



Igoki v Kanini (Civil Appeal E025 of 2022) [2023] KEHC 20715 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E025 OF 2022**

LW GITARI, J

JULY 13, 2023

BETWEEN

NANCY IGOKI APPELLANT

AND

SECONDINA KANINI RESPONDENT

JUDGMENT

1. This is an appeal against the award by trial court of Kshs 150,000/= as general damages for pain, suffering and loss of amenities in Chuka CMCC No E038 of 2021, Nancy Igoki v Secondina Kanini. The judgment was delivered on October 3, 2022. Aggrieved by the judgment, the Appellant filed a memorandum of appeal on the August 7, 2020. The appeal is mainly on the trial court's finding on quantum. The grounds of appeal are that:-
 - a. THAT the learned trial court erred in both law and fact when he failed to consider the evidence of the plaintiff to the extent of her injuries and in the process arrived at an erroneous decision as relates general damages.
 - b. THAT the learned trial court erred in both law and fact in awarding Kshs 150,000/= as general damages for the serious injuries the Appellant sustained which amounts to a manifestly low award and connotes an erroneous estimate of damage suffered.
2. The Appellant thus prayed for the enhancement of the trial court's award on general damages from Kshs 150,000/= to Kshs 800,000/=.
3. At the hearing of this appeal, directions were taken to have both counsel for the parties file their respective submissions which I have summarized below.



Appellant's Submissions

4. It is the submission of the Appellant that an award of Kshs 150,000/= for a fracture of the tibia bone is inordinately low considering that according to Dr Njiru, the Appellant is likely to develop osteo arthritis on the right knee and ankle joints. The Appellant relied on the cases of *Godfrey Wamalwa Wamba & Another v Kyalo Wambua [2018]eKLR* where the Respondent sustained a compound fracture of the right distal/fibula and was awarded Kshs 700,000/=.
5. Reliance was also placed in the case of *Eldoret HCCA No 77 of 2007, Janet Opiyo & Karen Njuguna v Stephen Tuwei* where the Respondent sustained a compound fracture of the right tibia and some bruises and she was awarded Kshs 600,000/= under the head general damages in 2012.
6. Finally, the Appellant relied on the case of *Charles Mwanja & Another v Batty Hassan [2008]eKLR* where the Respondent sustained a fracture of the right tibia and other soft tissue injuries and was awarded Kshs 800,000/= in 2008.
7. The Appellant thus submitted that the fair award to compensate him in general damages for pain, suffering and loss of amenities was Kshs 800,000/= and not Kshs 150,000/=. It is therefore the Appellant's submission that this appeal should be allowed and for this Court to re-evaluate the award on general damages for loss and suffering and award her costs for this appeal.

Respondent's Submissions

8. On her part, the Respondent submitted that the medical report dated January 16, 2021 prepared by Dr GN Njiru does not indicate persisting pain or degree of disability hence it is only proper to conclude that the Appellant has made a full recovery. Further that an award of between 150,000/= and 300,000/= would be an appropriate compensation considering the prevailing judicial precedents.
9. The Respondent relied on the case of *Samuel Mungai Njau v Wanainchi & Hardware Limited [2004] eKLR* where the court awarded general damages of KShs 150,000/= where the Plaintiff had suffered a crushed leg, compound fracture of the right tibia and fibula, a fracture of the 1st, 2nd, 3rd and 4th metatarsal of the right foot, and superficial wounds over right arm.
10. The Respondent further relied on the case of *Ibrahim Kalema Lewa v Estee Co Ltd [2016]* where the appellate court upheld the trial court's award of Kshs 300,000/= in general damages where the Appellant sustained intertrochanteric fracture of the left femur and physical and psychological pains.
11. It was finally the Respondent's submission the above precedents involved more serious injuries than those of the Appellant herein and that even accounting for inflation the award of the sum of Kshs 150,000/= as general damages would be sufficient to compensate her. The Respondent therefore urged this Court to dismiss the appeal with costs to the Respondent.

Analysis

12. This being the first appeal, this Court is obligated to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not hear and see the witnesses who testified [See: *Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123*].
13. With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following issue for determination by this Court in my view:



- a. Whether the award of KShs 150,000/= as general damages by the trial court in Chuka CMCC No E038 of 2021 should be upheld or substituted.

On the award on quantum

14. A brief background of this case is that on September 14, 2019, the Appellant was aboard motor cycle registration number Kxxx 5xxN along Chogoria-Kabeche road when around Mukui market a motor vehicle registration number Kxx 6xxF from the opposite direction lost control, veered off its lane and knocked the motor cycle that the Appellant was aboard and as a result, the Appellant suffered a fracture of the right tibia bone.
15. The issue of liability is not challenged as the parties recorded a consent apportioning liability at 80:20 in favour of the Respondent herein.
16. The issue of the injuries suffered by the Appellant is also not challenged as the same were listed in the Appellant's treatment notes, the P3 form and the Medical report by Dr Njiru as a fracture right tibia bone.
17. On quantum, the Appellant proposed an award of Kshs 800,000/= and Kshs 150,000/= as general and special damages respectively. On the other hand, it was the Respondent's submission that a compensation of between Kshs 150,000/= to Kshs 400,000/= as the prevailing judicial precedents award of compensation for similar injuries. In the impugned judgment, the trial court made the following awards in favour of the Appeal as against the Respondent:
 - a. General damages – Kshs 150,000/=
 - Less contribution – (Kshs 30,000/=)
 - Net Total - KShs 120,000/=
 - b. Special damages - Kshs 15,520/=
 - c. Interest on the general damages from date of judgment
 - d. Interest on special damages from the date of filing of the suit being March 10, 2021
 - e. Costs of the suit with interest from the date of the judgment
18. Aggrieved by the said decision, the Appellant instituted the instant appeal seeking an enhancement of the award on general damages.
19. I have considered the precedents relied upon by the parties. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd. vs Musingi Mutia [1985] KLR 730* where it was held that:

' It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to



award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.'

