



**Muthike v VGM (Minor Suing Through Next Friend PNN) & another
(Civil Appeal E45 & E55 of 2022 & Miscellaneous Case 37 of 2022
(Consolidated)) [2023] KEHC 20271 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E45 & E55 OF 2022 &
MISCELLANEOUS CASE 37 OF 2022 (CONSOLIDATED)**

LM NJUGUNA, J

JULY 19, 2023

BETWEEN

JAMES MUTHONI MUTHIKE APPELLANT

AND

VGM (MINOR SUING THROUGH NEXT FRIEND PNN) 1ST RESPONDENT

MARY VAATI MWANGANGI 2ND RESPONDENT

JUDGMENT

1. The appellant herein who was the defendant in the trial court suit, filed the present appeal against the 1st and 2nd respondents who were the plaintiffs in Senior Principal Magistrate's Court at Siakago civil suit no 31 and 33 of 2018 respectively.
2. According to plaint dated 14 March 2018 the plaintiff (1st respondent herein) was along Ishiara-Kawanjara road near Kanyuambora together with the 2nd respondent and one Jemima Kaunyu, when motor vehicle registration number KCL 314D knocked them down. As a result, he was injured and averred that the defendant was negligent for the tortuous acts committed upon him. The particulars of negligence and injuries are detailed in paragraphs 4 and 5 of the plaint.
3. On her part, the 2nd respondent herein in her plaint dated 14 March 2018 particulars similar to the 1st respondent's averments save for the particulars of injuries in paragraph 5 of the plaint.
4. The defendant entered appearance and filed his statement of defence dated July 16, 2018 against the 1st respondent's case wherein he denied liability, vicarious or otherwise as the driver, who is the actual tort feaser was not a party to the suit. He also stated that he blamed the plaintiff for carelessness while using the road. While further denying liability, he put the plaintiff to strict proof of the allegations made in the plaint. He also filed a statement of defence dated 07 June 2018 against the 2nd respondent's



case making similar averments save for paragraph 6 detailing the particulars of negligence by parent/guardian.

5. In both cases, judgment was entered against the defendant. He proceeded to file the present appeal, being dissatisfied with the two decisions of the trial court. In his memorandum of appeal, he listed 5 grounds and sought the following orders:
 - a. That the appellant's appeal be allowed;
 - b. That the whole of the judgment delivered on 21 July 2022 on quantum be set aside;
 - c. That the honourable court do assess the proper damages payable to the respondent;
 - d. That the costs of this appeal be awarded to the appellant in any event; and such other relief as the court may deem fit.
6. The parties recorded a consent on liability in both matters in the ratio of 80:20 in favour of the plaintiffs as against the defendant. The court directed that the appeal be dispensed with through written submissions and all the parties complied.
7. The appellant submitted that the 1st respondent was a minor who did not suffer any permanent incapacity and that he would recover faster than an adult and with no long term repercussions. The 1st respondent sustained a fracture on the left metatarsal bones. The appellant relied on the cases of *James Nyaboga Masogo Vs Kipkebe Ltd* (2007) eKLR and *Crown Foods Ltd Vs Emily Wangui* (2011) eKLR to make his case that the damages are not awarded to put the plaintiff in a better position than he would have been had the accident not happened. He also cited precedent to persuade the court that the damages ought to be reviewed. He further submitted that the special damages must be pleaded and supported by receipts and for this he cited the case of *Pollmans Tours & Safaris Ltd Vs Gupta Sea Tour Limited* [2015] eKLR.
8. The appellant submitted that much as the 2nd respondent's injury was a left metatarsal bone fracture, the trial court erred in awarding general damages at Kshs 450,000/=. On this argument he relied on the cases of *James Nyaboga Masogo Vs Kipkebe Ltd (supra)* and *Crown Foods Ltd Vs Emily Wangui (supra)*. He further provided precedents on decisions made in previous cases on the similar matters.
9. The respondent's submissions states that the trial courts duly considered the evidence placed before them and that such evidence was sufficient thereby enabling the courts to make the relevant decisions in both SPMCC Nos 31 and 33 of 2018. The respondents prayed that the court upholds its decision in the trial court as the same are not excessive and erroneous as the appellant described. With reference to the precedence relied on by the appellant, the respondents stated that in the case of *Njora Samuel Vs Richard Nyang'au Orethi* (2018) eKLR the court awarded between Kshs 450,000/= - Kshs 500,000/= which in respondent's view is within the range of the awards granted by the trial courts.
10. I have considered the arguments made by the parties herein both at the trial court and on appeal. While understanding that the award of damages by this court is at the discretion of the trial court, it is important to note that this discretion is to be exercised strictly on the basis of evidence produced and matters pleaded at trial. On this I stand by the case of *Savanna Saw Mills Ltd Vs George 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 ..."



