



REPUBLIC OF KENYA



KENYA LAW
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**Ngure v Omondi (Civil Appeal 451 of 2018)
[2022] KEHC 11519 (KLR) (Civ) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 451 OF 2018

JK SERGON, J

JULY 21, 2022

BETWEEN

PAUL IRUNGU NGURE APPLICANT

AND

EVERLYN AUMA OMONDI RESPONDENT

(Being an appeal from the judgment of the Hon. Magistrate E. K. Usui, SPM delivered on 28th August 2018 at the Chief Magistrate's court at Nairobi in CMCC no. 5019 of 2014)

JUDGMENT

- 1) The respondent was involved in a road traffic accident on June 18, 2011 along Komarock road. She filed Civil Suit Number 5019 of 2014 before the Milimani Chief Magistrate's Court. On June 19, 2018 both parties recorded a consent on liability at the rate of 90% for the appellant and 10% for the respondent. Two witnesses testified for the respondent. In its judgment delivered on May 28, 2018 the trial court awarded the respondent Kshs.700,000 as general damages and Kshs.2,000 special damages.
- 2) The appellant is not satisfied with the trial court's assessment of damages and has preferred this appeal on the following grounds:-
 - i. That the learned trial magistrate judgment was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned miscarriage of justice.
 - ii. The learned trial magistrate erred in law and in fact in awarding Kshs 700.000 as general damages. The said amount was excessive and unjust in the circumstances considering the injuries sustained and the conventional awards in relation to such injuries.



- iii. The Learned Magistrate erred in law and in awarding an excessive amount for the injuries suffered in the face of evidence adduced.
- 3) In their submissions, counsel for the appellant contend that the award of the trial court is quite excessive. The trial court failed to exercise its discretion fairly and took into consideration irrelevant factors. Counsel referred to the case of *Kim Pho Choo v Camden & Islington Area Health Authority* (1979) I ALL ER 332 cited in the case of *Nancy Oseko v Board of Governors Masai Girls High School*(2011) eKLR where it was 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.”
- 4) It is the appellant’s submission that the respondent only suffered an injury to the right wrist and forehead. The treatment notes from Kenyatta National Hospital does not indicate that the respondent suffered a fracture of the radius. Counsel maintain that an award of Kshs.350,000 is adequate compensation for the injuries suffered. Counsel relied on the case of *Philip Musyoka MutuA v Leonard Kyalo Mutisya*(2018) eKLR where Kshs.300,000 was awarded for fracture of radius and other soft tissue injuries. Counsel also referred to the case of *Gogni Rajope Construction Company Ltd v Francis Ojuok Olewe*(2015) eKLR where Kshs.350,000 was awarded for fracture of the left distal ulna and radius. Counsel urged the court to award the appellant cost of the appeal.
- 5) On his part, counsel for the respondent contend that the trial court properly assessed the damages payable to the respondent. The medical report indicate that the respondent suffered a fracture of the right radius, deep cut wound to the left frontal region, blunt trauma to the chest and soft tissue injury to the left hand.
- 6) Counsel for the respondent relied on the case of *John Muli Kasika & another v Samuel Gitau Waweru*, Kiambu Civil Appeal No. 13 of 2018 where Kshs.800,000 was awarded for similar injuries.
- 7) This is a first appeal and the court is required to evaluate the evidence and record of the trial court before drawing its own conclusion. Two witnesses testified for the respondent. PW1 Dr. Kimani Mwaura examined the respondent on April 30, 2014. He itemized the injuries as fracture of the radius right arm, soft tissue injury to the left hand and arm, deep cut wound on the left frontal region (face) and blunt injury to the chest.
- 8) The respondent was the second witness. She narrated the injuries suffered as per the evidence of PW1. She was put on a plaster for three (3) months.
- 9) The appellant closed his case without calling any witness. According to the appellant the respondent did not suffer any fracture. A P3 form was filled on October 4, 2011. It indicates that X-rays from Kenyatta National Hospital indicate that there was a fracture of the right radius. There is one treatment note which makes reference to an injury of the right wrist and forehead. PW1 in his report dated April 30, 2014 indicate that an X-ray on the right wrist was taken and it showed a fracture of the right radius. PW1 testified and was cross-examined. I do find that the respondent indeed suffered a fracture of the right radius plus other injuries as per the evidence of PW1.
- 10) The case of John Muli Kasike(supra) cited by counsel for the respondent does not provide comparable injuries. The trial court in its judgment indicated that it was guided by the decision in *Deborah Omari v Kenya Woodfuel & Agroforestry Programme Limited*, Kisii HCCCNo 132 of 1998 (2004) eKLR where Kshs.650,000 was awarded by Justice Kaburu Bauni on October 26, 2004.



- 11) That authority was provided by Counsel for the respondent. In that case the plaintiff suffered fracture and displacement of the right radius, bilateral posterior dislocation of the left hip, dislocation of the right hip and soft tissue injuries. Those injuries are more severe compared to those suffered by the respondent. However, that decision was rendered in 2004 which is over fifteen (15) years now.
- 12) In the case of *Philip Musyoka Mutua v Leonard Kyalo Mutisya*(*supra*) relied upon by counsel for the appellant, the court was referred to the case of *Kennedy Ago Lidweye v Steel Plus Ltd*; Nairobi HCCC No. 248 of 2010 where Kshs.400,000 was awarded for compound fracture of the right distal radial ulna. The court reduced an award of Kshs.400,00 for fracture of left distal radius and other soft tissue injury to Kshs. 300,000. Judgment was delivered on 30th November, 2018.
- 13) Considering the injuries suffered by the respondent, and the authority of Philip Musyoka Mutua case, I do find that the award by the trial court was not based on comparable injuries and is excessive. I do set aside the award of Kshs.700,000 and replace it with an award of Kshs.550,000.
- 14) In the end, the appeal is found to be meritorious hence it is allowed. Consequently, judgment on appeal is as follows
 - i. The award of ksh.700,000/= is set aside and is substituted with an award of ksh.550,000/= less 10% contribution. making an award of Kshs.495,000.
 - ii. The respondent is awarded the sum of Kshs.2,000 special damages as awarded by the trial court plus costs of the suit before the trial court and interest.
 - iii. Parties shall bare their own costs of this appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
21ST DAY OF JULY, 2022**

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

