



**Mars Logistics Co. Limited v Kipruto (Civil Appeal E062 of 2022)
[2023] KEHC 20463 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E062 OF 2022
RN NYAKUNDI, J
JULY 21, 2023**

BETWEEN

MARS LOGISTICS CO. LIMITED APPELLANT

AND

JOSEPHAT KIPRUTO RESPONDENT

*(Being an appeal from the Judgment/Decree of the Honourable Naomi
Wairimu (SPM) delivered On 25/3/2022 in Eldoret CMCC NO. 840 of 2015)*

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

M/s Odede & Oduor Advocate

M/s Wambua Kigamwa & Company Advocates

- 1 The appeal is mainly on the issue of quantum. By a plaint dated 27/10/2015, the Respondent sued the Appellant seeking general damages, special damages and costs plus interests of the suit, arising from a road accident that occurred on 11/7/2015, along Eldoret- Webuye road at Paul Boit area involving motor vehicle registration number KBA 203 M-ZD 1247 Nissan UD Trailer being driven by the Respondent and motor vehicle registration number KBR 966N – ZE 2721 Mercedes Benz Axor belonging to the Appellant. As a result of the said accident the Appellant sustained severe injuries.
- 2 The Appellant filed statement of defence dated 24/11/2015, denying the allegations made by the Respondent. In the alternative, blamed the Respondent for contributory negligence.
- 3 After trial Judgment was delivered on 25/3/2022, and the Appellant was found 100% liable and damages assessed as hereunder: -
 - a. General Damages..... Kshs.900,000/=



- b. Special Damages..... Kshs.15,515/=
 - c. Plus, costs and interests
- 4 The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (4) grounds: -
- 1. That the learned trial Magistrate erred in law and fact by applying the wrong principles in the assessment of damages.
 - 2. That the learned trial Magistrate erred in law and fact and misdirected herself in assessing general damages at Kshs.900,000/= which damages were manifestly excessive compared to the injuries sustained by the Plaintiff.
 - 3. That the learned trial Magistrate erred in law and fact in failing to consider the submissions by the Appellant.
 - 4. That the learned trial Magistrate erred in law and fact by taking into account irrelevant factors and disregarding relevant factors thereby arriving an erroneous decision.
- 5 The appeal was canvassed by way of written submissions. The Appellant filed its submission on 27th January, 2020 whereas, the Respondents did not file any.

Appellant's written submissions

- 6 On the issue of quantum, Counsel for the Appellant faulted the learned trial Magistrate for awarding general damages that were inordinately highly in comparable to the injuries that were sustained by the Respondent. Counsel submitted that the Respondent pleaded that he sustained the following injuries; -
- a. A crack fracture of the right radius.
 - b. Dislocation of the right wrist joint.
 - c. Deep cut wound on the left parietal scalp.
 - d. Blunt injury to the neck.
 - e. Blunt injury to lower back
 - f. Blunt injury to the left knee.
 - g. Bruises and lacerations on the right foot.
- 7 Counsel further submitted that the P3 Form dated 16/9/2023, did not indicate that the Respondent suffered a blunt injury to the left knee. Counsel further argued that the assessment by Dr. Sokobe that the Respondent suffered permanent disability at 10% was disapproved by DE1, Dr. Aggarwal's medical report which proved that the fracture of the right arm of the Respondent had united well and that his reflexes and movement was normal contrary to the opinion of Dr. Sokobe, who stated that the Respondent could not use his right upper limb as it would not pronate and supinate well. Counsel further argued that Dr. Aggarwal's prognosis was that the Respondent had suffered soft tissue injuries which had healed and a crack fracture of the right radius which had healed completely.



- 8 Counsel faulted the trial Magistrate for applying the wrong approach in determining general damages. Counsel maintained that Kshs.900,000/= awarded by the trial Court was not commensurate to the injuries that were sustained by the Respondent.
- 9 Counsel further submitted that the Respondent had testified that he had healed save for his right hand which was still hurting. Counsel argued that the Respondent however did not produce any medical documents showing he had pursued continuous treatment.
- 10 Counsel urged the Court to be guided by Dr. Aggarwal’s medical report while assessing the damages payable to the Respondent since it his report that is most recent and that it actually captures the current physical status of the Respondent.
- 11 Counsel argued that an award of Kshs.300,000/= to Kshs.400,000/= would be sufficient compensation in the circumstances. Counsel cited the case of *Gladys Lyaka Mwomber V Francis Namatsi & 2 Others [2019]* eKLR, where the Court upheld the award of Kshs.300,000/= for a fracture of the lower tibia and fibula and soft tissue injuries including a cut wound on the scalp and face which were more serious injuries compared to the one suffered by the Respondent herein.
- 12 Counsel urged the Court to re-assess the amount award as damages and award the Respondent Kshs.300,000/=.