11. That said, I further rely on 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 Vs Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Bashir Ahmed Butt Vs Uwais Ahmed 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).

12. In my view, the issue for determination here is whether or not the trial court’s award of damages was extremely high and needed review downwards, keeping in mind the nature and extent of the injuries sustained.
13. In determining the appeal, I will rely on precedents in similar cases to determine the award of damages. In the case of: *Khettya & 2 others Vs Wamalwa* (Civil Appeal E050 of 2021) [2023] KEHC 17544 (KLR) the court stated:

“43. I took the step of considering comparable awards previously made and relied on the following cases:

- a. ...
- b. *Josephine Angwenyi Vs Samuel Ochillo* (2010) eKLR Civil Appeal 125 of 200: The Court awarded Kshs 70,000/= for soft issue injuries with deep cut wound on the back, bruises to both legs, chest contusion, bruises to both hands, cerebral concussion and pain to the back.
- c. *David Okoka Odera Vs Kilindini Tea Warehouse Ltd HCCA* 2008 (eKLR): The Court awarded Kshs 40,000/=for injuries on the lumbar sacral spine and soft tissues injuries that healed without permanent incapacity.
- d. *Gilbert Odhiambo Owuor Vs Nzoia Sugar Company Ltd* (2012) eKLR Civil Appeal 46 of 2010: The Court awarded Kshs 50,000/-. The Appellant suffered soft tissue injuries on the left leg with swollen and tender left foot and his ankle was in server pain. Further, the Plaintiff in the cited case was unable to use the left ankle and foot for considerable period. Further, there was limited movement of the left ankle. In our case the Plaintiff did not suffer any temporary or permanent disability. In fact, he was treated as an out patient as evidenced by his outpatient card.



- e. Mokaya Mochama Vs Julius Momanyi Nyokwoyo (2013) eKLR: The award of Kshs 70,000/= was upheld. The Respondent/Plaintiff suffered cerebral concussion, deep cut wound on the back of his head, bruises on the right fore leg, injuries on his right hand, right leg (on the calf), his rib and his head. These injuries were described as “serious” and “severe soft tissue injuries”. In the instant case, the injuries were bruises and no deep cut wound or cerebral concussions were suffered.
- f. Ndungu Dennis Vs Ann Wangari Ndirangu & Another (2018) eKLR. The Court made an award of Kshs 100,000/= Injuries included minor bruises on the back, hit on the tibia or fibula area of the right leg with no fractures and tenderness on the right leg. The injuries sustained were described as soft injuries to lower right leg and soft injuries to the back. These were multiple soft tissue injuries. In this case, the injuries were bruises and knocks.”

14. Further reliance is placed on the following cases:

- a. *Mulwa Musyoka Vs Wadia Construction* [2004] eKLR the court awarded Kshs 150,000/= as general damages for Fracture of mid shaft left tibia, fracture mid shaft femur, bruises on head and face and unconsciousness for 30 minutes.
- b. *Michael Gichoni Mwangi Vs Peter Mwangi & Another* (1990) e KLR the court in 1998 awarded Kshs 350,000/= as general damages for compound fracture of the right tibia and fibula bones third level.
- c. *JTK (Suing at the Father of WR - Minor) Vs Bonaya Godana & another* [2021] eKLR the court awarded Kshs 480,000/= as general damages for comminuted fracture of the base of the right first metatarsal and a chip fracture fragment of the anterior portion of the right calcaneal bone.
- d. *Richard Kieti Kathuu Vs Musee Mutemi* [2018] eKLR the court awarded Kshs 150,000/= general damages for fracture and dislocation of the left hip joint; compound dislocation of the left knee joint; compound fracture left patella and left upper 1/3 tibia and metatarsal fracture of the left foot.

15. In light of the above precedents I find that the trial courts’ award of damages are excessive. The injuries sustained by the respondent warrants the court to exercise its jurisdiction to award general damages at an amount lower than what the trial courts awarded.

16. Therefore I allow the Appeal by setting aside the award of general damages by the trial court which I substitute with Kshs 250,000/= in favour of the 1st respondent and Kshs 200,000/= in favour of the 2nd respondent. Interest on the sum awarded shall accrue from the date of this judgment until payment in full. For the avoidance of doubt, the amounts shall be as follows:

For the 1st respondent:

- a. Liability 80:20
- b. General damages Kshs 250,000/=
 - Less 20% contribution Kshs 50,000/=
 - Subtotal Kshs 200,000/=



Proven special damages Kshs 5,300/=

Grand Total Kshs 205,300/=

For the 2nd respondent:

c. Liability 80:20

d. General damages Kshs 200,000/=

Less 20% contribution Kshs 40,000/=

Subtotal Kshs 160,000/=

Proven special damages Kshs 11,300/=

Grand Total Kshs 171,300/=

17. Each party shall bear its own costs.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....Appellant

.....Respondent

