



**KenafriC Industries Limited v MW (A Minor Suing Through His Mother and Next Friend NM) (Civil Appeal E056 of 2021) [2024] KEHC 3934 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3934 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E056 OF 2021  
FROO OLEL, J  
APRIL 23, 2024**

**BETWEEN**

**KENAFRIC INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**MW (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND NM) ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of the Hon G. O Shikwe, Principal Magistrate dated 21st April 2021 in Kithimani SPMCC No 173 of 2019)*

**JUDGMENT**

**A. Introduction**

1. The Appellant was the Defendant in the primary suit wherein they were sued for special damages, general damages, costs for future teeth replacement, costs and interest of the suit, arising from a road traffic accident which occurred on 24.07.2019 at about 6.00pm hours at Kateki area along Ikombe-Matuu road. It was alleged that on the said date the respondent was walking as a pedestrian by the roadside when motor cycle registration number KMEF 489H(hereinafter referred to as the suit motor cycle) was negligently, carelessly managed and controlled by the Appellants rider and/or agent, that he knocked down the respondent herein occasioning him the following injuries; missing incisor teeth numbers 11,21,22,41, missing teeth numbers 31 & 12, severe pain and tenderness on lips both upper and lower lips, cut wound on the lower lip, severe pain and tenderness on the lower lip, severe pain and tenderness on the chin, haematoma formation on both upper and lower lips and bleeding both upper and lower gums. The present complaints were pain over the lower chin.
2. The Appellant did entered appearance and filed a statement of defence dated 18.12.2019 wherein they denied all the allegations in the plaint and averred that, if an accident did occur, which was denied, the



same was caused due to the respondent(minor) and his mother's negligence. They sought to have the suit dismissed.

3. After the hearing of the case, the learned Trial Magistrate in his judgment delivered on 21.04.2021 apportioned Liability at 80% against the Appellant and proceeded to award general damages of Kshs.1,200,000/= special damages of Kshs 6,550/=, future teeth replacement Kshs 90,000/=plus costs and interest of the suit.
4. The Appellant being dissatisfied by the quantum awarded did file their memorandum of Appeal dated 24.04.2021 on 02.11.2021 and raised grounds of appeal namely: -
  - a. That the Learned Magistrate erred in law and in fact in holding and awarding a sum of Kshs 1,200,000 as general damages which sum was grossly excessive.
  - b. That the Learned Magistrate departed from age old applicable principles of assessing the measure for loss of dependency, pain and suffering and loss of expectation of life and consequently arrived at a manifestly wrong assessment of the overall measure of damages.
  - c. That the Learned Magistrate erred in law and in fact in failing to find that the evidence presented by the Plaintiff could not sustain the award made on pleaded claim for general damages.
  - d. That the Learned Magistrate erred in law and in fact in making an award of damages that was unwarranted, grossly excessive and inconsistent with the evidence and or case law
  - e. That the Learned Magistrate erred in law and in fact in holding and finding for the Plaintiff.

## **B. Facts At Trial**

5. On 2.12.2020 parties did enter into a partial consent on the issue of liability and it was settled at 80:20 in favor of the respondent. Further on 25.2.2021, the parties further consented that the issue of quantum be canvassed by way of written submissions.

## **C. Submissions**

6. The appeal was disposed of by way of written submissions. The Appellant did not submissions in this Appeal. The Respondent filed submissions on 02.03.2023 and submitted that the evidence produced remained uncontroverted as the Defence did not call any witness to rebut the same, therefore the issue liability was settled.
7. As regards quantum, it was submitted that the award, by the learned Magistrate fully considered the evidence and the exhibits on record, the parties written submissions and the relevant law in awarding general damages. Reliance was placed on the cases of Alphonse Mwatsuma Mwagamchi vs Joseph Mwanzia Mwanzu & Another [2005] eKLR, John Njoroge Murigi vs D. M. K. (minor suing through the father and next friend Michael Kariuki Nganga) [2022]eKLR and Lucy Waruguru Gatundi vs Miriam Nyambura Mwangi [2017]e KLR.
8. It was submitted that ground 2 of the memorandum of appeal was irrelevant as the case before the court was not a fatal injury claim. Further, the trial court, had considered what was commensurate with the current similar award given for similar injuries and caselaw to arrive at the appropriate award. The respondent therefore urged this court to dismiss this Appeal.



