



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Ndereva (Civil Appeal E005 of 2022)
[2023] KEHC 20717 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E005 OF 2022**

**LW GITARI, J
JULY 6, 2023**

BETWEEN

KIMARI MWANGI APPELLANT

AND

LYDIA KATHOMI NDEREVA RESPONDENT

JUDGMENT

1. This is an appeal against the award of damages in the sum of Kshs 1,063,128 for general and special damages with liability at 80:20 in favour of the Respondent. The judgment was delivered on February 24, 2022 in Chuka CMCC No E040 of 2020. The respondent had filed a plaint dated October 27, 2020 claiming special and general damages after she sustained injuries in a road traffic accident while travelling as a pillion passenger on a motor bike which got involved in an accident with the appellants motor vehicle.
2. Liability was apportioned by consent of the parties. As such, this appeal is mainly on the trial court's finding on quantum of damages. The grounds of appeal are that:
 - i. The Honourable Trial Magistrate erred in fact and in law by awarding the Respondent inordinate general damages to constitute a miscarriage of justice in the circumstances of this case.
 - ii. The Learned Trial Magistrate erred in law and fact in awarding Kshs 28,910/= special damages by failing to consider that the receipts produced were illegible and did not bear the mandatory stamp duty revenue stamps.
 - iii. The Learned Trial Magistrate erred in fact and in law by failing to consider the Appellant's authorities in their submissions on quantum hence arriving to an erroneous decision.



- iv. The Honourable Trial Magistrate erred in fact and in law in failing to consider the Appellant's documents that were filed and produced in court.
 - v. The Honourable Trial Magistrate misdirected herself as to the facts of the case thus arriving at an erroneous decision.
 - vi. The Honourable Trial Magistrate's judgment as a whole is not supported by the evidence that was tendered in court by the parties.
3. The Appellant thus prays for the following orders:
- i. The appeal be allowed;
 - ii. This Honourable Court do proceed and set aside judgment and decree;
 - iii. This Honourable Court do proceed and set aside the award on general damages and reduce the same; and
 - iv. The costs and interest of the subordinate court and this appeal be awarded to the Appellant herein.
4. The appeal was canvassed by way of written submissions which I have summarized hereunder.

The Appellant's Submissions

5. The Appellant submits that the quantification of damages awarded to the Respondent was excessive, inordinately high, and unsupported by the evidence on record.
6. According to the Appellant, the trial court failed to address the conflicting medical reports and the same ought to be revisited by this Court by setting aside the impugned judgment, reevaluating the evidence on record, and making its own determination as to the Respondent's proven injuries before assessing the appropriate circumstances.

The Respondent's Submissions

7. On the issue of there being conflicting medical reports, it is the Respondent's submission that the Appellant is improperly relying on a medical report whose author never testified and the report never produced as an exhibit by consent or otherwise.
8. It was further the Respondent's submission that the Respondent never proved any special damages but concedes that the award of special damages ought to be Kshs 13,600/= and not Kshs 28,910/=.
9. The Appellant further took issue with the lacking of revenue stamps. On this issue, it is the Respondent's submission that the Postal Corporation of Kenya and Embu Level 5 Hospital are not institutions whose receipts require revenue stamps.
10. It was finally the Respondent's submission that this appeal ought to fail as the Appellant has failed to prove the very allegations he claims.

Issues for Determination

11. I have considered the Memorandum of Appeal as well as the respective submissions by the parties. the main issues that arise for determination are:
 - i. Whether the trial magistrate's award of compensation was erroneous, and if so, how should damages be quantified?



- ii. Whether costs should be apportioned.

Analysis

12. This is a first appeal and it is the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial court in order for it to reach its own independent conclusion.

The powers of the appellate court are laid down under Section 78 of the Civil Procedure Act. It provides:-

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

The duty of the first appellate court has been settled in various authorities of this court and the Court of Appeal.

In *Selle V Associated Motor Boat Co Ltd* (1968) EA 123 the court held as follows in this regard:

“The court must consider the evidence, evaluate itself and draw its own conclusion though doing so it should always bear in mind that it neither heard witnesses and should make due allowance in respect. However, this court is not bound necessarily to follow the trial judge’s finding of fact as it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

This was also the holding by the Court of Appeal in the case of *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Company Advocates* (2013) eKLR where the court stated that “this being a first appeal we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.” See the case of *Kenya Posts Authority v Kinston Kenya Limited* where the Court of Appeal held that ‘on a 1st appeal the court should reconsider the evidence, evaluate it itself and draw its ‘on conclusions though it should bear in mind that it has not seen or heard the witnesses and make allowance in that respect.’

