



Theuri v PWN (A minor suing through next friend NMN) (Civil Appeal 50 of 2019) [2023] KEHC 1832 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 50 OF 2019**

**FR OLEL, J
MARCH 2, 2023**

BETWEEN

THOMAS NGUNYI THEURI APPELLANT

AND

**PWN ALIAS PWN (A MINOR SUING THROUGH NEXT FRIEND
NMN) RESPONDENT**

(Being an appeal from the judgment and decree in Kerugoya CMCC No 245 of 2017 delivered by Hon. T. Barasa (SRM) ON 14th June 2021)

JUDGMENT

1. The Appellant was the defendant was in the primary suit, where he was sued for compensation arising from a Road Traffic Accident which occurred on April 28, 2017 at 4.30 hours. It was alleged that on the said date the defendant drove, managed, steered and/or controlled motor vehicle KBP 875P Toyota Corolla in a negligent manner thereby permitting the same to veer off the road and ram into a bicycle which was carrying the plaintiff as a pillion passenger, which accident resulted in the said plaintiff sustaining serious bodily injury.
2. After hearing the suit, the learned magistrate in his judgment delivered on June 14, 2019 apportioned Liability at 100% as against the appellant and proceeded to award general damages at Kshs 1,000,000/= , special damages at Ksh 6,710/= plus costs and interest of the suit.
3. The Appellant, who was the defendant in the primary suit, being dissatisfied by the quantum awarded did file their memorandum of Appeal on July 13, 2019 and raised grounds of appeal namely:-
 - a. That the learned trial magistrate misdirected himself and erred both in law and in fact by not properly considering the medical reports on record and hence arriving at a wrong assessment of damages that are so manifestly excessive as to be erroneous.



- b. That the learned trial magistrate misdirected himself and erred both in law and in fact by not properly considering the severity of the appellants injuries and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous.
 - c. That the learned trial magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.
4. The Appellant herein is thus mainly aggrieved with the issue of quantum of damages as assessed by the trial court.

Facts of the Case

5. At the trial, PW1 Purity Wangari Njeri did adopt her witness statement dated December 4, 2017, wherein she stated that on July 28, 2017 she was a lawful pillion passenger on board a bicycle along Kiangai – Kigumo road. They were coming from Kigumo and were heading to Kiangai and keeping left and off the road. It was her testimony that the suit motor vehicle KBP 875P Toyota Corolla which was being driven from the opposite direction from Kiangai heading towards Kigumo veered off it lane at high speed went off the road and violently rammmed into the bicycle. She lost consciousness and regained it in hospital after 5 days. She continued to receive treatment and stayed in hospital for three months before being discharged.
6. Further it was her testimony that she suffered severe injury on the right leg, which was fractured. She also injuries to the neck, back and hands. She said that she had not healed well as she could not run or play due to the injury on the leg nor could she carry heavy stuffs as her neck was still painful. The plaintiff proceeded to produce the p3 form, Birth certificate, Discharge summary from Kerugoya county hospital, copy of records, demand notice and notice to insurance as Exhibits. The plaintiff in cross examination faulted the defendant for the accident. She insisted the accident happened on their path (left side of the road) and denied that they were crossing the road to go home. she prayed for compensation as she had not healed well and could not walk for long distance.
7. PW2 Nancy Maregu Njeru also adopted her witness statement wherein she stated that on April 28, 2017 she asked her daughter to board a bicycle from Kiaragana and to alight at Kiangai, while her she would walk and follow them as it was quite a distance between the two villages. As she walked she met a group of women who were talking about an accident which had occurred and which involved a motor vehicle and a bicycle. The women told her the bicycle was carrying a girl and both the girl and the rider were injured and were rushed to Kerugoya District hospital. She rushed to hospital and found that her daughter had been taken to theater. The daughter was to regain her consciousness five days later and stayed in hospital for three months.
8. The witness further stated that her daughter suffered serious injury and sustained bruises on the left side of the face and chin, bruises on the back , bruised and swollen left hand, swelling and tenderness on the right thigh with limited range of motion, cut wound on the right thigh with a compound fracture and displaced femur fragments. She confirmed that her daughter had not healed and still experience pain on the right leg and was still limping. On cross examination she confirmed that she did not witness the accident.
9. PW 3 was a P C Sila Boma a police officer attached to Kerugoya Police station traffic base. He confirmed that on April 28, 2017 he did visit a scene of a road traffic accident at Kiangai, along Kagumo – Karatina Road, which accident involved motor vehicle KBP 875P Toyota corolla driven by the appellant and a pedal cyclist known as Antony Mureithi Gacheru. The cyclist and the pillion passenger were injured as a result of the accident and were rushed to hospital. He blamed the appellant for the accident as



