

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. E005B OF 2021

BENSON WANYOIKE NYAMBURA.....1ST

APPELLANT

ZAWERO BUNDI THIRUINE.....2ND

APPELLANT

VERSUS

ESTHER MUTHONI GICHIMU.....

RESPONDENT

*(Being an appeal from the judgement of Hon. E Agade (SRM)
dated July 29 2020 in Kigumo SPMC civil case no. 231 of 2017)*

JUDGEMENT

1. This appeal arises from the judgement and decree of the lower court in a suit which was instituted by the respondent against the appellants. In the suit, the respondent sued the appellants seeking general and special damages following

personal injuries sustained in a road traffic accident on 24th March 2017.

- 2.** In the amended plaint dated 13th August 2018, the respondent alleged that on the aforesaid date, she was travelling in motor vehicle Registration No. KBK 545U (the subject vehicle) as a fare paying passenger when the vehicle's driver so negligently controlled it that it overturned. She also claimed that as a result of the accident, she sustained serious injuries and as the subject vehicle was owned by both appellants, they were vicariously liable for their drivers' negligence.
- 3.** Although the appellants filed a joint statement of defence dated 30th October 2017 denying liability as alleged, the trial court record shows that on 18th July 2019, the parties recorded a consent on liability in favour of the respondent against the appellants in the ratio of 90:10.
- 4.** In their consent, the parties also agreed that hearing was to proceed for assessment of damages and that all documents attached to the respondent's list of documents were to be

admitted in evidence without calling their makers save for the medical report and the medical report prepared by *DR. Jennifer Kahuthu* at the instance of the appellants which were to be produced by their makers.

- 5.** In the formal proof hearing, the respondent testified in support of her case and called an additional witness, *DR. Patrick Mwangi* who produced as P. Exhibit 1 a medical report he prepared after examining the respondent on 14th August 2017. The appellants chose not to call any witness in support of their defence.
- 6.** In her judgement delivered on 29th July 2020, the learned trial magistrate awarded the respondents Kshs.1,200,000 as general damages for pain and suffering and special damages in the sum of Kshs.55,550. The total award was subjected to reduction of 10%, the respondents agreed contribution. The respondent was also awarded costs of the suit and interests.
- 7.** Aggrieved by the trial court's decision, the appellants proffered an appeal to this court vide the memorandum of appeal dated 12th March 2021. In support of their appeal,

the appellants relied on eight grounds in which they principally faulted the learned trial magistrate for disregarding their evidence and submissions during the trial and; misdirecting herself on the exact cause of the accident and nature of the respondent's injuries; awarding the respondent general damages in the sum of Kshs.1,365,845 which was manifestly excessive for the injuries sustained.

- 8.** The appellants also complained that the trial court erred by failing to apply correct legal principles in the assessment of damages and by disregarding authorities cited in their written submissions; that the trial court's decision was unjust, against the weight of evidence and the law and amounted to a miscarriage of justice.
- 9.** The appeal was prosecuted by way of written submissions which both parties duly filed. Those filed on behalf of the appellants are dated 18th December 20204 while those filed on behalf of the respondent are dated 20th July, 2024.
- 10.** As the first appellate court, I have a duty to exhaustively analyse and reconsider the evidence adduced before the

trial court to draw my own independent conclusions regarding the validity or otherwise of the trial court's decision. In doing so, I should bear in mind that unlike the trial court, I did not have an opportunity of hearing and seeing the witnesses as they testified in order to assess their demeanour. This duty was captured and expounded by the Court of Appeal in **Selle & Another V Associated Motor Boat Company & others [1968] EA 123** when the court stated as follows;

“...The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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....”

See also : Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.

11. I have carefully considered the grounds of appeal, the rival written submissions filed on behalf of the parties and the evidence on record. I have also read the judgement of the trial court. Having done so, I find that the only issue for my determination is whether the trial court erred in awarding the respondent Kshs.1,200,000 as damages for pain and suffering. I say so because the award of special damages was not contested on appeal and the issue of liability was settled by consent of the parties.

