



REPUBLIC OF KENYA



**Richard & another v Ngomo (Civil Appeal 35 of 2020)
[2023] KEHC 17349 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 17349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 35 OF 2020
HM NYAGA, J
MARCH 23, 2023**

BETWEEN

MASIKA RICHARD 1ST APPELLANT

FREDRICK KITETU 2ND APPELLANT

AND

MARGARET WANZA NGOMO RESPONDENT

*(Being an appeal from the judgment of the Honourable Senior Resident Magistrate
Hon. G. O. Shikwe delivered on 07/05/2020 in Kithimani Civil Suit No. 267 of 2016)*

JUDGMENT

Background

1. The Respondent filed Civil Suit Number 267 of 2016 at Kithimani Senior Resident Magistrate's Court seeking general and special damages for injuries sustained in a Road Traffic Accident on 21/8/2015.
2. A consent on liability was recorded whereby the Defendants/Appellants were to shoulder 70% while the Plaintiff/Respondent conceded 30% contribution.
3. At the conclusion of the trial, the learned magistrate on April 30, 2020 awarded the Plaintiff/Respondent Kshs. 1,200,000/= as general damages and special damages of Kshs. 22,100/= subject to liability as agreed plus costs and interest.
4. Aggrieved by the said decision the Appellant preferred this Appeal. The Memorandum of Appeal dated May 18, 2020 sets out the following grounds:-
 1. The Learned magistrate erred in law and in fact in assessing General damages at Kshs. 1,200,000/= which is inordinately high in the circumstances.



2. The Learned magistrate erred in law and in fact in and ignored the submissions of the Defendants on the assessment of general damages and loss of future earnings.
3. The Learned magistrate erred in law and departed and ignored the decided authorities relied upon by the Defendant without justification.
4. The Learned magistrate erred in law and in fact in considering the submissions that the Plaintiff's fracture has united, no further complications were envisaged and no total incapacity occurred.
5. The Learned magistrate erred in law and in fact and departed from the principles applied in award of general damages.
6. The Learned magistrate erred in law and in fact in assessing Special damages at Kshs. 22,100/= which is inordinately high in the circumstances.
7. At the hearing of the Appeal, parties agreed to proceed by way of Written Submissions.

Appellant's Submissions

8. The Appellants were clear that their Appeal was limited to the award of damages by the trial magistrate.
9. The Appellants termed the award as inordinately high in light of the injuries sustained by the Respondent.
10. Counsel for the Appellant cited *Odinga Jacktone Ouma v Maureen Achieng Odera* [2016] eKLR where the court held that:-

...Comparable injuries should attract comparable awards.”

I was also referred to *Gitobu Imanyara and 2 Others v Attorney General* [2016] eKLR and *Butt vs Khan* [1981] KLR 139.

11. It is the Appellants case that there are sound grounds for this court to interfere with the finding of the trial court on account of same being inordinately high and non-commensurate with award made in cases where the litigant sustained similar injuries. Cited were the following cases:-
 - a. *Kenya Steel Fabricators Ltd v Tom Moki* [2018] eKLR.
 - b. *Silphanus Kumba Murondo v Lamek Mbaka Motegi and Another* [2013] eKLR
 - c. *Njora Samuel v Richard Nyangau Orechi* [2018] eKLR
 - d. *Ndung'u Dennis v Ann Wangari Ndirangu and Another* [2018] eKLR
 - e. *Emmanuel Ithau Nyamai and Another v Paul Kipsang Samoei* [2021] eKLR
12. The Appellants Submission is that an award of Kshs. 200,000/= would be reasonable compensation for the Respondent, considering that she did not suffer permanent incapability.

Respondent's Submissions

13. The respondent submitted that the court ought not to interfere with the award by the lower court, even if it finds that it would have awarded a different figure. That the question of the degree of injuries is that of fact and the appellate court ought to be slow to review an award as it did not have the advantage of hearing and seeing the witnesses.



Determination

14. This Appeal is only to the extent of the award of damages made by the trial court.
15. An award of damages is at the discretion of the court. An Appellate court will only interfere with such an award under well known principles.
16. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, 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).

Similarly, 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"

17. Lastly, in the case of *Savanna Saw Mills Ltd v 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 ..."

18. I think that the above authorities have clearly spelt out the law. It is not enough that the Appellate Court would have made a different award had it been hearing the matter. It has to be satisfied that it finds that the award was excessively high or low or that the trial court proceeded on wrong principles.
20. In the instant case the Respondent is said to have sustained the following injuries:-
 - a. Distal fracture of the fifth metacarpal bone
 - b. Blunt injury on the head
 - c. Blunt injury right elbow



- d. Blunt injury on the right hand with fracture on 5th metacarpal
- e. Cut wound on the left leg
21. It must be noted that the injury described in (a) appears to be similar to one set out in (d) above. Looking at the wording they refer to the same injury to the 5th metacarpal bone. It is not clear if this was a typographical error or was a deliberate attempt to ‘increase’ the particulars on the list of injuries with the hope of ‘reaping’ a higher award.
 22. The Appellant’s case is that according to Dr. Wambugu, who examined the Respondent at their request, the fracture had united with no further complications were envisaged.
 23. When the Respondent was examined by Dr. Kimuyu J. M. on October 17, 2015, she was in the process of recovery. That is reasonable given that she was examined just 2 months after the accident. No permanent incapacity was foreseen by the said doctor otherwise he would have stated so in his report.
 24. I have looked at the authorities cited by each side. I will cite just a few examples which I find to be relevant.
 25. In *Njora Samuel vs Richard Nyang’au Orechi (supra)* the claimant sustained fractures of 1st, 2nd, 3rd and 4th metatarsals. An award of Kshs. 50,000/= was made.
 26. In *Kenya Steel Fabricators Ltd Case (supra)*, the claimant was left with 4% permanent disability for a fracture of the right index finger. An award of Kshs. 350,000/= was made by the trial court but was reduced to Kshs. 260,000/= on Appeal.
 27. Having looked at the decided cases. The nature of injuries sustained by the respondent and taking into consideration the effluxion of time, I have come to the irresistible conclusion that the award made by the trial court was inordinately high and thus warrants interference of this court. This may have been due to the double listing of the same injury.
 28. It must be remembered that inordinately high award will have a negative effect on the economy itself. As much as a claimant may feel that he/she is entitled to the highest possible award, the court has to strike a balance between the need to compensate the claimant and the general state of the economy. The fragile economy may not be able to sustain monstrous awards and this will affect the cost of living.
 29. Having considered the matter, I find that an award of Kshs. 200,000/- as proposed by the appellant is on the lower side. The authorities it cited are quite old and so I have to take account of the effluxion of time and inflationary factors.
 30. I find that Ksh. 400,000/- would be adequate compensation and I review the award accordingly. This is subject to the agreed liability.
 31. The parties 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

Appellant N/A

Ms Kwamboka for Nzei for Respondent



Stay of execution – 30 days

