



REPUBLIC OF KENYA



**Climax Coaches v Ndiri (Civil Appeal E25 of 2022)
[2023] KEHC 20304 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E25 OF 2022
SC CHIRCHIR, J
JULY 13, 2023**

BETWEEN

CLIMAX COACHES APPELLANT

AND

JACKSON ECHESA NDIRI RESPONDENT

*(Being an appeal from the Judgment of Hon. G Olimo (RM)
delivered on 31/3/2022 in Butere SPMCC NO. 68 of 2018)*

JUDGMENT

1. On 30.4.2018, the Respondent filed Civil Suit No. 68 of 2014 at the Senior Principal Magistrate's Court at Butere seeking for damages for personal injuries sustained following a Road Accident which occurred on 12th March 2018 along Butere – Sabatia Road. The accident involved motor vehicle Registration Number KCC 113X and Motor cycle registration number KMCA 958G.
2. At the conclusion of the hearing, the court returned a verdict in favour of the Respondent wherein the Appellant was held fully liable for the accident and the Respondent awarded kshs. 700,000/= in general damages, among other reliefs. This appeal is against the award on general damages only.

Grounds of Appeal

3. The Appellant has set out the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact by failing to consider the submissions by the appellant
 2. That the learned trial magistrate erred in law and in fact by adopting the wrong principles in assessment of damages.



3. That the trial magistrate erred in law and fact by awarding the respondent Kshs. 700,000/= in general damages which was excessive thereby arriving at a wrong decision.
 4. That the learned trial magistrate erred in assessing general damages at kshs. 700,000/=and failed to apply the principles applicable in award of damages and comparable award made for similar injuries.
4. The appeal was canvassed by way of written submissions

Appellant's Submissions

5. It is the appellant's submissions that in view of the variation on the findings and opinions of the Doctors in respect to the injuries that the Respondent is said to have sustained, the trial court failed to arrive at a determination on the actual injuries sustained, before arriving at an appropriate award.
6. It is further submitted that by failing to determine the nature of the injuries, then the trial court failed to lay a basis for the award of ksh. 700,000.
7. The Appellant further argues that failure to lay a basis, means that the trial court failed to take into account a relevant factor in assessing damages and this should be a justification for this court to interfere with the assessment.
8. The Appellant urges this court to find that the injuries sustained by the respondent was a fracture of ring finger with blunt inquiries to the chest and left shoulder which had fully healed leaving 15% permanent incapacitation.
9. The Appellant finally submits that the award of kshs. 700,000 was excessive and proposes a reduction to kshs.300,000. They have relied on the case of *Kenya steel fabrication ltd. v Tom Mkoï* (2018) eKLR and *Emmanuel Itabu Nyamai & another v, Paul Kipsang* (2021)eKLR in support of their proposal.

Respondent's submission

10. The Respondent has indicated to the court that he is relying on his submission at the trial court and has cited several Authorities in support.
11. In the said submissions the respondent set out the injuries as sustained and points out that the injuries presented by the respondent were indeed corroborated by the Appellant's own doctor. They had proposed an award of kshs.800,000 while relying on the case of *Dominion outdoor advertising (200) ltd v Patrick Wachira* (2021) eKLR.
12. It is the Respondent's final submissions that the trial court applied the correct principles , that the award was neither erroneous nor excessive, and urges this court not to interfere with it.

Summary of the evidence

13. PW1 was the Respondent herein. He relied on his written statement as his evidence -in -chief. He testified that he sustained a cut wound on the scalp, multiple abrasions to the scalp, blunt injury to the chest and the left shoulder, a cut wound to the right hand, an open fracture of the middle phalanx of the right ring finger and blunt injury to the right knee. He said he became unconscious and came around at Butere Sub- county hospital.
14. PW3 was Dr. Charles Andayi. He told the court that he examined the plaintiff on March 15, 2018. He established that the respondent sustained injuries as follows.Cut wound to the scalp with



abrasion. Blunt injuries to the chest, left shoulder and right knee. Cut wounds on right hand and right ring finger. Loss of Consciousness

- On examination he found a 2cm long wound on the right parietal region, Multiple bruision marks to the scalp right side of the chest and a splint on the right ring finger.

-He opined that the Respondent sustained moderately soft tissue injuries. He further told the court that he could not confirm permanent physical disablement.

-He confirmed that the respondent suffered an open fracture of the right finger. He later did a further examination. He found that the right finger was stiff and there was partial stiffness of 3 fingers of the right hand. He then assessed disability at 25%.

15. DW1 Was Dr. Jenipher Kahuthu, testifying on behalf of the defence. She found that respondent sustained injuries as follows: Open fracture of the middle phalanx on the right finger. Blunt chest injury to the chest and left shoulder. On examination she found healed scars on the right finger. The ring and middle finger of the right hand were extending well. He had partial stiffness of the little and index fingers. She assessed permanent disability at 15%.
16. Dr. Kahuthu told the court that she concurred with Dr. Andayi on the injuries sustained save for the degree of permanent disability. She opined that Dr. Andayi's assessment was exaggerated, as a degree of 25% disability is when the wrist joint cannot move at all. She said her assessment was guided by paragraph 15 of the 1st schedule of [WIBA](#) although she admitted that the same was not indicated in her report.
17. In cross examinations she admitted that the respondent would not be in a position to continue with farming activities with such an injury.

