



**Munene v Mbarire (Civil Appeal 488 of 2015)
[2023] KEHC 18417 (KLR) (Civ) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 488 OF 2015

JN NJAGI, J

MAY 19, 2023

BETWEEN

TERESIA WANJIKU MUNENE APPELLANT

AND

LOISE MUTHONI MBARIRE RESPONDENT

*(From the judgment and decree of Hon M.Chesang, RM, in Milimani
Commercial Court Civil Case No.6902 of 2014 delivered on 21/9/2015)*

JUDGMENT

1. The Appellant was aggrieved by an award of general damages to the Respondent at the lower court in the sum of Kshs 350,000/= consequent to which she filed the instant appeal. The grounds of appeal are:
 - a. That the learned trial Magistrate erred in failing to properly scrutinize and evaluate the evidence tendered in support of the injuries suffered by the Appellant and correctly relate them to the case law cited to the court and thereby failed to arrive at a fair and reasonable compensation to the Appellant for her injuries.
 - b. That the learned Trial Magistrate erred in law and in fact in failing to find that the nature of injuries sustained by the Appellant did now warrant an award of Kshs 350,000/- only for general damages.
 - c. That the learned Magistrate erred in law and in fact by making an award on general damages which was inordinately low as to represent an entirely erroneous estimate.
 - d. That the learned Magistrate erred in law in failing to uphold the doctrine of precedent.



- e. That the learned Magistrate erred in law and fact by failing to properly take into account the Appellant's submissions while considering the Judgment
 - f. That the learned Magistrate erred in law and fact in failing to apply proper legal principles regarding quantum and thus arriving at a bad decision.
2. The background facts to the case are that the Appellant was hit by the Respondent's motor vehicle on the March 3, 2015 while crossing the road. She sustained the following injuries: bruises on the right side of the face, both elbows, right groin, right knee and fracture of the right tibia/fibula. She was admitted at Agha Khan University Hospital for 5 days. She underwent an operation involving open reduction and internal fixation of the fracture. She was later examined by Dr Mwaura who prepared her medical report on the February 22, 2014 at which time the implants were still in situ.

Submissions

3. The appeal was canvassed by way of written submissions of the advocates for the Appellant, Kinyua Mwaniki & Wainaina Advocates and those of the advocates for the Respondent, Kiplagat & Co Advocates.

Appellant's Submissions

4. The advocates for the Appellant submitted that the sum of Kshs 350,000/= awarded by the trial Magistrate was low and unreasonable considering that the Appellant had received severe injuries which had left her with long lasting effects. It was submitted that the award was not informed by any legal precedent and the Magistrate did not state or justify how she arrived at the said award.
5. It was submitted that the general method of approach in awarding general damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. In support of that proposition the Appellant cited the cases of *Stanley Maore v Geoffrey Mwenda (2004) eKLR* and *Easy Coach Limited v Emily Nyangasi (2017) eKLR*.
6. The Appellant faulted the trial court for failing to apply the applicable principles when making the award such as considering the value of the shilling, the state of the economy and ensuring that the award makes sense and fairly compensates the claimant. Reliance to that end was made on the case of *Mbaka Nguru & another v James George Rakwar (1998) eKLR*.
7. It was submitted that the metal implants placed on the Appellant required to be removed through an operation the cost for which the doctor estimated at Kshs 300,000/=.
8. The Appellant had at the lower court asked for general damages in the sum of Kshs 1,200,000/= and had relied on the case of *Savco Stores Ltd v David Mwangi Kimotho, Mks HCCA No 12 of 2995* where Kshs 800,000/= was awarded.
9. In this appeal the Appellant urged the court to review the award to Kshs 1,200,000/= and cited the following authorities:
 - a. *Mwaura Muiruri v Suera Flowers Limited & another (2014) eKLR* where the plaintiff was awarded Kshs 1,750,000/= for sustaining multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia fibula.



- b. [*James Gathirwa Ngugi v Multiple Hauliers \(EA\) Limited & another \(2015\) eKLR*](#) where Kshs 1,500,000/= was awarded for compound comminuted fracture of the right tibia, compound fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg.
- c. [*Geoffrey Mwaniki Mwinzi v Ibero \(K\) Limited & another \(2014\) eKLR*](#) where Kshs 2,000,000/= was awarded for extensive fractures of the left tibia and fibula with extensive damage to the soft tissues of the left leg and fractures of the left leg and fracture collar bone with resultant amputation of the left leg.