It follows that as a first appellate court the primary duty is to analyse the evidence, evaluate it and make its own finding but not for the purpose only of determining whether the trial court’s decision must be upheld, it must make its own independent finding.

- a. On Quantum of Damages



13. In the case of *Butt v Khan* [1982-88] KAR 1 the court held that: -
- “An appellate court will not disturb an award of damages unless it’s 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.”
14. The evidence before the trial court was that the Respondent herein was a pillion passenger on motor cycle registration number KMCE 605L on September 12, 2019 travelling along Ishiara - Meru road when a motor vehicle registration number KBD 143U belonging to the Appellant knocked the motor cycle. As a consequence, the plaintiff sustained some injuries. The aspect of liability is unchallenged as the parties entered into a consent to have the same at 80:20 in favour of the Respondent against the Appellant. What is challenged in this appeal is the award of general damages for pain and suffering.
15. As a result of the said accident, the Respondent alleges to have suffered the following injuries which have been set out in the Respondent’s medical report dated September 28, 2021 and prepared by Dr GN Njiru as follows
- i. Pubis diastasis syphysis
 - ii. Contusion right lower limb
 - iii. Massive laceration right pretibial region
 - iv. Laceration left shoulder joint
 - v. Contusion to the neck
 - vi. Laceration right gluteal region
16. On the other hand, the Appellant relied on the medical report prepared by Dr Maina Ruga dated May 29, 2021 which set out the injuries suffered by the Respondent as follows:
- i. Pelvic injuries with pubic symphysis diastasis
 - ii. Laceration wound on the left shoulder
 - iii. Laceration wound on the leg
17. With that backdrop, the trial court went to award the damages as follows:
- i. General damages – Kshs 1,300,000/=
 - ii. Special damages – Kshs 28,910/=
 - iii. Less 20% Liability – (Kshs 265,782/=)
 - iv. Net Award - Kshs 1,063,128/=
 - v. Costs and interest at court rates from the date of judgment
18. By a consent of the parties dated July 29, 2021 the medical report by Dr Njiru was adopted and produced as evidence. on cross examination, the said Dr Njiru stated that the injuries suffered by the Respondent were all soft tissue injuries. On the other hand, the Appellant claims that there is a medical report by one Dr Maina Ruga. This report is at page 36 of the record but it was not produced in court as exhibit although it was in the list of documents filed by the appellant. In the circumstance, it is only the



medical report by Dr Njiru that was available before the trial court. This was the only report available to assist the court in assessing the quantum of damages.

19. The appellant avers that the award was erroneous in-ordinately high and was not supported by the evidence. He contends that there was no permanent disabilities and the injuries were soft tissue. in this regard, the Court of Appeal in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR stated as follows:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

20. The trial magistrate relied on the following authorities:

1. *George Njenga and Another v Daniel Wachira Mwangi* (2017) eKLR where the plaintiff sustained pelvic fracture, unstable left ankle joint, soft tissue injuries and laceration on the left leg. General damages awarded amounted to Ksh 800,000/-
2. *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo* (2019) eKLR where Kshs2,000.000/- was awarded for injuries involving-Pelvic injuries with fracture of the right pubic ramus and diastasis of the symphysis pubis. The damages reduced to Ksh 1,400,000/- on appeal.
3. *Nilion Complex Ltd & Thomas Njoroge Kirima v Joseph Kiplagat Towett* (2019) eKLR. where the plaintiff sustained Traumatic severance of cervical vertebral colume (burst commuted fracture of vertebrae) and soft tissue injuries. Kshs 1,800.000/- awarded in general damages.
4. Isaac Kd were; left hip fracture, right mid temporal tube area, brain contusion head injury soft tissue injuries Kshs 1,500,000/- was awarded as general damages.

The trial magistrate relied on these authorities and awarded Kshs 1,300,000/-

I find that in all these authorities the plaintiffs had sustained more severe injuries which involved fractures among other injuries. Fractures are internal injuries which leave the victims with permanent injuries and long term effect on the health of the individual.