- he had lost his lane when he knocked down the cyclist. As a result the appellant was charge in court Traffic case No 257/17. The driver (the appellant herein) was found guilty and fined Ksh 15,000/= or in default to serve 6 months in prison.
10. The witness reiterated that the plaintiff was not to blame for the accident. On cross examination the witness confirmed that the visited the scene and took measurements which he used to draw the sketch map. Further though he didn't have the sketch Map in court, he stated that the had produced it in the traffic case where it was considered. He maintained the appellant was to blame for the accident.
 11. PW4 was Dr Muchai Mbugua a surgeon practicing in Nyeri town. He confirmed examining the plaintiff and compiling a medical report which he produced as Exhibit 4 and receipt as Exhibit 5. He confirmed that the plaintiff sustained multiple injuries including; compound fracture of the thigh, left color bone fracture, several cut wounds on the left hand, right thigh and neck. She also had bruises on both hands. He confirmed that the right leg had shortened by 2cm but she would improve partially.
 12. The appellant herein did testify in his defence and confirmed that he was driving the suit motor vehicle KBP 875P from Nyeri to Kerugoya on April 12, 2017 when the accident occurred He stated that as he approached Kiangai the cyclist, who was coming from the opposite direction suddenly swerved into his path. He tried to brake but the distance was too short and a collusion happened. According to him the point of impact was on his side of the road and he blamed the cyclist for occasioning the accident. In cross examination he confirmed that he was charged in court with a traffic offence in Kerugoya Traffic case No 257 of 2017 and was convicted to pay a fine of Ksh 15,000/=
 13. In his judgment the learned trial magistrate did find that the defendant/appellant herein was 100% liable for the accident. On quantum the learned magistrate found that the plaintiff had sustained serious injuries. He proceeded to award damages of Kshs 1,000,000/= and special damages for Kshs 6,710/=. He also awarded costs and interest.

Submissions

14. The appellant relied on their written submissions filed in court on October 7, 2022. The jest of their appeal is that the quantum awarded to the respondent was high and this court ought to relook at the same and assess it afresh given its comparison with other similar precedent. They relied on the case of Kericho Hcc No 56 of 2004 *James Nyambogo Masogo Vs Kipkebe Ltd* (2007) eKLR, Nakuru Civil Appeal No 60 of 2010 *Crown foods Ltd V Emily Wangui* (2011) eKLR , *Bernard Musuu John V Jesman Distributors Limited & Another* (2020) eKLR, *Mwavita Jonathan V Silvia Onunga* (2017) eKLR & *Paul Kithinji Kirimi & Another Vs Gatwiri Murithi* (2018) eKLR According to the appellant the average award for fracture of the femur in these cases was Ksh 400,000/= and it was their submissions that the award herein should be reduced to the said amount.
15. The respondent also did file their written submissions on January 13, 2023. They averred that it is trite law that this court can only interfere with the award of damages if the same is manifestly too high or too low as to occasion miscarriage of justice. It was the respondent's submissions that the award herein was not too high. It was modest and reasonable given the unique circumstances set out in this case. They relied on the case of Kajiado HCCA No 17 of 2016 *John Mwanzia Mwilu Vrs Gitthinji Wabinya, Gitobu Imanyara & 2 others Vrs Attorney General*, *Butt V Khan* (1981) KLR 349 & *Kemfro Africa Limited T/A Meru Express service & Gathoni Kanini Vs A.M Lubia & Olive Lubia* (1982 -88) 1KAR 727.
16. Finally the respondent did distinguish the injuries herein as compared to the injuries suffered in the legal citations relied on by the appellant on grounds that herein, the respondent was unconscious for 5 days, she has suffered permanent injury as the right leg has been shorted by 2 centimeters causing



