



**Omwaga & another v Maikini (Civil Appeal 36 of 2021)
[2023] KEHC 20553 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 36 OF 2021
PN GICHOHI, J
JULY 19, 2023**

BETWEEN

PETER OSORO OMWAGA 1ST APPELLANT

KEFA OKWARE 2ND APPELLANT

AND

BATHSHEBA MWANGO MAIKINI RESPONDENT

*(Being an appeal from the Judgment delivered by Hon. D.O .Mac’
Andere (RM) on 26th March 2021 in Kisii CMCC No. 106 of 2019)*

JUDGMENT

(Being an appeal from the Judgment delivered by Hon. D.O .Mac’ Andere (RM) on 26th March 2021 in Kisii CMCC No. 106 of 2019)

1. This Appeal arises from the Judgment delivered on 26th March, 2021 in Kisii CMCC No. 106 of 2016 where the trial magistrate held the 2nd Appellant 100% liable and the 1st Appellant vicariously liable for the accident. The Respondent was awarded Kshs. 2,000,000/= in general damages and Kshs. 120,750 as special damages.
2. In that suit filed on 26th February 2019 through the firm of Ombuhi K. Mogire & Co. Advocates, the Respondent sued the Appellants for injuries she allegedly sustained on 22nd October 2018 motor vehicle registration number KCA 607K in which she travelled as a fare paying passenger veered off the road and caused the accident along Mbada-Marani Road. She blamed the 2nd Appellant as the driver and the 2nd Appellant as the owner of the said motor vehicle hence holding both jointly liable for the accident. She claimed to have sustained the following injuries: T7/T8 (Thoracic Vertebra) burst fracture Chest contusion Blunt trauma to the neck Blunt trauma to the right shoulder Blunt trauma to the left shoulder Bruises on the lower lip



3. In their defence, the Appellants had denied the claim and pleaded that if an accident did occur as pleaded, it was caused by the reckless, negligent and or the careless act or omissions on the part of the Respondent.
4. Being aggrieved by the Judgment of the lower court, the Appellant filed the Appeal herein through the firm of Kimondo Gachoka & Company Advocates and raised four (4) grounds which are condensed into two (2) as follows:
 1. The learned Magistrate erred in law and in fact in finding that the Appellants were 100% liable for casing the Accident, the subject of this suit while there was a third-party motor vehicle involved.
 2. The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to an award of Kshs. 2,000,000 as general damages.
5. They therefore seek that the appeal be allowed , the said judgment set aside and the damages be assessed afresh by this Court. They also seek that the costs of the Appeal be borne by the Respondents.

Appellants Submissions

6. The Appellants filed their submissions dated 17th February 2023 on quantum only. Counsel submitted that the injuries sustained by Respondent mainly soft tissue injuries and therefore the award of Kshs. 2,000,000/= was so high as to be an erroneous estimate. While appreciating assessment of general damages is discretionally, counsel submitted that discretion should be exercised judiciously and that the appellate court would interfere with the discretion if the well laid principles of assessment are violated by the trial court.
7. Counsel therefore urged the Court to revise the award made by the lower court and proposed that a maximum award of Ksh. 80,000/= be allowed by this Court. In support of that sum, counsel relied on several cases both in regard soft tissue injuries among them , PF (Suing as next friend and father of SK(Minor) v Victor O. Kamadi & another [2018]eKLR where the Appellant had sustained cut wound on the forehead, multiple small abrasions on the face, blunt injury to the head leading to loss of consciousness for some time, abrasion to the back, abrasion wounds to the dorsum of the right hand and cut wound to the right leg. On appeal, High Court substituted the award of Kshs. 50,000/= with Kshs. 100,000/=.
8. In regard to fracture injuries , counsel relied on several cases among them DG (Minor suing through her next friend MOR v Richard Otieno Onyisi [2021]eKLR where the minor sustained a chest contusion , left tibia fracture, bruises on the left foot and bruises on the left leg and was awarded Kshs. 400,000/= as general damages.

