



REPUBLIC OF KENYA



**Achari v Omwoyo & another (Civil Appeal E001 of 2020)
[2023] KEHC 22363 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E001 OF 2020
F GIKONYO, J
SEPTEMBER 19, 2023**

BETWEEN

HYLINE KWAMBOKA ACHARI APPELLANT

AND

MARY OMWOYO 1ST RESPONDENT

EDWARD ONGERI SWANYA 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. A.N. Sisenda
(RM) delivered on 19.10.2020 in NAROK CMCC No. 89 of 2017)*

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate’s Court at Narok in Civil Suit No. 89 of 2017 delivered on the 19.10.2020. The trial court entered judgment for the appellant against the respondents jointly and severally as follows;
 - i. Liability: 85% against the respondents.
 - ii. General damages: Kshs. 400,000/=
 - iii. Less 15%: Kshs. 60,000/=
 - iv. 85%: Kshs. 340,000/=
 - v. Add: special damages: Kshs. 2,550/=
 - vi. Future medical costs: Kshs. 150,000/=
 - vii. Total KSHS. 492,000/=



- viii. The respondents to pay costs of the suit to the appellant and interest at court rates as prayed.
2. The memorandum of appeal dated 09.11.2020 cited three (3) grounds of appeal which relate to; i) quantum of damages

Background

3. The appellant vide plaint dated 16.06.2017 pleaded that she was lawfully standing on the kerb along Narok road near Hass petrol station. The 2nd respondent negligently drove, managed and / or controlled motor vehicle registration number KBF 414 W in such a reckless manner that it veered off the road and knocked the appellant. The appellant was thrown off into a drainage and as a result, she sustained severe injuries thereto.
4. The injuries suffered by the appellant were enumerated by Dr Cyprianus Okere in his medical report dated 22.03.2017 as thus;
- a. Compound fracture of the right tibia and fibula.
5. The said doctor classified the injuries as grievous harm and assessed the degree of permanent incapacity at 30%.
6. The 1st respondent entered appearance and filed her defence. She denied any liability whatsoever. She however did not file any documents and /or witness statements in support of her case.
7. The suit against the 2nd respondent was withdrawn vide notice of withdrawal dated 05.11.2018.
8. Being aggrieved with the decision of the trial court, the appellant has filed the appeal herein.

Appellant's Submissions

9. The Appellant submitted that the learned trial magistrate erred by failing to judiciously analyze the evidence on record thereby relying on evidence that was never adduced before the court. That the trial court in its judgment stated that the permanent incapacity assessed by Dr. Wokabi was 8%. Also, that the 1st respondent in their submissions quoted permanent incapacity at 15% yet did not file any documents or call any witnesses to support her case. Therefore, the percentages quoted by the trial magistrate and the 1st respondent were not provided for. The appellant relied on the case of *Mutiga Kamai V Pius Muthuri Mukaria* [2020] Eklr
10. The appellant submitted that the trial court relied on caselaw which were inconsistent wherein the injuries were unrelated to the injuries suffered by the appellant herein. That the trial magistrate failed to judiciously analyze the medical evidence on record to the extent of the injuries sustained by the appellant. That therefore, the magistrate arrived at an award on general damages which was inordinately low. That the injuries suffered by the victims in the case laws relied upon by the respondent and the trial court were fracture of the right tibia and fibula, while the injuries sustained by the appellant were compound fractures of the right tibia and fibula which are far more grievous. The appellant relied on the cases of Migori Civil Appeal No. 7 Of 2015, Formerly Kisii HCCA No. 86 Of 2012: *Harun Muyoma Boge Vs Daniel Otieno Agulo* And *Gladys Lyaka Mwombe V Francis Namatsi & 2 Others* [2019] eKLR
11. The appellant submitted that the trial court misapprehended the evidence on record and arrived at an award which was inordinately too low in the circumstances. That the medical report by Dr. Cyprianus Okere showed that the appellant sustained a compound fracture of the right tibia and fibula with a 30 % degree of permanent incapacity. The appellant proposed an amount of Kshs. 1,500,000/= for



general damages for pain and suffering. The appellant relied on the cases of *Stanley Maore V Geoffrey Mwenda* NYR CA Civil Appeal No. 147 Of 2002 [2004] eKLR, *Francis Ndungu Wambui & 2 Others V VK (A Minor Suing Through Next Friend And Mother MCWK)* [2019] eKLR, *Kornelius Kweya Ebichet V C & P Shoe Industries Ltd* (2008) eKLR, *Frankline Chilibasi Spii V Kirangi Liston* [2017] eKLR, *Mwaura Muiruri Vs Suera Flowers Limited & Another* [2014] eKLR, *John Mwangi Munyiri & Another V Paul Wacira Njuguna* [2020] eKLR, *Stephen Kamau Wanderi & Another Vs Gladys Wanjiku Kungu* [2006] eKLR.

