



County Government of Tharaka Nithi v JSM ((Suing as the next friend/mother of NMM - Minor)) (Civil Appeal E022 of 2023) [2024] KEHC 13850 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E022 OF 2023
LW GITARI, J
NOVEMBER 6, 2024**

BETWEEN

COUNTY GOVERNMENT OF THARAKA NITHI APPELLANT

AND

JSM RESPONDENT

(SUING AS THE NEXT FRIEND/MOTHER OF NMM - MINOR)

(Being an Appeal from the Judgment of the Resident Magistrate's Court at Chuka delivered by Hon. O. Kinyua on the 28th August 2023 in Civil Suit No. E162 of 2021)

JUDGMENT

Grounds of Appeal:-

1.

1. That trial court erred in law and facts by awarding a manifestly excessive amount in general damages for pain, suffering and loss of amenities which amount was not within the range of conventional awards for similar injuries, and as such arrived at an erroneous figure.
2. That the learned trial court erred in law and facts by awarding interest on costs without stating the basis for the exercise of that discretion.
3. The appellant prays that the decree of the honourable Resident Magistrate delivered on 28/8/2022 in Chuka C.M.CC 162/2021 be set aside.
4. That court do proceed and assess general damages for pain and suffering and loss of amenities.
5. That the court be pleased to award the costs of this appeal to the appellant.



2. The appeal arises from the decision in Chief Magistrate’s Court at Chuka in a personal injury claim. The facts giving rise to the claim are that the appellant is the registered owner of motor cycle registration number 13CG 110A. On 22/5/2021 the motor cycle lost control as it was being used on the road, veered off the road and landed in the respondent’s home compound and ran over the minor child NMM who was in the said compound playing with other children. The minor sustained bodily injuries as a result of the crash with the said motor cycle. A personal injury claim on behalf of the minor was filed vide a plaint dated 26/8/2021. The respondent claimed general damages, special damages in the sum of ksh.47,779.00, costs and interests.
3. The learned magistrate proceeded and heard the suit where the respondent testified and called two witnesses. The defendant did not adduce any evidence. The learned magistrate entered Judgment as follows:-
 1. Liability - 100%
 2. Ksh.800,000/-, general damages for pain and suffering.
 3. 46,779.00 special damages with interests at court’s rate from the date of filing the suit.
 4. Costs of the suit with interests at court’s rate from the date of Judgment.
 1. The appellant was aggrieved by the Judgment of the learned magistrate and filed this appeal.
 2. The respondent opposed the appeal and prayed that the Judgment of the lower court be upheld.
4. The appeal was canvassed by way of written submissions.

Appellant’s Submissions:

5. The appellant submits that this is a first appeal and the guiding principles are as stated in *Selle & Another –v- Associated Motor Boat Co. Ltd & Others (1968) E.A* where it was held:-

“..... this court is not bound necessarily to accept the findings of fact by the court below. An Appeal to this 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
6. The appellant submits that the appellate court will not interfere with the exercise of the discretion by the learned magistrate unless it brings itself to the criteria in *Bashir Ahmed Butt –v- Uwals Ahamed Khan (1978) E.A* where the court held that:

“An Appellate Court will not disturb an award of general damages unless it so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either in ordinately high or low.”
7. The appellant submits that the trial court failed to exercise its discretion judiciously when it awarded an excessive amount in general damages which was not within the range of conventional awards for similar injuries. The appellant submits that the authority relied on by the learned magistrate was not comparable to the injuries sustained by the respondent. The appellant submits that the award of



Ksh.800,000/- with respect to injuries which the learned magistrate stated that were a simple fracture and soft tissue injuries is excessive. He proposes that the court substitutes the award of the trial magistrate with an award of Ksh.400,000/-.

8. The appellant submits that the learned magistrate erred by awarding interests on costs. He relies on the Court of Appeal decision in Jane Wanjiku Wambu-v- Anthony Kigamba Hato & 3 Others 2018 eKLR which adopted the decision in Hasanali-v- City Motor Accessories Ltd & Others (1972) E.A 48 and it stated that it is not normal to award interests on costs.
9. The appellant submits that the trial court did not explain the basis for awarding interest on costs. He prays that the award by magistrate be set aside.

Respondents Submissions:

10. The respondent submits that the appellant sustained a fracture on the numerous and laceration.
11. On the face, he also sustained Abrasions on the hand which required plastering. He submits that the minor underwent surgery on the left arm humerous for the insertion of an orthopedic metal implant. The injuries were confirmed by the doctor who prepared a medical report and formed the opinion that the minor was at risk of developing Osteoarthritis of the elbow joint in the near future. He relies on the Court of Appeal decision in Stanley Maore-v- Geoffrey Mwenda Nyeri C.A 147/2002 where the court stated that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award, keeping in mind the correct level of awards in similar cases. He has relied on the following cases:-DPL Festive Limited –v- Rose Akinyi Ochola H.C.C.A 28/2018 where the plaintiff suffered fracture of distal femur and right tibia and right fibular and a cut wound on right elbow, Kshs.750,000/- was awarded on appeal. Joseph Kimathi Nzau –v- Johnson Macharia (2019) eKLR where the appellant sustained fracture right clavicle and fracture of 1st and 2nd ribs. Ksh.800,000/-awarded. Pestony Limited & Another –v- Samuel Itonye Kagoko (2022) eKLR, Ksh.800,000 was awarded for the fracture of the left femur.
12. He submits that the minor suffered comparable to more severe injuries to the above
13. The respondent prays that the award of general damages be upheld.

