



**Kasyoka v Nzau (Suing in his Capacity as the Administrator and Legal Representative of the Estate of Joseph Nzioka Ngui – Deceased) (Civil Appeal 24 of 2019) [2024] KEHC 628 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 628 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 24 OF 2019  
MW MUIGAI, J  
JANUARY 25, 2024**

**BETWEEN**

**STEPHEN KASYOKA ..... APPELLANT**

**AND**

**FRANSISCA KALUNDE NZAU (SUING IN HIS CAPACITY AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH NZIOKA NGUI – DECEASED) ..... RESPONDENT**

*(Being an appeal from the judgment and decree by Hon. C. Mwangi (P.M) at the Chief Magistrate’s Court at Machakos CMCC No. 1580/2009 delivered on 28th August 2012)*

**JUDGMENT**

**Plaint dated 11<sup>th</sup> November 2009**

1. The Plaintiff/Respondent instituted a suit Machakos CMCC 1580 of 2009 against the Respondents seeking
  - a. Special Damages in the sum of Kshs.10,070/-
  - b. General damages for pain, suffering and loss of amenities
  - c. Cost of the suit
  - d. Interest on (a) and (b), and (c) at Court rates.
  - e. Any other further relief this court may deem fit and just to grant.
2. The Defendant was at all material times relevant to this suit, the registered and beneficial owner of motor vehicle registration number KBC 215C Toyota Hiace Minibus/Matatu.



3. That on or about 22/07/2009 the plaintiff was lawfully walking along Ngei Road near oil Libya petrol station within Machakos Township, way off the tarmac when the Defendant and/or his authorized driver drove, controlled and or managed the said motor vehicle registration no KBC215C so negligently that he permitted the same to loose control, veer off the road, hit and knock down the plaintiff deceased and as a result whereof he sustained serious injuries.

**Particulars of Negligence on the Part of The Defendant and/or the Defendant's Authorized Driver, Agent and /or Servant**

- a. Driving at an excessive speed in the circumstances
- b. Driving without any due care and /or sufficient attention.
- c. Failing to maintain any or proper and effective control of the said motor vehicle so as to avoid the said accident.
- d. Failing to stop, swerve, brake, slow down or in any other manner so to steer the said motor vehicle so as to avoid the accident.
- e. Permitting the said motor vehicle to veer off the road and hit the plaintiff.
- f. Driving the said motor vehicle carelessly and dangerously without- any due regard to the safety of other road users and or pedestrians along the said road and especially the plaintiff herein.
- g. Failing to see the plaintiff so as to avoid hitting him.
- h. Driving onto the path of the plaintiff.
- i. Failing to adhere to the road Traffic Act and the Highway Code.

**Defense Dated 15<sup>Th</sup> January 2009**

4. The Defendant denies the whole contents of paragraph 3 and particulars of negligence there under (a-i) and in particular he denies that the plaintiff was lawfully walking along Ngei road when the mentioned motor vehicle knocked him and put the plaintiff to strict proof.
5. The defendant states that if at all the accident occurred involving the plaintiff at the alleged date which is still denied then it was wholly caused by the plaintiff
6. Particulars of the Negligence on the part of the plaintiff included;
  - a. Walking in the middle of the road
  - b. Jay walking along Ngei road
  - c. Crossing the road when it was unsafe
  - d. Ignoring traffic rules.
  - e. Walking along Ngei road without due care and attention and disregard to the oncoming vehicles
  - f. Causing the accident.



## Court Proceedings

7. By consent judgement was entered on liability at 70:30 percent in favour of the plaintiff. Medical reports of Dr. Kamuyu of 25.10.2009 and Dr. Waaambu of 12.04.2010 be produces without calling of the makers.
8. Parties were directed to file submissions for assessment of quantum and the plaintiff was directed to annex receipts in support of special damages

## Trial Court Judgment

9. The trial Court delivered its judgment on 23<sup>rd</sup> August 2012 and entered the following terms
  - a. General damages Ksh. 600,000/-
  - b. Special damages Ksh. 10,000/-

## Memorandum Of Appeal

10. The Appellant, Stephen Kasyoka, being dissatisfied with the Judgment of the Hon. K. Mwangi – PM delivered on 23<sup>rd</sup> August 2012 in Machakos CMCC No.1580 of 2009, appeals to the high court of Kenya against the whole of the said judgement and decree on quantum o the following grounds.
  - a. That the learned Trial magistrate erred in law and in fact by making an award on general damages which was manifestly excessive given the injuries sustained by the plaintiff and the relevant case law produced by the defendant.
  - b. That the learned Magistrate applied wrong principles of law in assessing general damages hence manifestly arriving at manifestly excessive damages.
  - c. That the learned Trial Magistrate erred in law and in fact by ignoring the appellant submissions in his judgement without proper reason to do so