12. Before addressing the issue isolated above for my determination, I must point out that ground 1 of the grounds of appeal is clearly misplaced because as stated earlier, the appellants closed their case without calling any evidence. The learned trial magistrate could not therefore have disregarded evidence which was not placed before her in the first place. It is also my finding that ground No. 3 is largely baseless given that the issue of liability was not before the trial court as the same had been settled by consent of the parties.

- 13.** Turning now to the crux of the appeal which is a challenge on the quantum of general damages awarded to the respondent for pain and suffering, I wish to state at the outset that it is settled law that assessment of damages is at the discretion of the trial court and consequently, an appellate court should be slow to interfere with an award of damages made by the trial court unless certain circumstances are shown to exist.
- 14.** It is an established legal principle that an appellate court should not interfere with a trial court's award unless it was satisfied that in arriving at its decision, the trial court applied wrong legal principles or considered irrelevant factors or failed to consider relevant ones. The award can also be interfered with if the trial court misapprehended the evidence and thereby arrived at a figure that was so inordinately high or low as to represent an entirely erroneous estimate.
- 15.** The above principle has been re-iterated in several authorities but it will suffice in this case to cite just one of them. ***In the Catholic Diocese of Kisumu V Tete (2014)***

eKLR, the Court of Appeal expounded on the principle and stated thus;

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”

- 16.** Another principle in the assessment of damages for personal injuries is that the assessment should, as a general rule, be guided by the nature and extent of injuries suffered by the victim. The general method of approach as held by the Court of Appeal in **Stanley Maore V Geoffrey Mwenda**

[2004] eKLR is that comparable injuries should, as far as possible, be compensated by comparable awards. It must however be appreciated that no two cases can be exactly similar.

17. In this case, the appellants have submitted that the award of Kshs.1,200,000 was inordinately high given the injuries sustained by the respondent. In their view, Kshs.300,000 would have been sufficient compensation for the respondent's pain and suffering. For this proposition, they relied on three authorities namely;

- (i) **Gerald Muhuthia Mwangi V John Mburugu & Another [2022] eKLR** where the court awarded Kshs.280,000 to a plaintiff who had sustained a distal right clavicle fracture with superior displacement, bruises on the right shoulder and soft tissue injuries on the back.
- (ii) **Robert Kithinji Kithaka V AG [2018] eKLR** where the claimant was awarded Kshs.250,000 for fracture on

the left leg involving both tibia and fibula, fracture of the left collar bone and multiple bruises.

(iii) **Lawrence Wairimu Wanyoike & Another V Joseph Letting [2021] eKLR** where the claimant was awarded Kshs.350,000 for a deep cut on the forehead, fracture of left clavicle and blunt injury to the chest and shoulder.

18. The respondent on the other hand supported the trial court's award arguing that it was justified given the nature of injuries suffered by the respondent as shown in the medical report produced as

PExhibit 1. In the lower court, the respondent had proposed a sum of Kshs.4,000,000 relying on the following two authorities;

1) **Duncan Kimathi Karagania V Ngugi David & 3 Others (2016) eKLR** in which the plaintiff was awarded general damages of Kshs,4,000,000 for fractured jaws, fractured hands, nasal implants and scratches on the face and knees.

2) **Christine Mwigina Chege(2017) eKLR** in which the plaintiff was awarded general damages of KShs.4,000,000 for fracture of the right femur, fracture of two ribs, blunt injury to the right side of the chest, right thigh and right knee.

19. In this case, the respondent pleaded in paragraph 5 of her Amended

Plaint that as a result of the accident, she sustained the following injuries;

- (i) Head injury
- (ii) Injury to the left face
- (iii) Fracture on left clavicle
- (iv) Blunt chest injury

20. In his evidence and in his medical report, *Dr. Patrick Mwangi* who testified as PW1 confirmed the above injuries and broke down the head injury suffered by the respondent as follows;

- (a) Cranial fractures affecting the left side of the skull and left side of maxillary intrasinus haemotoma

- (b) Right temporal lobe hemorrhagic contusion
- (c) Left cerebral herniation with mild subdural hygroma.
- (d) A cut wound on the left side of the forehead.

