



**Masiba v Bosire (Civil Appeal E206 of 2023)
[2024] KEHC 16965 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E206 OF 2023
F WANGARI, J
NOVEMBER 21, 2024**

BETWEEN

SHEE HAMISI MASIBA APPELLANT

AND

RODNEY BOSIRE RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment of Hon. J.M. Omido (SPM) delivered on 20/06/2023 in Kwale CMCC No. 302 of 2015. The Appeal is on quantum only.
2. Through a Complaint dated 07/12/2024, the Respondent claimed general and special damages as a result of injuries sustained in an accident that occurred on 01/11/2014. It was pleaded that the Respondent was a pillion passenger in the Appellant's motor cycle which was carelessly driven and hit a road bump, causing an accident resulting to injuries sustained by the Appellant.
3. The Trial Court heard the parties and proceeded to render judgement on 20/06/2023. In the Judgement, the Court entered liability as per the consent by the parties at 20% liability against the Respondent and 80% against the Appellant. Kshs. 500,000 was awarded as General Damages for pain and suffering, less 20% contributory negligence, with special damages of Kshs. 3,000 less 20%.
4. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal. The appeal was on quantum only.

Submissions on quantum

5. In the trial court, the Respondent in his submissions sought for Kshs. 850,000 as General Damages for pain and suffering. He relied on the case of Kennedy Kipkoech Kosgey v Kormoto General Agencies (2015) eKLR and George Njenga & another v Daniel Wachira Mwangi (2017) eKLR.



6. On the other hand, the Appellant relied on the case of *Mumias Sugar & Co. Limited v Henry Khatolwa Amukoya* (2015) eKLR in proposing an award of Kshs. 350,000 as General Damages for the injuries sustained.
7. Upon filing this appeal, this court directed that the appeal be disposed of by way of written submissions and both parties complied by filing of rival submissions. The Appellant filed submissions dated 13/09/2024 submitted that the trial court's award of Kshs. 500,000 as General Damages was exorbitant and unjustified.
8. The Appellant relied on cases of *Katoyo Mwakamusha Lugogo v Krystalline Salt Limited* (2020) eKLR where Kshs. 80,000 was awarded and *Mary Muathe Muthikwa & ano v Issac Maina Thomba* (2017) eKLR where Kshs 200,000 was awarded for injuries similar to that of Respondent. He prayed that the appeal be allowed and the judgment of the lower court be set aside.
9. The Respondents submitted that the award in the lower court was too low to meet the treatment costs of the Respondent, and citing the case of *George Njenga & another v Daniel Wachira Mwangi* (2017) eKLR, he prayed that the award be reviewed upwards to Kshs. 1,000,000.

Analysis

10. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see *Peters vs Sunday Post Limited* [1958] EA 424 and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)

Quantum

11. The Appellant submitted that an award of Kshs. 500,000 was too low for general damages for pain and suffering as commensurate compensation in the circumstances of this case.
12. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”
13. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.
14. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.



15. There is no dispute that the Respondent suffered the injuries as pleaded. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages.
16. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
17. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
 - 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
18. The Appellant suffered fracture of the right leg, sprain of the ankle, blunt injury to the chest and forehead, soft tissue injuries and 9% permanent injury of the right knee.
19. In *Joseph Kimanthi Nzau v Johnson Macharia* [2019] eKLR, the court, G.V. Odunga J. as then he was, considered a case where the plaintiff suffered cut wound on the occipital region with lacerations on the left temporal region of the head, fracture of the skull on the occipital region, subluxation of the cervical vertebrae C1, C3 and C4, fracture of 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ribs of the left side of the chest, fracture of the left scapula and cut wound on the left hand and left arm and awarded Kshs. 800,000.
20. In the case *Easy Coach Bus Limited v Mary Adhiambo Okuru*, HCCA No. 68 of 2015 [2020], Kshs. 300,000 was awarded for similar injuries as sustained by the Appellant in this case. From the above, and in consideration of the fact that the Respondent requires reconstruction surgery of the knee ligaments, I find no reason to interfere with the award on quantum by the lower court as the same was commensurate to the injuries sustained.
21. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The court exercises this discretion and award costs to the Respondent.

Determination

22. In the upshot, I make the following orders: -
 - a. The Appeal lacks merits and is hereby dismissed.
 - b. Costs awarded to the Respondent.



It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 21ST DAY OF NOVEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

M/S Wanyama Advocate for the Appellant

M/S Juma Advocate for the Respondent

Brian, Court Assistant

