



**Pamellah v Mokaya & another (Civil Appeal E009 of 2022)
[2023] KEHC 19987 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E009 OF 2022**

**WA OKWANY, J
JULY 13, 2023**

BETWEEN

ODERA AKINYI PAMELLAH APPELLANT

AND

WALTER MBOROGO MOKAYA 1ST RESPONDENT

GEORGE MORAA NYACHAE 2ND RESPONDENT

(Being an Appeal against the Judgment of the Hon. S. K. Arome, Senior Resident Magistrate dated and delivered on 2nd February 2022 in the original Principal Magistrate's Court at Keroka, Civil Case No. E005 of 2021)

JUDGMENT

1. The appellant herein was the 2nd defendant before the trial court where the 1st respondent sued her alongside the 2nd respondent. The 1st respondent's (plaintiff) case was that he was, on the December 8, 2020, lawfully walking on the verge of Metamaywa-Tinderet road at Mecheo area or thereabouts when the appellant's motor vehicle Reg No KBZ 518Y was recklessly, negligently or carelessly driven, controlled, or managed by the appellant, her driver, agent or servant that it lost control and veered off the road and knocked him. The 1st respondent stated that he sustained serious injuries in the said accident thus necessitating the filing of the suit for damages arising out of the said accident.
2. On December 8, 2021, the parties recorded consent on liability at 80:20 in favour of the plaintiff/1st respondent. The trial court then proceeded to hear the case on quantum and rendered a decision on 2nd February as hereunder:
 - a. Liability by consent 80:20
 - b. General damages for pain & suffering - Kshs 3,000,000/=



Less 20% contribution – Kshs 600,000/=

Sub-total – Kshs 2,400,000/=

c. Future medical expenses Kshs 300,000/=

d. Special damages – Kshs 413,275/=

Net total Kshs 3,113,275/=

3. Dissatisfied with the decision of the trial court on quantum, the appellant filed the present appeal in which she listed the following 5 grounds of appeal: -
 1. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently, coming to a wrong conclusion on the same.
 2. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
 3. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
 4. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances, that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
 5. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.
4. The appellant urged this court to set aside the lower court's judgment with costs.
5. The appeal came up for directions on April 26, 2023 when the parties agreed to canvass it by way of written submissions.
6. The Court of Appeal discussed the duty of a first appellate court in *Silvano Nyaga Peter v Misbeck Silverius Njiru* [2013] eKLR where the learned judges quoted the case of *Jabane v Olenja* [1986] KLR 661 at pg 664 and held thus: -

“This being a first appeal we are reminded of our primary role namely, to re-evaluate and re-analyze the facts as they were before the trial judge and then arrive at our own conclusions on the issues in controversy as between the appellant and the respondent and give reasons for the same.”
7. I am therefore duty-bound to re-examine the entire trial record in order to arrive at my own independent findings. The main issue for determination is whether the award of Kshs 3,000,000/= for pain and suffering was excessive.
8. The principles that should guide the court in determining whether or not to interfere with the lower court's award of damages were stated by the Court of Appeal in *Kemfro Africa Limited t/a Meru*



Express Service Gathogo Kanini v A.M Lubia and Olive Lubia (1982 –88) 1 KAR 727 at p. 730, where Kneller J.A held thus: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

9. I have perused the medical evidence presented at the trial and i note that the 1st respondent suffered the following injuries: Lumber 1 vertebra, lumber 2 vertebra grade 2 traumatic spondylolisthesis, blunt trauma to the back, chest contusion, bruises on the right knee, bruises on the left knee, deep cut wound on the back, bruises on the right elbow and bruises on the left elbow.

10. The appellant argued that the trial court’s award for pain and suffering was excessive. She referred to the decision by the Court of Appeal in Mbaka Nguru and another v James George Rakwar Nrb CA civil appeal No 133 of 1998 [1998] eKLR, where it was held that: -

“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.”

11. I have considered the 1st respondent’s injuries alongside the following comparable cases: -

- a. Geoffrey Alex Wachira Njagua v Gathuthi Tea Factory & another [2010] eKLR. where the plaintiff suffered blunt injuries of the head with a contusion, fracture of the left tibia, fracture of the right fibula, cut wound on the forehead, bruised elbow and bruised knee and was awarded Kshs 3,000,000/=.
- b. In Nicholas Njue Njuki v Eliud Mbugua Kaburo [2014] eKLR, Ngaah J. awarded Kshs 3,800,000/= in general damages for pain, suffering and loss of amenity for unstable fracture dislocation of lumbar vertebrae leading to spinal cord damage; complete paralysis in the lower limbs; incontinence of stool and urine. Permanent incapacity was assessed at 100%.
- c. In Nancy Oseko v Board of Governors Masai Girls High School [2011] eKLR. the plaintiff sustained chest injury, head compression, fracture of the thoracic spine no. 12 and loss of sensation from the level T-12 downwards, loss of motor function from the same level downwards and other injuries and was awarded Kshs 2,500,000/= general damages for pain suffering and loss of amenities.

12. In this present case, I note that the injuries are less severe than the injuries sustained by the claimants in the above-cited cases considering the injuries stated in the medical reports supplied by both the appellant and the 1st respondent. I note that the main injury suffered by the 1st respondent was spondylolisthesis of L1 and L2 on the spine and soft tissue injuries on his torso and extremities. The 2nd medical report by Dr Adero (D.Ex1) indicated that the surgical site had healed and the respondent could retain stool and urine, with no erectile dysfunction. I have also noted that although the 1st respondent had healed; he was still walking with a cane. Dr Adero assessed his permanent disability at 20% while Dr Morebu who conducted the first medical examination assessed it at 60% which meant that his healing was progressive.



13. In my view and considering the injuries shown in the medical reports and the above cited cases, I find that the award of general damages of Kshs 3,000,000/= was excessive. I at the same time find that the appellants' proposal of an award of Kshs 800,000/= is inordinately on the lower side.
 14. I have also taken into account the inflationary trends that has wreaked havoc on the value of the Kenyan shilling. I therefore set aside the award of Kshs 3,000,000/= and substitute it with an award of Kshs 2,000,000/= which I consider to be a fair compensation for pain and suffering.
 15. In the end, I find that this appeal is merited and I therefore allow it only to the extent of quantum of general damages for pain and suffering. I make the final orders as follows: -
 - i. Liability by consent 80:20
 - ii. General damages for pain and suffering – Kshs 2,000,000/=
 - iii. Future medical expenses Kshs 300,000/=
 - iv. Special damages – Kshs 413,275/=Sub total – Kshs 2,713,275/=
16. Each party shall bear their own costs of the appeal.
 17. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE

