



REPUBLIC OF KENYA



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**Ngati v Kawama Sacco & another (Civil Appeal E086 of 2021)  
[2023] KEHC 22434 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22434 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E086 OF 2021  
FROO OLEL, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**MUNYIVA NGATI ..... APPELLANT**

**AND**

**KAWAMA SACCO ..... 1<sup>ST</sup> RESPONDENT**

**CAR HOUSE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being An Appeal From The Judgment/decree Of Hon. A. Nyoike (pm.)  
Delivered On 18Th May 2021 In Macabkos Cmcc No 406 Of 2020)*

**JUDGMENT**

1. This appeal is brought against the Judgment/ decree of Honourable A. Nyoike (P.M) dated 18<sup>th</sup> May 2021, where she awarded the Appellant Ksh.400,000/= as General damage, Kshs.150,000/= as future medical expense and Kshs.5,150/= as special damages plus costs and interest.
2. Dissatisfied by this decision, the Appellant filed this Appeal seeking to have the Judgment/decree set aside. The Appeal was founded on the grounds that;
  - i. The learned Trial Magistrate erred in law and in fact by awarding the appellant Kshs 400,000/= in general damages which award was inordinately low compared to the severity of the injuries sustained by the Appellant and the current court awards for similar injuries.
  - ii. The learned Trial Magistrate erred in law and in fact by not putting sufficient weight and consideration to the plaintiff's evidence, submissions, medical documents and the authorities in support thereof.



1. The appellant prayed that this appeal be allowed, the decision of the trial magistrate be set aside and it be substituted with an award which is commensurate with the injuries sustained. The appellant also prayed for costs of this appeal.

#### **A. Brief Facts at Trial**

4. The appellant did file a suit and claimed damages arising out of a road traffic accident which occurred on 10<sup>th</sup> July 2019 at Kaseve Area along Kitui – Machakos road. The Appellant averred that she was a fair paying passenger on motor vehicle KCS 281K Toyota Van (herein after referred to as the 1<sup>st</sup> suit motor vehicle), which belonged to the Respondents as legal/beneficial owners. The said motor vehicle was carelessly, recklessly and negligently driven and/or controlled and as a consequence thereof, while negotiating a corner at Kaseve area, it violently collided with Motor vehicle KCS 709V (hereinafter referred to as the 2<sup>nd</sup> suit motor vehicle), thereby causing the Appellant to suffer serious bodily injuries.
5. The Respondents did file their statement of defence wherein they denied that any accident occurred between the two suit motor vehicles and denied all the particulars of negligence set out in the plaint. Further in the alternative the Respondent's did aver that if an accident did occur it was caused by the carelessness, negligence and recklessness of the appellant and the drive of the 2<sup>nd</sup> suit motor vehicle. They particularized the alleged negligence.
6. The appellant testified and adopted her witness statement where she stated that she was a fair paying passenger in the 1<sup>st</sup> suit motor vehicle. At Kaseve area along Kitui -Machakos road, the said motor vehicle was being driven at high speed and the 2<sup>nd</sup> respondent, who was its driver lost control at a bend/corner and violently collided into the 2<sup>nd</sup> suit motor vehicle, which was coming from the opposite direction. As a result, the Appellant stated that she sustained severe injuries as particularized in the plaint. She was taken to Machakos level 5 hospital and later transferred to shalom Hospital in Machakos.
7. The Appellant produced all her documents as Exhibits and blamed the Respondents for being careless and causing the said accident. Further she did stated that she needs a sum of Ksh.150,000/= for future medical treatment/surgery. In cross examination the Appellant reiterated that she was a passenger in the 1<sup>st</sup> suit motor vehicle and had put on her belt when the accident occurred. she blamed the driver of the said motor vehicle as he veered off its lane and crushed into the 2<sup>nd</sup> suit motor vehicle.
8. The Appellant did not call any other witness and closed her case. The Respondents too opted to close their case without calling any witness.

#### **B. Appellants Submissions**

9. The appellants counsel filed his submissions on 18<sup>th</sup> January 2023 and stated that the appellant suffered serious injuries which were sustained as a result of the said accident. The appellants injuries were;
  - a. Fracture of the pelvis with;
    - i. Right acetabulum fracture
    - ii. Right inferior public ramus fracture
    - iii. Right superior public ramus fracture
    - iv. Left superior public ramus fracture.
  - b. Left Ankle joint dislocation



- c. Left bimalleolar fracture ( Distal 1/3 fibula fracture and distal tibia fracture.)
  - d. Pain and tenderness on the back
  - e. Wounds on the forehead
  - f. Loss of consciousness
  - g. Pain and tenderness on the chest
10. The appellant further submitted that for the injuries suffered the award of Ksh.400,000/= was low and urged the court to interfere with the same as the said award was not reflective of similar awards given for similar injuries. The appellant urged the court to award him Ksh.3,000,000/=. Reliance was placed on Marsabit HCCA No 9 of 2017 Hussain Ali Sharriff alias Hussain Ali vs ALL ( minor suing through FTL), Naivasha HCCA No 42 of 2017 John Mutunga Kamau vs kanini Haraka Enterprises limited.

