



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge & another v Muchai (Civil Appeal E14 of 2022)
[2023] KEHC 22428 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E14 OF 2022**

**FR OLEL, J
SEPTEMBER 22, 2023**

BETWEEN

JAMES KIARE NJOROGE 1ST APPELLANT

DANIEL KAMAU MUGURE 2ND APPELLANT

AND

ESTHER WANJIRU MUCHAI RESPONDENT

***(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON H.O BARASA
SRM DELIVERED ON 27TH JANUARY- 2022 IN NAIVASHA SPMCC No. 37 OF 2020)***

JUDGMENT

1. The Appellants were the defendants in the primary suit, where they were sued jointly and severally by the respondent as the lawful, registered and/or beneficial owner(s) and or user(s) of Motor vehicle KCF-910C (hereinafter referred to as the suit motor vehicle). The respondent alleged that on 31st March 2020 she was a lawful passenger aboard the suit motor vehicle along Engineer- Miharati Road at/near Kianjogu area when the driver of the suit motor vehicle in his/her lawful course of duty, employment and or engagement so carelessly, negligently, and/or recklessly drove, managed and/or controlled the suit motor vehicle as a result of which it lost control, veered off the road, torpedoed, fell, ploughed-down crashed and/or had a self-involving accident as a result of which the plaintiff/respondent herein sustained serious body injuries.
2. The appellants filed their statement of defence dated 24th June 2020 where they denied the occurrence of the accident and stated in the alternative that if at all the accident occurred, (which was denied) then it was caused solely and/ or largely contributed to by the negligence of the plaintiff which was particularized in the said statement of defence as filed.



3. After hearing the suit, the learned magistrate in her judgment delivered on 27th January 2022 apportioned Liability at 100% as against the appellants and proceeded to award damages to the tune of Kshs 723,250 plus the cost of the suit.
4. The Appellants, being dissatisfied by the whole of the judgment did file a memorandum of Appeal on 16th February, 2022 and raised several grounds of appeal namely:-
 - a. That the learned trial Magistrate erred in law and in fact in awarding Kshs 700,000 under general damages for pain and suffering which was inordinately high in the circumstances.
 - b. That the learned trial magistrate erred in law and in fact in awarding damages and costs without basis or proof of the same.
 - c. That the learned trial magistrate erred in law and in fact in failing to accord due regard to the Appellants' submissions on quantum on applicable principles of assessment of damages.
5. The Appellant herein is thus mainly aggrieved with the issue of quantum of damages as awarded terming the same as inordinately high and excessive.

Facts of the Case

6. The plaintiff/respondent testified that on or about the 31st March 2020, she was a lawful passenger aboard the suit motor vehicle along Engineer-Miharati Road at / near Kianjogu area when the driver of the suit motor vehicle in his/ her lawful course of duty or employment so carelessly, negligently and recklessly drove, managed and controlled the suit motor vehicle as a result it lost control, veered off the road and had a self-involving accident as a result of which she sustained serious bodily injuries.
7. PW1 the plaintiff testified that she used to work as a farmer and following the injuries sustained, she has never resumed her normal duties. She testified that she has not fully healed and cannot lift any object that is above 5kg with her right hand. She still experiences pain in the back and in the chest and whenever it is cold, she usually feels nauseated.
8. Pw2 Inspector Hussein Muhamud Ali, attached to Kipipiri Police station testified that on 31st march 2020, at about 1855 hours they received an accident report through one Mwaura who indicated that an accident had occurred at Kianjogu river, He then proceeded to the accident scene with two of his officers and found the suit motor vehicle registered under Satima Sacco which was coming from Engineer headed to Miharati had been involved in an accident. They established that the suit motor vehicle was descending down Kianjogu hill and on reaching the bridge as the road surface was slippery because it was raining, the driver lost control of the vehicle and landed on the right hand side of the road on its body work. The plaintiff was one of the passengers in the suit motor vehicle and they issued her with a P3 form and a police abstract.
9. The appellants did not call any witness to testify on their behalf, but 16th November 2021, the parties recorded a consent whereby the medical report of Dr Jennifer Kauthu was produced as Defence Exhibit. The trial court did consider the evidence adduced and awarded the Respondent a sum of Ksh 7000,000/= as General Damages and Ksh 23,250/= as Special damages.

Appellants Submissions

10. The appellants filed their submissions on 8th March, 2023 and framed the issue for determination as to whether the Quantum of damages awarded was inordinately high and therefore warranted interference by this court. It was submitted that the injuries pleaded by the respondent were: displaced fracture of the right clavicle, soft tissue injuries of the right shoulder joint, soft tissue injuries of the chest, soft



tissue injuries of the left thumb and soft tissue injuries of the back. That assessment of quantum of damages is a discretionary exercise which must be exercised within the provided legal principles.

11. It was also submitted that the discretion in assessing general damages payable will be disturbed if the trial court took into account irrelevant factor, left out of account a relevant factor or the amount is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages. Reliance was placed on the case of *Denshire Muteti Wambua v Kenya Power & Lighting Co.Ltd* [2013] eKLR where it was held that court awards for damages must take into account comparable injuries or similar injuries and awards.
12. The court was urged to uphold the appeal and reduce the award of kshs 700,000 as there was no satisfactory explanation rendered by the trial court in arriving at the overly inflated figure. Reliance was placed on the cases of *Harun Muyoma Boge v Dr. Daniel Otieno Agulo*, Migori HCCA No.86 of 2012, *Naomi Momanyi v G4S Security Services Kenya Limited*[2018] eKLR, *Wakim Sodas Limited v Sammy Aritos* [2017]eKLR, *Gladys Lyaka Mwombe v Francis Namatsi & 2 Others*[2019] eKLR. It was submitted that an award of Ksh.400,000 was wholly sufficient.
13. The court was urged to uphold the appeal and disturb the judgement of the trial court in terms of quantum and cost be awarded to the appellants.