Analysis and Determination:

14. I have considered the grounds of appeal, the submissions and the proceedings before the learned magistrate. I find that the issue which arises for determination is:
 1. Whether the court should interfered with the award of general damages.
 2. Whether the court should set aside the ward of interests on costs.
15. This is the 1st appellate court and it is well settled that the court has a duty to analyze the evidence, evaluate it and come up with its own independent finding. See Selle –v- Associated Motor Boat Co. Ltd (supra) See also Peters –v- Sunday Post Ltd (1958) E.A 424.
16. The first appellate has jurisdiction to come up with its finding and may uphold or set aside the findings of the trial court. The 1st appellate court exercises jurisdiction to consider both point of law and facts.
17. I will now proceed to consider the issues for determination.



1. Whether this court should interfere with the award of general damages

18. The parties have expounded the principle which upon which the 1st appellate court will interfere with an award of damages. This was stated in the case of Butt –v- Khan (1978) E.A supra.

19. In the case of Kenya Bus Service Limited-v- Jane Karambu Gituma Civil Appeal No. 241/2000 the Court of Appeal stated that-

“... An appellate court will not interfere with the quantum of damages canvassed by the trial court unless it is satisfied that either the court acted on wrong principles of law by taking into account some irrelevant factor or leaving out some relevant one or adopting the wrong approach, it misapprehended the facts, or the award was so inordinately high or low so as to represent a wholly erroneous estimate of damages.”

20. The award of damages is an exercise of discretion which is expected to be exercised judiciously and the court should have reasons to interfere with the exercise of the discretion. In *Kemfro Africa Limited t/a Meru Express Services 1976 & Another –v- Lubia & Another (No 2) (1985) KLR*. The court considered the principles to be observed by the appellate in deciding whether it should disturb the quantum of damages awarded by the trial Judge and stated:-

“as held by former court of Appeal of Eastern Africa the court must be satisfied that the Judge in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this the amount is so inordinately low of so inordinately high that it must be wholly erroneous estimate of the damage.”

21. It has also been stated that an appellate court will not disturb an award simply because it would have awarded a different figure if it had tried the case at the first instance, See *Nance –v- British Columbia Electric Company Ltd* cited in *Hilainga –v- Manyika (1961) P.C 705*.

21. In *Kigarangari-v- Aya (1985) KLR Nyarangi J.A* stated that

“awards made in this type of cases or in any other similar must not only be seen to be within limits set by decided cases but also within what Kenya can afford. That must bear heavily upon the court. That as large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden inform of increased costs for insurance cover (incase of accident cases or increased fees.’

22. From the foregoing the common reasoning is that huge awards of damages will lead to increased insurance premiums the insurance industry. Thus courts awards what is reasonable to compensate the party as money cannot renew a physical frame that has been battered and wounded. The awards are for compensating not enrichment.

23. Guided by the above authorities I now proceed to consider whether the award was in ordinally too high or low in the circumstances of this case.

24. The respondent at paragraph 5 of the plaint pleaded as follows:

Particulars of the Plaintiff’s injuries:Tender swollen left upper limbCusts on the hand and face

25. He was admitted at Chuka County Referral Hospital on 22/5/2021 and discharged on 8/6/2021.



26. The P3 form states that the plaintiff had tender upper limb Xray showed Humerous Fracture. A medical report by Doctor Nicholas Nkonge shows that the respondent sustained injury, Fracture supracondylar left humerous, laceration on the hands. He underwent surgery of the left humerous. He complains of episodes of pain scaring of the wound, loss of full function of the affected limb. The fracture of the humerous has a future risk of developing Osteoarthritis.
26. The respondent cited the case of DPC Festive Limited –v- Rose Akinyi Ocholo and Joseph Kimathi –v- Johnson Macharia (2019) eKLR
27. The respondent relied on Benard Muide Kilonzo –v- Adrea Maiko
28. The learned magistrate considered the principles that comparable injuries should be as far as possible be compensated with comparable awards and reflect the trend of previous recent and comparable awards. He also considered the court’s consider the value of Kenya shillings, state of economy and avoid making astronomical awards. He relied on the case of Pestony Limited & Another –v- Samuel Itenye Kagoko (2022) eKLR. In the case the respondent suffered fracture of the left femur (mid shaft) and swollen tender left thigh and on appeal an award of Ksh.800,000/- was made. The appellant availed the Judgment at page 25 of the list of authorities and it shows that the respondent had suffered 4% permanent incapacity and risk of early onset of osteoarthritis. There was also a metal implant. There is no doubt that the respondent in the case relied on by the learned trial magistrate had suffered more severe injuries which were not comparable to those of the respondent in this appeal. The learned trial magistrate failed to apply the principle that comparable awards should be compensated with similar awards. By failing to apply the principle he gave an award that was inordinately high. This court has reason to interfere with the award.
29. In Benard Muide Kilonzo –v- Andrea Maiko Mogia & Another (2021) eKLR the Plaintiff had sustained fracture of the right humerous with a permanent incapacity being assessed at 20% and the High Court awarded Ksh.500,000/ I find that the injuries in the case are more comparable to the present case but slightly more severe due to 20% permanent incapacity.
30. I find that an award ksh.400,000/- is appropriate in the circumstances of the case and having considered comparable awards.
31. On interests on costs I note that the respondent did not oppose the submissions by the Counsel for the appellant. In a binding decision by the Court of Appeal, it was not ‘the normal practice’ to award interests on costs. See Hassanali-v- City Motor Accessories Ltd & Others (supra) and Jane Wanjiku Wambu-v- Anthony Kigamba .
32. I find that the learned magistrate did not have a basis for awarding interests on costs.

Conclusion:

33. I find that this appeal has merits. I allow the appeal and order that the award of general damages and interest on costs by learned magistrate is set aside. It is substituted as follows:
 1. General damages- 400,000/-
 2. Costs to the Appellant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE

