



REPUBLIC OF KENYA



KENYA LAW
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**Mugo v Kagwima (Civil Appeal E021 of 2021)
[2023] KEHC 21498 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E021 OF 2021
DKN MAGARE, J
AUGUST 1, 2023**

BETWEEN

JUDITH MIKUI MUGO APPELLANT

AND

STEPHEN KIRAGU KAGWIMA RESPONDENT

JUDGMENT

1. The appeal is from the judgment of Hon Lesootia Saitabau given on February 23, 2021 in Mombasa CMCC 1336 of 2015.
2. The appellant has 5 grounds of appeal. They are all on quantum.
3. The Court of Appeal in *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR warned against having prolixious grounds. It stated as doth:-

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 others* [2018] eKLR. In the latter case, this court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve



anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.”

4. The only ground of appeal raised is that: -

“ 1. On the basis of stare decisis, the court erred in awarding damages that are so low as to amount to an erroneous estimate of damages in other words, the court was plain wrong in award of damages.

Duty of the Court

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. In the case of *Mbogo and another v Shab* [1968] EA 93 where the court, Duffus VP stated: -

“...that this court will not interfere with the exercise of judicial 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

7. In the case of *Peters v Sunday Post Limited* [1985] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. In *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Analysis

9. This being an appeal on damages, the analysis will include review of the law on damages. The High Court, pronounced itself succinctly on these principles in [*Kemfro Africa Ltd v Meru Express Service V.A.M Lubia & another* 1957 KLR 27](#) as follows: -

“The principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by the trial judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the judge in assessing the damages, took into account an irrelevant facts 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 damages.

10. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the common law principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the learned judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

11. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.
12. In a nutshell, I cannot substitute award of damages with my own view. That is to say, even if I would have awarded differently, if I was sitting I cannot substitute the court's discretion with mine.
13. This then means that where it comes to damages, they must not be shown to be low or high but must not only be low or high, but also so low or so high as to amount to an erroneous estimate of damages. In other words, for a person knowing the injuries the plaintiff suffered and being fairly informed, must come to a conclusion that the court did not appreciate the fullest extent of the injuries or that the damages relate to a different kind of injury than what you know the plaintiff suffered. He should ask, he only suffered this kind of injuries, why is he being overpaid so much or vice versa.

Pleadings

14. In her plaint dated July 13, 2015, the appellant pleaded the following injuries.
- a. Head injury with (i) brain swelling oedema
 - (ii) bleeding in the brain (subdural haematoma)
 - (iii) brain contusion (right frontal/temporal)
 - b. Fracture of the right tibia and right fibula leg bone medial and lateral an ankle malleolus)
 - c. Displacement (subluxation) of right ankle joint
 - d. Fracture of upper front tooth No.: - 11
 - e. Cut on the tongue.
15. The P3 form showed features of temporal parietal bone, and cut wound on the tongue in the fracture of both medial and lateral tibia and fibula and subluxation of the Right ankle.
16. In her submissions the plaintiff relied on the cases of *New Original Investment Co Ltd v Bernard Kimatu Muia* [2019] eKLR, *Edward Mzamili Katana v CMC Motors Group Ltd & another* [2006] eKLR and *Keter Kimtai & another v Christopher Kamau Kiruku* [2018] eKLR, *Duncan Mwenda & 2 others v Silas Kinyua Kithela* [2018] EKLR, Francis Ndungu wambui & 2 others v Benson Maina Karanja v Transami Transporters (K) Ltd [1999] eKLR and *Daniel Otieno Owino & another v Elizabeth Atieno Owino* [2020] eKLR.



17. The court relied on the case of *Civicorn Ltd v Richard Njomu Omwancha & 2 others* (2019) eKLR. The court then awarded 500,000/= in general damages less agreed liability.
18. It is against the award of 500,000/= that the appellant is appealing.