## Submissions

11. The Appellant filed his submissions on 6<sup>th</sup> October 2023, it was submitted that the amount awarded by the Trial Court was excessive because the Respondents pleaded the following injuries: blunt injury to the left lower limb, fracture of the right tibia- fibula and bruises on the right leg. It was submitted that when assessing quantum, a trial court is guided by case law on comparable injuries. Considering the respondent’s injuries and the two medical reports, the sum of Kshs 600,000 awarded was excessive in the circumstances and prayed that the award be reduced to kshs. 250,000.
12. Reliance was placed in the case of *Hassan Noor Mahmoud v Tae Youn Ann* [2001] and *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR where it was stated considering the rate of inflation as at the time of the accident and delivery of judgement and reiterated that award of kshs 250,000 was adequate Compensation for the injuries herein.
13. On the issue of Special damages, it was submitted that it was trite law that special damages must not only be pleaded but must also be proved by way of productions of receipt. The respondent pleaded a sum of kshs 10,070 and prayed that the proved sum be awarded.
14. It was submitted that it was trite law that when assessing quantum, atrial court is guided by case law with comparable injuries. Reliance was made in the case of *Nancy Oseko v Board of Governors Masai Girls High School* [2011] eKLR , *West (HI) and Sons Ltd v Shepherd* (1964) AC 326



15. It was submitted that the Trial Magistrate did not take into consideration the Appellant's submissions as he stated in his judgement that the defendant did not file any documents thus he only relied on the authorities submitted by the plaintiff thus arriving at a wrong decision.
16. It was further submitted that the Trial Court took into consideration matters that he ought not to have considered and disregarded the weight of evidence on the quantum thus arriving at an award which was excessive in the circumstances.
17. It was the appellant's submission that the court award a lower sum of kshs 260,070 subject to less 30% contribution totaling to kshs 182,049.
18. Reference was made to order 42 rule 32 of the Civil Procedure Rules 2010 which provides for the powers of the Appellate Court and the case of Kenfro African Ltd t/a Meru Express Services [1976] & Another v Lubia & Another – (No 2) [1985] eKLR.

### **Respondent' Submissions Dated 30<sup>th</sup> May, 2023**

19. The respondent submitted that the issue of liability was never appealed against as it was entered by consent by both parties and thus the submission was on quantum
20. It was submitted that following the accident the plaintiff had sustained the following injuries; blunt injury to the left lower limb, fracture on the right tibia fibula and bruises on the right leg. That the ward of Kshs 600,000 was not excessive in the circumstances. That the medical report by Dr. Kimuyu and Dr. Wambugu were admitted into record without calling the makers by consent of the parties. The two medical records confirmed the injuries along with the treatment and the opinion was that the injuries sustained were serious bone and moderate soft tissue injuries.
21. It was submitted that there was therefore no dispute as to the nature of injuries sustained
22. Reliance was made on the cases of Francis Ndungu Wambui & 2 others v VK(a minor suing through the next friend and mother MCWK)[2019]eKLR where the trial court awarded kshs 1,000,000 where the respondent suffered soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft and the appellate court agreed with the trial court that the award was reasonable and adequate compensation for the injuries sustained
23. Reliance was also made in the case of Mwaura Muiruri V Suera Flowers Ltd [2014] eKLR and Kornelius kweya Ebichet v C&PShoe Industries Ltd[2008]eKLR where the plaintiffs sustained similar injuries and were awarded kshs 1,500,000 and 1,000,000 respectively. Clement Gitau v G K K [2016] eKLR where the 1<sup>st</sup> respondent sustained a fracture of the left tibia and minor bruises and kshs 600,000 was awarded and was left undisturbed on appeal.
24. It was submitted that taking into account the similarities in nature of the claims herein, the rising cost of living and the rate of inflation, Kshs 600,000 awarded was not inordinately high and thus the court leaves it undisturbed.

### **Determination**

25. I have considered the evidence on record as well as the submissions filed and cases relied upon by respective parties.



26. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

20. A similar view was held by the same Court in *Sbeikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 where it was pronounced that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”

27. In awarding damages, the Court of Appeal in *Southern Engineering Company Ltd. v. Musingi Mutia* [1985] KLR 730 set out the following principles:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in



awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

28. The bone of contention for the appellant was that the Trial Magistrate erred in awarding general damages which was manifestly excessively given the injuries sustained by the Respondent. The Respondent’s injuries were blunt injury to the left lower limb, fracture of the right tibia fibula and bruises on the left leg. The medical reports prepared by both the Appellant’s and Respondent’s doctor seemed to agree to the extent of the injuries sustained by the Respondent and that he had not yet fully recovered.
29. In this case I have considered the decisions cited and it is my view that the case that comes closest to the instant one is that of *Clement Gitau v G K K* (2016) eKLR where the Court awarded a sum of Kshs. 600,000/= to the 1<sup>st</sup> Respondent with similar injuries. Accordingly, I do not find any basis for interfering with the award.

Orders accordingly.

**JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25<sup>TH</sup> JANUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

