



**Mbacho & another v Kamba (Civil Appeal 138 of 2021)
[2024] KEHC 6567 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 138 OF 2021**

MW MUIGAI, J

MAY 27, 2024

BETWEEN

SAMUEL MBACHO 1ST APPELLANT

STEPHEN KIMANI MUNGAI 2ND APPELLANT

AND

CHRISTINE MWIKALI KAMBA RESPONDENT

(eing an Appeal from the judgment delivered on 5th August, 2021 at the Chief Magistrate's Court number 822 of 2019 at Mavoko by Hon. B. Kasavuli, Principal Magistrate)

JUDGMENT

Background

Proceedings in Magistrates' Court

1. Vide a Complaint dated 24.10.2019, the Plaintiff sought for general damages, special damages of Kshs 3550, costs of the suit and interest. The cause of action arose on 17.09.2019 along Mombasa road at green park area when the driver, servant, agent or employee of the Defendant who was in control of Motor vehicle registration number KBX 921Y Toyota Hiace Van that the Plaintiff was a passenger in, caused the motor vehicle to lose control and ram into another motor vehicle. As a result of the accident, the Plaintiff sustained the following injuries; Trauma to the right eye, cut wound with swelling on the right knee and blunt injury to the right knee.
2. The Defendants jointly filed a defence dated 26.11.2019 in which they denied the contents of the Complaint and contended that if the accident occurred, it was due to the Plaintiff's own negligence. They asked the court to dismiss the suit.
3. The Plaintiff filed a reply to defence dated 30.11.2019 in which she reiterated the contents of the Complaint.



Hearing

4. The Plaintiff called two witness, PW1 was Dr. Titus Ndeti who testified that he examined the Plaintiff on 30.9.2019 and produced a medical report and receipts for Kshs 3000 and 10,000 for the report and court attendance respectively.
5. Upon cross- examination, he said that he physically examined the Plaintiff. It was his testimony that the Plaintiff sustained soft tissue injuries and complete healing was anticipated.
6. PW2 was Christine Mwikali who adopted her witness statement and further stated that she was seated behind the driver and had fastened her safety belt. She told the court that she was injured on both her legs and eyes, she was 64 years old and had not healed. In addition, that she could not carry water. She blamed the driver and owner of the motor vehicle and prayed for compensation and costs.
7. She produced the following documents;
 - a. The identity card of the Plaintiff
 - b. Treatment notes and medical records
 - c. P3 form,
 - d. Police abstract
 - e. Motor vehicle search
 - f. Receipts
 - g. Demand letter
8. Upon cross examination, she said that she takes painkillers and she had no documents to show that she still receives medication/treatment.
9. In re examination she told the court that she buys drugs from the chemist or doctor.
10. The defendants did not call any witness.

Trial Court Judgement

11. The court found in favour of the Plaintiff and stated as follows;
 - h. Liability 100%
 - i. General Damages Kshs 300,000
 - j. Special Damages Kshs 3,550
Total Kshs 3,035,550
 - k. Costs
 - l. Interest of the suit.
 - m. Interest of special damages form date of filing the suit to payment in full.

The Appeal

12. Dissatisfied by this judgment, the Appellant filed a memorandum of Appeal dated 13.08.2021 seeking to have the judgment set aside and a re assessment of the award on the grounds that;



- a. The Learned Magistrate erred in fact and in law in awarding the Respondent Kshs 300,000 for general damages which amount was exorbitantly high in the circumstances and injuries suffered by the Respondent.
 - b. The Learned Magistrate erred in fact and in law in holding that the Respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
 - c. The Learned Magistrate erred in law and in fact when he failed to consider the Appellants evidence on points of law and facts with regard to liability and quantum based on the injuries sustained by the Respondent.
 - d. The Learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - e. The Learned Trial Magistrate erred in law and in fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
 - f. The Learned Magistrate erred in fact and law in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.
13. The Appeal was canvassed by way of written submissions.

Appellant Submissions Dated 25.09.2022

14. The Appellant submitted on the issue of quantum only and while relying on the cases of Kenya Power Lighting Company Limited & Another vs Zakayo Saitoti Naingola & Another (2008) e KLR, Godwin Ileri vs Franklin Gitonga [2018] e klr and Ndungu Dennis vs Ann Wangari Ndirangu & another [2018] e KLR, it was submitted that an award of Kshs 100,000 would be reasonable compensation for the soft tissue injuries that were sustained by the Respondent.
15. The Appellant submitted that costs follow the event and relied on section 27 of the [Civil Procedure Act](#).