The 1st Respondent's Submissions

12. The 1st respondent submitted that the trial court rightly awarded Kshs. 400,000/= in general damages and the same is neither inordinately high or low as to warrant the same to be set aside. That the trial court was well guided by principle of comparable injuries as the cases cited by the appellant the injuries were more grievous, severe and multiple than the appellant's injuries. The 1st respondent relied in the cases of *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5, *Arrow Car Limited V Elijah Shamall Bimomo & 2 Others* [2004] eKLR, *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR, *Mbaka Nguru And Another V James George Rakwar* NRB CA Civil Appeal No. 133 Of 1998[1998] eKLR, *Denshire Muteti Wambua Vs Kenya Power & Lighting Co. Ltd* [2013] eKLR, *Ndwiga & Another V Mukimba* (Civil Appeal E006 Of 2022) [2022] KEHC 11793 (KLR), *Cecilia Mwangi & Another Vs Ruth Mwangi* CA 251 Of 1996 Cited In The *Case Of Nancy Oseko Vs Board Of Governors Masai Girls High School* [2011] eKLR, *Lim V Camden HA* [1980] AC 174.
13. The 1st respondent submitted that the injuries in the cases of *Daniel Otieno Owino & Elizabeth Atieno Owuor*[2020] eKLR, *Aloise Mwangi Kabari V Martin Muiya & Another* [2020] eKLR, *Dg(Minor Suing Her Next Friend MOR V Richard Otieno Onyisi* [2021] eKLR, *Maina Onesmus V Charles Wanjobi Githome* [2019] eKLR, *Wakim Sodas Limited Vs Sammy Aritos* [2017]eKLR, *Blue Horizon Travel Co. Ltd Vs Kenneth Njoroge* [2020] eKLR were instances where the plaintiffs had suffered grievous injuries which were more severe than those that the appellant allegedly sustained.
14. The 1st respondent urged this court to uphold the amount awarded by the trial court as adequate to compensate the appellant and dismiss this appeal with costs.

The 2nd Respondent's Submissions.

15. The 2nd respondent did not file any written submissions.

Analysis And Determination

Duty of court

16. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.
17. The first Appellate Court should therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor -Vs- Associate Motor Boat Co. Ltd* 1968 EA 123.

Issues

18. Directions were given that the appeal be disposed of by way of written submissions. The appellant and the 1st respondent filed their respective written submissions, which I have considered.



19. A single issue arises for determination in this appeal; whether the damages awarded was inordinately low as to warrant its being set aside.
20. An appellate court would interfere with the discretion of the trial court in assessment of damages only where; i) the trial court committed an error in principle; or ii) the damages are too high or low as to be completely erroneous estimate of damages (*Kemfro Africa Ltd T/A "Meru Express Service Gathogo Kanini Vs A.M Lubia and olive* (1982-88) 1 KAR 727 at page 73)
21. The trial magistrate awarded Kshs 400,000/= as general damages; the appellant regards the award as inordinately low. The 1st Respondent considers it fair compensation for the injuries sustained.
22. Damages are awarded in accordance with the nature of injuries sustained. The appellant herein sustained the following injuries-
 - i. Compound fracture of the right tibia and fibula.
23. There are two medical reports produced as exhibits. There is a medical report by Dr. Okere dated 22.03.2017 which assessed the permanent incapacity at 30%. The doctor noted recurrent pains in the right lower leg, and inability to lift heavy load. He classified the injury as grievous harm. The right upper and lower leg had a lacerated scar and healed fracture site is palpable, tender on a deep palpation. He walks with a limp.
24. According to the medical report by Dr. Wokabi dated 27.11.2018 he assessed permanent incapacity at 8% and projected the removal of the k-nail would cost Kshs. 120,000/=. He confirmed the compound fracture of the right tibia and fibula. He noted complaints that the said leg swells, cannot walk or stand for long hours or carry heavy loads. Upon examination he found that she was walking normally, obvious moderate swelling of the leg, trauma and surgical scars on the right shin, no deformity of the leg, clinically, the fracture is united and healed well and in good position.
25. From the medical reports it is discernible the injuries sustained by the appellant were severe. The post-traumatic effects of these injuries on her life and health are severe also as she may not walk long distances or carry heavy objects or stand for long due to the pain in the right leg. The leg is still swollen and the swelling is obvious- see Dr. Wokabi's report. In light of these injuries, is the award of Kshs. 400,000 inordinately low?
26. The Appellant cited authorities with the awards ranging from Kshs 1,800, 000/= to Kshs. 900,000/=. The respondent relied on an authority where the court awarded Ksh. 300,000/=.
27. The court notes that the injuries in the authorities cited by the appellant entails either fracture on right distal tibia and fibula among other injuries, or compound fracture of the right tibia fibula, comminuted fractures of the right humerus and soft tissue injuries. The authority has the injuries suffered by the appellant along with other severe injuries. But as no injury is exactly like the other, these previously decided cases act as a general guide. The injury has severe post-traumatic effects on her life as well as health in a significant way to the extent that permanent incapacity has been assessed at 30% and 8% by Dr. Okere and Wokabi, respectively.
28. The authority by the 1st respondent does not offer any pointed guidance and carry very low award.
29. The case of *Stephen Kamau Wanderi & Ano vs. Gladys Wanjiku Kungu* (*supra*) is appropriate. It awarded Kshs. 600,000 for comparable injuries.
30. Accordingly, in light of the injuries sustained, inflationary trends and the comparable authorities, the award of Kshs. 400,000 is inordinately low. It is set aside. And, in lieu thereof, the court makes an



award of Kshs. 600,000 in general damages, costs and interest. All the other awards remain as awarded by the trial court.

31. The appeal therefore succeeds. Costs of the appeal goes to the appellant.

32. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 19TH DAY OF SEPTEMBER, 2023.

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F. GIKONYO M.

JUDGE

In the presence of:-

M/s Muthiani for the Appellant

M/s Gesare for Nyakora for the 1st Respondent

Mr. Muraguri –C/A

