



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu & another v Mwangi (Civil Appeal E001 of 2022)
[2024] KEHC 2109 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E001 OF 2022
CW GITHUA, J
FEBRUARY 28, 2024**

BETWEEN

FRANCIS GACHAU NDUNGU 1ST APPELLANT

ANNE NYAMBURA MAINA 2ND APPELLANT

AND

JOSEPH KUNG'U MWANGI RESPONDENT

*(Being an appeal from the judgement of Hon. E.M. Nyagah, (SPM),
dated the 7th of December 2021, in Murang'a CMCC NO. 13 of 2018)*

JUDGMENT

1. This appeal challenges the quantum of damages awarded to the respondent who was the plaintiff in Murang'a CMCC No. 13 of 2018 while the appellants were the defendants.
2. Following a claim for general and special damages as a result of injuries sustained in a road traffic accident whose occurrence was blamed on the appellant's negligence, the respondent was awarded Kshs. 2,000,000 as general damages for pain and suffering, special damages in the sum of Ksh.5000 together with costs of the suit and interest.

The parties had earlier on recorded a consent on liability in the ratio of 70:30 in favour of the respondent against the 1st appellant.
3. The appellants were dissatisfied with the aforesaid award. They proffered the instant appeal vide a memorandum of appeal dated 13th January 2022 in which they advanced five grounds of appeal. They principally complained that the learned trial magistrate erred in law and fact by: awarding Kshs 1,200,000 as general damages for pain and suffering which was excessive compared with conventional awards previously made for similar injuries; awarding damages for loss of amenities in the sum of Kshs 300,000 which were not pleaded in addition to a separate award for pain and suffering; awarding



identical damages of Kshs 500,000 for loss of earning capacity in Civil Suit No. 12 and 13 in which the respondents had different injuries and earning capabilities.

4. The appellants also faulted the trial court for allegedly failing to consider their submissions when making its decision thereby occasioning them a miscarriage of justice.
5. The respondent filed a cross –appeal on 17th January 2022 in which he supported the courts award for pain and suffering but faulted the trial court for allegedly failing to award him damages for loss of earning capacity which were pleaded and proved.
6. The appeal was prosecuted by way of written submissions. The appellants’ submissions were filed on 11th October, 2023 by Ms. Humphrey & Company LLP while those of the respondent were filed on 16th June 2023 by Ms. Kirubi, Mwangi Ben & Company Advocates.
7. In their submissions, the appellants re-iterated their grounds of appeal and emphasized that the learned trial magistrate erred by awarding excessive general damages in favour of the respondent without any legal or evidential justification. Relying on several authorities, the appellants contended that the award of Kshs, 2,000,000 for pain and suffering was unreasonable and inordinately high as it was not comparable to previous awards made by the superior courts for similar injuries; that the award represented an entirely erroneous estimate of the damage suffered.
8. Further, the appellants contended that in making the impugned award, the learned trial magistrate overlooked or misapprehended their evidence and applied wrong legal principles thereby arriving at an erroneous decision.
9. The respondent on the other hand supported the trial courts award of Kshs. 1,200,000 as general damages for pain and suffering arguing that it was fair and reasonable considering that the respondent had sustained serious and life-threatening injuries which caused him permanent incapacity.
10. The respondent further submitted that the court was right in awarding him damages in the sum of Kshs. 300,000 for loss of amenities given that he had developed a permanent limp as a result of shortening of his right leg which made walking difficult; that the award of Kshs. 500,000 general damages for loss of earning capacity was in fact low, as in his opinion, the trial court having adopted the multiplier approach should have awarded him kshs.2,289,792 considering that at the time of the accident, he was 24 years old and the degree of incapacity was assessed to be 30-40 %. He urged me to exercise my discretion and enhance the award if I was persuaded that it was in fact low.
11. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am well aware of my duty as the first appellate court which as succinctly stated by the Court of Appeal in the case of Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR is to ;

“..... re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

12. Since the instant appeal only challenges the quantum of damages awarded by the trial court, it is important to set out the parameters within which an appellate court can interfere with awards made by the lower court.

I must start by observing that as a general rule, an appellate court should be slow to interfere with an award of damages made by the trial court basically because such awards are at large and they depend



on the trial courts discretion. Needless to say, that discretion must be exercised judiciously taking into account the facts of each case and the law.

13. The principles that guide an appellate court in exercising its mandate in appeals of this nature have been enumerated in many authorities. In *Mariga V Musila* [1984] KLR 251 for instance, the Court of Appeal expressed itself as follows:

“ The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principle...”

14. Other principles on the subject were stated by the Court of Appeal in *Bashir Ahmed Butt V. Uwais Ahmed Khan* [1978] eKLR where the court stated that;

“... An appellate court will not disturb an award of damages unless it is 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 inordinately high or low...”

See also: *Kemfro Africa ltd t/a“Meru Express Services[1976]” & Another V. Lubia & Another* [1987] KLR 30.

