

Mbae (Suing as the Legal Representative of the Estate Koome Mbae) v Kinya (Civil Appeal E018 of 2022) [2024] KEHC 2285 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA**

CIVIL APPEAL E018 OF 2022

LW GITARI, J

MARCH 6, 2024

BETWEEN

**MARTIN DOPORRES MBAE (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE KOOME MBAE) APPELLANT**

AND

BRENDA KINYA RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Hon. O. Kinyua (RM) delivered on 18th July, 2022 in Chuka CMCC No. 18 of 2021 Brenda Kinya v. Martin Doporres Mbae (The Legal Representative of the Estate of the late Kelvin Koome Mbae).
2. The Respondent herein was the Plaintiff in the lower court and she had instituted the proceedings against the Appellant herein seeking general damages for pain and suffering, loss of amenities and future medical expenses arising from the injuries she sustained in the road traffic accident that occurred on 23rd December, 2020. She also sought for special damages as well as costs and interests of the suit.
3. The brief facts of the matter as contained in the Complaint dated 4th August, 2021 were that on the material day, the Respondent was riding as a pillion passenger in motor cycle registration number KMCQ 016N Tiger make along Meru-Chuka Highway at Wiru area when the driver, servant, and/or employee of motor vehicle registration number KCX 733A Nissan S. Wagon drove, managed, and/or controlled the said motor vehicle so negligently, carelessly and/or recklessly that he caused or permitted the same to violently hit motor cycle registration number KMCQ 016N Tiger make thereby causing an accident and as a consequence of which the Respondent sustained serious bodily injuries. The Respondent averred that the Appellant ought to be held liable for negligence.
4. The particulars of negligence on the part of the Appellant were pleaded in paragraph 4 of the Complaint whereas the particulars of the injuries were itemized in paragraph 5 of the Complaint.
5. The Respondent thus prayed for judgment to be entered against the Appellant in the following terms:
 - a. Liability – 100%;



- b. General damages for pain and suffering – Kshs. 2,000,000/=;
 - c. Future medical expenses Kshs. 111,000/=;
 - d. Special damages – Kshs. 70,000/=
 - e. Costs and interest of the suit.
6. In response, the Appellant averred that he lacked the requisite locus standi to be sued on behalf of the estate of the late Kevin Koome Mbae. The Appellant further denied ownership of the motor vehicle registration number KCX 733A, occurrence of the subject accident, and the particulars of negligence and injuries suffered as pleaded by the Respondent.
 7. In the impugned judgment, the learned trial magistrate entered judgment for the Respondent herein against the Appellant as follows:
 - a. Liability – 100%;
 - b. General damages – Kshs. 1,750,000/=;
 - c. Interest on the general damages from date of the judgment;
 - d. Kshs. 75,000 as future medical expenses with interest from date of filing the suit;
 - e. Kshs. 70,114/= as special damages with interest from the date of filing the suit;
 - f. Costs of the suit with interest from the date of the judgment.
 8. Aggrieved by the said decision, the Appellant proffered this appeal on the grounds THAT:
 - a. The learned magistrate misapprehended the factual and medical evidence on the nature, extent and effect of the Appellant’s injuries and therefore made a disproportionately high award of general damages.
 - b. The learned magistrate ignored completely the Appellant’s submission on the nature, extent and effect of the Appellant’s injuries and therefore made a disproportionately high award of general damages.
 - c. The learned magistrate misapprehended the legal principles and guidelines set for the award of damages and therefore made an inordinately high award for general damages vis-à-vis the injuries sustained by the Respondent.
 9. The Appellant thus proposed for this appeal to be allowed with costs and for the awards of Kshs. 1,750,000/= and Kshs. 75,000/= as general and special damages respectively be set aside and substituted with the award of Kshs. 600,000/= and Kshs. 70,114/= respectively.
 10. The appeal was opposed and the same was canvassed by way of written submissions.

The Submissions

11. It is the Appellant’s submission that the injuries as captured in the Complaint, that is: a) open fracture tibia-fibula; b) fracture femur; c) ulna fracture; and soft tissue injury were disputed by the Appellant. The Appellant submitted that the Respondent underwent second medical examination by Dr. Wambugu who confirmed in the medical report dated 9th May, 2022 that the Respondent suffered the following injuries; a) compound fracture tibia and fibula involving distal third; closed fracture right femur; and closed fracture right radius not ulna. That although the second medical examination of the



Respondent was done two (2) years after the accident, the medical report of Dr. Wambugu indicated that the fractures sustained by the Respondent had since united. Further that the degree of permanent incapacitation was assessed at 5% and that the metal implants may have to be electively removed at an estimated all inclusive costs of Kshs. 75,000/= in a medium cost private hospital. In the end, the Appellant urged this Court to find that the trial court misapprehended the medical evidence in material respect and thus arrived at a wrong assessment of damages.

