeal.

30. In assessment of damages, the court is guided by;

- i. The medical evidence before it;
- ii. Award made in similar cases
- iii. The effect of inflationary factors
- iv. Any other relevant factor



31. As stated earlier, this court can only interfere with the award and if it finds that it was either excessively too low or too high. The court must remind itself that it did not have the advantage of hearing the witnesses. It has a duty to re-evaluate the evidence and arrive at an independent decision. Only then can it conclude that the trial court's award was manifesting too high or too low.
32. This is a case of 2 different medical opinions. With all due respect to the Appellant, a statement by the Respondent on cross-examination that he sustained a dislocation cannot vitiate the findings of medical experts and the reports on record. The Respondent was not an expert and thus cannot purport to overrule the medical notes. It is also instructive to note that Dr. Wambugu did not conduct any X-rays. He merely, apparently, looked at the same x-rays that were considered by Dr. Mwaura and the police surgeon. Surprisingly, the "experts" gave different opinions.
33. In *Stephen Kiaini Wangonde v The Ark Ltd [2016]* eKLR it was held that:-

“While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value. This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.

Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.’

34. Then in *Kimatu Mbuvi T/a Kimatu and Bros. v Augustine Munyao Kioko [2007] 1 EA 139* it was held that;

“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions. We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

35. In my view, the initial hospital documents, from Kangundo District Hospital are a sound basis to determining the exact injury sustained by the Respondent. After all, this is the hospital that managed the Respondent for 5 weeks.
36. I am thus satisfied that the Respondent did indeed suffer an open book fracture of the pelvis.
37. The next question is whether the award of damages was inordinately high as alleged by the Appellant.



38. I have looked at several authorities where the claimants sustained similar injuries. These include;-

(1) *Mwavita Jonathan vs Sylvia Onunga [2017]* eKLR

In this case the Respondent sustained a commuted intertrochanteric fracture on the left hip, blunt chest injury, dislocated right knee joint, sprains of the cervical spine, deep wound on the left lower leg.

Justice Majanja reviewed the award of damages from Kshs. 1,000,000/= to Kshs. 400,000/=

(2) *Peninah Waithera Kaburu v L.P (supra)*

39. In this case the Respondent sustained fractures of the pelvic injuries to the urethra, bruises on the legs. He was admitted for one month and underwent several surgeries.

Justice Ngaah upheld an award of Kshs. 2,000,000/= made by the lower court.

40. It must be remembered that no 2 cases are similar to a 'T'. Several other factors come into play. For example, the age of a claimant may determine the period an injury takes to heal. The degree of permanent incapacity is also relevant.

41. Having looked at the authorities cited above, I come to the conclusion that the award by the trial court was manifestly excessive. The Respondent did not require surgeries like in the cited cases.

42. I find this case as one in which the court ought to interfere with the award.

43. The appellant has suggested that the award be reviewed to Ksh.300,000/-. I am of the view that the figure is too low considering the injuries that were suffered by the Respondent.

44. I therefore review the award of general damages to Kshs. 900,000/= subject to liability as agreed.

45. I also direct that each party bears 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

Mrs Odeo Appellant

Miss Kisiangani for Respondent

Stay of execution – 30 days