15. It is now a settled principle of law that in assessing damages for personal injuries, the general method of approach is that comparable injuries should be compensated by comparable awards but regard must be had to the fact that no two cases can be exactly similar. Each case must therefore be decided on its own merits.

See: *Stanley Maore V. Geoffrey Mwenda* [2004] eKLR.

16. In this case, the injuries sustained by the respondent are not disputed. According to paragraph 5 of the plaint, the respondent sustained the following injuries:

- a. Blunt injury to the head (Concussion type)
- b. Fracture of the right upper limb.
- c. Fracture of the right femur.
- d. Bruising and lacerations to the facial region.

17. The above injuries were confirmed by two medical reports prepared by Dr. Elijah Njoroge dated 4th December 2017 and Dr. Joab Bodo dated 24th April 2018 which were produced as evidence by consent of both parties without calling their makers. Both doctors were in agreement that the soft tissue injuries healed well but the fractures did not as at the time of examination by Dr. Obodo about six months later, the respondent still had pain on the fracture sites and he walked with the aid of a crutch. There was shortening of his right leg by 2cms. Dr. Njoroge assessed the degree of residual permanent incapacity at 40% while Dr. Bodo put it at 30 %.

18. Before delving into the key issue raised in this appeal which is whether the learned trial magistrate erred in the assessment of damages payable to the respondent, I wish to first deal with the interpretation adopted by the appellants in their memorandum of appeal and the respondent in his submissions that the award made by the trial court in the sum of Kshs. 2,000,000 was inclusive of the award of Kshs.



300,000 for loss of amenities and the award of Kshs.500,000 for loss of earning capacity so that the difference represented the amount awarded for pain and suffering.

19. From my independent evaluation of the trial court's judgement, I am unable to agree with the aforesaid interpretation for two main reasons. First, at the conclusion of his judgement, the learned trial magistrate specifically stated that he had awarded the respondent Kshs. 2,000,000 as general damages for pain and suffering and nothing else. Secondly, it is clear from the body of the judgement that the trial court had awarded the respondent Kshs. 300,000 for loss of amenities as a separate and distinct award. The same case applied to the award of Kshs. 500,000 for loss of future earning capacity.
20. Had the learned trial magistrate intended that the aforesaid sum of Kshs.2,000,000 was inclusive of the award made for loss of amenities and future earning capacity, as interpreted by the parties, nothing stopped him from clearly saying so.

Considering that damages for loss of future earning capacity can be awarded on its own head or as part of damages for pain and suffering, it is apparent that the learned trial magistrate intended to make separate awards for loss of amenities, loss of earning capacity and pain and suffering but inadvertently failed to indicate the other two awards when computing the total award made in favour of the respondent.

21. Turning now to the merits of the appeal, I wish to address the appellants' complaint that the trial court erred in awarding the respondent general damages for loss of amenities and loss of earning capacity although they appear to have abandoned this complaint given that they did not make any reference to it in their written submissions.
22. Starting with the award for loss of amenities, when making the award, the learned trial magistrate relied on an extract from Halsburys Laws of England 4th Edition Vol. 12 at page 348 and the persuasive authority of Emukule J in Mwaura Muiruri V. Suera Flowers Ltd & Another [2014] eKLR where the Hon. Judge separately awarded Kshs 300,000 for loss of amenities to compensate the plaintiff for diminished quality of life due to inability to enjoy certain aspects of life he would otherwise have continued to enjoy had it not been for injuries sustained in an accident.
23. On my part, I am unable to agree with the reasoning expressed by Emukule J in the aforesaid authority for the reasons stated by Manjaja J in Benuel Bosire V Lydia Kemunto Mokora [2019] eKLR which I fully agree with. In that case, the Hon. Judge stated as follows;

“.....the decision of Emukule J. in making of a separate award for loss of amenities runs against the grain of precedent and practice in this country where a single award of general damages is made to compensate the injured party for pain, suffering and loss of amenities”.

The learned judge proceeded to adopt the explanation given by Kamau J in Peninah Mboje Mwabili V Kenya Power and Lighting Co Ltd (Voi) HCCC No. 2 of 2015 [2016] eKLR where the Hon. Judge observed thus:

“General damages connotes a generic term for the different heads of claims, which are monetary award but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury. The inability to perform any duties must therefore be taken into account at the time of awarding general damages. A claim for loss of amenities is thus encompassed and/or is included in a claim for general damages and need not be awarded separately. Allowing an extra amount in the sum of Kshs 2,000,000/= to form a distinct and



separate award for loss of amenities as had been submitted by the Plaintiff would grossly exaggerate the claim herein.”

