



**Nyambura v Njuguna & another (Civil Appeal E025 of 2022)  
[2024] KEHC 4185 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4185 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E025 OF 2022  
GL NZIOKA, J  
APRIL 30, 2024**

**BETWEEN**

**ESTHER WAMBUI NYAMBURA ..... APPELLANT**

**AND**

**MARY WANJIRU NJUGUNA ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MWANGI MUCHUE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the decision of Hon. Eunice Kelly Senior  
Resident Magistrate (SRM) delivered on 11th March 2022 vide  
Naivasha Chief Magistrate's Court vide Civil Case No. 410 of 2019)*

**JUDGMENT**

1. By a plaint dated 19<sup>th</sup> June 2019, the plaintiff sought for judgment against the defendant for the following orders:
  - a. General damages
  - b. Special damages – Kshs, 93,864
  - c. Costs of the suit
2. The claim arose from the accident that occurred on or about the 24<sup>th</sup> February 2019, in which the plaintiff was injured. The plaintiff blamed the defendants for causing the accident. He averred that, as a result of the accident he sustained injuries as follows:
  - a. Closed left tibia fibula fracture.
  - b. Deep cut wound on he left big toe leading to soft tissue injuries.
  - c. Crush to the left second toe leading to disarticulation at the distal phalanx.



- d. Deep cut wound on the left heel leading to soft tissue injuries.
  - e. Soft tissue injuries on the right leg.
  - f. Soft tissue injuries of the right hand.
  - g. Blunt injury to the lower back leading to soft tissue injuries.
  - h. Consequently, the plaintiff sought for the orders herein.
3. By a statement of defence dated 12<sup>th</sup> July 2019, the defendants denied liability and averred on without prejudice basis that if the accident occurred and the plaintiff was injured, then the plaintiff caused it. The defendants further relied on the doctrine of *res ipsa loquitur* and *volenti non fit injuria*.
4. Subsequently on the 9<sup>th</sup> November, 2021, the parties recorded a consent judgment on liability to the effect that, judgment be and was entered on liability in the ratio of 80:20 % in favour of the plaintiff as against the defendant. The suit was disposed of vide filing of submissions.
5. The trial court vide a judgment dated 1<sup>st</sup> March 2022 awarded to the plaintiff general damages and special damage in the sum of Kshs. 400,000 less 20% to a sum of Kshs. 392,800 plus costs and interest from the date of the judgment.
6. However, the appellant is aggrieved by the decision of the trial court on quantum and appeals against it on the grounds:
  - a. That the learned Magistrate erred in law and in fact by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellant's case.
  - b. That the learned trial Magistrate erred in law and in fact by failing to consider the plaintiff/appellant's submissions on quantum payable and therefore awarding general damages which were too low comparable to the injuries suffered by the appellant.
  - c. That the learned trial Magistrate erred in law and in fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.
7. The appeal was disposed of vide filing of submission. The appellant in submissions dated 16<sup>th</sup> February, 2023 relied on the case of; *Mkube vs Nyamuro* (1983) KLR at 403, and *Bhutt vs Khan* (1981) KLR 349 where the Appellate Court discussed the factors the Appellate Court should consider to consider before it can interfere with an award of damages. The factors were stated to be where the damages are inordinately high or low to represent an erroneous estimate, or the Judge misapprehends the evidence or acts on wrong principles and arrives at a figure that is inordinately high or low.
8. The appellant submitted that the trial court held that the authorities cited by the parties were different in nature incomparable to the present suit and instead relied on the case of *Nyamai Petronila & Ano vs Monicah Musyoki* (2020) eKLR where the court award Kshs 200,00 where the claimant sustained soft tissue injuries, a fractured thumb, and a degloving injury to the left leg.
9. That, the trial court relied on the case of; *Nashon Nyambaro Nyadega bs Peter Nyakweba Omboya* (2021) eKLR where the claimant sustained bruises on the face, compound fracture of the right tibia bone, cut wound, and tissue damage on the right leg and was awarded Kshs. 600,000.
10. Further, the trial court relied on the case of; *Daniel Otieno Owino vs Elizabeth atieno Owour* (2020) eKLR where the appellant suffered a compound fracture of the tibia and fibula bones on the right leg,



