



**Mahia v Chepkemoi & 2 others (Civil Appeal E165 of 2023)
[2024] KEHC 3527 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E165 OF 2023
RE ABURILI, J
MARCH 21, 2024**

BETWEEN

DICKSON MAHIA APPELLANT

AND

JANET CHEPKEMOI 1ST RESPONDENT

MWANANCHI CREDIT LIMITED 2ND RESPONDENT

WARGEN SERVICES LIMITED 3RD RESPONDENT

*(An appeal arising out of the Judgement of the Honourable S.O. Temu
in the Senior Principal Magistrate's Court at Nyando delivered
on the 15th June 2023 in Nyando SPMCC No. E046 of 2022)*

JUDGMENT

Introduction

1. The appellant Dickson Mahia was sued for general and special damages for injuries sustained by the 1st respondent Janet Chepkemoi following a road traffic accident that occurred on the 17th February 2022 along the Awasi - Kericho when motor vehicle registration No. KBB 649A Mitsubishi Lorry registered in the names of the 2nd and 3rd respondents but beneficially owned by the appellant collided with motor vehicle registration No. KDE 209Q in which the 1st respondent was a lawful passenger leading to the injuries sustained by the 1st respondent.
2. The appellant filed his defence and denied all the averments in the plaint and stated that if an accident ever took place, which he denied, then the same was caused due to negligence of the 1st respondent.



3. The trial magistrate found liability in favour of the 1st respondent at 100% against the appellant and 2nd and 3rd respondents jointly and proceeded to award the 1st respondent general damages of Kshs. 450,000.
4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 6th October 2023 raising the following grounds of appeal:
 1. The learned trial magistrate grossly misdirected himself treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
 2. The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
 3. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
 4. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent, if any, and failed to apply precedents and tenets of law applicable.
 5. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis a vis the respondent's claim.
 6. The learned trial magistrate failed to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
5. The parties filed written submissions to canvass the appeal which, from the grounds of appeal, only challenges quantum of damages awarded.

The Appellant's Submissions

6. The appellant submitted that award of general damages at Kshs. 450,000 by the trial court was inordinately high vis-à-vis the injuries sustained by the 1st respondent which were soft tissue injuries and that an award of Kshs. 150,000 would have been sufficient. Reliance was placed on the cases of *Richard Kieti Katbuu v Musee Mutemi* [2018] eKLR where the court awarded Kshs. 150,000 for blunt trauma to left elbow joint, bruised left elbow, a cut wound and fracture to the metatarsal bone of the left limb, the case of *Silphanus Kumba Murodo v Lamek Mbaka Motege & Another* [2013] eKLR where the most serious injury suffered by the plaintiff was fracture of the 5th metacarpal bone of the right hand and finally the case of *Nyambati Nyawabu Erick v Toyota Kenya Ltd & 2 Others* [2019] eKLR where an award of Kshs. 90,000 was given in general damages for metatarsal fracture, a deep cut on the scalp extending to the maxillary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs.
7. The appellant also prayed for costs of the appeal.

1st Respondent's Submissions

8. It was submitted that the trial court correctly applied the principles of the law in awarding Kshs. 450,000 as general damages. Reliance was placed on the cases of *Njora Samwel v Richard Nyang'au Orechi* [2018] eKLR where the court upheld an award of Kshs. 500,000 for a plaintiff who suffered



a closed fracture of the right 5th metatarsal, the case of *Vincent Mbogholi v Harrison Tunje Chilyala* [2017] eKLR where the appellate court upheld an award of Kshs. 500,000 for a plaintiff who suffered a fracture of the left tibia leg bone, blunt object injury to the chest and lower limb and bruises on the left forearm, right foot and big toe and the case of *Hussein Abdi Hashi v Hassan Noor* [2004] eKLR where the plaintiff received an award of Kshs. 800,000 for fracture injuries of the left malleolus and metatarsal, with permanent incapacity being assessed at 20%.

