



REPUBLIC OF KENYA



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Ongeri v MN (Minor suing thro' her next friend JOM) (Civil Appeal E004 of 2022) [2023] KEHC 4150 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E004 OF 2022
WA OKWANY, J
MAY 11, 2023**

BETWEEN

DOMINIC JOACHIM M ONGERI APPELLANT

AND

MN (MINOR SUING THRO' HER NEXT FRIEND JOM) RESPONDENT

(Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered at Nyamira on the 20th day of December 2021 in the original Nyamira Chief Magistrate's Court Civil Case No. E063 of 2021)

JUDGMENT

1. The Respondent herein sued the Appellant before the Lower Court seeking redress for damages (special and general) arising out of an accident that occurred on January 17, 2021. The Respondent's case was that she was on the material day a pillion passenger riding on a motor cycle along Nyamira – Corner 'T' Road when the motor cycle collided with the Appellant's motor vehicle Registration No xxxx thereby causing an accident in which she sustained serious injuries.
2. The Lower Court heard the case and rendered a judgment in favour of the Respondent on December 20, 2021 as follows: -
 - a. General damages – Kshs 650,000.00
 - b. Future medical expenses – Kshs 200,000.00
 - c. Special damages – Kshs 101,390.00
Sub – Total – Kshs 951,390.00
 - d. Less 20% contribution – Kshs 190,278.00
Total award – Kshs 761,112.00



3. Aggrieved by the said judgment, the Appellant filed the instant appeal and listed the following grounds in the Memorandum of Appeal: -
 1. The Learned Trial Magistrate erred in fact and in law by awarding general damages which were excessive in the circumstances.
 2. The Learned Trial Magistrate erred in law and in principle by adopting wrong approach in computation of the General damages and by departing from the trends contained in the Authorities cited by the appellants which were binding on him and adopting a method which was erroneous in the circumstance and thereby occasioning miscarriage of justice.
 3. The Learned Trial Magistrate based her judgment on extraneous issues which were never pleaded nor proved before him, to award Kshs 650,000/= as General damages, Kshs 200,000/= as Future Medical Expenses and Kshs 101,390/= as special damages thereby reaching an erroneous decision.
 4. The Learned Trial Magistrate erred in law and in fact in disregarding and/or failing to take into account the Appellant's written submissions which had articulated weighty and relevant issues of law and facts thereby arriving at an erroneous decision both in law and in principle.
 5. That Learned Trial Magistrate erred in law and in fact, by failing to dismiss the Respondent's suit with costs to the Appellant.
4. The appeal was canvassed by way of written submissions and at the hearing of the appeal, parties confirmed that the appeal was mainly on the issue of quantum as parties had agreed on liability at 80% - 20% in favour of the Respondent.
5. The Appellant submitted that the injuries that the Respondent sustained in the accident were minor and that she had fully recovered at the time of the hearing of the case. It was therefore the Appellant's case that an award of Kshs 650,000/= general damages had no basis and was inordinately high.
6. The Appellant referred to the decision in [*Juliet Kemunto Ondati vs Gladys Mwende Mwende \[2021\] eKLR*](#) wherein for almost comparable injuries, the court awarded Kshs 350,000/= general damages.
7. The Appellant proposed that the Lower Court's award for general damages be reduced to Kshs 350,000/=.
8. The Respondent, on the other hand, submitted that she sustained severe injuries in the accident as can be noted from the assessment of permanent disability at 40% and 30% by the Respondent's and Appellant's doctors respectively. The Respondent cited the decision in [*Francis Ndungu Wambui & 2 others v VK \(a minor suing through her next friend and mother MCWK\) \[2019\] eKLR*](#) where an award of Kshs 1,000,000/= was made to the claimant who sustained soft tissue injuries to the upper limbs, compound fracture of the distal tibia fibula shaft as well as loss of consciousness.
9. The Respondent further submitted that both the special damages and the claim for future medical expenses were proved to the required standards.
10. I have carefully considered the Record of Appeal and the parties' respective written submissions together with the authorities that they cited.
11. The main issue for determination is whether the trial court's findings on quantum was inordinately high. The duty of the first appellate court as was explained in *Selle vs Associated Motorboat Company (1968) EA 123*, is 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.

