**Mwangi v Njuguna (Civil Appeal 47 of 2018)**
**[2023] KEHC 23761 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23761 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CIVIL APPEAL 47 OF 2018**

**GL NZIOKA, J**

**OCTOBER 18, 2023**

**BETWEEN**

**DANSON MWAURA MWANGI ..... APPELLANT**

**AND**

**MARY NDUTA NJUGUNA ..... RESPONDENT**

***(Being an appeal from the judgment of Hon. M. K. Mutegi, Senior Resident Magistrate vide Engineer Senior Principal Magistrate Civil Suit No. 38 of 2016 delivered on 4th July 2017)***

## JUDGMENT

1. By a plaint dated 7th March 2016, the plaintiff (herein the "respondent") sued the defendant (herein the "appellant") seeking for general damages, special damages of Kshs. 12,000, costs and interest.

2. The claim was based on the fact that, on or about 10th July 2015 the respondent was lawfully travelling as a passenger along Karangatha – Njabini road when the appellant by himself, his authorized driver, agent and/or servant drove motor vehicle registration No. KAS 360F so carelessly and negligently that he veered off the road and knocked down the respondent and as a consequence whereby the respondent sustained severe bodily injuries, loss and damage. The particulars of the injuries are tabulated as: blunt trauma to the chest, spine, pelvic region, and left shoulder joint

3. The respondent further avers that, the accident was caused by the negligence of the appellant, as he was driving at excessive speed without due care and attention, failed to keep a proper look out, to stop, swerve, slowdown or brake so as to avoid the accident and did not have effective control of the motor vehicle. That the doctrine of res ipsa loquitur applies.

4. By a statement of defence dated 2nd February 2017, the appellant denied liability and/or the particulars of negligence attributed to him. He averred that, without prejudice, if the accident, occurred at all, it was caused by circumstances beyond his control; and/or wholly or substantially contributed to by the respondent.

5. However, the parties subsequently negotiated the issue of liability and entered a consent on the same in the ration of 85:15 in favour of the respondent and as against the appellant.

6. The parties filed submissions on the issue of liability and upon considering the same, the trial court ordered that liability ration of 85: 15 in favour of the plaintiff and on quantum as follows: -

    a. General damages for pain and suffering Ksh.300,000/=

    b. Special Damages Ksh.4,430

    c. Total Ksh.304,435

        Less 15% Ksh.258,765.50

        Net Ksh.258,765.50/

    The costs of the suit were awarded to the respondent. Interest was awarded on (c) above at court rates from date of this Judgment, and interest also awarded on (d) above from date of filing this suit.

7. It is against the aforesaid judgment that the appellant appeals on the following grounds: -

    a. That the learned magistrate erred in Law and fact and ended up misdirecting Himself in awarding exorbitant quantum of damages of Kshs.300,000/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries sustained by the respondent herein.

    b. That the learned magistrate erred in Law in making such a high award as to show that the magistrate acted on a wrong principle of law.

    c. That the learned magistrate's award on damages was so high as to be entirely erroneous.

    d. That the learned magistrate's award was made without considering the medical evidence before the Court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence presented before the court.

    e. That the learned magistrate erred in Law and Fact in failing to give reasons for her award and to consider the defendant's submissions and authorities in making a finding on quantum.

    f. That the whole judgment on quantum was against the weight of evidence before the court.

8. The appeal was disposed by filing of submissions. The appellant submitted that the amount of Ksh. 300,000 awarded as general damages was not commensurate with the nature of injuries. That, from the respondent's medical report, she suffered soft tissue injuries that healed leaving residual pain that would subside gradually, and has no discernible and/or permanent incapacitation. Further, the fact that the respondent is 67 years old was an irrelevant factor that contributed to the court arriving at an exorbitant award.

