



REPUBLIC OF KENYA



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**Maina & 2 others v Langat (Civil Appeal 48 of 2021)
[2023] KEHC 19966 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 48 OF 2021
SM MOHOCHI, J
JULY 11, 2023**

BETWEEN

SOLOMON MAINA 1ST APPELLANT

NALOKI SACCO 2ND APPELLANT

BENJAMIN MAINA 3RD APPELLANT

AND

WESLEY KIPNGETICH LANGAT RESPONDENT

*(Being an Appeal from the Judgment/Decree of the Hon B. Kalo (C.M)
delivered on 24th April 2021 in Nakuru CMCC No. 599 of 2021)*

JUDGMENT

Introduction

1. This appeal majorly on quantum award, arises from the judgment delivered on April 29, 2021 in Nakuru CMCC No 599 of 2019 where the Appellant was held liable and judgment entered in favour of the respondent herein for Kshs 250,000.00 awarded as general damages.
2. By a plaint dated May 28, 2019, the Respondent sued the Appellants seeking general damages, special damages and costs plus interests of the suit, arising from a road accident that occurred on April 23, 2019, along Ravine-Nakuru road involving motor vehicle registration number KAR 339N being driven by the 3rd Appellant and motorcycle registration number KMEH-992H being ridden by the Respondent.
3. The Appellant filed its defence dated September 5, 2019, denying the allegations made by the Respondent. In the alternative, they blamed the Respondent a rider of motorcycle registration number KMEH-992H.



4. By consent of parties, liability had been apportioned in the ratio of 90: 10 in favour of the Appellant herein.
5. The Trial Court after hearing the parties and scrutinising the evidence before it delivered its judgment dated April 29, 2021 whereby the Respondent herein was awarded Kshs 250,000/= as general damages, Kshs 14,100/= as special damages and costs and interest of the suit.
6. Being aggrieved by the said judgment, the Appellant instituted this appeal vide a Memorandum of Appeal dated May 10, 2021 and filed in Court on the December 8, 2021 on the following grounds that can be collapsed into a Quantum award challenge on the following grounds namely: -
 - a) That The learned trial Magistrate erred in law and in fact in awarding damages of Kshs 250,000/= which was inordinately high in the circumstances.
 - b) That The trial Magistrate erred in fact and in law and in fact in awarding damages and costs without basis or proof of the same.
 - c) That The learned trial Magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions on quantum on applicable principles for assessment of damages in
 - d) That The learned magistrate erred and misdirected himself in law and in fact misapplying the principles applicable to assessment of damages.
7. The Appeal was canvassed by way of written submissions with the Appellant filing on the October 14, 2022 and the Respondent filing on October 21, 2022.

Appellants Written Submissions

8. On the issue of quantum, the Appellant faulted the Learned Trial Magistrate for awarding general damages that were inordinately high.
9. Regarding the injuries sustained, the Appellant submitted that as a result of the said accident, the Respondent sustained soft tissue injuries corroborated by P3 dated April 23, 2019 and medical report from Dr. Wellington K. Kiamba dated May 16, 2019 as follows: -
 - i. Head injury;
 - ii. Multiple deep lacerations on the foreheads and peri orbital Region;
 - iii. Deep lacerations on the lips;
 - iv. Laceration and swelling of the nose-had bleeding;
 - v. Lacerations on the chin;
 - vi. Deep laceration on the left knee;
 - vii. Deep cut wound on the right leg;
 - viii. Multiple lacerations on the hands;
 - ix. Soft tissue injuries of the shoulder; and
 - x. Blunt abdominal injury.



10. The Appellants submit that the sum and Kshs 250,000.00 as general damages were inordinately high considering the injuries sustained by the Respondent and that Kshs 100,000.00 would be reasonable and sufficient compensation.

11. The Appellants rely on the case of *Power Lighting Company limited & another v Zakayo Saitoti Naingola & another* [2008] eKLR cited in the case *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR, the Court held: -

“On quantum Court the in determining whether to interfere with the same or not, the Court has to bear in mind the following principles on assessment of damages;

- a) Damages should not be inordinately too high or too low
- b) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
- c) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
- d) past awards are taken into consideration as guides and where element of inflation should be taken into account as well as the purchasing power of the Kenyan Shillings, then at the time of the judgment....