#### D. Analysis & Determination

9. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.
10. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Ouseph* AIR 1969 Kerala 316.
11. Accordingly, I have re-evaluated the evidence that was presented before the lower court and I note that the issue before the court is that of quantum as parties agreed on the issue of liability by consent. It is not contested that the minor sustained the following injuries; missing incisor teeth numbers 11,21,22,41, missing teeth numbers 31 & 12, severe pain and tenderness on lips both upper and lower lips, cut wound on the lower lip, severe pain and tenderness on the lower lip, severe pain and tenderness on the chin, haematoma formation on both upper and lower lips and bleeding both upper and lower gums. There were present complaints were pain over the lower chin.
12. This court is guided by the decisions of the Court of Appeal on the issue of interference with damages. In the case of *Johnson Evan Gicheru vs Andrew Morton & another* [2005] eKLR where it was stated that: -

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.
13. It is also a principle of law that awards must be reasonable and comparable to awards in similar cases. In the case of *Tayab v Kinanu* [1983] eKLR, where the court stated as follows:-

“I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd v Shephard* [1964] AC 326 at 345: “But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”



14. Further, in the case *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] where Kneller J.A stated that:

“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 that 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 a wholly erroneous estimate of the damage.”

15. I have perused the judgment, the nature of injuries suffered by the respondent, submissions filed by the parties at the trial court and the respondent’s submissions filed herein. The award of Ksh 1,200,000/= for the injuries sustained by the minor are inordinately high. Though the respondent(minor) lost six (6) tooth, had suffered severe soft tissue injury to the lips, face and severe pain and tenderness in the chin, he did not suffer any fracture. This then would differentiate the said injuries from those suffered by the injured parties in *Alphonse Mwatsuma Mwangamchi vs Joseph Mwanzia Mwanzu & Another* [2005] e KLR, *John Njoroge Murigi vs D. M. K. (minor suing through the father and next friend Michael Kariuki Nganga)* [2022]e KLR. In both citations the injured party suffered fracture of the jaw and/or mandible’s necessitating corrective surgery and had more severe bodily injury. The nature of injuries herein are more in line with the findings in *Isaac Muriungi Mbataru Vs Silas Kalumani* (2017) eKLR & *Joseph Mutua Nthia Vrs Fredrick Moses M Katuva* (2019) Eklr, Where for similar injuries, the court did award quantum in the range of Ksh 400,000/=.

16. In the case of *Kim Pho Choo V Camden & Islington Area Health Authority* (1979) I, Aller 332 cited in the case of *Nancy Oseko V Board of Governors Masai Girls’ High School* [2011] eKLR the court stated:-

“In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.”

## **E. Disposition**

17. The upshot is that this Appeal partially succeed. The award of General damages of Kshs 1,200,000/= issued by Hon G.O Shikwe (P.M) dated 21<sup>st</sup> April 2021 and issued in Kithimani SPMCC NO 173 of 2019 is hereby set aside and the same is substituted by an award of Kshs 500,000/= having considered the injuries sustained, inflationary factors and similar awards.

18. The final decree awarded to the respondent will thus be as follows;

- a. Liability 80.20 in favour of the respondent
  - b. General Damages at Kshs 500,000/=
  - c. Special damages Kshs 6,550/=
  - d. Cost of future teeth replacement Kshs 90,000/=
- Total Award.....Kshs 596,550/=
- Net award (at 80%).....Kshs 477,240/=
- Plus costs and Interest from the date of Judgement in the primary suit.

19. The appellant is awarded half costs of this Appeal which is assessed at Ksh 100,000/= all inclusive.



20. It is so ordered.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF APRIL, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 23<sup>RD</sup> DAY OF APRIL, 2024.**

In the presence of;

No appearance for Appellant

Ms Omar for Respondent

Sam Court Assistant