21. In addition, PW1 testified that upon examination of the respondent on 14th August 2017, he noted that in addition to the above head injury, the respondent had also suffered a fracture of the left clavicle bone, fracture of the maxilla bone with eight (8) loose teeth, blunt soft tissue injuries to the neck muscles, anterior chest and on both legs. She also complained of headache and dizziness, severe low back pains and inability to bend or eat hard foods. His prognosis was that the head injuries predisposed the respondent to convulsions in future. He produced the medical report as P.Exhibit 1.

22. PW2 (the respondent) confirmed in her evidence that she had sustained the above injuries and testified that at time of the trial, she had not completely healed as she experienced pain if she stood for a long time.

- 23.** It is important to note that PW1 and PW2's evidence regarding the injuries she had suffered in the accident was not controverted by any evidence to the contrary since the appellants did not call *DR. Jennifer Kahuthu* as a witness to produce the medical report she had prepared at the instance of the appellants.
- 24.** In her judgement, the learned trial magistrate elaborately analysed the written submissions filed by both parties and the authorities cited in support of each party's respective proposal for award of damages to the respondent. The appellants claim that the trial court disregarded their submissions and authorities when arriving at its decision on quantum is thus baseless and unmerited.
- 25.** After my independent appraisal of the evidence on record and the submissions filed by both parties, I agree with the learned trial magistrate that the authorities relied on by the parties were not useful to the court as a guide to the determination of quantum of damages payable to the respondent. I say so because the injuries suffered by the

claimants in those authorities were not comparable to those sustained by the respondent. The injuries sustained by the respondent were largely different and much more severe than the injuries sustained by the plaintiffs in the cited authorities.

26. On my part, I have found the following authorities relevant;

1) **Patrick V Maluak [2022] KEHC 11306 (KLR).** In this case, this court upheld the trial court's award of Kshs. 800,000 as general damages for a victim who had sustained a head injury with loss of consciousness for six hours, laceration on the left face with cut wound on the lateral periorbital area, blunt injury on the left eye with ecchymosis, comminuted fracture of the zygomatic arch, comminuted and depressed fracture of the left lateral wall orbit and left maxillary sinus, blunt injury to the left lower jaw; Pain in the left eye and left face.

2) **Joseph Kimanthi Nzau V Johnson Macharia [2019] KEHC 6491 (KLR)** where the plaintiff had sustained a fracture of the skull, right clavicle, left 1st and 2nd ribs and

multiple soft injuries. On appeal, this court set aside the trial court's award of Kshs. 450,000 and substituted it with an enhanced award of Kshs. 800,000.

27. Guided by the above authorities, i have considered the nature and severity of the injuries sustained by the respondent. In doing so, I have taken into account the fact that the respondent was admitted for treatment at the Kenol Hospital for about a week and her injuries had not healed five months later when she was examined by PW1. It is also noteworthy that she was yet to undergo a procedure to fix her eight teeth which had become loose as a result of the fracture on her maxillar bone.

28. Given the above undisputed facts, I find that the respondent must have experienced immense pain and suffering while undergoing treatment and when recuperating from her injuries. Taking all relevant factors into account including inflationary trends which were also considered by the learned trial magistrate, I am satisfied that the trial court's award of general damages in the sum of 1,200,000 was fair and

reasonable compensation for the respondent's pain and suffering.

29. Having found like I have above, I am unable to agree with the appellant's submissions that the award was manifestly excessive or inordinately high as to lead to an inference that it amounted to an erroneous estimate of the damage suffered. The award is consequently upheld.

30. As the award for special damages was not contested on appeal, the same will remain undisturbed.

31. For the foregoing reasons, it is my finding that this appeal is devoid of merit and it is consequently dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at **MURANG'A** this 16th day of OCTOBER 2025.

HON. C. W. GITHUA

JUDGE

In the presence of:

Mr. Mbutia for the Respondent

No appearance for the Appellant

M/s Susan Waiganjo, Court Assistant

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