9. Furthermore, the trial court in its judgment did not indicate the factors it relied on and/or legal reasoning in arriving at the conclusion that the award was commensurate with the injuries. That the appellant proposed a sum of Ksh. 100,000 while the respondent proposed a sum of Ksh. 500,000.

10. That, the trial court misdirected itself by relying on the respondent's submission and authorities while failing to appreciate the appellant's authorities in support of his submission that an award of Ksh. 100,000 would have been commensurate to the injuries. That in doing so, the trial court left its seat as an impartial arbiter and became a litigant.

11. That while assessment of damages is discretionary, the appellate court can interfere with the discretion where the trial court failed to take into account a relevant factor, or took into account an irrelevant factor or the amount awarded is inordinately so low or so high so that it must amount to a wholly erroneous estimate to the damages.

12. That in the present case, the award of Ksh. 300,000 is unfair, unreasonable, not commensurate with the injuries and thus inordinately high to warrant it to be disturbed by this appellate court and allow the appeal with costs.

13. However, the respondent submitted that as the appeal is purely on quantum, the legal principle is that an appellate court will not interfere with an award of damages by the lower court unless it is satisfied that the lower court acted on wrong principals of law or made an award of damages which is inordinately high or low as to represent a wholly erroneous estimate of damage as stated in the case of Mugambi And Silas vs Isaiah Gitiru Civil Appeal No. 130 of 2002.

14. That in arriving at the award, the trial court took into consideration the respondent's injuries. That, the appellant has not pointed out any irrelevant factors the trial court took into account, or any relevant factor it failed to take into account in arriving at its judgment.

15. Further, the trial court took into account submissions by both parties before arriving at its decision evidenced by the fact that it noted the appellant had proposed an award of Ksh. 100,000 as general damages. However, the trial court was persuaded by the case of Samuel Muthama —vs- Kenneth Maundo Muindi Machakos HCCA No. 102 of 2008 where the injuries suffered were similar.

16. That the award of Ksh. 300,000 for the injuries the respondent suffered is not inordinately excessive to warrant interference by this court. That in the case of Naivasha Civil Appeal No. 36 of 2017 Lake Naivasha Growers -vs- Muigai Thuka, the court dismissed an appeal challenging the award of Ksh. 250,000 as general damages where the respondent suffered soft tissue injuries to the left thigh and soft tissue injuries to the left leg.

17. Further in the case of; Meru HCC No. 17 of 1983 Lucy Ntibuka vs Benard Mutwiri the plaintiff sustained head injuries, lacerations on the lateral side of the right eye and lacerations and cut wound on the left arm (elbow) and on 8th February 2007, the court assessed general damages at Kshs. 500,000.

18. Furthermore in the case of; Samuel Muthama —vs- Kenneth Maundo Muindi Machakos HCCA No. 102 of 2008 the High Court confirmed the award by the trial court of Ksh. 380,000 as general damages where the plaintiff sustained blunt injury to the neck, scalp, head and lower back.

19. As such the award of Ksh. 300,000 is fair and not inordinately high as it is comparable with other awards and urged the court to dismiss the appeal with costs.

20. At the conclusion of the arguments by the parties I have considered the appeal in light of the material placed before the court and in particular the judgment by the trial court. I note that in the assessing general damages for pain and suffering, the learned trial Magistrate relied on the case of Samuel Muthama vs Kenneth Maundo Muindi Machakos (supra) in which the plaintiff suffered allegedly similar injuries and the court awarded Ksh. 380,000. The learned trail Magistrate also considered that the plaintiff/respondent is 67 years old and then awarded Ksh. 300,000 herein.

21. I Further note from the trial court record that, the respondent relied on the medical report of Dr. A. K. Mwaura dated 23rd October 2015 in support of injuries suffered. The injuries stated in the subject report are as tabulated in the plaint. The doctor classified them as harm.