Respondent Submissions Dated 8.06.2023

16. The Respondent submitted on the issue of liability and quantum. As regards liability, It was submitted that the Plaintiff was a fare paying passenger on board the defendant's motor vehicle and as such had no control over the way the motor vehicle was being driven and the court was asked not to disturb that award as the evidence was uncontroverted. This point was buttressed by placing reliance on the cases of Boniface Waiti & Another vs Michael Kariuki Kamau [2007] e KLR and North end trading Company Limited (Carrying on the business under the registered name of Kenya Refuse Handlers Limited vs City Council of Nairobi [2019] e KLR.
17. As regards quantum, it was submitted that the award of Kshs 300,000 was sufficient in the circumstances based on the injuries sustained and the report of Dr. Titus Nzina Ndeti. Reliance was placed on the case of Joseph Kimani Gathaga & Another vs Dickson Ndungu Njoroge [2019] e KLR, John Kaindo Ngugi & Another vs John Kimanu Iraya [2020] e KLR and Michael Okello vs Priscilla Atieno [2021] e klr



Determination

18. I have considered the lower court record, the memorandum of Appeal and the respective submissions of the parties and the issue for determination is whether the award of General damages should be disturbed.

19. This being a first Appeal, This court is guided by the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

20. The Appellant does not contest liability, the award of special damages, costs and interest.

21. The principles of interfering with general damages were espoused by the Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...”

The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...

It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can



do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

22. Similarly in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55* set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

23. The same court in the case of *Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47*, held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

24. The Court of Appeal in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139* observed as follows:

“Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

25. In this case, the Respondent sustained the following injuries; injuries;

- a. Trauma to the right eye,
- b. cut wound with swelling on the right knee
- c. blunt injury to the right knee.

26. This was her testimony in court and was corroborated by the evidence of PW1, Dr. Titus Ndeti through the medical report dated 30.9.2019 which he produced. This evidence was not contradicted in any way

27. In the case of *Patrick v Ajak (Civil Appeal E07 of 2020) [2022] KEHC 612 (KLR)* in which the Respondent sustained the following injuries; Blunt injury to the upper 1st incisor tooth with mild breakage at the tip, Cut wound on the inner aspect of the upper lip, Blunt injury to the neck, Blunt injury to the left shoulder, Blunt injury to the left chest, Blunt injury to the left hip, Bruises on both



knees; and occasional chest and left hip joint pain and the court lowered the award of the lower court to Kshs. 249,363.20 from Kshs. 561,704/= .

28. In the Baloch Faisal & Another v Elloy Kawira Nthiiri [2019] eKLR in which the respondent sustained soft tissue injuries to the head, knees, chest, back and injury to upper incisor teeth. The High Court allowed the appeal on quantum and substituted the award of Kshs. 360,000/= with an award of Kshs. 200,000/= as general damages.
29. In the case Martha Agok v Kampala Coach [2017] eKLR where the appellant sustained injuries on the face; lost one incisor tooth and fractured another, as well as blunt trauma on the lower abdomen, chest and right leg, the court awarded Kshs. 350,000.00 as general damages.
30. In Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR, wherein the 3rd Plaintiff was awarded general damages of Kshs. 350,000.00 for multiple soft tissue injuries, injury on the left elbow joint and injuries on both ankles.
31. In the case of Francis Ochieng & another v Alice Kajimba [2015] eKLR, in which Kshs. 350,000.00 was awarded for multiple soft tissue injuries without fractures in addition to head injuries which aggravated the injuries.
32. Isaac Katambani Iminya v Firestone East Africa (1969) Limited [2015] eKLR where the court awarded appellant Kshs. 350,000.00/= as general damages for multiple soft tissue injuries
33. I find that the Appellant has not demonstrated why this court should interfere with that award. It has not been demonstrated that the trial court proceeded on the wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate. Taking into account previous decisions and the inflation rate, I find that the award was commensurate to the injuries sustained.

Disposition

34. The Appeal is dismissed and the costs of the Appeal are awarded to the Respondent.

It is so ordered

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 27/5/2024 IN MACHAKOS HIGH COURT

(VIRTUALLY/PHYSICALLY).

M.W.MUIGAI

JUDGE