Analysis and Determination

9. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & Anor. v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).
10. I have carefully considered the evidence adduced before the lower court, judgement appealed against as well as the grounds of appeal and the parties' respective submissions in this appeal. The only issue for determination is whether the trial court erred in its award of the general damages of Kshs. 450,000 in favour of the 1st respondent.
11. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another* (1982-88) I KAR 777:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor 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 wholly erroneous estimate of the damages.”
12. From the trial court record, the 1st respondent pleaded and testified that she sustained the following injuries in the material accident:
 - i. Damage of the right lower limb, which involved the following;
 - a. Complete fracture of the tarsal and metatarsal bones of the right heel joint.
 - b. Soft tissue injuries of the blood vessels, nerves and tendons of the affected limb.
 - ii. Blunt head injuries with haematoma at the facial anterior aspect of the scalp.
 - iii. Dislocated right hip joint.
 - iv. Friction lacerations on the left elbow region.
13. The aforementioned injuries were corroborated by the medical report dated 24th February 2022 and produced as PEX6 by PW3.
14. The burden of proof lies with he who alleges. This is the stipulation in Sections 107-109 of the *Evidence Act*. PW3, George Mwita, testified in corroboration of the respondent's testimony confirmed that when he saw the respondent, she had a displaced shoulder dislocation.



15. The injuries sustained by the 1st respondent as detailed in the P3 form produced as PEX5 produced as PW4 were as follows:
 - i. Bruises on the right and left elbows
 - ii. Swelling tender right foot
 - iii. X-ray showed fracture tarsal metatarsal medial region with marked soft tissue injuries
16. PW4, Geoffrey Ouma, the clinical officer based at Awasi mission hospital who examined the 1st respondent following the accident and testified that the 1st respondent had bruises on the forehead, a cut on the lower lip and a cut wound on the leg. He testified that at the time an x-ray had not been performed. He produced the treatment notes from Awasi Hospital as PEX8.
17. I have considered the evidence by both parties. There is evidence on record that in addition to the soft tissue injuries sustained by the 1st respondent to the forehead, lip and leg, the 1st respondent also suffered a complete fracture of the tarsal and metatarsal bones of the right heel joint as detailed in the medical report and P3 form.
18. It is noteworthy that the testimony provided by PW4 in which he admitted that an X-ray was not undertaken on the 1st respondent at the point when she was brought to hospital was dated the 17th February 2022. The P3 report is dated the 20th February 2022 and the medical report by Dr. M.O. Onyimbi and it is discernible to this court that the fracture to the 1st respondent's foot was not discovered initially when she was taken to hospital immediately following the accident.
19. Accordingly, it is my finding that the 1st respondent proved on a balance of probabilities that in addition to the soft tissue injuries she sustained to the forehead, lip and leg, the 1st respondent also suffered a complete fracture of the tarsal and metatarsal bones of the right heel joint.
20. I now turn to consider whether the general damages awarded by the trial court were manifestly excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds legal backing in the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
21. The trial court awarded the respondent general damages of Kshs. 450,000 while the appellant in his submissions proposed that an award of Kshs. 150,000 would be sufficient.
22. I have considered comparable awards for similar injuries although no two injuries can be exactly the same. In *Eldoret Steel Mills Limited v Elphas Victor Espila* [2013] eKLR, the plaintiff was awarded Kshs. 300,000/= in 2013 for a fracture of the right femur, fracture of the metatarsal bones of the right foot and soft tissue injuries to the right arm, right hip, right thigh and right foot; and in which permanent disability was assessed at 35%.
23. In *Abbyssinia Iron & Steel Limited v Isaack Okoth Ochieng* [2018] eKLR the respondent sustained a blunt head injury, dislocation of the left shoulder, chest injury with damage and the right rib cage, fracture at the left elbow part with a deep penetrating wound at the same region, dislocation of the lumbar-sacral spine at the back and injury of the left foot, with cut wounds and dislocated metatarsal



bones of the pedis with injuries classified as grievous harm the High Court upheld an award of Kshs. 380,000.

24. Taking into consideration the injuries sustained by the 1st respondent herein as enumerated above, the awards by courts on similar injuries and the inflationary trends which have lowered the value of the Kenya Shilling, I find the award of Kshs. 450,000 awarded by the trial court to the 1st respondent was reasonable in the circumstances. I thus find no reason to interfere with the trial court's award of general damages.
25. In the end, I find that this appeal has no merit and proceed to dismiss it with costs to the 1st respondent assessed at Kshs 50,000 payable within 30 days of today and in default, the 1st respondent is at liberty to execute for recovery.
26. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2024

R.E. ABURILI

JUDGE