I find that the injuries in the authorities cited by the trial magistrate are far from being comparable to those sustained by the respondent. The respondent had pleaded the particulars of injuries in her plaint at paragraph -5- and she called Doctor Njiru to give an opinion on the injuries. The doctor confirmed that the injuries were soft tissue. It is trite that comparable injuries should attract comparable awards. The award by the learned trial magistrate were guided by findings in cases in which the plaintiff had sustained more severe injuries than the respondent herein. The authority of *Millicent Atieno Ochuonyo v Katola Richard*, (2015) which was cited by the respondent was in compatible with injuries which she had sustained as they involved severe and complex pelvic fractures and were assessed as grievous harm and left permanent disability of 40%. The injuries sustained by the respondent were classified as harm and left no permanent injuries safe for scars

There is no doubt that the award of the learned trial magistrate was erroneous. As stated in the case of *Butt v Khan* (*supra*) an appellate court, will interfere with the discretion of the trial court where it is shown that wrong principle were followed or that he misapprehended the evidence in some material respect. The trial magistrate erred as she ignored the submission and



authorities and ended up on relying on authorities which were not relevant and arrived at an erroneous award.

The respondent has in his submission pointed out the principles for setting aside an award of damages. As stated above the trial magistrate took into account irrelevant factors as seen in basing her award on injuries which the respondent had not suffered and making an award which was manifestly high. The award was erroneous and has exposed itself for a downwards review. This court has reason to interfere with the exercise of jurisdiction by the learned trial magistrate.

21. In this regard, the Appellant has prayed for an award of Kshs 200,000/= as general damages. In the case of *George Njenga & Another v Daniel Wachira Mwangi* [2017] eKLR, the High Court maintained an award of Kshs 800,000/- in 2020 for a plaintiff who sustained a pelvic fracture, unstable left knee joint, unstable left ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterolateral aspect of the left leg. While the injuries in this case are not exactly similar to the injuries in this case, this Court must take into account passage of time, rate of inflation and other imponderables. In my view, an award of Kshs 600,000/= as general damages should be sufficient compensation, the same being subject to the agreed contribution.
22. On special damages, it is trite that the same must be specifically pleaded and strictly proved. The Respondent itemized the particulars of special damages under paragraph 5 of the Plaint dated October 27, 2020 as follows:
 - i. Medical report charges – Kshs 5000/=
 - ii. Doctor’s court attendance fees – Kshs 6,000/=
 - iii. Reasonable miscellaneous expenses to attend 2nd medical opinion – Kshs 3,000/=
 - iv. Treatment expenses – Kshs 21,790/=
 - v. Registration of demand – Kshs 100/=
 - vi. Search for motor vehicle KBD 143U – Kshs 550/=
23. From the record, there is a receipt from Embu Level 5 Hospital for Kshs 15,310/=, a medical report charges of Kshs 5,000/= from Dr Njiru G N, and an illegible receipt from Komarock Modern Healthcare. In my view, the Respondent strictly proved a sum of Kshs 20,310/= only.
 - b. On costs
24. Ordinarily, costs should follow the event unless some good reasons the court orders otherwise. In arriving at this decision, the trial court exercised its discretion in favour of the Respondent. an appellate court should not interfere with such discretion unless it is satisfied either;
 - a) The judge misdirected himself on law, or
 - b) That he misapprehended the facts, or
 - c) That he took account of considerations of which he should not have taken an account, or
 - d) That he failed to take account of consideration of which he should have taken account, or



e) That his decision, albeit discretionary one, was plainly wrong.

[See: *Carl Ronning vs Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)* [1984] KLR 1 as quoted with approval in *Canyon Properties Limited & 3 others v Eliud Kipchirchir Bett & 2 others* [2017] eKLR]

25. In this case, it is my view that the trial magistrate exercised her discretion judicially in awarding the Respondent costs of the suit. It is trite that costs are the discretion of the trial court and costs follow the event Section 27 of the *Civil Procedure Act* refers.

Conclusion

26. The upshot of the foregoing, is that the appeal should succeed. The award of general and special damages be substituted with an award of Kshs 600,000/= and Kshs 20,310/= respectively. The appellant is the successful party in this appeal. Costs must therefore follow the event. The appellant is entitled to the costs of the appeal. I order as follows: -

1. The appeal has merits and is allowed.
2. The Judgment of the trial magistrate is hereby set aside.
3. It is substituted as follows:-General damages, Kshs 600,000/-Special damages 20,310/- Liability- 80:20 in favour of the respondent.
4. Costs of the appeal to the appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF JULY 2023.

L.W. GITARI

JUDGE

6/7/2023

Ms Moroko holding brief for Mr. Ogweni for Respondent

Mr. Oteko for Applicant.

L.W. GITARI

JUDGE

6/7/2023

