**Mikuro v Oeri & another (Civil Appeal E020 of 2022)**
**[2023] KEHC 4146 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4146 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYAMIRA**

**CIVIL APPEAL E020 OF 2022**

**WA OKWANY, J**

**MAY 11, 2023**

**BETWEEN**

**HEZBORNE KENG'ARA MIKURO ..... APPELLANT**

**AND**

**NEDDY KERUBO OERI ..... 1ST RESPONDENT**

**CHARLES NGOTHO NDUNG'U ..... 2ND RESPONDENT**

***(Being an Appeal against the Judgment of Hon. C. Ombija – RM Keroka dated and delivered at Keroka on the 6th day of April 2022 in the original Keroka Principal Magistrate's Court Civil Case No. E100 of 2021)***

## JUDGMENT

1. The Appellant herein sued the Respondents before the Lower Court seeking damages for pain and suffering arising out of a road traffic accident. The Appellant's case was that she was on or about 11th December 2020 lawfully travelling as a passenger in the Respondents' motor vehicle Registration No. KCL 915D along Keroka – Kisii Road when as a result of the negligence of the Respondents' driver, the said vehicle lost control and rammed into an on-coming motor vehicle Registration No. KCL 462G, trailer No. ZC 8999. The Appellant averred that she sustained serious injuries in the said accident to wit;

    a. Fracture of the left humerus which was operated on and fixed with a metal implant.

    b. Blunt laceration on the scalp.

    c. Blunt impact injury to the chest that caused fractures of the left ribs.

2. Default judgment was entered against the Respondents before the trial court on account of their failure to enter appearance and file a defence.

3. The matter thereafter proceeded for formal proof and in a judgment delivered on April 6, 2022 the trial court entered judgment for the Plaintiff/Appellant as follows: -

    a. Liability at 80% to 20% in favour of the Appellant

    b. General damages of Kshs. 500,000/=.

    c. Future medical expenses – Kshs. 80,000/=.

    d. Special damages – Kshs. 162,424/=.

    e. Costs of the suit.

4. The Appellant was aggrieved by the said Lower Court judgment and filed the instant appeal. He listed the following grounds in the Memorandum of Appeal: -

    1. That the Learned Trial Magistrate erred in law and fact by apportioning liability at 80:20 in favour of the Plaintiff and which apportionment was erroneous as it was made against the weight of the evidence adduced before the court.

    2. That the Learned Trial Magistrate erred in law and fact by adopting a higher standard of proof than required in Civil matters and which error led him to an erroneous determination on the issue of liability.

    3. That the Learned Trial Magistrate erred in law and fact in finding that the Appellant was entitled to general damages for pain and suffering at the amount of Kshs. 500,000.00 which amounts are too low in view of the injuries sustained by the Appellant so as to amount to an erroneous assessment of the injuries suffered by the Appellant and an award that is inordinately low in the circumstances.

    4. That the Learned Trial Magistrate erred in law and fact by failing to award the Appellant damages for loss of future earning capacity as pleaded by the Appellant.

5. The appeal was canvassed by way of written submissions which I have considered.

6. The Appellant submitted that interlocutory judgment having been entered in her favour, it was not open for the trial court to reopen or deliberate on the issue of liability as the same had been settled through the said interlocutory judgment. For this argument, the appellant cited the decision in *Adan Hussein Ali & Another vs Geoffrey Ndiku Mutisya A. H. Hameed Traders* [2015] eKLR where it was held: -

> " The Plaintiff need not prove liability in instances where interlocutory judgment is entered since such judgment is considered final on the issue of liability. All the Plaintiff is required to do therefore is to prove damages."

7. The Appellant further submitted that the apportionment of liability went against the weight of the evidence on record which was not controverted by any evidence or defence by the Respondents.

8. On quantum, the Appellant submitted that the award of Kshs. 500,000/= general damages was too low when considered alongside the injuries that she suffered in the accident. She added that the trial court's assessment of damages was erroneous and that the award was too low. Reference was also made

to the case of *Ram Gopal Gupta v Nairobi Tea Packers Ltd & 2 others* [2017] eKLR where the Court of Appeal discussed the need to consider cited authorities as follows: -

> " Counsel then appearing for the appellant (plaintiff) recommended an award of Shs. 1,000,000/= to the trial Judge and counsel for the respondents thought that the award should be between Shs. 450,000/= and Shs. 500,000/=. A perusal of the judgment written by the trial Judge shows that although the learned Judge set out the cases referred by counsel on either side nonetheless she did not make any comment on the cases at all; nor did she say whether they were relevant to the matter before her; or even compare the injuries in the previous cases to the case before her. She did not distinguish them. All she satisfied herself with, was to state cases referred to and proceeded to make the award we have referred to without reference to any past decided case. We think that the learned Judge erred by failing to make reference to past decided cases and make an award without laying any basis for it. This was, with respect, an improper use of her discretion and this is a case where we must interfere with that wrong use of discretion and correct the error that the learned Judge made."