### **C. Respondents Submissions**

11. The respondents counsel did file their appeal on 24<sup>th</sup> April 2023. The Respondent submitted that before interfering with a determination on quantum the court ought to consider the following principles;
- a. Damages should not be inordinately too high or too low.
  - b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
  - c. Where past decisions are taken into consideration, they should be taken as mere guide and each case depends on its own facts.
  - d. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.
12. The Respondents urged this court to maintain the award of Kshs 400,000/= as sufficient and adequate compensation. The Respondents relied on *shreeji Enterprise (k) ltd v John Kiyeene Wambua & Ano [2015] eKlr*, *Maina Onesmus v Charles Wanjohi Githome [2019] eKlr*, *Inter – Health International INC v Charles Musembi Munyao [2019] eKlr* and *Civicon Limited v Richard Njomo Omwancha & 2 others [2019] eKlr*.
13. The respondent’s urged this court to find that this appeal lacks merit, is misconceived, incompetent, bad in law and thus should be dismissed with costs.

### **C. Analysis and Determination**

14. 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.
15. As held in *Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123* where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high



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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. ( *Abduk Hammed saif v Ali Mohammed Sholan*[1955], 22 E.A.C.A 270

16. The same position was also appreciated in *Peters Sunday Post Limited* [1958] EA 424:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question....it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

17. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions,



but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

18. Guided by the above cases, and having carefully gone through the entire record of appeal, pleadings filed in the primary suit, the decree appealed against and the submissions filed herein I do find that the only issue for determination in this appeal is whether the quantum awarded was sufficient.
19. 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.”

20. The Court of Appeal in *Southern Engineering Company Ltd. v Musingi Mutia* [1985] KLR 730 also restated these 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.

21. Similarly, in *Jane Chelagat Bor vs 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.”

22. 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.”

23. 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.
24. 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.
25. The appellant suffered both superior and inferior fracture to the right acetabulum and ramus area, left bimalleolar fracture (distal 1/3 fibula and distal tibia fracture). She also suffered other soft tissue injuries. These severe injuries were captured in the discharge summary from Machakos level 5 hospital, discharge summary from shalom hospital, P3 form and medical report dated 2<sup>nd</sup> July 2020, by Dr. Muoki Kames K, an orthopedic and trauma surgeon who confirmed that the appellant had sustained a fracture of her pelvic bone, leg and left ankle and could not walk without support. She also needed further surgery to remove the implants.
26. For similar injuries the award of the trial court was manifestly low and such awards were given over twenty years ago;
- (a) In *Nakuru HCCC No. 780 of 1991: Mwangi Gachanjwa vs. Luka Kibet & Another*, the Plaintiff, a minor, had sustained slightly more serious injuries in the form of bilateral fracture of the acetabulum of both hip joints along with head injury. The injuries healed with post-traumatic arthritis in both hip joints, especially on flexion and abduction. The Plaintiff also suffered severe mental impairment due to brain concussion. As a result, he was unable to remember past events. He was awarded Kshs. 500,000/= on 7<sup>th</sup> May 1998 for pain suffering and loss of amenities.
- (b) In *Mombasa HCCC No. 534 of 1996: Kisemei Mutua v Lucy Muhugo & 2 Others*, the plaintiff therein sustained a fracture of the right pelvic ramus and acetabulum as well as whip-lash injury to the neck with fractures of the spine. His urethra was also affected and he had to undergo 2 operations. He was awarded Kshs. 700,000/= on 14 December 2000 for his pain suffering and loss of amenities.



- (c) In Nairobi HCCA No. 134 of 1998: Texcal House Service Station Ltd & Another vs. Timo Kalevi Jappinen & Another, the Plaintiff was awarded Kshs. 1,750,000 by the High Court for dislocation of the right hip joint, with comminuted fractures of the posterior rim of the acetabulum, compound comminuted fracture of the lower left tibia and fibula with bruises over the right side of the forehead. He had undergone five operations under general anaesthesia and was severely affected psychologically. The Court of Appeal reduced the award to Kshs. 750,000/= on 23 April 1999.
27. More recent awards for similar injuries range from Ksh. 2,500,000/= to Ksh.3,500,000/=. In Warano Tosha & Ano v DMK 2021] eKLR , Justice S Chitembwe (As he was then ) reduced an award of Ksh.3,200,000/= to Ksh.2,500,000/=. while in Milicent Atieno v Katola Richard [2015] eKLR, Justice Onyancha awarded the Appellant Ksh.2,000,000/= for similar injuries. The awards in the two-citation relied upon by the appellant are also in a similar range. see Marsabit HCCA No 9 of 2017 Hussain Ali Sharriff alias Hussain Ali vs ALL ( minor suing through FTL), Naivasha HCCA No 42 of 2017 John Mutunga Kamau vs kanini Haraka Enterprises limited.
28. The Appellant not only suffered severe fracture and extensive injury to the pelvic bones she also sustained fracture on her distal 1/3 fibula fracture and distal tibia fracture. She did also dislocate her left ankle joint and had soft tissue injuries too. The award of Ksh.400,000/= was manifestly too low compared to similar awards and similar injuries. The magistrate thus acted on the wrong principles and arrived at an entirely erroneous estimate of the damages the Appellant was entitled too and the same warrants an interference by this court.

### **C. Disposition**

29. This appeal thus has merit. The Judgment of Hon A. Nyoike (P.M) dated 18<sup>th</sup> May 2021 and delivered in Machakos CMCC NO 86 of 2021 with respect to General damages awarded of Ksh.400,000/= is thus set aside and the same is increased to Ksh.2,500,000/=. The other aspects of the same judgment shall remain as awarded by the trial Magistrate.
30. The costs of this appeal is hereby assessed at Ksh.300,000/= all inclusive.
31. It is so ordered.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 21st day of September, 2023.

**In the presence of;**

.....for Appellant

.....for Respondent

.....Court Assistant

