



Ngare v Kiai (Civil Appeal 6 of 2020) [2023] KEHC 24212 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 6 OF 2020
FN MUCHEMI, J
OCTOBER 25, 2023**

BETWEEN

ROBERT MBUTHIA NGARE APPELLANT

AND

JAMES KARANI KIAI RESPONDENT

*((Being an Appeal from the Judgment and Decree of Hon. E. O. Wambo (SRM)
delivered on 31st May 2018 in Kerugoya CMCC No. 260 of 2015))*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Kerugoya Senior Resident Magistrate in CMCC No. 260 of 2015 on a claim of general and special damages arising from a road traffic accident. By consent liability was apportioned at the ratio of 30:70 with the appellant bearing 70%. The respondent was awarded general damages of Kshs. 2,000,000/- for pain, suffering and loss of amenities and special damages of Kshs. 367,450/-.
2. Dissatisfied with the award of damages, the appellant lodged this appeal citing 8 ground hereby condensed to the effect that the court below erred in law in awarding general damages of Kshs.2,000,000/- for pain & suffering and loss of amenities which was manifestly excessive.
3. This appeal was disposed of by filing written submissions.

Appellant's Submissions

4. The appellant relies on the cases of *Kenya Tea Development Agency vs Augustine Gori Makori* [2014] eKLR and *Kemfro Africa Ltd t/a Merua Express & Another vs A. M. Lubia & Another* [1982-1988] 1 KLR and submits that the trial court erred by applying wrong principles in assessing the quantum of damages. The appellant submits that the respondent sustained the following injuries:-



- a. Compound bilateral fracture of tibia/fibula;
 - b. Compound fracture of the proximal end of the right tibia;
 - c. Compound fracture of the left distal tibia.
5. The appellant further states that the medical report by Dr. Muleshe confirms that the respondent sustained fractures on both legs to the right tibia and left fibula. Thus, the appellant argues that the general damages awarded to the respondent of Kshs. 2,000,000/- was manifestly excessive taking into consideration the respondent's injuries and precedents on comparable decisions. Therefore the appellant urges the court to award a sum of Kshs. 800,000/- and draws support from the comparable authorities. In the case of *Ram Gopal Gupta vs Nairobi Tea Packers Ltd & 2 Others* [2017] eKLR Kshs. 800,000/- was awarded to a claimant who suffered compound fractures involving tibia and fibula, a tear of medial as well as collateral ligaments of the left knee.
6. In *Alphonza Wothaya Warutu & Another vs Joseph Muema* HCCA No. 1 of 2017, the appellate court retained Kshs. 800,000/- where the plaintiff had sustained; deep cut wound on the forehead, compound fracture of midshaft of the right humerus, compound fracture of the right tibia and deep cut wound on the right lower leg. In the case of *Joseph Mwangi Thuita vs Joyce Mwole* (2018) eKLR where the plaintiff suffered injuries of fracture to the right femur, compound fracture of the tibia and fibula with shortening of the right leg and episodic pain thigh inability to walk without support. The court awarded Kshs. 700,000/- as general damages.

The Respondent's Submissions

7. The respondent submits that he sustained the following injuries:-
- a. Compound fracture on proximal end of the right tibia;
 - b. Compound bilateral fracture of the tibia and fibula;
 - c. Compound fracture on the left distal tibia.
8. The respondent further submits that Dr. Muleshe testified and produced his medical report dated 24th July 2017 in which he stated that the respondent experienced pain, bleeding and loss of function. The doctor confirmed that the respondent had healed surgical scars on the right leg proximally and the left leg distally. The respondent further states that at the date of examination, the x-rays showed that the fractures were at various stages of healing and that his right knee was stiff with restricted movement. The respondent argues that the seriousness of his injuries was further compounded by the fact that the doctor concluded that he is likely to suffer from post-traumatic osteoarthritis of the right knee and the left ankle joint, as long term complications of the fractures.
9. The respondent further submits that he was admitted at PCEA Kikuyu Rehabilitation Centre on 27th February 2015 until 24th March 2015 when he was discharged on a walking frame. He thus argues that the fact that he was admitted for more than 24 days indicates the seriousness of his injuries. He further explained that during his admission he was taken to surgery for surgical toilet, advancement flap, suturing of the wounds. The respondent states that he also sustained injuries to both lower limbs and the face.
10. In submitting on comparable injuries and awards, the respondent relies on the case of *Frankline Chilibasi Spii vs Kirangi Liston* [2017] eKLR where the plaintiff was awarded Kshs. 1.8 million for injuries of compound and comminuted fracture of the right distal tibia; fracture of the distal right radius extending to the wrist joint, severe head injuries involving fracture of the left zygomatic arch



