



**M'Mutungi v Ogoti alias Oscar Mogire Ogoti (Civil Appeal E224 of 2023)
[2024] KEHC 16919 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E224 OF 2023
F WANGARI, J
DECEMBER 6, 2024**

BETWEEN

DAVID KINOTI M'MUTUNGI APPELLANT

AND

MOGIRE OSCAR OGOTI ALIAS OSCAR MOGIRE OGOTI RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Desderias Orimba (SPM) delivered on 19/07/2023 in Mombasa CMCC No. E1492 of 2021. The Appeal is on quantum only.
2. Through a Complaint dated 21/09/2021, the Respondent claimed general and special damages as a result of injuries sustained in an accident that occurred on 08/06/2021. It was pleaded that the Respondent was riding his motor cycle where the Appellant's motor vehicle was carelessly driven and lost control thereby causing an accident resulting to injuries sustained by the Appellant.
3. The Trial Court heard the parties and proceeded to render judgement on 19/07/2023. In the Judgement, the Court entered liability as per the consent by the parties at 30% liability against the Respondent and 70% against the Appellant. Kshs. 1,000,000 was awarded as General Damages for pain and suffering, less 30% contributory negligence.
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. 2,000,000 as General Damages for pain and suffering. He relied on the case of Eric Nyarangi Ondora & ano v JMO & 3 others (2019) eKLR and George Njenga & another v Daniel Wachira Mwangi (2017) eKLR.



6. On the other hand, the Appellant relied several authorities as per the written submissions dated 17/02/2023 in proposing an award of Kshs. 250,000 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 20/04/2024 submitted that the trial court's award of Kshs. 1,000,000 as General Damages was inordinately high and should be reduced downwards to Kshs. 250,000, and with costs to the Appellant. He cited authorities relied on in the lower court in support of the submissions.
8. The Respondent in the submissions dated 27/05/2024 stated that the trial court took all relevant factors in assessing the general damages awarded. It was further submitted that the award was comparable to the injuries sustained. He prayed that the judgment of the lower court be upheld. He cited the case of Joseph Musee Mua v Julius Mbogo Mugi & 3 others (2013) eKLR.

Analysis

9. 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

10. The Appellant submitted that an award of Kshs. 1,000,000 was too high for general damages for pain and suffering as commensurate compensation in the circumstances of this case.
11. 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.”
12. 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.
13. 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.
14. 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.



15. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
16. 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.
17. The Appellant suffered fracture of the left tibia and soft tissue injuries. 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.
18. In comparison to the injuries sustained by the Plaintiff in the above mentioned case, and the injuries sustained by the Respondent in this case, the injuries sustained by the Respondent was far much less than in the above case yet an award of Kshs. 800,000 was granted. I do agree with the Appellant that the General Damages awarded by the lower court were not commensurate to the injuries sustained. I find an award of Kshs. 500,000 would be adequate and sufficient considering the loss of value for money.
19. 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 appeal being partially successful, this court exercises its discretion and order that each party bears its own costs.

Determination

20. In the upshot, I make the following orders: -
 - a. The Appeal is partially successful and is allowed on the following terms;
 - i. Judgment of the lower court on award of General Damages of Kshs. 1,000,000 is hereby set aside.
 - ii. The award is substituted with an award of Kshs. 500,000.
 - b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 6TH DAY OF DECEMBER, 2024.



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F. WANGARI

JUDGE

In the presence of;

Mr. Kioko Advocate for the Appellant

N/A by the Respondent

Brian, Court Assistant

