



REPUBLIC OF KENYA



**Richard & another v Wainaina (Civil Appeal 406 of 2017)
[2024] KEHC 3367 (KLR) (Civ) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 406 OF 2017

AN ONGERI, J

MARCH 22, 2024

BETWEEN

KAMANYI RICHARD 1ST APPELLANT

GITHAIGA CHARLES 2ND APPELLANT

AND

NATHANIEL ANYOKE WAINAINA RESPONDENT

*(Being an appeal from the judgment of Hon. D. O. Mbeja (SRM)
in Milimani CMCC No. 5830 of 2012 delivered on 10/7/17)*

JUDGMENT

1. The respondent was the plaintiff in Milimani CMCC No. 5830 of 2012 where he sued the appellants seeking general damages for pain and suffering for personal injuries the respondent sustained on 30/8/2011 when he was travelling as a passenger in motor vehicle registration no. KAV 219K Nissan matatu when it was hit by motor vehicle registration no. KBQ 285C belonging to 1st appellant while being driven by the 2nd appellant.
2. The respondent's evidence was that the appellant's motor vehicle did not give way at a junction and it hit the motor vehicle in which the respondent was travelling causing the respondent serious injuries.
3. The trial court found the appellants 100% liable for the accident and awarded damages as follows;
General damages for pain & suffering 700,000
Special damages ksh.500+1,500+49,052
Future medical costs 100,000



Total 851,052

4. The appellants have appealed on the following grounds;
 - i. That the honourable learned magistrate erred in law and in fact by awarding a manifestly high award of general damages of kshs.700,000/= which was incommensurate to the proven injuries sustained by the respondent.
 - ii. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the respondent with due regard to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
 - iii. That the court failed to consider the totality of the evidence adduced and consequently arrived at an erroneous decision.
5. The parties filed written submissions as follows; the appellant submitted that the trial court erred on the principle of comparative award analysis. The respondent suffered a fracture of the left ulna and radius and it was confirmed by Dr. Cyprianus Okoth Okere in the medical report dated 20/1/2012. The appellant argued that the award was too high in the circumstances considering the appellant's injuries. In support the appellant cited the following cases;
 - a. In *Patrisia Adhiambo Omolo v Emily Mandala [2020]* eKLR, Justice Aburili awarded Kshs 180,000/= where the respondent sustained the following injuries: Fracture of the left forearm radius and ulna bones; Colles fracture of the left forearm; Swollen deformed distal aspect of the left forearm; Multiple body injuries, Injuries on the left forearm with swelling.
 - b. In *Jane Warugurumiano v Jotham Nguri Magondu & another [2018]* eKLR the court awarded Kshs. 250,000/= as general damages where the respondent the plaintiff sustained a headache, had huge haemotoma, had neck pain, left scapular fracture with tenderness, dislocation of right shoulder joint, fracture of 8th rib with tenderness, lumbar spine, pain and bruises of lower limbs. General damages for pain and suffering was awarded at Kshs.250,000
6. The respondent alternatively submitted that the Appellants have failed to point out with specificity which wrong principles the learned trial magistrate applied and/or ignored to consider to justify their request for this Court to vary the findings on quantum. The evidence shows that Appellant never sought for the Respondent to be seen by their own Doctor for a second medical opinion who could have independently examined him and offered an informed expert view in addition to the fact that no Doctor or medical report was ever called or filed by the Appellant to challenge and/or dispute the findings of the one by the respondent's Doctor (Dr. Okere) on the degree of disability suffered and the future medical expenses that the respondent will be required to have the k-nails and plates removed.
7. The respondent argued that the trial court reached the correct award. The trial court considered Dr. Jenifer Kahuthu's medical report on behalf of her colleague Dr. Leah Wainaina who had examined the respondent on 11/4/2016 and in her findings she noted that the respondent was in a fair general condition on examination though he complained of pain on the left wrist. The said Doctor testified that a repeat X-ray confirmed fixation of the plates which in her own estimates would require removal at a cost of Kshs. 80,000/= in a private hospital.
8. The respondent maintained that he sustained grievous injuries which occasioned him a lot of pain and loss of blood with recurrent pains in the left forearm and a weakness on the hand as confirmed by both the reports of Doctors Okere and Leah Wainaina. He proposed that a compound sum of Kshs 1,000,000 would suffice as adequate compensation towards the severe injuries he suffered and in support cited Nairobi HCCC No. 1150 Of 2001, Antony Mwundu Maina -versus- Samuel Gitau



Njenga, where the plaintiff suffered a compound fracture of the radius and ulna of the left arm in addition to other injuries and the Honourable Court awarded him the sum of Kshs. 1,200,000/= under the head of general damages for pain and suffering.

9. This being the first appellate court, the duty of the appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court.
10. The sole issue for determination is whether the quantum of damages awarded was excessive and erroneous estimate of the damages suffered by the respondent.
11. I have considered the following comparable authorities;
 - a. In *George Raini Atungu v Moffat Onsare Aunga [2021]* eKLR the respondent was awarded Kshs 650,000/= general damages for the following injuries: Chest contusion; Fracture of the left radius and ulna; Pelvic contusion; Contusion to the right leg; and Fracture of the right tibia/fibula bones.
 - b. In *Martin Ileri Namu & another v Alicalinda Igoki Kiringa [2019]* eKLR the respondent suffered dislocation of the left and fractures to the right tibia fibula and left radius ulna. He was awarded Kshs 800,000/=
12. I find that the award is a reasonable estimate of the injuries suffered.
13. The only time an appellate court interferes with an award is when it is too high or too low as to warrant interference by the appellate court.
14. In the case of *Butt v. Khan [1981] KLR 349 Law, J.A* held as follows;

“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.”
15. The appeal here lacks in merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF MARCH, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