22. In addition, the respondent relied on the discharge summary from Kijabe Hospital dated, 16th October 2015. However notably, the said notes indicate injuries to only two parts of the body, being to the lower back and lower limbs. It suffices to note the accident occurred on 10th July 2015, therefore the first port of call must have been the Kijabe Hospital. Again notably from the subject treatment notes, the X-ray taken of the chest, bilateral tibial/fibula, pelvic were all normal, and the respondent was treated and discharged on pain killers.

23. Furthermore, the P3 form dated 6th October 2015 produced by the respondent indicates (although the copy supplied in the record of appeal is incomplete, as only page one (1) was availed), I note from the trial court file copy that, the injuries indicated therein, are soft tissue injuries to the chest and back and s the pelvic joint. The degree of injuries is classified as harm.

24. Thus on the aforesaid, the injuries identifiable in all the three documents, that is the medical report, the Kijabe Hospital treatment notes and the P3 form are; soft tissue injuries to the chest, back and pelvic. The injuries identified as blunt trauma to the spine and left shoulder are indicated in the medical report by Dr. A. K. Mwaura only. The report was apparently filed on the 23rd October 2015, after the Kijabe Hospital notes and P3 form was filled yet the medical report indicates that, the respondent produced the P3 form, x-ray and the Kijabe Hospital summary. Therefore the injuries in the medical report should have been consistent with other documents. Be that as it were, the injuries sustained by the respondent were soft tissue of which she was treated and discharged on pain killers.

25. I note from the submissions in the trial court that the respondent sought for Ksh. 500,000 as general damages. I have considered the authorities cited in the subject submissions and I find that, in the case ofMeru HCC No. 17 of 1983 Lucy Ntibuka vs Benard Mutwiri relate to more serious injuries to the head, laceration on the lateral side of the right eye and laceration and cut wounds on the left arm elbow and the authority of Samuel Muthama vs Kenneth Maundo Muindi Machakos (supra) though relatively similar to the respondents injuries are still more advanced.

26. The appellant on its part proposed a sum of Ksh. 100,000 based on the cases of Nyeri HCCA No. 254 of 1997 John Mukura Karari v Nicholas Kinyua Mbui [2005] eKLR, Macahkos HCCA No. 127 of 2009 Munza Investment Company Limited vs Mwonewa [2012] eKLR, and Eldoret HCCA No. 73 of 1995 Cyrus Gachanja Muya & 4 Others vs Abbas Mohammed [1999] eKLR but significantly all these authorities were 20, 8 and 22 years old in the year 2017, when the decision in this matter was rendered. Therefore it is not tenable to propose the same figure in this matter.

27. However, to revert back to the trial court judgment, in stating that, the injuries in the case of Samuel Muthama vs Kenneth Maundo Muindi Machakos (supra) were similar to those herein the learned trial Magistrate did not expound on the similarity and that makes the trial court decision untenable. In my considered opinion, the trial court should have at least made an effort to distinguish or concur with authorities cited by the parties. Merely stating that, they were considered without more on how they were considered renders the final award unsupported.

28. Be that as it may, as the first appellate court, I have distinguished the authorities cited, and the fact that, the injuries sustained were merely soft tissue and were classified as harm. The respondent was not admitted at all. She was treated and discharged on pain killers. There were no medical documents to support continued treatment. Presumably then the injuries healed well.

29. Finally, I have taken into account the inflation issue in that the authorities cited by the appellant, to support a sum of Ksh. 100,000 were awarded 20 years ago. I therefore assess general damages at Ksh. 200,000. I set aside the figure of Ksh. 300,000 and substitute it with a figure award Ksh. 200,000 as

general damages reduced by 15% contributory liability. The rest of the quantum award, the costs and interest as ordered by the trial court is upheld.

30. It is so ordered.

**DELIVERED, SIGNED AND DATED THIS 18TH DAY OF OCTOBER 2023.**

**GRACE. L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Mwangi for the appellant

Mr. Kamau for the respondent

Ms. Ogutu court assistant