



REPUBLIC OF KENYA



KENYA LAW
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**Muthoga v Kibuchi & another (Civil Appeal 30 of 2015)
[2023] KEHC 22310 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 30 OF 2015
HM NYAGA, J
SEPTEMBER 18, 2023**

BETWEEN

JANE WANGECHI MUTHOGA APPELLANT

AND

SIMON GITHUI KIBUCHI 1ST RESPONDENT

JOSEPH THEURI NDERITU 2ND RESPONDENT

(Being an Appeal from the Judgment delivered on 11th February 2015 by Hon. Amwayi Resident Magistrate in Nakuru Chief Magistrate's Court Civil Case No. 591'B' of 2012)

JUDGMENT

Introduction

1. The Appellant instituted a suit in lower court seeking general and special damages for injuries sustained in a road traffic accident on 14th January 2012.
2. A consent on liability was entered whereby the respondent bore 90% liability while the appellant bore 10% liability. The matter proceeded for assessment of damages.
3. At the conclusion of the trial, the learned magistrate made the following award;-
 - (a) General damages at Kshs. 120,000/=
 - (b) Special damages at Kshs. 10,190/=
 - (c) Costs
4. The award of general and special damages was subjected to the 10% contribution.



The Appeal

5. Aggrieved by the award, the appellant filed a Memorandum of Appeal dated 9th March 2015. It is founded on the following grounds:-
 1. The Learned Trial Magistrate erred and misdirected herself in law and in fact by ignoring the Appellant's testimony in court, medical documents produced and his submissions on the gravity of his injuries.
 2. That the Learned Trial Magistrate erred and misdirected herself in law and in fact in her assessment of damages awarded to the Appellant by awarding damages that were inordinately low in the circumstances.
 3. That the Learned Trial Magistrate failed to appreciate and/or misapplied the principles applicable in the assessment of damages under the circumstances.
6. The appellant seeks orders that the Appeal be allowed, the judgment on quantum set aside and that this court re-assesses and enhances the award.
7. When the matter came up for directions, the court directed that the Appeal proceeds by way of written submissions, which were duly filed. It suffices to state that I have considered them and will incorporate them in this judgment.

Analysis and Determination

8. The Appeal is only in respect of quantum. The parties have correctly cited the principles to be applied in a matter where the trial court had exercised its discretion in awarding damages. This court will only interfere with such discretion. If it is satisfied that in making the award, the trial court took account of an irrelevant factor, or left out of account a relevant one or that the award was inordinately low or so high that it must be wholly erroneous estimate of damages. (see *Kemfro Africa Limited t/a Meru Express Service & Another vs A. M. Lubia and Another* (1982 – 88) KAR 727 at 730 cited by both parties).
9. The Appellant's case is that the Appellant sustained serious injuries being:
 - a. Fracture of 2nd, 3rd and 6th ribs
 - b. Soft tissue injuries on the neck
 - c. Blunt injury of the lower abdomen
 - d. Injury to the right breast
 - e. Soft tissue injuries of the back
 - f. Deep cut wounds on the left leg
 - g. Bruises on the anterior aspect or of the left side of the chest
 - h. Bruises on the right leg
10. It was further submitted that the Appellant was examined twice by Dr. Kiamba and the fractures were confirmed. It is also pointed out that the Appellant was awarded 10% permanent disability. It was her submissions that the trial court did not consider the medical evidence and thus fell into error in making its decision. The Appellant proposes that the award of general damages be enhanced to Kshs. 1,000,000/=.



11. The Respondent's case is that the discharge summary did not disclose any fractures as alleged and the court ought to be guided by the same.
12. In her Judgment, the trial magistrate found that in the absence of the X-ray film, she was not able to state if the fractures were related to the accident or not. On that account, she ruled out the fractures.
13. This Appeal revolves around the nature of the injuries sustained by the Appellant. There are two versions of the nature of the injuries.
14. From the documents produced in court, there is a Radiology Request/Report Form dated 14th January 2012 by Moi Teaching and Referral Hospital. It shows that a Radiology Report was requested for, but the Report section is blank. The request was in respect to the Tibia/Fibula, right knee and the chest (marked as CXR a common abbreviation for chest x-ray). It is thus not clear where the discharge summary drew its conclusion that there were no fractures of the chest.
15. The Appellant was re-examined just two (2) days after the accident. A chest x-ray was taken and this time, there was a finding of fractures of 3 ribs. There is a radiology report to that effect and I don't think that it was necessary to have availed the X-ray film itself. An interpretation of the same was presented in court, prepared by an expert.
16. In my opinion, the proximity of the x-ray report must be interpreted to mean that it was related to the accident. This was a patient on treatment and it would be presumptuous to relate the injury to any incident other than the accident in question.
17. I find that the trial magistrate erred in ruling out the fractures sustained by the Appellant and thus ended up making an award that was inordinately low. I am therefore inclined to interfere with the award made by the trial court.
18. I will now deal with the question of what award I should make, in view of the finding that I have made above.
19. I have considered the submissions by the parties made in the lower court and on Appeal.
20. My view is that any award made must be pegged to the awards that were made at the material time. That is in 2015.
21. I have considered the following authorities cited by the parties;-
 - a. *Joseph Mavula Mutua vs Samuel Njoroge Mwangi* (2003) eKLR.
 - b. *Sospeter kimutai and Another vs Isaac Kipleting Boit* (2021) eKLR.
 - c. *Michael Okello vs Priscilla Atieno* (2021) eKLR
 - d. *Comply Industries Limited vs Julius Kuria Kabutu* (2020) eKLR.
22. From the authorities, it is apparent that the courts have generally awarded the claimants damages in the region of Ksh. 225,000/- to Ksh 700,000/-. No cases are exactly the same and the court will only attempt to make an award that it feels is reasonable in the circumstances.
23. In this case the injuries sustained by the appellant were quite severe and she was awarded a 10% disability.
24. I am of the view that an award of Kshs. 400,000/= would suffice as compensation for the Appellant. I reassess the damages to this amount.



25. On costs, I think that since the Appellant is successful, it is only fair that she be awarded the costs of this Appeal and I order so.
26. In conclusion, I hold as follows;-
- a. The award of general damages by the lower court is set aside and is substituted with an award of Kshs. 400,000/=. The award shall be subject to 10% liability.
 - b. The Appellant shall have special damages as awarded by the lower court at Kshs. 10,190/= subject to 10% liability.
 - c. The Appellant shall have costs of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF SEPTEMBER, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Sitati for Respondent

Mr. Njuguna for Appellant