The Respondent’s Submissions

- 13 Counsel for the Respondent submitted that the Court ought not to interfere with an award unless it can be demonstrated that the trial Magistrate proceeded on wrong principles or misapprehended the evidence in some material aspect thus arriving at an award that is inordinately low or excessive as was laid out in *Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another [1982-1988]* 1 KAR.
- 14 Counsel maintained that the trial Magistrate did not err in awarding damages of Kshs.900,000/= . Counsel argued that in arriving at the said amount the trial Magistrate considered the authorities relied upon by both parties in their submissions and found that the injuries that were sustained by the Respondent were minor compared to those that were sustained by in the cases that were cited by the Appellant and Respondent respectively.
- 15 With regard to the issue of permanent disability being assessed at 10%, Counsel submitted that the said issue is none consequential to the appeal herein as the trial Magistrate did not make an award on account of the disputed permanent disability. Counsel argued that in her judgment the trial Magistrate observed as follows; “ On the claim for loss of future earning, I would making a finding that the Plaintiff having stated that he is still a driver, he is not entitled to an award under this head and the claim for 10% permanent disability would be best addresses in claim under workmen’s compensation.”
- 16 Counsel cited the case of *Jospeh Njeru Luke & 3 Others V Stellah Muki Kioko [2020]* eKLR, where Majanja, J. sitting on appeal awarded the Respondent Kshs.750,000/= for pelvic fractures and soft tissue injuries and also cited the case *Barnabas V Ombati*, (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) where Ougo, J. sitting on appeal affirmed the award of Kshs.800,000/= for soft tissue injuries and fractures.
- 17 In the end, Counsel reiterated that the Appellant herein has fallen short of demonstrating that the trial Magistrate adopted wrong principles in awarding the quantum as the issue raised such



as the 10% permanent disability had no bearing on the award made. Counsel further urged the Court to dismiss the appeal herein with costs to the Respondent.

Analysis and Determination

18 This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to re-evaluate, re-assess and reconsider the evidence presented before the trial court to reach its own determination bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage. See: *Selle V Associated Motor Boat Co. Ltd* (1968) EA 123

19 I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the Appellant together with all the authorities cited. Having done so, I find that only one key issue emerges for my determination:

Whether the award of general damages of Kshs.900,000.00/= in light of the injuries stated above is inordinately low to persuade this court to interfere with it.

20 It is not in dispute that on 11/7/2015, along Eldoret- Webuye road at Paul Boit area an accident occurred involving motor vehicle registration number KBA 203 M-ZD 1247 Nissan UD Trailer being driven by the Respondent and motor vehicle registration number KBR 966N – ZE 2721 Mercedes Benz Axor belonging to the Appellant. As a result of the said accident the Appellant sustained severe injuries.

21 As assessment of damages is at the discretion of the trial court, this court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another* (supra) where the Court held as follows: -

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

22 In the case of *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.”

- 23 The question is whether this Court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.
- 24 The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
- 25 In this matter two medical reports were produced. The first medical report dated 16/9/2015, prepared by Dr. Joseph Sokobe, who opined that the injuries sustained by the Appellant were as follows;
- a. Deep cut wound on the left parietal scalp.
 - b. Blunt injury to the neck.
 - c. Dislocation of the right wrist joint.
 - d. Crack fracture of the right radius.
 - e. Blunt injury to lower back
 - f. Blunt injury to the left knee.
 - g. Bruises and lacerations on the right foot.
- 26 He observed that the Respondent had sustained severe soft tissue and bony injuries which he had healed with multiple scars on his body. He also observed the Respondent’s inability to fully utilize his right upper limb as it cannot pronate or supinate well, and his had cannot hold strongly and that he had developed early osteoarthritis of the left knee. He assessed the Appellant’s disability at 10%.
- 27 The second medical report dated 24/8/2018, was prepared by the Respondent’s doctor, Dr. Aggarwal who opined that injuries sustained by the Appellant were as follows;
- a. Blunt injury to the right arm resulting in fracture of right radius
 - b. Blunt injury to the left knee.
 - c. Bruises on the right scalp
 - d. Blunt injury to the neck
 - e. Blunt injury to the buttocks.
- 28 Dr. Aggarwal, observed that the Respondent had suffered a crack fracture of the right radius which was completely healed. He further observed that the Respondent suffered minor soft tissue injuries which had since healed and that no complications were seen or expected. From his notes he noted that the Respondent current complaints were that he cannot lift heavy things with the right arm and had swelling of the ankles. He further made no assessment on disability.