extending to the lateral wall of the left orbit, haematoma on the right temporal scalp, soft tissue contusion on the left per-orbital and front scalp residual scars; 8 x 3 large friction burns on the left forearm, 6cm long friction burns on the left forearm and large wound on the right leg and foot.

11. The respondent further relied on the case of *Zipporah Nangila vs Eldoret Express Limited & 2 Others* [2016] eKLR where the plaintiff was awarded Kshs. 2.4 million for injuries of the bilateral leg right wrist injury, fracture dislocation of the right ankle, comminuted compound fracture of the distal and fibular, fracture of the left distal, tibia and fibula and total functional loss with a lifeless right foot and ankle at 70%. Further in *Mwaura Muiruri vs Suera Flowers Limited & Another* [2014] eKLR where the plaintiff was awarded Kshs. 1,750,000/- for the following injuries:- multiple lacerations on the face, soft tissue injuries on the chest cage, comminuted fractures of the right humerus, upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia fibula.
12. Similarly in the case of *James Gathirwa Ngungi vs Multiple Hauliers (EA) Limited & Another* [2015] eKLR where the plaintiff suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg. The court awarded Kshs. 1,500,000/- for pain suffering and loss of amenities. Thus the respondent submits that the trial court's award was arrived at judiciously taking into account circumstances of the case, similar awards for similar injuries, inflation and economic conditions at the date of the judgment.

Issue for Determination

13. The main issue for Determination is whether the court below awarded excessive damages.

The Law

14. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

15. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
16. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”



17. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the Trial Court Erred in Awarding an Inordinately High Award for General Damages.

18. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele* 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.”

19. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

20. It is not in dispute that the respondent suffered the following injuries:-

- a. Compound bilateral fracture of tibia/fibula;
- b. Compound fracture of the proximal end of the right tibia;
- c. Compound fracture of the left distal tibia.

21. The Trial Magistrate awarded a sum of Kshs. 2,000,000/- for pain and suffering plus loss of amenities. The appellant submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. He urges the court to award Kshs. 800,000/- and relies on the cases as quoted above. The respondent submits that the award is justifiable and comparable to the injuries he sustained.

22. I have looked at the decisions relied by both parties. Some of those of the respondent are comparable with the injuries he sustained whereas other cases have more severe injuries and not comparable. The respondent suffered compound fractures on three parts of his body, in particular on the proximal end of the right tibia, on the tibia and fibula and on the left distal tibia. The respondent was admitted in hospital for about one month with a walking frame. The fractures on both of the lower limbs were serious in nature. The Trial Court did not clearly indicate the authorities that guided him in the award.



The cases of *Frankline Chibasi Spii vs Karangi Liston* [2017] eKLR had more serious injuries in that in addition to the fractures on the lower limb, the plaintiff suffered head injuries. I find the decision of *Maina Mwaura* more comparable to the injuries suffered by the respondent. It was decided in 2016 quite a few years ago. Factors of inflation ought to be taken into account in assessing damages.

23. I am of the considered view that the award of Kshs.2,000,000/- was a bit on the higher side and I substitute it with Kshs.1,600,000/-. The other item of special damages of Kshs.367,450/- remain undisturbed. The award is subject to the agreed ration 30:70.
24. I find this appeal successful and direct that each party meets their own costs of this appeal.
25. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October , 2023.

