



REPUBLIC OF KENYA



KENYA LAW
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**Njagi v Mugendi (Civil Appeal E008 of 2022)
[2023] KEHC 18340 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 18340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E008 OF 2022
MS SHARIFF, J
MARCH 20, 2023**

BETWEEN

BETTY KATHOMI NJAGI APPELLANT

AND

MASTON MWANGI MUGENDI RESPONDENT

(Being an Appeal from the Judgment/Decree of the Learned Trial Magistrate Hon. Njoki Kabara in Chuka Chief Magistrate's Court Civil Case No E082 of 2021 delivered on 14th April 2022)

JUDGMENT

a. Case Background

1. The Respondent had vide an amended plaint dated 2nd November 2021 sued the Appellant in a claim of tortious negligence following his involvement in a road traffic accident with the Appellant's Motor Vehicle Registration No KBL 200R Station Wagon. The Respondent was then a rider of a Motorcycle Registration No KMEP 484C make Boxer.
2. The suit was duly defended by the Appellant who filed a defence dated 1st July 2021.

b. Liability

3. Liability was eventually apportioned by consent of the parties at 80% against the Appellant and 20% against the Respondent.

c. Quantum

4. Judgment on quantum was delivered on 14th April 2022 as follows :-
 - a. General damages - Kshs 1,600,000



- b. Future medical expenses - Kshs 300,000
 - c. Special damages - Kshs 31,550
Less 20% contribution - Kshs 386,310
Total - Kshs 1,545,240
5. The Respondent was also awarded costs and interest.

d. Appeal

6. The Appellant was aggrieved by the aforesaid Judgment on quantum and thus preferred this appeal and set forth the following grounds:-
- i. The Learned Senior Resident Magistrate erred in law and in fact in awarding the Respondent general damages which were manifestly and grossly excessive.
 - ii. The Learned Senior Resident Magistrate erred in law and in fact in awarding the Respondent general damages which was not commensurate with the injuries sustained by the Respondent.
 - iii. The Learned Senior Resident Magistrate erred in law and in fact in departing from the principle that comparable injuries should as far as possible be compensated by comparable awards.
 - iv. The Learned Senior Resident Magistrate erred in law in failing to warn himself that the award must be reasonable and ought to be assessed with moderation.
 - v. The Learned Senior Resident Magistrate acted on the wrong principles in arriving at our award of Kshs 1,600,000 as general damages for pain and suffering.
 - vi. The Learned Senior Resident Magistrate erred in law and in fact in taking into consideration matters she ought not to have considered and/or in not taking consideration matters she ought to have considered as a result arrived at a wrong decision on quantum.
 - vii. The Judgment was against the weight of evidence.
7. The Appellant seeks that the award of general damage be reduced. He also craves costs of this appeal.
8. The Respondent herein also filed a cross appeal and faulted the trial court for failing to award him damages for loss of earning capacity and he also maintains that the award on general damages was excessively low in the circumstances.

e. Submissions

9. Both parties filed written submissions with the Appellant maintaining that the trial court did not base his assessment of the general damages on precedents with comparable injuries whilst the Respondent submits that the said award ought to be enhanced and further that an award on loss of earning capacity be made.

f. Evidence

10. The Respondent testified and stated that he had sustained injuries that were described in the amended plaint as follows:
- a. Inability to bear weight with both lower limbs.



- b. Obvious deformity of both (???)
 - c. Bilateral fractures femur.
 - d. Painful thighs bilaterally
 - e. Lower limbs weakness.
11. The Respondent's injuries are described in the P3 form as bilateral fracture femur.
12. The Respondent stated that he requires further medical costs of Kshs 300,000 for removal of the metal implants in both femurs. He said that one of his legs had shortened and that whereas he used to be an employed rider and would also undertake CCTV installments, he was due to the said accident unable to work. On cross-examination the Respondent could not adduce any proof of employment.

g. Analysis And Determination

13. As a first appellate court I am duty bound to re-evaluate, re-assess and re-analyze the evidence and make my own conclusions while taking into account that I did not see nor hear the witness. In the case of *Selle & another v Associated Motor Boat Company Limited & others* (1968) EA 123 the court stated that: -
- “...this court is not bound necessary to accept the findings of fact by the court below. An appeal to this court...by way of a retrial and the principles 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
14. The Respondent/Cross Appellant did not adduce any evidence of his income prior to the accident wherefore he did not lay any basis for an award for loss of earning capacity.
15. Whereas the Appellant had submitted for a sum of Kshs 600,000 by way of general damages and the Respondent had asked for Kshs 1,500,000, the trial court made an award of Kshs 1,600,000 on that account.
16. It is trite that parties are bound by their own pleadings and so is the court. Whereas the trial court considered several precedents of comparable injuries I do find that it's final assessment was excessive and was not based on the said precedents. No explanation was given for the court's departure from the submissions of the parties and it's magnanimity in making the award on quantum.
17. In the case of *George Raini Atungu v Jared Ogwoka Ondari* (2021) eKLR an award of Kshs 1,000,000 on account of general damages was upheld on appeal for multiple fractures of ribs, for tibia/fibula, pelvis, chest contusion, multiple bruises on upper limbs and lower limbs.

Conclusion

18. I do find that the general damages award of Kshs 1,600,000 was excessive and I thus set it aside and substitute it with an award of Kshs 1,200,000. The Appellant's appeal is merited and it thus allowed whilst the Cross appeal is dismissed. The Appellant will have the costs of this appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF MARCH 2023

MWANAISHA S. SHARIFF

JUDGE