Respondent's Submissions

10. The advocates for the Respondent on the other hand submitted that it is trite law that an appellate court can only interfere with the findings made by a lower court if such findings were based on no evidence or on misrepresentation of the evidence or if the trial court in reaching its decision applied the wrong principles. Reliance on that principle was made on the case of [*Gitobu Imanyara & 2 others v Attorney General \[2016\] eKLR*](#). It was consequently submitted that the trial Magistrate exercised his discretion within the confines of the law thus the court should not interfere with the decision.
11. It was submitted that general damages are damages at large and the court in awarding such damages does the best it can in reaching an award that reflects the nature and gravity of the injuries. That in assessing damages the general method of approach should be that comparable injuries should be as far as possible be compensated by comparable awards but that it must be recalled that no two cases are exactly alike – see *Stanley Maore v Geoffrey Mwenda (supra)*.
12. The Appellant submitted that it was the evidence of the Appellant's doctor that the Appellant may heal without any disability. That it is not true as submitted by the Appellant that the injuries were severe and that they left the Appellant with a long-lasting effect as that was not supported by the medical report tendered in court.
13. The Respondent submitted that the authorities relied on by the Appellant were severe compared to the injuries sustained by the Appellant. That the injuries in the case of *Savco Stores Ltd v David Mwangi Kimotho (supra)* that was relied on by the Appellant at the lower court were more severe and not comparable to the ones suffered by the Appellant in the present case.
14. The Respondent submitted that the award of the trial court was in tandem with the injuries suffered by the Appellant and therefore that the award was proper. He relied on the following authorities:
 - a. [*Yabesh Opanga v Francis Ngunjiri Mukoma & another \(2009\) eKLR*](#) where the respondent sustained fracture of the left femur, cuts and lacerations to the hands, blunt trauma to the rib and soft tissue injuries to the face with resultant 20% disability. The respondent was awarded Kshs 350,000/=.
 - b. [*Tabro Transporters Ltd v Absalom Dova Lumbasi, Bungoma HCCA No 31 of 2912*](#) where the plaintiff sustained soft tissue injuries and fracture of tibia fibula which resulted to permanent deformity assessed at 3%. The court set aside an award of Kshs 500,000/= and substituted it with Kshs 400,000/=.
 - c. [*Harun Muyoma Boge v Daniel Otieno Agulo \(2015\) eKLR*](#) where the plaintiff sustained multiple injuries and fracture of the tibia and fibula. On appeal the award was reduced to Kshs 300,000 from Kshs 1,500,000/=.



15. It was submitted that the Appellant has not proved that the learned Magistrate proceeded from a wrong point of law in reaching the award of Kshs 350,000/=. The Respondent urged the court to dismiss the appeal.

Analysis and Determination

16. This being a first appeal, it is the duty of this Court to re-evaluate the evidence and record of the trial court before drawing its own conclusion – see *Selle & Another v Associated Motor Boat Co Ltd (1968) EA 123*.
17. I have considered the grounds of appeal, the rival submissions and the entire evidence adduced before the trial court. The only issue for determination is whether the quantum of damages was inordinately low as to warrant the interference by this court.
18. The principles to be observed by an appellate court in deciding whether to disturb quantum of damages were set out in the case of *Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia (1982-88) 1 KAR 727* and restated by the Court of Appeal in the case of *Arrow Car Ltd v Elijah Shamalla Bimomo & 2 Others (2004) eKLR* that:

' The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'
19. The Appellant submits that the award was inordinately low. She faulted the trial Magistrate for failing to scrutinize and evaluate the evidence tendered in support of the injuries and correctly relate it to case law cited to the court thereby failing to uphold the doctrine of precedent.
20. The trial Magistrate was further faulted for failing to apply proper legal principles regarding quantum and thus arriving at a bad decision.
21. The Respondent on his part submits that the award corresponded with the injuries sustained by the Appellant and there is thus no reason to interfere with the award.
22. There is no dispute on the injuries sustained by the Appellant. These are: bruises on the right side of the face, both elbows, right groin, right knee and fracture of the right tibia/fibula. She underwent an operation involving open reduction and internal fixation of the fracture. At the time she was examined by Dr Mwaura almost a year after the accident she had scars on the right leg, experienced pain on the right leg on exertion and the metal implants were still in situ. According to the doctor the prognosis was fair. The doctor did not indicate that there was any permanent incapacity.
23. The Appellant at the lower court relied on the case of *Savco Stores Ltd v David Mwangi Kamotho [2008] eKLR*. In that case the Respondent had sustained fractures of the left tibia and fibula which failed to unite with conservative treatment and which had to be fixed during a major surgical operation during which time metallic plates and cancerous bone graft were applied. The Respondent had also sustained fracture of the left ulna resulting in left forearm restriction of important movements of internal and outward rotation. There was also deep cut wound on the left side of the forehead which had healed by the time of the examination. The wound area was however found to be hyposensitive due to severance of sensory nerve. The Respondent walked with a limp in the left leg. Permanent disability was assessed at between 12 and 20%.



24. It is abundantly clear that the injuries suffered by the Respondent in the Savco Stores case were far more serious than the injuries sustained by the Appellant in the present case. In that case the Respondent, apart from the fibia and fibula fractures, also sustained an ulna fracture. There was some permanent disability whereas there was no permanent incapacity in the case of the Appellant. There was thus no comparison between the injuries suffered in the two cases.
25. I have keenly considered the awards in the authorities cited by the Appellant in this appeal. The awards in those cases ranged between Kshs 1,500,000/= and Kshs 2,000,000/= and involved very severe injuries. In all of them there were more than two fractures. For example, in the James Gathirwa case, there were 5 fractures. In Geoffrey Mwaniki Mwinzi case there were three fractures that resulted to amputation of the left leg. There is thereby no comparison between the injuries in those cases and the injuries sustained by the Appellant in the present case. The said authorities are not of any assistance to the court.
26. I have looked at the authorities cited by the Respondent. The injuries in those authorities were to some extent relatively comparable to the injuries sustained by the Appellant in this appeal. Awards ranging between Kshs 300,000/= and 400,0000/= were made, two of which were for fractures of tibia/fibula and the other for femur fracture.
27. I have also considered the awards in the following cases:
- a. In *Ndwiga & another v Mukimba (Civil Appeal E006 of 2022) [2022] KEHC 11793 (KLR)*, where Njuguna J. reduced an award of Kshs 1,200,000/= to Kshs 500,000/= where the Respondent had sustained tenderness and swelling of the left leg and fracture of tibia and fibula left leg.
 - b. In *Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR* where the respondent had suffered a fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg and the High Court set aside the award of Kshs 600,000/= and replaced it with Kshs 400,000/=.
 - c. In the case of *Zachariah Mwangi Njeru v Jospeh Wachira Kanoga, Nyeri HCCA No 9 of 2012* the plaintiff sustained comminuted fracture of the tibia and fibula. The court set aside an award of Kshs 800,000/= and substituted it with an award of Kshs 400,000/=.
 - d. In *Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR*, where the respondent sustained compound fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries, and soft tissue injury on the lower left leg, the court substituted an award of Kshs 600,000/= with one of Kshs 400,000/=.
 - e. In *Tirus Mburu Chege & Another v JKN & Another (2018) eKLR* where the Respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness the court reduced the award for general damages from Kshs 800,000/= to Kshs 500,000/=.
28. I have considered that the Appellant suffered some bruises and fractures of the right tibia and fibula bones. The implants were still in situ one year after the accident. I am of the view that the award made by the trial magistrate was low and an erroneous estimate of damages warranted to be awarded to the appellant. This court has reason to interfere with the award. I consider a sum of Kshs 450,000/= to be adequate compensation for the injuries suffered by the Appellant.



29. The upshot is that the award of the trial court is set aside and replaced with an award of Kshs 450,000/= . The Appellant to have the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF MAY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Wainaina for Appellant

Mr. Kiptoh for Respondent

Court Assistant – Amina

30 days Right of Appeal.