24. In my view, the learned trial magistrate should have awarded damages for loss of amenities as part of the damages awarded for pain and suffering so that the award for Kshs. 2,000,000 should have been compensation for pain, suffering and loss of amenities. Making a separate award for loss of amenities was unjust as it may have amounted to double compensation. I therefore agree with the appellant that the learned trial magistrate erred in making a distinct and separate award of damages for loss of amenities in addition to an award of damages for pain and suffering. I consequently set aside the award of Kshs. 300,000 for loss of amenities.
25. Regarding the challenge in respect of the award of Kshs 500,000 as damages for loss of earning capacity, the only reason given to contest this award is that the learned trial magistrate erred in making a similar award in CMCC No 12 of 2018 yet the plaintiffs in both cases had different injuries and earning abilities.
26. In briefly responding to this complaint, I wish to re-iterate the well established legal principle that the award of damages is dependent on the trial court’s discretion and unless it is established that the award was based on a misrepresentation of the evidence on record or on the wrong legal principles or that the trial court otherwise abused its discretion in making the award, an appellate court ought not to interfere with such an award.
27. In this case, the appellants have not alleged that the award made to the respondent was wrong in the sense that it was based on wrong legal principles or misinterpretation of the evidence nor has it been claimed that the respondent was not entitled to such an award. The fact that the trial court may have made a similar award in another case does not by itself warrant interference by this court as the award was made in the trial court’s discretion.
28. I am also not persuaded as submitted by the respondent that the award was low and should be considered for enhancement by this court since in my view, the award was based on the evidence on record and sufficiently compensated the respondent for the possibility of having diminished earning capacity given the extent of disability occasioned by his injuries. The Respondent did not avail any evidence during the trial to prove that the degree of permanent disability he suffered as a result of the injuries sustained in the accident grossly affected his future chances of securing gainful employment or engaging in income generating activities. I therefore find no basis to disturb the award made by the trial court under this head and it is hereby upheld.
29. Turning to the award of Kshs. 2,000,000 for pain and suffering, the record shows that in making the award, the learned trial magistrate referred to the proposal of Kshs 2,500,000 made by the respondent and the authorities cited in support thereof but made no reference to the proposal of Kshs 700,000 made by the appellants and the authorities they had relied on. This was an error on the part of the learned trial magistrate. He ought to have objectively evaluated the proposals made by each of the parties and the authorities cited in support of each proposal before making his decision.
30. From the record, it is not clear how the learned trial magistrate arrived at the award of Kshs 2,000,000 since he did not indicate the authority or authorities he relied on nor did he state any reasons for settling on that amount.
31. After my own independent appraisal of the authorities cited by the parties before the lower court, I find that the authorities cited by the appellants involved claimants who had injuries not quite similar or comparable to those sustained by the respondent. The cases cited by the respondent were also not helpful.



32. I however find guidance in some authorities which were decided about a year or so before the trial court made the impugned award where the claimants had by and large comparable injuries.

In *Margaret Wothaya Kirweya & another V James Muchai Muchiri* [2020] eKLR the plaintiff sustained a fracture of the right femur and right fibula which resulted to shortening of her right leg by three centimetres. Degree of permanent incapacity was assessed at between 30-45%. The trial courts award of Kshs 1,800,000 for pain and suffering was upheld on appeal.

33. In the case of *Benson Kariuki Ireri V Vincent Oyango Owour* Civil Appeal No.82 of 2019 [2022] KEHC 15661[KLR] the High Court confirmed an award of Kshs.1,500,000 made to a claimant who had sustained multiple fractures on the right femur, right tibia/ fibula which resulted to a deformity in the right lower limb. Permanent incapacity was assessed at 20%.

34. Guided by the above authorities and considering that the respondent was admitted in hospital for an entire month during which time skeletal traction and plaster of Paris were applied and noting that he will have to live with the resultant deformity for the rest of his life and taking into account inflationary trends, I find that the award of Kshs 2,000,000 by the trial court was not inordinately high or excessive as to warrant this courts intervention.

I will therefore uphold the award save to add that the award will be compensation for the respondent's pain, suffering and loss of amenities.

35. In the end, the appellants appeal partially succeeds to the extent that the award of Kshs 300,000 being damages for loss of amenities is set aside. Given that the award of special damages was not contested, the damages now payable to the respondent will be as follows:-

i. General damages for pain, suffering and loss of amenities

Kshs 2,000,000

ii. General damages for diminished earning capacity

Kshs 500,000

iii. Special damages Kshs 5000

Total Kshs 2,505,000

Less 30% respondent's contribution to liability.

The award of general damages will attract interest at court rates from date of judgement of the trial court until payment in full while the award of special damages will earn interest from date of filing of the suit.

36. Turning to the cross appeal, as stated earlier, the singular complaint therein was that the learned trial magistrate erred in failing to make an award for loss of earning capacity though the same was pleaded and proved. This complaint clearly lacks merit considering that, as stated earlier, the respondent admitted having benefitted from an award of Kshs 500,000 under that head. The cross- appeal is therefore devoid of merit and it is hereby dismissed.

37. Costs follow the event and are at the discretion of the court. Since the appellants appeal has partially succeeded and the respondent's cross appeal has been dismissed, each party shall bear its own costs of the appeal but the appellants will bear the respondent's costs in the lower court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF FEBRUARY 2024.



C. W GITHUA

JUDGE

In the presence of:

Ms. Waititu holding brief for Mr. Mwangi Ben for the Respondent

Ms. Susan Waiganjo Court Assistant

No Appearance for the Appellants