Determination.

18. I have considered the grounds of appeal, the rival submissions by the parties and the evidence on record. There are only two issues for determination in this Appeal, namely:
 - (a) what injuries were sustained by the respondent
 - (b) Was the award of kshs. 700,000 too excessive.

What injuries did the respondent sustain?

19. The Appellant has complained that the trial court failed to ascertain the injuries and as such failed to demonstrate the basis of the award of kshs.700,000. I have perused the judgment and noted that on page 3 of the judgment, the trial court listed the injuries as set out by Dr. Andayi. The magistrate went on to indicate that Dr. Kahuthu's report was in agreement with Dr. Andayi's, save when it came to the percentages of permanent disability. The court further went on to state that it found the assessment by Dr. Kahuthu to be more plausible as the said Doctor gave an analytical process upon she arrived at her conclusion.
20. Thus, contrary to the submission by the Appellant, the court made a finding on the injuries sustained; simply that the injuries were as set out by Dr. Andayi and confirmed by Dr. Kahuthu in her own testimony. That is what the trial court arrived at, and it clearly comes out in the judgment. The trial court took note of the variance in the assessment of permanent disability, adopted the Dr. Kahuthu's assessment of 15% and gave justification on why she went by the said assessment. Further, Dr. Kahuthu was the appellant's witness. The court went along with this witness assessment on the



issue of permanent disability. Therefore the Appellant's complain in this regard is far from being genuine, and I dismiss it.

21. It is my finding, that the trial court indeed determined the nature of injuries and can not be accused of having failed to lay a basis of assessment of the award.

Was the award too excessive?

22. The nature of the injuries were as in paragraph 14 and 15 of this judgment. On permanent disability, I have no reason to fault the trial's court decision to adopt the 15% offered by Dr. Kahuthu.
23. Assessment of damages is an act of discretion and the principles upon which an appellate court can interfere with the said discretion has been a subject of many past decisions of the courts. In the case of *Charles Oriwo Odengo v Apollo Justus Andabwa* (2017) eKLR. The court held "on the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the appellate court would only interfere on particular grounds. These grounds were and are:
 - a. that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or;
 - b. that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at a wrong decision (see *Buttler v Buttler*(1984) KLR 225"
24. Thus, was the award of Kshs.700,000 too excessive to warrant the intervention of this court?
25. The guiding principles when assessing damages are as follows:
 - (a) An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.
 - (b). The award should be commensurate to the injuries suffered.
 - (c) .Awards in decided cases are mere guides and each case should be treated on its an facts and merit.
 - (d). Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.
 - (e). Awards should not be inordinately too high or too low. (see *Boniface Waiti v Michael Kariuki Kamau* (2007) eKLR
26. Dr. Andayi classified the injuries as moderate soft tissue and bone injury. The bone injury involved a fracture of the right ring finger. The injury also left stiffness on some 2 fingers. The trial court adopted assessment of 15% on permanent disability.
27. In arriving at Ksh.700,000 the trial court relied on the case of *Kenya Steel fabrication v Tom Moki*(2018)eKLR, and took into account factors of inflation. However, in the cited case the court had awarded kshs.260,000. The year was 2018. Even though the court noted the big variance on the percentages of disability, and factors of inflation, I am of the view that kshs.700,000 in the year 2022 was rather excessive and warrants the intervention of this court.
28. I have further considered the decision of *Emmanuel Ithau Nyamai v Paul Kipsang Samoei* (2021) eKLR were the court awarded kshs. 200,000 for fairly similar injuries. The decision was made in July 2021.



29. I have also considered the case of *Kenya Power and lighting Co. Ltd v Mary Wanjiku Njoroge* (2019) eKLR, where the award was reduced to Kshs.500,000 on appeal. However the injuries on the cited case were more serious than the present one because it involved amputation of the thumb and the little finger while one finger healed with some conformity. Permanent disability was assessed at between 15% to 20%.
30. In the case of *Elizabeth Wangare Njiru v David Mwangi Ngisi and Ano* (2020) eKLR. The claimant suffered almost similar injuries but with a permanent disability of 45%. The court awarded kshs.500,000 in 2020.
31. Taking into account the aforesaid decision and factors of inflation I consider an award of kshs. 500,000 a reasonable compensation for the injuries suffered.
32. In conclusion, I hereby set aside the trial court award of kshs. 700,000 and substitute it with kshs.500,000. Each party to meet their own costs in this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 13TH DAY OF JULY 2023.

S. CHIRCHIR

JUDGE

In the presence of:-

Ms Wesonga for the Appellant

Mr. Wandallah for the Respondent.