Applicant submissions

19. The appellant filed submissions dated April 18, 2023. She relied on the case of *Ken Odondi and 2 others v James Okoth Omburu T/A Okoth Ombura and Company Advocates* where it was held that the court can aside an award of damages, it is demonstrated that the award is too low or too high as to amount to erroneous estimate of damages.
20. The appellant is of the view that she suffered 8% permanent disability, due to the fracture of the right tibia and fibula displaced (sub luxation of the right ankle, fracture of the upper front tooth No 11 and fractures remain weak points for life and expected stiffness of the right ankle.
21. He faults the court for using the percentage of disability instead of severally of the injuries. They urge the court to award 1,500,000/=. They rely on *Kieri Peter and 2 others v Martha Njeru Githiomi* (2020) eKLR. In that matter the court award 1,500,000/= for arachnoid hemorrhage, compound fracture of tibia and fibular with no permanent disability.
22. He also relied on *Robert Jeriot v Geoffrey Nyakundi Abere* [2021] eKLR, where the plaintiff suffered right pelvic bone fracture, fracture of the acetabular bone fracture of the right radius, fracture of the left radius cut wound on the anterior and 8 % permanent disability.
23. The other case relied on was that of *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another* [2015] eKLR, where 1,500,000/= was awarded for fracture of left ulna fracture of right tibia and fracture of right fibula. She also relied on the *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR, where 1,300,000/= was awarded for unconscious ness, broken out fracture of tibia and fibula bones and soft tissue injury to the head.
24. The hall mark of all decisions used by the appellant that they related to extremely serious injuries. They are far removed from the appellant's injuries.

The Respondent's submissions

25. The respondent filed submission dated April 28, 2023. He relied on *Anisa Ali (suing through her mother Fatuma Abdulla Salim as next friend) v John Mubozozo & another* [1983] eKLR, where the court stated that no one case is the same as another. He supports the authority of *Civicon Ltd v Richard Njomo & 2 others* (2019) eKLR, which the court considered before awarding damages. It is the respondent's view that the award of damages was proper.

Analysis

26. The duty of the court is not to punish the tortfeasor. It is to award damages commensurate with the injuries. The court awards not only on the basing of the injuries, by their degree if permanency.
27. The award of liability may have been agreed upon. For the court to set aside damages, they must be inordinately high or inordinately low. The authorities used in the court below show that the appellant was using exaggerated injuries well outside the range of the actual injuries suffered. For example, a fractured tooth or broken ankle can never equated to archiroid Hemorrhage or compound fracture. As shown above multiple fractures of serious nature attract Kshs 700 – 8000 /= with more complicated one, going for 1,000,000/=.



28. The award is meant to give a fair compensation and not to unjustly enrich the claimant. In *John Kamore & another v Simon Irungu Ngugi* [2014] eKLR, the court, Justice Ngaah Jairus, posited as doth: -

“In arriving at the figure of Kshs 500,000/= which he awarded the respondent as general damages subject to apportionment on liability, the learned magistrate held, correctly in my view, that the respondent is only entitled to what is fair, just and reasonable and that whenever assessments such as this are necessary, they must be done with moderation; they should neither be seen to be enriching the plaintiff or punishing the defendant. In the learned magistrate’s view, which view is consistent with the law, a plaintiff in a claim such as the claim before him is only entitled to what is fair, just and reasonable.”

29. In the case of *Wanyiri Kiboro v Attorney General* CA 151/88 (Gachuhi, Masime, Kwach JJA) unreported, Justice, Kwach, JA, as then he was, stated as doth: -

“I am satisfied and find that the plaintiff was maliciously prosecuted. That such prosecution was politically motivated. He has therefore suffered loss, ill treatment and torture.

“The purpose of damages is not to punish a defendant but to afford a plaintiff a reasonable compensation or the loss or injury he has suffered.”

30. In the decision of *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR, which was relied on by the respondent and which the court below relied on was a decision justice Majanja made on April 25, 2019. In that case the court reviewed previous decisions.

31. In *Clement Gitau v GKK* [2016] eKLR, the appellant had a fracture of the tibia/fibula and bruises on the neck. An award of Kshs 600,000/= was upheld on appeal. It is clear that an award for the injuries suffered by the appellant range from 400- 600,000/=. However, the court did not differ significantly with decide cases.

32. I therefore find no merit in the appeal.

Determination

33. The upshot of the foregoing is that I make the following orders: -

- a. The appeal herein is bereft of merit and is accordingly dismissed with costs.
- b. The respondents costs of 50,000/= be paid within 30 days. in default they be deducted from the award given in the lower court.

34. The file is closed.

DELIVERED, DATED and SIGNED at MOMBASA on this 1st day of August, 2023. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Brian