9. I have considered the Record of Appeal and the Appellant's submissions. I am cognizant of the duty of the first appellate court to re-consider and re-evaluate the evidence tendered before the trial court in order to arrive at its own conclusion while bearing in mind the fact that it neither saw nor heard the witnesses testify. This is the position that was taken in *Selle vs. Associated Motorboat Company* (1968) EA 123, where Sir Clement stated thus: -

> " This court must consider the evidence, evaluate itself and draw its own conclusions. Though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression bases as the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamond Sarif vs. Ali Mohamed Solan [1955] 22 EACA 270)"

10. This appeal is on twin issues of liability and quantum of general damages.

**Liability**

11. On liability, I agree with the Appellant's submissions and find that in view of the fact that liability was settled the moment interlocutory judgment was entered against the Respondents, upon the entry of interlocutory judgment, formal proof was only to be undertaken for purposes of confirming the injuries. In *Moses Ochieng Owili vs Benard Githata Kamau* [2004] eKLR it was held that: -

> " The effect of the interlocutory Judgments is that liability against the defendant is final and at 100%. This judgment is minuted in the court file by the deputy registrar from the ministerial powers given to him/her under order 48 of the Civil Procedure Rules."

12. The Respondents did not defend the suit, and obviously, did not tender any evidence from which the trial court could come up with the notion that the Appellant contributed to the accident. Furthermore, it was not disputed that the Appellant was a passenger travelling in the Respondents' motor vehicle and I find that there was no way she could have contributed to the occurrence of the accident. Liability should have been determined at 100% in favour of the Appellant. (See Rosemary Wanjiku Kungu vs Francis Mutua Mbuvi & Another (2014) eKLR.)

**Quantum**

13. Turning to the issue of quantum, I note that the Appellant established that he sustained serious injuries in the accident which included loss of teeth, fractures of the maxillae and lower jaw. The Appellant presented medical evidence to show that she had not fully recovered from her injuries. The Medical Report showed that the Appellant would require to undergo specialized dental treatment at an estimated cost of Kshs. 500,000/=. Dr. W. M. Wokabi, who examined the Appellant, was of the opinion that the Appellant suffered pain from the major oral dental injuries that would require major expensive dental treatment.

14. The Appellant's counsel cited authorities showing that, for similar injuries, awards ranging between Kshs. 2 million to 4 million were made.

15. In awarding general damages, the court does the best that it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore vs Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR that:

> " 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 awards keeping in mind the correct level of awards in similar cases".

16. In addition to comparable awards, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service vs Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and *Jabane vs Olenja* [1986] KLR 661).

17. It is also trite that an appellate court will not interfere with an award of damages unless it is shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see Butt v Khan [1981] KLR 349).

18. In the case of *Henry Hidaya Kanga vs Manyema Manyuka* (1961) E.A. 705 AT 713, the then Court of Appeal for East Africa held:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

19. Taking into account these principles and having regard to the cases cited by the Appellant, I find that the Lower Court award was too low considering the serious injuries that the Appellant suffered in the said accident and the fact that he will require future medical attention. I find that an award of Kshs. 600,000 will be appropriate compensation in the circumstances of this case. I am guided by the

decision in *Kennedy Kipkoech Kosgey vs Kormoto General Agencies* HCCA 36/2011 where the Plaintiff was awarded Kshs. 400,000/= general damages for fracture of ribs together with soft tissue injuries, in (2009) and *George Kinyanjui T/A Climax Coaches & another vs Hansan Mugo Agoi* (HCCA 29/2012) where Kshs, 450,000/= was awarded to the Plaintiff for injuries involving compound fractures of the rib.

20. Having regard to the findings and observations that I have made in this judgment, I find that this appeal is merited and I therefore allow it and quash the Lower Court's findings on liability and quantum and substitute it with a finding of 100% liability in favour of the Appellant and Kshs. 700,000/= general damages.

21. In conclusion, I enter judgment for the Appellant as follows: -

    a. General damages – Kshs. 700,000/=

    b. Future medical expenses – Kshs. 80,000/=

    c. Special damages – Kshs. 128,723

       Total – Kshs. 908,723/=

    d. Interest on the above total sum at court rates from the date of this judgment till payment in full.

22. On costs of the appeal, it is trite that the same is at the discretion of the court and in any event, awarded to a party who is successful. However, in this case, I order make no orders as to costs as appeal was not defended or opposed.

23. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 11TH DAY OF MAY 2023.**

**W. A. OKWANY**

**JUDGE**