



REPUBLIC OF KENYA



KENYA LAW
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**Sancha v Oeri & another (Civil Appeal 1 of 2022)
[2023] KEHC 4145 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL 1 OF 2022**

**WA OKWANY, J
MAY 11, 2023**

BETWEEN

MARGARET WANGECHI SANCHA 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. E099 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.
2. The Appellant’s case was that she was on or about December 11, 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 maxillae;
 - b. Broken front teeth;
 - c. Laceration of the gums;
 - d. Loss of upper incisor tooth;



- e. Laceration of the lower lip;
 - f. Fractures of the lower jaw;
 - g. Blunt laceration on the scalp.
3. Default judgment was entered against the Respondents before the trial court on account of their failure to enter appearance or file a defence.
 4. The matter then 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 300,000/=.
 - c. Future medical expenses – Kshs 400,000/=.
 - d. Special damages – Kshs 128,723.
 - e. Costs of the suit.
 5. The Appellant was aggrieved by the said Lower Court judgment and filed the instant appeal. She 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 300,000.00 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.
 6. The appeal was canvassed by way of written submissions which I have considered.
 7. On liability, 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 said issue as the same had been settled through the said 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.”
 8. 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.
 9. On quantum, the Appellant submitted that the award of Kshs 300,000/= 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 as the award was too low.



10. The Appellant faulted the trial court for failing to consider the comparable authorities that she had cited, namely; -
 - a. *Kenya Wildlife Service versus Godfrey Kirimi Mwiti* [2018] eKLR where the court awarded the Plaintiff the sum of Kshs 2,000,000.00 as general damages for pain and suffering and loss of amenities in the year 2018 for similar injuries.
 - b. *Duncan Kimathi Karagania versus Ngugi David & 3 others* [2016] eKLR where the court awarded the Plaintiff Kshs 4,000,000/= as general damages for pain and suffering and loss of amenities.
11. Reference was also made to the case of *Ram Gopal Gupta vs 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.”
12. I have considered the Record of Appeal and the Appellant’s submissions.
13. The duty of the first appellate court as was explained in *Selle v 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.
14. This appeal is on twin issues of liability and quantum.

Liability

15. I agree with the submissions by the Appellant 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. (See *Moses Ochieng Owili vs Benard Githata Kamau* [2004] eKLR).
16. 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. I find that in the circumstances of this case, liability should be 100% in favour of the Appellant. (See *Rosemary Wanjiku Kungu vs Francis Mutua Mbvi & Another* (2014) eKLR.)



Quantum

17. Turning to the issue of quantum, I note that the Appellant established that she 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 she suffered pain from the major oral dental injuries that would require major expensive dental treatment.
18. As I have already noted in this judgment, the Appellant cited authorities wherein, for similar injuries, awards ranging between Kshs 2 million to 4 million were made.
19. 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, 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).
20. 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”
21. In the case of *Savanna Saw Mills Ltd Vs Gorge 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 ...”
22. Guided by the principles expressed in the above cited authorities and based on my re-evaluation of the evidence, I find that even though the learned trial magistrate made reference to the relevant evidence on record, the award of Kshs 300,000 general damages was not commensurate with the gravity of the



injuries that the Appellant sustained in the accident. I am guided by comparable previous awards in the following cases:

- a. *Mary Muthoni Ndichu vs Heshima Distributors*, Nairobi HCCC No 4983 of 1989 decided on March 22, 1994 which was cited in *Kenya Power Lighting Co. Ltd & Another vs Zakayo Saitoti Naingola* where the claimant who sustained a fracture of the jaw right mandible, dislocation of the jaw left temporally mandible joint, broken and chipped left premolar tooth and loss of upper canine tooth was awarded Kshs 350,000/= general damages in 1994.
 - b. *Alphonse Mwatsuma Mwangamchi vs Joseph Mwanza Mwanzu & another* [2005] eKLR where an award of general damages of Ksh. 1,200,000/= was made in the year 2005 for injuries to the mandible with loss of six (6) teeth and seven (7) others broken, fracture of mandible, contusion chest and severe back injury which involved the spinal cord.
23. My finding is that looking at the above comparable authorities, the Lower Court award was too low considering the serious injuries that the Appellant suffered in the said accident and the age of the cited authorities. I find that an award of Kshs 800,000 general damages would be adequate compensation for the Appellant's injuries.
24. 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 both liability and quantum and substitute it with a finding of 100% liability in favour of the Appellant and Kshs 800,000/= general damages.
25. In conclusion, I enter judgment for the Appellant as follows: -
- a. General damages – Kshs 800,000/=
 - b. Future medical expenses – Kshs 400,000/=
 - c. Special damages – Kshs 128,723
Total – Kshs 1,328,723/=
 - d. Interest on the above total sum at court rates from the date of this judgment till payment in full.
26. 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.
27. It is so ordered.

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

W. A. OKWANY
JUDGE