12. That in lieu of the resemblance between this case and HCCA EO39 of 2020, we apply the same case law and we invite you to consider the following cases cited in HCCA E039 of 2020 and HCCA E40 of 2020 in determining this matter:

a) *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR

The Respondent adds the following injuries to these: blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands. That report also says that the Respondent still experiences back pains and chest pains on exertion. The Court stated that, "if one takes into consideration the actual injuries suffered by the Respondent - to wit soft tissue injuries to the lower right leg and to the back - it becomes readily obvious that an award of Kshs 300,000/= is manifestly excessive. Given the policy goal of Courts to try to compensate comparable injuries as far as possible by comparable awards, these two factors call for this Court to revise the quantum awarded to the Respondent. In my view an award of Kshs 100,000/= would be adequate to compensate for the injuries suffered in this case.

b) *Eva Karemi & 5 others v Koskei Kieng & another* [2020] eKLR

Where the Court awarded the 1st appellant Kshs 70,000/-. She sustained injuries to her right thigh and bruises on her lower and upper limbs. The 2nd appellant was awarded Kshs 40,000/- for injuries on the right shoulder pain and cut wound on her mouth. The 3rd appellant was awarded Kshs 45,000/- for injuries on and pain on her back and right shoulder pain. The 4th appellant was awarded Kshs 40,000/- for cuts on the chin and right shoulder tenderness. The 5th appellant was awarded Kshs 60,000/ for injuries sustained; 2cm cut on the forehead, cut wound on the right elbow and right limb (leg and ankle joint), The 6th appellant was awarded Kshs 65,000/- for injuries sustained being bruising on the forehead, hip and left ankle..

13. The Appellants pray that the Appeal be allowed and the judgment on quantum by the Honourable B. Kalo (Chief Magistrate) in Nakuru CMCC No. 599 of 2019 delivered on April 24, 2021, be set-



aside and this Honourable Court be pleased to assess damages afresh and the costs of this Appeal be borne by the Respondents.

Respondent's Written Submissions

14. The Respondent opposes the Appeal and submits that, the Appellate Court should be guided by the principles informing as to whether to disturb the Trial Court's assessment of damages, as was held in the case of *Wellington Odhiambo Owara & another v Isaac Konye Muiruri* [2021] eKLR :-

“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.”

See also the case of *George Njenga & others v Daniel Wachira Mwangi & another* [2017] eKLR:

“It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interest for which a delicate balance must be found...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with best that can be done is to pay regard to the limits of current thought. In a case such as the present, it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award this sphere there are inevitably differences of view and of opinion, he himself would have made. Having done so, and remembering that in sphere there are inevitably differences of vie 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” . .

15. That the guiding principles for assessment of damages in personal injury claims were elaborated in case of *Wellington Odhiambo Owara & another v Isaac Konye Muiruri* [2021] eKLR to include: -
- i. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained;
 - ii. The award should be commensurable with the injuries sustained;
 - iii. Previous awards in similar injuries sustained are mere guide but
 - iv. each case must be treated on its own facts;
 - v. Previous awards to be taken into account to maintain stability of
 - vi. awards but factors such as inflation should be taken into account; and
 - vii. The awards should not be inordinately low or high.
16. That in the Trial Court the Respondent had submitted for a sum of Kshs 500,000 as general damages while the Appellants submitted that Kshs150,000 would suffice.
17. The Respondent urges the Court to note that, the Appellants have introduced and relied on new authorities/materials to challenge the decision of the learned trial magistrate and which materials were not presented or availed to the Trial Court at the time of making the award.



18. It is the Respondent's view, that the Appellant's conduct is untenable and regrettable, as this being the first appeal and by way of retrial, it is only fair and just that parties do challenge the decision within the context the Trial Court decided time of making the award herein, this Honourable Court is supposed to consider the materials presented before the Trial Court when deciding whether or not the trial magistrate erred. However, and by the Appellants introducing new Authorities at this stage which were not presented to the trial magistrate, this amounts to requesting this Court to consider the Appeal herein outside the context that the trial magistrate dealt with the matter, which in the Respondent's view is plainly wrong. The Respondent relies on the case of *Sila Tiren & another v Simon Ombati Omiambo* [2014] eKLR where the Court held as follows in similar circumstances: -

“Those authorities have been cited by the respective parties, in their Submissions before this Court. None of those 3 cases were placed before the Trial Court...In effect, the learned trial magistrate was not given the benefit of the case-law which has now been placed before me, on this appeal. That means that this Court has been invited to assess the decision arrived at by the Trial Court, using a yardstick that was not made available to that Court. In my understanding of the law, an appeal process is intended to correct the errors made by the Trial Court. And in order for the appellate Court to be fair to the Trial Court, it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the Trial Court. That the first appellate Court is enjoined by law, to re-evaluate all the evidence on record, and to draw its own conclusions.