Respondent Written submission

14. The 1st Respondent did file their submission 10th March 2023 in opposing the appeal. It was submitted that as captured in the medical report the respondent was unable to lift objects above 5kgs using her right hand and still experiences pain in the chest and back, has never resumed her farming activities since she was involved in the accident herein and the injuries were assessed by the doctor who placed permanent disability at 15%. As such the award of kshs 700,000 was within the limits and range set by the decided cases.
15. The appellants had not demonstrated/ proved that the learned trial magistrate acted on a wrong principle of law or misapprehended the facts or has for any other reasons made a wholly erroneous estimate of damages suffered to warrant interference by the court. Reliance was placed on the case of *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR.
16. The court was urged to take note that the appellants had introduced and relied on new authorities to challenge the decision of the trial magistrate and which the decisions were not availed to the trial magistrate at the time of making the award and the said citations were not of similar injuries and could be differentiated. Reliance was placed on the case of *Sila Tiren & another v Simon Ombati Omiambo*[2014]e KLR, *Daniel Muchemi & another v Rosemary Kawira Kiambi*[2018], *Easy Coach Limited v Emily Nyangasi* [2017]eKLR, *Aloise Mwangi Kahari V Martin Muiya & another* [2020]eKLR.
17. The proposed award of Ksh.400,000 was not only inordinately low, undeserving but also unmerited and untenable taking into account all the circumstances of the case and ought to be disregarded. The court was urged to look at the applicable principles of law when it comes to an appeal of quantum. The learned trial magistrate did not err when arriving at the award for pain and suffering and hence the same should be upheld and the appeal be dismissed, cost to be awarded to the respondent.



Analysis and Determination.

18. I have considered the pleadings, evidence presented and submissions of the parties in this appeal. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
19. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.
20. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph* AIR 1969 Keral 316.
21. The only issue for determination in this appeal is whether the quantum awarded was inordinately high to warrant interference of the same by this court.
22. As regards quantum, in *Woodruff v. Dupont* [1964] EA 404 it was held by the East African court of appeal that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”

23. The Court of Appeal in *Southern Engineering Company Ltd. v. Musingi Mutia* [1985] KLR 730 also restated three principles which should guide the court in awarding damages, where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a



matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured.

24. In *Mbaka Nguru and Another v. James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR, the court of appeal held that 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.”

25. In *Jane Chelagat Bor v Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

26. Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision whether or not to interfere with an award by the appellate court must necessarily be restricted.

27. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award. It need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials, the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion.

28. The Respondent did suffer a displaced fracture of the right clavicle and soft tissue injuries to the right shoulder joint, chest, left thumb and back. After the accident the Respondent was admitted at J.M Kariuki (Olkalou) Hospital for two days for treatment and followed up further treatment as an outpatient until September 2020. Dr. Wellington K Kiamba did find that she had recovered though the fracture of the right clavicle malunited resulting into a prominent deformity. He classified the injuries suffered as Grievous harm with permanent disability assessed at Twenty (20%). Dr Jenipher Kahuthu



too examined the Respondent and confirmed her injuries. She placed the disability at Ten percent (10%) due to the Malfunction of the clavicle fracture.

29. The appellants did submit that the award should be reduced to Ksh.400,000/= and placed reliance on *Harun Muyoma Boge v Dr. Daniel Otieno Agulo*, Migori HCCA No.86 of 2012, *Naomi Momanyi v G4S Security Services Kenya Limited* [2018] eKLR, *Wakim Sodas Limited V Sammy Aritos* [2017]eKLR, *Gladys Lyaka Mwombe v Francis Namatsi & 2 Others*[2019] eKLR , which were cited as similar awards for similar injury suffered.
30. The Respondent on the other hand urged this court to dismiss the appeal and find that the award granted was not excessive taking into account all the circumstances of the case. The citations relied upon by the appellant were mainly for injury and/or fracture of the (tibia, fibula etc) and were thus inapplicable. The appellant had suffered permanent disability of fifteen (15%) and also suffered severe soft tissue injuries, coupled with inflationary trends the award was proper and within the acceptable range. Reliance was placed on *Board of Trustee Anglican Church of Kenya, Diocese of Marsabit v Adano Isacko* (2019) eKLR.
31. I have considered the judgement, all the citations relied upon and the nature of injuries suffered giving special emphasis to the fact that the Respondent suffered a permanent disability averagely placed at 15%. The learned magistrate properly addressed her mind on all relevant factors while considering the award. It has not been shown where she erred in principle nor was the award of our range as compared with other similar awards given the nature of disability and inflationary trends.

Disposition

32. This appeal therefore has no Merit and the same is dismissed with Costs.
33. The costs of this appeal is hereby assessed at Ksh.150,000/= all inclusive.
34. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of September, 2023.

In the presence of;

.....for Appellant
.....for Respondent
.....Court Assistant