- 29 From my re-evaluation of the evidence, I find that the learned trial Magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made.
- 30 At the trial Court Counsel for the Appellant proposed an award of Kshs.500,000/= as general damages. The Appellant relied on the
- 31 On the hand, the Respondent proposed an award of Kshs.4,000,000/= as general damages. The Respondent relied on the case of Joel Motanya vs Swan Carriers Ltd 2015 eKLR, wherein the Court awarded Kshs.2,000,000/= to a Plaintiff who had sustained similar injuries as the Respondent. The Respondent further submitted that the doctor having assessed permanent disability at 10%, the Court ought to award him Kshs.4,646,640/= for loss of earning.
- 32 In awarding Kshs.900,000/= as general damages, the trial Magistrate observed that from the authority cited by the Respondent it was evident that the injuries therein were more severe as compared to those sustained by the Respondent whereas in the authority relied upon by the Appellant the injuries therein were less severe than those that had been sustained by the Respondent herein.
- 33 In this matter both parties' doctors agree on the nature and extent of the injuries. Disagreement is only on the degree of permanent disability. Dr. Joseph Sokobe, assessed permanent disability at 10% whereas in a later medical report done by Dr. Aggarwal he didn't assess any permanent disability. Taking the two medical reports into account it clear that in rendering her decision, the trial Court did not base her assessment on general damages on the issue of disability for that matter,
- 34 In Joseph Njeru Luke & 3 others v Stellah Muki Kioko [2020] eKLR the Court awarded a Respondent who sustained pelvic fractures and soft tissue injuries Kshs.750,000/=. In Joseph Njuguna Gachie Vs Jacinta Kavuu Kyengo, HCCA NO. 31 OF 2017, Odunga J. reduced to Kshs.600,000/= the General Damages which the trial Court had assessed at Kshs.1,000,000/=. The Plaintiff had suffered the following injuries; blunt temporal injury with swelling; facial bruises; blunt injury on the left forearm; comminuted fracture of left radius and dislocated left ulna joint. Although the Respondent herein suffered more injuries than in this case, I find the authority comparable to the case before me. It must be noted that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.
- 35 In assessing damages for pain and suffering the trial court is bound to consider the features of pain which the particular plaintiff must have suffered and continues to suffer because of the post recovery effects of the accident. The implication of it is that it becomes the decisive factor or factors in the assessment of damages. In Ian Goldrein et al Personal Injury Litigation, practice and Precedents (Butterworths 1985) the word "pain" connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident while "suffering" includes fright, fear or future disability, humiliation, embarrassment and sickness"
- 36 The current procedure for measuring pain and suffering general damages is based on unfettered judicial discretion with cure guidelines past awards of similar facts and circumstances. The fundamental factors then would be whether given their age, time, unique surrounding events in that past award can proportionately and justly apply fairly on assessment of damages. Given the avalanche of appeals that measure seems to have failed to serve the compensation and



the accident avoidable goals of tort law. It is not in dispute that varying individuals suffer widely infinite pain and suffering in which discretion cannot desirably achieve some form of consistency and uniformity on the measure of damages. Therefore, just compensation in the context of pain and suffering represents standards and jurisprudence developed overtime to answer the predominant question that it is a measure necessary to place an injured party in the position she or he would have been obtained had the negligence act not taken place. It is a difficult formulation particularly when the plaintiff evidence denotes existence of a continuum of severe pain and suffering going to the future. Similarly, how courts can assess the degree of emotional and physical disability associated with a wrongful act of negligence resulting in the inflicted injury/injuries to the extent of restoring the plaintiff to his or her original good health are questions in the subjective domain. Indeed, even on appeals without some basis attributable to the unfairness of discretion the court is left with nothing to interfere upwards or downwards the assessment of damages by the trial court. The chosen category by the Appellant to challenge the compensation assessed by the trial court fails to meet the guidelines on appeal that the combination of facts considered occasioned prejudice or injustice to call upon reassessment by this court.

37 In the premises, I opine that the amount awarded by the trial Court was sufficient and reaffirm the same. The appeal is dismissed with costs to the Respondent.

38 It is so ordered.

DATED, SIGNED, & DELIVERED AT ELDORET THIS 21ST DAY OF JULY 2023

.....

R. NYAKUNDI

JUDGE