- deep cut wound and tissue damage on the right leg, chest injury, and a head injury with a cut on the nose. That, the court award damages of Kshs. 400,000 less 20% contributory liability.
11. The appellant argued that, the authorities relied on by the trial court dealt with less serious injuries compared to her injuries where she suffered inter alia; a permanent disability, a shortened leg, and a crush injury to the big toe leading to disarticulation at the distal phalanx. Further, the trial court did not factor inflation taking into account the age of the cases relied on. In the circumstances, taking into account all the factors, the award of Kshs. 400,000 was too low.
  12. The appellant urged the court to allow the appeal and substitute the award of the trial court of Kshs. 400,000 with an award of Kshs. 900,000.
  13. However, the respondents in submissions dated 15<sup>th</sup> March 2023, argued that, the appellant had the legal duty to prove her case on the quantification of general damages which she did not do. That, the medical reports by Dr. Obed Omuyoma and Dr. Joad Bodo both indicated that the injuries suffered by the appellant were classified as moderate bodily harm and they had healed contrary to the evidence by the appellant.
  14. The respondent cited from McGregor on Damages (2003) 17<sup>th</sup> Edition where the function of non-pecuniary heads of damages was set out and stated that, it is not possible to give full compensation as no amount of money can fully compensate a serious physical injury. That the best a court can do is to put a monetary value on the deprivation suffered by the person.
  15. The respondents submitted that, the appellant has failed to demonstrate how the award by the trial court was too low taking into account her injuries and therefore the award was proper and fair. They relied on the case of Charles Owino Odeyo vs Apollo Justus Andabwa & Ano [2017] eKLR where the court set out grounds where an appellate court can interfere with the discretion of the trial court in the award of damages. The grounds were stated to be where the court acts on wrong principles or the award is so excessively high or low that no reasonable tribunal would have awarded, or the court took into consideration matters it ought not to have considered or left out matter it ought to have considered.
  16. The respondents argued that, the trial court in awarding damages considered the evidence on record and took into account relevant factors being the nature of the injuries, and the doctor's opinion and exercised her discretion.
  17. Further, the trial Magistrate considered both the appellant's and respondents' submissions. However, the authorities relied on by the appellant were too excessive compared with the injuries she sustained. That, the respondents relied on the case of South Nyanza Co. Ltd vs John Owino Kisii HCC No. 9 of 2015 where the court awarded Kshs. 60,000 for comparable injuries to the present case.
  18. Further, in Bernard Makau vs Prime Steel Limited (2018) eKLR the appellate court maintained an award of Kshs. 100,000 as general damages where respondent sustained a fracture on his toe and soft tissue injuries.
  19. The respondents urged the court not to disturb the award of the trial court and dismiss the appeal with costs to themselves. I have considered the appeal in light of the materials before the court and taking into account that the role of the first appellate court as stated in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123 is to review the evidence adduced afresh to determine whether the decision impugned was arrived at properly and or correctly in law bearing in mind that, the appellate court did not have the benefit of the demeanour of the witnesses.
  20. As already stated, the appeal herein is on quantum alone. It is trite that the appellate court will not interfere the trial court's discretion in assessing damages unless in exercising that discretion the court



misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968)EA and Mkube -vs - Nyamuro 1983 KLR 403.

21. In the same vein the Court of Appeal in Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those 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 acted on the wrong principles (see Manga vs Musila [1984] KLR 257).”

