



REPUBLIC OF KENYA



KENYA LAW
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**Mashru & another v Kawai (Civil Appeal 41 of 2021)
[2023] KEHC 24163 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 41 OF 2021
GMA DULU, J
OCTOBER 9, 2023**

BETWEEN

P. N. MASHRU 1ST APPELLANT

RICHARD ASOMBA 2ND APPELLANT

AND

DENNIS KAVAI RESPONDENT

*(Being an appeal from the Judgment and decree delivered by Hon. Charles Mayamba
(PM) on 18th June 2021 at Kilungu Law Courts in SPMCC No. 56 of 2020)*

JUDGMENT

1. In a judgment delivered on 18th June 2021, the learned Magistrate entered judgment in favour of the plaintiff (the respondent herein) against the appellants and concluded as follows:-
 - a. Liability is awarded at 75%:25%
 - b. General damages awarded at Kshs 450,000/=
 - c. Special damages Kshs 4,900/=
 - d. Less 25% (Kshs 113,725/=) Kshs 341,175/=
 - e. Costs and interest
2. Dissatisfied with the decision of the trial court, the appellants, who were the defendants in the trial court, have come to this court on appeal through Counsel Kilonzo & Company Advocates, on the following grounds:-
 1. That the learned Magistrate grossly misdirected himself in treating the evidence and the submissions on quantum before him superficially and consequently coming to a wrong



conclusion by awarding general damages that were manifestly high for the minor injuries incurred.

2. That the learned trial Magistrate erred by failing to consider that it was the duty of the plaintiff to prove injuries satisfactorily on the required standard.
 3. That the trial Magistrate failed to consider that even though there was a consent on liability, the plaintiff was duty bound to prove the injuries suffered on a balance of probability.
 4. That the learned trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the defendants/appellants.
 5. That the learned trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable.
 6. That the learned trial Magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstance, excessive and not commensurate to the injuries in the circumstances occasioning into an erroneous estimate and miscarriage of justice to the appellant.
 7. That the learned trial Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
 8. That the learned trial Magistrate erred in law and in fact by failing to take proper and exhaustively (sic) evidence on record and hence arriving at a wrong conclusion.
 9. That the learned trial Magistrate erred in law and in fact by evaluating the evidence wrongly and did not take into account relevant factors.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Wambua Kilonzo & Company Advocates for the appellant, and Waiganjo Wachira & Company Advocates for the respondent. I have to acknowledge that both sides relied on decided court cases.
 4. This is an appeal against the quantum of damages, as liability was recorded by consent at 75%:25%
 5. Being an appeal on the quantum of damages, I have to be guided by the general rule applied consistently by courts, that an appellate court will not interfere with the quantum of damages awarded by a trial court unless the award is either so inordinately high or so inordinately low or founded on wrong principles or misapprehension of the facts see *Butt v Khan* (1982-88) KAR, *Karanja v Malele* (1983) KLR 42, and *Kemfro Africa Ltd & Another v Lubia & Another* (1987) KLR 30.
 6. In the present case, no oral evidence was tendered at the trial. Instead both counsel adopted a consent on 30th April 2021 in the following terms:-

“By consent judgment on liability be and is hereby entered in favour of the plaintiffs against the defendant in the ratio 75% to 25%. The documents of the plaintiffs be admitted as exhibits. The second medical report by Dr. Wambugu dated 30th October 2020 be produced as DEx1, and the same be attached to the submission. The court to assess quantum of damages based on submissions by the parties.”
 7. From the above consent in my view, the second medical report of the defendants (now appellant), which was the latest was admitted by counsel as evidence and was to be relied upon in determining the



quantum of damages. This medical report was filed by M/s Wambua Kilonzo & Company Advocates for the defendants and it was dated 30th October 2020 and signed by Dr. P. M. Wambugu Consultant Surgeon. The medical report acknowledged the medical report of the plaintiff/respondent by Dr. G. K. Mwaura, and the pleadings that the respondent suffered a fracture rib-chest left side and blunt-injury-chest, and recorded that:-

“Chest x-rays taken then reportedly revealed rib fracture. These films were however not forwarded to me.....Kavai’s injuries IF ANY, involved only the soft tissues only and he has since made full recovery. I assert that no total permanent incapacitation occurred.”

8. After citing a number of decided cases to the trial court the respondent’s counsel Waiganjo Wachira & Company Advocates asked for general damages of Kshs 1,000,000/= and special damages of Kshs 11,650/= On the other hand, the appellant’s counsel Wambua Kilonzo & Company Advocates asked for an award of Kshs 80,000/= for general damages, and contended that special damages pleaded had not been proved, as the receipts and documents relied upon were not in the plaintiff’s name and thus it was difficult to determine whether or not they belonged to him.
9. The burden is on the appellants herein to demonstrate that the award of general damages was inordinately high to entitle this court to interfere with the same. The fact that another court would probably award a different figure alone, is not proof that the award is inordinately high.
10. I note that the trial court relied on both medical reports, and observed that Dr. Wambugu should have conducted an x-ray examination if he was to differ with the opinion of the first medical report. In my view, even if he conducted another x-ray examination in 2020 for an accident that had occurred in 2019, it would most probably not be possible to observe the fracture of the rib, as same could as well have healed after the initial tests and medical report of Dr. G. K. Mwaura dated 30th November 2019.
11. In my view therefore, since the observations of Dr. Wambugu that the x-ray reports were not availed was not challenged, it means that the plaintiff now respondent did not prove on the balance of probabilities that he suffered fracture of the ribs. Thus the trial Magistrate was wrong in shifting the burden of proof on the appellant and finding that the respondent suffered fracture of the ribs.
12. With regard to quantum of damages, the case of Moses Ogutu Omwono v Shiloah Investments Ltd – Kisumu HCCA No. 80 of 2010 wherein 60,000/= was awarded, was not a recent decision. The case of Francis Murangiri Josiah & Another v Kiriam Mutunga (2017) eKLR where Kshs 800,000/= was awarded as general damages related to more severe injuries.
13. In the circumstances of this case, though I find that the figure of Kshs 450,000/= as general damages was inordinately high, I also am of the view that the figure of Kshs 80,000/= proposed by the appellant’s counsel was inordinately low. Doing the best I can and being mindful of the loss of value of money and inflation, I come to the conclusion that an award of Kshs 300,000/= is adequate compensation as general damages.
14. With regard to special damages, in my view same were proved as found by the trial court. In my view, though it is preferable that receipts be issued in the name of a payer of money, it is not uncommon for receipts to be issued without a name, or sometimes the name is misspelt. Each case will depend on the totality of the facts and circumstances. In the present case where documents were admitted without contest, the said documents cannot be contested in submissions, but should be given an interpretation in their ordinary meaning.
15. Consequently, I allow the appeal in part. The final orders of this court are thus as follows:-



- a. Liability 75%:25%
- b. General damages in favour of the respondent (plaintiff) Kshs 300,000/=
- c. Special damages Kshs 4,900/=
- d. Less 25% (Kshs 76,225/=) Kshs 228,676/=
- e. The appellant will pay 70% of the respondent's costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

No appearance for appellants

Mr. Kiptanui holding brief for Waiganjo for respondent