The appellate Court is not, ordinarily, expected to receive new or further evidence. That, the exercise of parties placing wholly new authorities before the appellate Court, and using them to either challenge or to otherwise support the decision of the Trial Court, is not a proper use of the mechanism of an appeal”.

19. Reliance is placed on the case of *Daniel Muchemi & another v Rosemary Kawira Kiambi* [2018] eKLR:-

“The appellant has complained that the trial magistrate erred in failing to consider conventional awards for damages in similar cases. In assessing damages, the Trial Court relies on similar decided cases 2 million by the trial magistrate in the case under consideration was not excessive. The award was supported by recent comparative authorities from the High Court. Taking into consideration the case of *Kipkemboi & Another v Moris Kedolo* [2019] eKLR(*supra*) the respondent who had sustained similar injuries as the respondent herein was awarded Kshs 2,500,000 in 2019. Therefore, an award of Kshs 2,000,000 in 2017 cannot be excessive.”

20. That secondly, the authorities cited by the Appellants herein in support of this Appeal are distinguishable and inapplicable. In the case of *Eva Karemi & 5 others v Koskei Kieng & another* [2020] eKLR, the 1st Appellant suffered soft tissue injuries to her right thigh and bruises on her lower and upper limbs unlike the Respondent herein who suffered more severe injuries including head injuries, similarly in the case of *Ndungu Dennis Vs Ann Wangari Ndirangu & another* [2018] eKLR, the Respondent suffered soft tissue injuries to the lower right leg and to the back unlike the Respondent herein. As such and the authorities cited by the Appellants in support of their Appeal herein being distinguishable and of less severe injuries than those suffered by the Respondent herein, then the same are distinguishable and inapplicable in this Appeal.
21. Finally, and apart from the Appellants citing new herein (but which are untenable/inapplicable as submitted, the Appellant has not established and/or demonstrated any error be it in law on in fact,



that the learned trial magistrate committed and/or fell into while assessing the general damages and that this appeal lacks merit and has not met the legal threshold to warrant this honourable Court's interference with the said award.

22. The Respondent implores the Court, to note that the Appellants had submitted for an award of Kshs 150,000/= in the Trial Court at page 36 of the record but they have now submitted for a sum of Kshs 100,000/= at page 5 of their submissions herein. In our humble view, this shift of position by the Appellants is a clear demonstration that they are not only unsure of themselves but also their Appeal herein is nothing but a pure guess, a shot in the dark and a fishing expedition. Taking into consideration the submissions herein, materials on record, and all other relevant matters, it is the Respondent's submissions that, the learned trial magistrate did not err when arriving at his award on general damages and hence urge this Court to dismiss the Appeal herein with costs to the Respondent as was held in the case of *Amos Njagi Emurasi & another v Alex Muriithu Njogu* [2016] eKLR:-

“I have carefully read through the judgment of the Trial Court. The learned trial magistrate properly addressed his mind to all relevant factors when considering what award to make. He did not consider any factor he should not have; nor did he fail to consider anything he should have. He took into account inflation and the prevailing cost of living. He committed no error of principle. It is not enough that that I would probably have made a slightly lower award had I been the trial magistrate. I do not find the award manifestly excessive as submitted by the Appellants. In the event there is no merit in this appeal and the same is hereby dismissed with costs to the Respondent”..

23. 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 v Gathogo Kanini Vs A.M.M Lubia & Another* 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.”

24. In the case of *Gitobu Imanyara & 2 others v 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.”

25. 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.”

26. 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 considered 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.
27. 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.
28. The Appellant have not in any way demonstrated, how the Award in General Damages was inordinately high that the same must be wholly erroneous estimate of the damages.
29. Accordingly, this Court finds no reason to disturb the trial magistrate’s decision and thus finds this Appeal to be without merit and dismiss the same.
30. The Appellant shall bear the costs of this Appeal.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2023.

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S. MOHOCHI (JUDGE)

In the Presence of: -

Appellant: Kimondo Gachoka & Co. Advocates

Respondents: J. Ndungu Njuguna & Co Advocates

M/S Schola C.A

