



**Johnson v Ayiera (Civil Appeal 136 of 2022)
[2023] KEHC 22523 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 136 OF 2022
RN NYAKUNDI, J
SEPTEMBER 25, 2023**

BETWEEN

JANE JOHNSON APPELLANT

AND

TIMOTHY OGACHI AYIERA RESPONDENT

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Onyinkwa & Co. Advocates

Nyamwega Osoro & Co. Advocates

1. The appeal herein arises from the decision of honourable B.K. Kiptoo delivered on 9/9/2022 in Eldoret CMCC No E207 of 2020; Timothy Ogachi Ayiera v Jane Johnson. The respondent instituted a suit against the appellant vide a plaint dated November 30, 2020 seeking general damage, costs and interests of the suit. The cause of action was that on October 7, 2020 the respondent was a pillion passenger onboard motorcycle registration number KMDZ 863X along Eldoret - Nakuru road when at Fountain Hospital the defendant so negligently and/or recklessly managed and/or drove motor vehicle registration number KCL 835C that it knocked the plaintiff who was on the motorcycle and as a result of which the plaintiff sustained severe bodily injuries.
2. The respondent sustained the following injuries; Blunt injury to the head Blunt injury to the neck Blunt injury to the chest Blunt injury to the left thumb Bruises and blunt injury to the left leg Dislocation of the left ankle
3. The trial court considered the evidence of the witnesses and the evidence before the court and apportioned liability at 90:10 against the appellant herein. The court awarded damages as follows;
 - a. General damages....Kshs 250,000/-



- b. Special Damages.....Kshs 6,550/-
4. Being aggrieved with the judgement and decree the appellant instituted the present appeal vide a Memorandum of Appeal dated September 28, 2022 premised on the following grounds;
1. The learned trial magistrate erred in law and in fact in awarding Kshs 250,000/ as general damages which was manifestly excessive having regard to the injuries sustained by the respondent.
 2. The learned trial magistrate erred in law and in fact in adopting the wrong principles in making a determination on the assessment of damages payable to the respondent thereby arriving at an erroneous decision.
 3. The learned trial magistrate erred in law and in fact in failing to take into consideration and/or be guided by relevant authorities and/or precedents with comparable injuries like the ones sustained by the respondents thereby arriving at an excessive amount payable for general damages.
 4. The learned trial magistrate erred in law and in fact in failing to take into account relevant issues and/or factors in making a determination as to the damages payable thereby arriving at an erroneous decision.
5. The appeal was prosecuted by way of written submissions.

Appellant's submissions

6. Learned counsel for the appellant filed submissions on June 28, 2023. Counsel urged that the trial magistrate while appreciating the principle and/or the guidelines behind awarding and/or assessment of damages for personal injury cases i.e. to restore the parties to the initial position; erred in awarding general damages which were excessive. Further, that the trial magistrate should have awarded damages that were in tandem with the injuries sustained. Counsel submitted that, it is a known principle in law that comparable injuries ought and should attract comparable damages as the court observed in the case of *Arrow Car Limited v Elijah Shamalla Bimomo & Others* (2004) eKLR. Further, that taking into account the nature of injuries that the respondent suffered an award of Kshs 90,000/= to Kshs 100,000/= would suffice as opposed to Kshs 250,000/= which the court granted as compensation.
7. The appellant urged the court set aside the judgement of the trial court and make its own independent assessment on quantum as pleaded herein and reassess the same downwards.

Analysis & Determination

8. The tort of negligence has its origin in common law. In *Rothwell v Chemical & Insulating Co Ltd* (2007) the court observed as follows:

a claim in or based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability".

Similarly in *Salmond and Heuston on the Law of torts* the learned authors stated that:

Negligence is conduct, not state of mind. Conduct which involves an unreasonably great risk of causing damage...negligence is the omission to do something much a reasonable man,



guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.

9. I take as my starting point the above principles as the commonly accepted approach, to assess the extent of the Appellants liability for the respondent's loss. Here it calls for an inquiry as examined by the trial court as to whether the wrongful conduct by the Appellant causally contributed to the loss, pain and suffering of the respondent. Further, what is the extent of the loss for which the appellant ought to have been held liable. The mechanism is in the details of the injuries suffered and the breach of the duty of care which resulted in the loss. It is therefore useful for an appeals court in the circumstances to appropriately evaluate the factual and counter factual of the claim within the scope of the duty of care and identify the fair allocation of risk between the parties to the litigation. The legal interest entitling the claimant/plaintiff is to be assessed based on the integrity of his life, impairment, pain, suffering and disability, which is traceable to the damage occasioned by the defendant, in this case the appellant. The argument against the trial court is on an overreach on the claim for damages. It is been suggested by the appellant that the damages were far beyond the jurisprudential anchor on the same awards decided by the superior courts. This court is therefore being asked to correct the error and place through value on the award of damages. The basis of this calculation is simply to answer the question Whether the award for damages was excessive

10. Before embarking on determination of the appeal, I must set out the duty of an appellate court. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

11. The appeal is against the award for damages granted by the trial court. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;

An appellate court will not disturb an award for damages unless it is 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”.

12. In that regard, an appellate court will only interfere with the judgment of the trial court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

13. It is trite law that when awarding damages, the courts are to be guided by comparable awards for comparable injuries that have been awarded in other cases. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that

comparable injuries should attract comparable awards.”



13. In *Shabani v City Council of Nairobi* (1985) KLR 516 the Court of Appeal had the following to say regarding the paramount need for Courts to attempt to give comparable awards in like cases:

There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is...to have regard to recent award in comparable cases in the local courts.

14. I have considered the authorities cited by the parties and similar awards for comparable injuries that have been granted in various decisions. I have also taken into account the fact that the injuries sustained by the respondent were soft tissue injuries.
15. In *Justine Nyamweya Ocboki & another v Juma Karisa Kippingwa* [2020] eKLR the respondent had suffered a blunt object injury to the lower lip, a blunt object injury to the chest and a blunt object injury to the left wrist. The Court set aside an award of Kshs 300,000/- and substituted it with an award of Kshs 152, 550/-
16. In *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD* [2021] eKLR the respondent suffered multiple cut wounds on the right lower limb, bruises on the right lower limb, bruises on both elbows, bruises on the right iliac region and bruises on the frontal region. The court set aside an award of Kshs 230,000/- and substituted it with one for Kshs 180,000/=.
17. When considering previous decisions in determining quantum, the court must also take into account issues such as inflation. In *Telkom Orange Kenya Limited v S O (minor suing through his next friend and mother* [2018] eKLR Majanja J stated:-
- In addition, the current value of the shilling and the economy has to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service v Gachoki NKU CA Civil Appeal No 66 of 1981 [1982] KLR 661*).”
18. Upon considering the comparable awards for comparable injuries, the injuries sustained in the present appeal, and all other relevant factors, I find no reason to disturb the award.
19. The appeal is dismissed with costs to the respondent.
20. It is so ordered.

DELIVERED VIA E-MAIL AT ELDORET ON THE 25TH DAY OF SEPTEMBER 2023

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R. NYAKUNDI

JUDGE