22. In the instant matter, the injuries the plaintiff suffered are tabulated in the plaint. In support thereof, the plaintiff adduced evidence vide the discharge summary from Kijabe Hospital which indicates that she was admitted in the hospital on 24<sup>th</sup> February 2109 and discharged on 5<sup>th</sup> March 2019. The injuries stated therein include a fracture of the distal tibia fibula, crush injury on the 2<sup>nd</sup> toe.
23. The plaintiff further relied on the P3 form dated 8<sup>th</sup> March 2019 which indicates the plaintiff sustained injuries on the lower back, bruises on the hand, fracture of the right ankle joint, crush injury of the second (2<sup>nd</sup>) toe and deep cut wound on the left heel. The degree of injury was classified as “maim”.
24. Finally, the plaintiff relied on the medical report prepared by Dr, Obed Omuyoma dated 22<sup>nd</sup> March 2019, in which he reflects the injuries pleaded and states that the plaintiff has a permanent disability of 10%. He clasified the degree of injuries as “grievous harm”.
25. Based on the aforesaid, the plaintiff sought for a sum of Kshs. 900,000 general damages and Kshs. 93,864 as special damages.
26. The defendants did not adduce any oral evidence as the trial. In its submissions in the trial court, it submitted that an award of Kshs. 250,000 was sufficient as general damages.
27. I have considered the authorities the parties cited in their respective submissions and I note that the plaintiff relied on the case of; Jane Njeri Macharia vs Godfrey Muriruri Muya & Anor (2020) eKLR where the plaintiff therein suffered compound fractures on both legs and was admitted in hospital for three (3) months. She required surgical implants. In this case, the plaintiff sustained only one fracture and was admitted for only one week. The fracture was managed by application of P.O.P. Therefore the authority was not appropriate for compensating on the nature of injuries and award.
28. The respondent on its part relied on authorities where the plaintiff suffered soft tissue injuries as Kipkebe Ltd vs Peterson Ondieki Tai [2016] eKLR, the plaintiff sustained a deep cut on the left leg and chest contusions. In the case of Ndungu Dennis vs Ann Wanagri Ndirangu & Another [2018] eKLR the plaintiff suffered minor injuries on the back, tenderness on the right leg. Thus as can be adduced, the respondent did not cite any cases where the plaintiff suffered a fracture as herein.
29. In the trial court’s judgment, the learned trial Magistrate was correctly guided in disregarding the authorities cited. The court relied on the decision in Daniel Otieno Owino & Anor vs Elizabeth Atieno Owour [2020] eKLR where Kshs. 400,000 was awarded for compound fractures of the tibia and fibula bones, deep cut wound and tissue damage to the right leg, blunt injury to the chest and head injury with cut. On that authority the plaintiff was awarded Kshs. 400,000.



30. The submissions by the appellant is that her leg has shortened which is a permanent disability and her big toe was disarticulated at the distal phalanx. Further, inflation was not considered based on the age of the matter. The appellant reverts to a claim of Kshs. 900,000.
31. The award of Kshs. 400,000 awarded is not excessively low. The plaintiff was awarded Kshs. 83,864. She incurred medical expenses of Kshs. 8,000 for the medical report. She was basically awarded Kshs. 491,000 and the sum was only reduced by her own 20% contributory liability. Furthermore, the medial report by Dr. Obed Omuyoma indicates at the time of examination she was in fair state of health within normal limits. That movement at the ankle joint was restricted because of pain.
32. It is noteworthy that, whereas the P3 form indicated the degree of injury as “maim” while Dr. Obed Omuyoma classified the same as “grievous harm”. Further, Dr. Obed Omuyoma did not clarify what constitutes the 10% disability. However, more significantly although the appellant submitted that she has suffered a shortened leg, all medical reports produced do not reflect or support that position.
33. I therefore hold and find that, there are no good reasons for the court to interfere with the award of damages and I dismiss the appeal with costs to the respondent assessed at Kshs. 30,000.
34. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Owour for the appellant

N/A for the respondent

Ms. Ogutu: Court Assistant