Respondent's Submissions

9. The Respondent filed their submissions dated 3rd March 2023 on both liability and quantum. On liability, counsel urged the Court to consider that the accident was self-involving and that the Respondent was a mere passenger who had no moderation at all over the vehicle's maintenance or driving ethics of the driver and therefore, he urged the Court to uphold the judgment on liability at 100 % against the Appellants as even the evidence in the lower court was not controverted.



10. On quantum, counsel submitted that the assessment of general damages is in the discretion of the trial court and therefore the Appellate Court is not justified in substituting a figure with its own simply because it would have awarded a different figure.
11. In this case, he submitted that the during the hearing of the case before the trial court more than a year after the accident, the Respondent was still complaining of pain on her back where she had been operated. Further, counsel submitted that despite the Respondent undergoing a second medical, the Appellant did not avail a medical report to challenge there report by Dr. Peter Momanyi Morebu which was produced by consent pf parties and which confirmed the injuries sustained by the Respondent and that permanent disability was anticipated.
12. While reiterating and reproducing the submissions in the lower court where counsel had cited the case of Job Kenyasa Miranyi v Ezekiel Tochi & another [2005]eKLR and Robert Gichuchu Maina v John Kamau [2004] eKLR among others, counsel submitted that the award of Ksh. 2,000,000/= by the lower court was not inordinately high to warrant interference by this Court as there is no evidence that the trial magistrate cited wrong principles of law or misapprehended the facts or made erroneous estimate of the damage suffered by the Respondent.
13. He therefore urged the Court to uphold the judgment by the lower court and dismiss this appeal with costs to the Respondent.

Determination

14. As the first appellate Court, this Court has a duty to re- evaluate the evidence before the lower court and come up with its own conclusions. The lower court record shows that the Respondent was the only witness for her case. She adopted her witness statement dated 7th February 2019 where she reiterated the contents of the plaint and produced documents in support. Whereas she still blamed the driver for the accident, she was not cross examined at all on the issue of occurrence of the accident, the driver or ownership of the said accident motor vehicle and that it was self-involving.
15. There is nothing to show how the Respondent, as a passenger would have contributed to the accident. Indeed, it was not even an issue submitted on by counsel for the Appellants in the lower court. The trail magistrate was fully justified in her finding on liability. That issue is not even a ground of appeal here and it is not submitted on by the Appellant.
16. On quantum, there was no issue on special damages and therefore that is not affected by the decision in this appeal. The issue is therefore on general damages. Parties have correctly argued that an award of general damages is discretionally. There are parameters within which the Appellate Court would interfere with the trial court’s discretion in arriving at a particular amount of damages in a case. Indeed, the Court of Appeal in the case of Catholic Diocese of Kisumu v Tete [2004] eKLR held:

“It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles,

As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”



17. Before the trial court, the Appellants herein had sought a sum of Ksh. 2,500,000/= as general damages while relying on the case of Job Kenyasa Miranyi v Ezekiel Tochi & another [2005]eKLR and Robert Gichuchu Maina v John Kamau [2004] eKLR and in her judgement, the trial magistrate held:

“The plaintiff submitted that a sum of Kshs. 2,500,000/= will be sufficient compensation for general damages and relied on the cases of Job Kenyasa Miranyi v Ezekiel Tochi & another [2005]eKLR and Robert Gichuchu Maina v John Kamau [2004] eKLR where court awarded a sum of Kshs. 1,500,000/= and Kshs. 1,000,000/= respectively for injuries more or less similar to the present ones...I find the first case cited by the plaintiff to be more convenient . In that case plaintiff suffered compound fracture of the T 7 and T8 , fracture of the left styloid radial process , injury to the bladder , fracture of the left wrist and could not walk. I however find the more severe than the present ones and if I were to award this case in year 2005, when that case was held I would have awarded a sum of Ksh. 700,000/=. However, we are now in the year 2021 and given the spiralling nature of the shilling occasioned by the rising economic trends, I find an award of Kshs. 2,000,000/- to be sufficient compensation for general damages.” [Emphasis mine]