The award of general damages is the matter of the trial court's exercise of discretion. They are awarded on a case to case basis and on the principle that comparable injuries should be awarded comparable damages. In [Masai Girls High School \(2011\) eKLR](#), the assessment of damages ;

' This court has to bear in mind the principles that guide assessment of damages as espoused in West (HI) and Sons LTD VS SHEPHERD (1964) AC 326 which was adopted in the case of CECILIA MWANGI & Another VIS RUTH MWANGI CA 251 /1996 Lord Morris said:-

'But money cannot renew a physical frame that has been battered and shuttered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common constant awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.'

'I am also guided by Lord Denning's decision in Kim Pho Choo Vs Camden & Islington Area Health Authority (1979) 1, ALL ER 332. The court said that in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for the plaintiff and the defendant. Guided by the above principles, the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.'

It is also trite that an appellate court will not interfere with an award of damages unless it is shown that it is not based on any evidence or that the court acted on wrong principles.

See Court of Appeal in [Makube-v- Nyamuro \(1983\) eKLR](#).

20. Based on this principle, I will proceed to consider whether I should interfere with the learned trial magistrate's award of damages. The trial magistrate based her award on the confirmed injuries sustained by the appellant which were fracture right tibia bone. The learned trial magistrate stated that the



claim by the appellant for an award Ksh 800,000/- based on the case of Janet Opiyo & Another –v- Stephene Tuwei could not be sustained as the injuries therein were not comparable to those sustained by the appellant. She further stated that the authorities cited by the defendant presents injuries not comparable to those sustained by the appellant. The learned trial magistrate further held that the doctors report stated that the appellant sustained fracture right tibia bone and anticipated complications are Osteo-arthritis right knee and ankle joints. She further stated that, taking into account the nature of the injuries and the evidence presented, authorities cited on award of Ksh 150,000/- was sufficient for pain and suffering.

I find that the learned trial magistrate properly addressed her mind to the evidence presented before her and cannot be said to have acted on wrong principles.

The question I have to consider is whether the award was too low as present a wrong award. The respondent cited the authorities of Samuel Mungai Njau –v- Wanainchi Sanitary & Hardware Ltd (2004) eKLR where the plaintiff was awarded Ksh 150,000 for injuries involving crushed leg, compound fracture of right tibia and fibula and fracture of metatarsal of right foot and superficial wounds over right arm. These injuries were no doubt more severe than those sustained by the appellant. The award was made nearly twenty years ago and the value of the Kenya Shilling has fallen tremendously. The court in assessing the award has to consider such factors as inflation and devaluation of the Kenyan Currency.

The respondent further relied on Ibrahim Kalema Lewa –v- Esteele Company Limited (2016) eKLR where Ksh 300,000/- was awarded where the plaintiff had sustained fracture of left femur and physical and psychological pains.

For the appellant, the case of Godfrey Wamalwa Wamba & Another –v- Kyalo Wambua (2018) eKLR was cited. The plaintiff was awarded Ksh 700,000/- in general damages for pain and suffering. The injuries sustained were compound fracture of right distal tibia/Fibula. The injuries are a bit severe though comparable. She further relies on Janet Opiyo and Karen Njuguna –v- Stephene Tuwei HCCA No 77/2007. The plaintiff had sustained compound fracture of the right tibia and some bruises Ksh 600,000/-. The injuries were slightly severe.

I have considered these submissions. The duty of the court is to compensate the plaintiff adequately for the loss suffered and care be had not to give unreasonably high awards which may hurt the respondent and amount to a wrong award.

21. In this case, the Appellant suffered a fracture right tibia bone. In case of [Clement Gitau v GKK \[2016\] eKLR](#) the court awarded Kshs 600,000/- in 2016 to a plaintiff that suffered a fracture of the left tibia and minor bruises. In [Naom Momanyi v G4s Security Services Kenya Limited & another \[2018\] eKLR](#). In the said case the court found that the appellant therein had sustained soft tissue injuries and a fracture that had healed although causing deformity to the right leg. The court awarded the appellant Kshs 300,000/=.

Conclusion

22. I find that base on the analysis of the above authorities, the award of Kshs 150,000/= as general damages was inordinately low considering the injuries suffered.

I find that I should then interfere with the award of damages which were awarded by the learned trial magistrate.

I find that an award of Ksh 300,000/- in general damages is reasonable. The appeal succeeds. I order as follows:-



1. I allow the appeal.
2. The award of Ksh 150,000/- as general damages is set aside and substituted with an award of Ksh 300,000/- as general damages less 20% the agreed appellant's contribution.
3. Special damages 15,520/-
4. The net award to the appellant is 252,416/-
5. I award the appellant the costs of the appeal.

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

L.W. GITARI

JUDGE