12. The Respondent pleaded that she sustained the following injuries in the accident in question: -
 - i. Compound right tibia fracture;
 - ii. Compound right fibula fracture;
 - iii. Head injury with loss of consciousness for a day;
 - iv. Anterior tibialis tendon injury;
 - v. Deep cut wounds on the frontal region of the head.
13. I have perused the exhibits produced by the Respondent during the trial to wit, the Discharge Summary, P3 Form, Medical Report by Dr Morebu Peter and the second Medical Report by Dr James Obondi Otieno (presented by the Appellant before the Lower Court).
14. According to the 2nd Medical Report, the claimant sustained open fracture of the right tibia fibula, injury to the tibial anterior tendon and cut wound on the frontal scalp. The said doctor whose report was prepared at least 9 months after the accident noted that the injured leg had extensive skin grafting and that the fracture had not clinically united. The doctor further opined that the delayed union of the fracture would require surgery at Kshs 150,000/=.
15. The Respondent's doctor on the other hand, estimated the cost of future medical treatment at Kshs 350,000/=.
16. In *Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR*, where 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, JA 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. In *Bashir Ahmed Butt vs Uwais Ahmed Khan [1982-88] KAR 5* the court 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'



18. The trial court held as follows when making an award on general damages: -

' The foregoing medical evidence confirms that the plaintiff suffered a fracture of the right tibia and fibula coupled with soft tissue injuries. Both doctors concur that the plaintiff has a permanent disability albeit they disagree on the percentage. Doctor Momanyi assessed disability at 40% while Doctor Otieno assessed disability at 30%.

This court notes that the plaintiff has not healed. She was still on crutches when she adduced evidence before this court.

It is trite law that comparable injuries should attract comparable awards. In addition, no two (2) cases are alike. A court must also consider previous and recent decisions as well inflationary trends in assessing general damages.

In *Francis Ndungu Wambui & 2 others v Benson Maina Gatia [2019] eKLR* the court held:

'14. General damages are damages at large and the court does the best 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 (see *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No 147 of 2002 [2004] eKLR*).'

The Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No 133 of 1998 [1998] eKLR* that: -

'The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.'

The plaintiff submitted for an award of Kshs 1,800,000.00 as general damages whereas the defendant prayed for a sum of Kshs 400,000.00. This court has considered the decisions cited by both parties.

Having considered the nature of the injuries sustained by the plaintiff and the applicable principles, this court awards the plaintiff the sum of Kshs 650,000.00 as general damages. This court relies on the following cases:

- a. *Third Engineering Bureau China Construction Group Limited v Edwin Kinanga Atuya [2021] eKLR*; and
- b. *Aloise Mwangi Kabari v Martin Muitya & another [2020] eKLR*.'

19. My finding is that the trial court's award cannot be said to have been made outside the principles governing the award of general damages as the Magistrate considered the seriousness of the injuries together with the resultant complications on the Respondent's health and wellbeing. The court also considered comparable similar awards in making its assessment on damages. I therefore find no reason to interfere with the trial court's award which I hereby uphold.

20. Turning to the claim on future medical expenses, I note that the doctors for both parties were in agreement that the respondent will require further surgery to take care of the fractured right leg that had not healed fully. While the Respondent's doctor opined that the said surgery would cost Kshs



350,000/=, the Appellant's doctor was of the view that the surgery will cost Kshs 150,000/=. The trial court held as follows over the issue of future medical expenses: -

' This court notes that both doctors did not adduce any supporting documents to buttress their respective estimates. In the circumstances, this court awards the plaintiff the sum of Kshs 200,000.00 for future medical expenses.'

21. My finding is that the court struck a middle ground in arriving at Kshs 200,000/= which I find to be a modest assessment in the circumstances of this case.
22. Having regard to the finding and observations that I have made in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with costs to the Respondent.
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