18. I have had a look at the two decisions captured by the trial court. In Job Kenyasa Miranyi (supra) the plaintiff sustained a fracture dislocation spine of the 8th and 9th thoracic vertebrae resulting to complete paralysis and at T6 level, and also a comminuted distal 1/3 clavicle fracture and closed head injury with concussion. He had no control of his bowels and had become wheelchair bound for life. In Robert Gichuchu Maina (supra) the plaintiff sustained complex fracture of the two thoracic vertebrae of the spine consequent injury to the spinal cord - causing paralysis of both limbs, had fracture of the left wrist, could not walk and was confined to a wheel chair, was indeed paralysed for life , had no control of passing urine and therefore he was a paraplegia.
19. Though the trial magistrate used the word “convenient” in her choice of Job Kenyasa Miranyi (supra), the courts do not use convenience in award of damages. The word should have been “comparable”. Nevertheless, emphasis should be on her reason that followed to see if there is any justification for this Court to interfere with the award through re- assessment and substitution with its own award as sought by the Appellant herein.
20. This Court also bears in mind the principle that no two cases or injuries sustained are exactly alike and that is why the trial magistrate was correct in her reasoning in Job Kenyasa Miranyi (supra) that the injuries were more severe than the injuries sustained by the Respondent. The trial magistrate also correctly considered the time the awards in those cases were made and took into consideration the inflation in arriving at the award of Kshs. 2,000,000/=.
21. The question then is whether, this Court should still interfere with the award. The Court of Appeal in Catholic Diocese of Kisumu (supra) went on to say while quoting Kneller JA in Kitavi v Coast Bottlers Limited [1985]KLR 470 at page 477 para10:
- “It is now settled law that what the appellant was entitled to was a reasonable compensation assessed with moderation and conformity with the general method of approach, local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency but awards will very much depend on the facts of each case and any attempt to standardize “or rigidly” classify them will be in vain and wrong...” [Empasis mine]
22. In this appeal, the Respondent generally sustained soft tissue injuries but he also sustained T7/T8 (thoracic vertebrae) burst fracture. She was admitted in for three (3) days at Kisii Level 6 Hospital and



then transferred to Moi Teaching and Referral Hospital and admitted on 28th October 2018 where she was treated and operated on her back. She was discharged on 19th October 2018. As at the time he testified on 30th July 2019, she was still feeling pain on her back.

23. Dr. Morebu who examined her on 26th November 2018 indicated in his medical report dated 26th November 2018:

“Following the road traffic accident Bathseba sustained grievous harm i.e . with multiple severe body injuries. The patient is currently unable to walk thus cannot undertake her daily chores as the sole breadwinner to her family. She requires physiotherapy with occupational therapy. She would require to undergo another operation to remove the metal implant costing her approximately Ksh. 200,000/= permanent disability is anticipated.”

24. There is no doubt that these are severe injuries sustained by Respondent coupled with 7th and 8th thoracic vertebral burst fracture . My understanding of these fractures is that they relate to the spinal cord hence the danger they may cause hence the doctor’s opinion that permanent disability is anticipated. On that ground then, the Appellant’s authorities leaning towards normal soft tissue injures and fractures sustained in the authorities cited including PF (Suing as next friend and father of SK(Minor and DG (Minor suing through her next friend MOR (supra) would not in the least compare with the injuries sustained by the Respondent in this appeal.

25. Considering that there was no permanent disability at the time but the same was only anticipated and in which case, she may not suffer it despite the danger posed by such an injury and, further considering the award in Job Kenyasa Miranyi (supra) was in 2004 though injuries more severe therein than in the present case, the award of Kshs. 2,000,000 is inordinately high in the circumstances.

26. Likewise , the award proposed by the Appellant is so low for a fracture of this nature that it cannot be a proper estimate of the compensation that the Appellant herein should be awarded in the circumstances.

27. Though money per se cannot compensate an injury, I am satisfied that putting all factors into consideration including inflation, an award of Kshs. 1,500,000/= would suffice as general damages.

28. The appeal therefore partly succeeds in that:

1. The award of Kshs. 2,000,000/= is set aside and substituted with an award of Kshs. 1,500,000/= together costs and interest from the date of judgment in the lower court.
2. The Appellant is awarded half costs of the appeal.

Orders accordingly.

Dated, signed and delivered at Kisii this 19th day of July 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Ndolo for Njuguna for Appellant

Mr. Mogire for Respondent

Kevin Isindu, Court Assistant