her permanently limp, the respondent was admitted in hospital for 3 months and she had to undergo blood transfusion as she had bled a lot after the accident. It was thus their submission's that the award was commensurate with the severity of the injuries and the trial court judgment cannot be faulted. They prayed that this appeal be dismissed with costs to the respondent.

Determination

17. 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.

18. 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 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 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 E.A.C.A 270

19. 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.

20. Therefore, this court I solemn duty to delve at some length into factual details and revisit facts 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.

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



circumstances under which an appellant 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”.

22. Similarly, in *Jane Chelagat Bor vs Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

23. Further in the case 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”.

24. The Appellant averred in his submissions that taking into account injuries the award of general damages should be reduced between to Ksh 400,000 to Ksh 450,000/= looked at in light with comparable awarded as already cited above

25. The Respondents in their submissions supported the findings of the trial magistrate and stated that the sum should be upheld. They relied on the case of *Easy coach limited Vs Emily Nyangasi* (2017) eKLR.

26. I have carefully considered all the pleadings filed, and evidence tendered in court especially on the issue of injuries sustained by the Respondent. It is clear she suffered severe injuries and was bed ridden for a reasonable long period. The extent of her injuries was confirmed by the Dr Muchai Mbugua’s, medical report dated October 3, 2017 which was produced as exhibit 5). The respondent indeed proved that was injured and therefore entitled to adequate compensation.

27. The question which then arises, is if the award of general damages of Kshs 1,000,000/= was adequate or is it manifestly too high to justify interference and or intervention by this court.

28. It is trite law that when it comes to assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are unusually



similar in terms of nature and extent of injuries sustained. The court of appeal in *Stanley Maroa Vr Geoffrey Mwenda* (2004) eKLR stated as follows ;

“ Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable award keeping in mind the correct level of awards in similar cases.”

29. Further in the case of *Charles Oriwo Odeyo Vs Apollo Justus Andabwa & Ano* (2017) eKLR the court stated that;

“ The court in making an award for damages must always consider prevailing inflation.”

30. The Appellants sought the award to be reduced to Kshs 400,000/=, to 450,000/=. I have considered the appellant’s submission and authorities relied upon. Most them are based on decisions made between the years 2004 to 2017. Given the inflationary trends it is obvious that the quantum as awarded then by now would have arisen. Secondly I do agree with the respondent that the injuries suffered by the respondent herein were serious. She literally hanged on to her life by the skin of her teeth and was unconscious for 5 days. She underwent blood transfusion and was in hospital for 3 months. Further, apart from breaking her right leg femur, she had a fracture on the collar bone too. There is also permanent damage to the right leg, which was gradually healing but remains 2 centimeters shorter. This is permanent disability which cannot be reversed. This is an aggravating factor which this court must consider while assessing the damages awarded.

31. Having considered the damages awarded, the injuries suffered and comparable awards, I do find that General damages awarded herein were reasonable. The trial magistrate obviously did exercise his discretion judiciously and did not erred in principle to justify interference by the appellate court. The award cannot be said to be inordinately high to justify the interference by this court. See; *Sophia Wanjiru Njuguna Vs Kyoga Hauliers Kenya Ltd* (2020) eKLR, *Denshire Muteti Wambua Vs Kenya Power & Lighting Co ltd* (2013) eKLR , *Joseph Musee Mua Vs Julius Mbogo Mugi & 3 others* (2013)Eklr , *James Gathirwa Ngungi Vs Multiple Hauliers (E.A) Limited & Another* (2015) eKLR amongst others.

32. I find that this appeal is not merited and dismiss it with costs to the Respondent. I also exercise my discretion and award cost of this appeal capped at Ksh150,000/= all inclusive

33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF MARCH 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;

Court Assistant - Susan