12. On the other hand, it was submitted on behalf of the Respondent that the issue of liability is conceded and as such was not presented in the present appeal. Further that the Appellant makes no dispute on the awarded future medical costs and special damages in his grounds of appeal and that as such, the awards under the two heads should be isolated from interference in this appeal.
13. The Respondent placed reliance on the medical report by Dr. Nkonge who noted that the Respondent suffered the injuries captured in the Complaint and noted in the Respondent's Discharge Summary that the Respondent was admitted at Chuka Referral Hospital from 24/12/2020 to 08/03/2021 totaling to 74 days or 2 months 13 days. According to the Respondent, the medical report by Dr. Wambugu did not address the lengthy hospitalization of the Respondent. It was thus submitted that since the 74-day hospitalization of the Respondent was unchallenged, the Respondent's allegations of the injuries suffered must be adopted as the unqualified truth.
14. On the authorities relied upon by the Appellant in support of this appeal, it is the Respondent's submission that the Appellant only relied on two authorities during trial, that is, the case of Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR and the case of Mwaura Muiruri v. Suera Flowers Limited & Another [2014] eKLR. Relying on the case of Sila Tiren & Another v. Simon Ombati Omiombo [2014] eKLR, the Respondent submitted that any additional case law relied upon by the Appellant in this appeal should not be applicable.
15. It was thus submitted on behalf of the Respondent in contrasting the authorities submitted by the parties, that although the award of Kshs. 1,750,000/= was slightly above the range of the relevant authorities given, the difference can be accounted for in view of the lengthy 74-day hospitalization of the Respondent, the prevailing permanent incapacity and the monetary devaluation and skyrocketing inflation ravaging the country since COVID-19 to date. The Respondent thus maintained that the award of Kshs. 1,750,000/= for pain and suffering was not unreasonable or arbitrary to warrant interference. The Respondent thus urged this court to uphold the said award by the trial court and to dismiss the present appeal with costs and interest of the appeal and the lower court to the Respondent.

Issues for Determination

16. I have considered the pleadings, and the submissions by the parties. The main issue that arises for determination by this Court is whether the trial court's assessment of general damages was excessive so as to warrant interference by this court.

Analysis

17. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. [See: Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424]. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

- "i. . First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
18. It is therefore the duty of this court as a first appellate court to re-evaluate the evidence and arrive at its own conclusions. In so doing the court must take into account that it had no opportunity to hear and see witnesses, and therefore must make an allowance for that. (See: *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968 (E.A. 123)).
 19. From the record, PW1 was Brenda Kinya, the Respondent herein. She testified as the only witness in support of her claim against the Appellant. It was testimony that as a result of the subject accident, she suffered broken limbs (fractures of the femur and hand), and soft tissue injuries. That she was attended at Chogoria Hospital and later referred to Chuka General Hospital for 3 months. That she has metal implants in her leg and that she requires Kshs. 300,000/= for the implants to be removed. Further, that she used to attend physiotherapy after the accident at a cost of Kshs. 5,000/= and that she still limps which was not an issue before. She produced in evidence her list of documents in support of her claim including a demand notice, a medical report by Dr. Nkonge dated 17.06.2021, treatment notes, payment receipts, P3 form and motor vehicle record.
 20. The Appellants, on the other hand, closed their case without calling any witnesses but produced in evidence, and by consent of the parties, a medical report dated 9th June, 2022 by Doctor Wambugu P.M
 21. The issue of liability in this case is not in question as the same was arrived at from the judgment of the test suit, that is, Chuka CMCC No. E025 of 2021.
 22. On quantum of damages, it is a general rule that an appellate court should not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. This is the principle enunciated in *Rook v Rairrie* [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:

“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.”
 23. In this case, the counsel for the Respondent, in his submissions, relied on the case of *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR where an award of Kshs. 1,500,000/= in a case where the Respondent had suffered segmental fracture of right femur mid shaft, segmental fracture of right tibia, fracture of the right fibula and fracture 3rd metatarsal bone. The Respondent further relied on the case of *Mwaura Muiruri v. Suera Flowers Limited & Another* [2014] eKLR where the court made a total award of Kshs. 1,750,000/= as general damages for pain and suffering and loss of amenities.
 24. On the other hand, it was submitted on behalf of the Appellant that an award of between Kshs. 600,000/= and Kshs. 650,000/= would be adequate compensation. Counsel for the Appellant relied on the case of *Derrick Mwenda Ngaine & Another v. Dennis Mwenda* [2021] eKLR where the Plaintiff therein sustained a fracture of both tibia and fibula with a degree of permanent disability assessed at 7% and the court vacated the award of Kshs. 900,000/= and awarded Kshs. 600,000/=. Reliance was



further placed on the case of Joseph Mwangi Thuita v. Samuel Chamgamure & Another [2017] eKLR where the court awarded Kshs. 600,000/= for pain and suffering where the Plaintiff had suffered the following injuries:

- a. Fracture of right tibia and fibula bone;
- b. Fracture of left tibia and fibula bone;
- c. Laceration on the neck area; and
- d. Deep cut wound on both legs mid shaft.

25. The factors that a court considers in determining the award to give in damages include the nature and extent of the injuries, the awards made for comparable injuries as well as inflation rates. A court must however bear in mind that no two cases are exactly the same. In the case of Stanley Maore v. Geoffrey Mwenda Nyeri CA No. 147 of 2002 [2004] eKLR the Court of Appeal held as follows on the assessment of general damages;

“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 method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases.”

26. In this case, the nature and gravity of the injuries as pleaded by the Respondent were disputed. Dr. Nkonge who examined the Respondent immediately after the accident, found that the Respondent sustained open fracture tibia-fibula, fracture femur, ulna fracture and soft tissue injury. The Respondent underwent second medical examination two (2) years after the accident by Dr. Wambugu who, according to his medical report found that the Respondent sustained a) compound fracture tibia and fibula involving distal third; closed fracture right femur; and closed fracture right radius not ulna. It is therefore not disputed that the Respondent suffered a femur fracture and tibia-fibula fracture. The only disputed injury is whether the Respondent suffered a fracture of the radius or the ulna. In my view, the initial treatments notes by Dr. Nkonge are more reliable in determining the exact injuries suffered by the Respondent as he examined her immediately after the accident while Dr. Wambugu examined the Respondent two (2) years after the accident when some of the injuries had healed and could only therefore rely on the initial treatment notes to give his finding.
27. In order to assist the court assess damages, the duty of the advocates is to cite appropriate cases from which the court can make a decision. In this case, it is my view that the authorities cited by the Appellant involved less severe injuries than those sustained by the Respondent herein. On the other hand, the authorities cited by the Respondent involve injuries that are more comparable to the ones involved in this case. I am also minded of the fact that before awarding Kshs. 1,750,000/= as general damages, the learned trial magistrate in this case took into consideration the value of the shilling, and the state of the economy, in addition to the nature of the injuries sustained by the Respondent in comparison to the awards made in authorities cited by the parties.
28. It is now well settled that award of damages should not be so excessive as to present an erroneous award and an award of damages aims at compensating the party but not to enrich it. As held in Butt v Khan (supra) an appellate court will interfere with an award of damages if they are in-ordinately high as to represent an erroneous estimate. In this matter the appellant had relied on the case of Dennis Mwenda Ngaine & Another v Denis Mwenda (supra) which was a comparable award where the plaintiff who had sustained similar injuries to those suffered by the plaintiff herein and a permanent incapacity of 7%. In the case an award of Ksh.900,000/- awarded by the lower court was reduced on appeal to



Ksh.600,000/-. This was in 2021. Although the trial magistrate considered the value of Kenya shilling and the state of the economy which are relevant matters, comparable injuries should be as far as possible be compensated by comparable awards. See *Arrow Car Limited v Bimomo & 2 Others* [2004] 2 KLR 101.

29. In making award of damages the court should bear in mind that the injured person is entitled to a fair compensation and the defendant expects fairness in the award of damages as well. See Lord Denning in *Kim Pho Choo v Camden & Islington Area Health Authority* [1979] 1 All E.R. 322 where he stated that in assessing damages, the injured person is only entitled to what in the circumstances a fair compensation for both the plaintiff and the defendant.
30. In the instant case the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards. The learned trial magistrate took into account relevant matter but considering that the appellant had cited a relevant authority with comparable injuries and degree of disability which was higher than that of the respondent, the award of Kshs1,750,000/- was not doubt excessive and present an erroneous award. I find that having found that the general damages awarded were inordinately high, I set aside the award of general damages by the learned trial magistrate.
31. I substitute the award to the respondent at Ksh.600,000/- as general damages for pain and suffering. I will not disturb the awards on the other heads.

On costs, each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF MARCH 2024.

L.W. GITARI

JUDGE

