



**Gakuo v Mugo (Civil Appeal 57 of 2018) [2023] KEHC 874 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 874 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL 57 OF 2018  
CM KARIUKI, J  
FEBRUARY 15, 2023**

**BETWEEN**

**SAMUEL MAINA GAKUO ..... APPELLANT**

**AND**

**IRENE NJERI MUGO ..... RESPONDENT**

*(Being an appeal against the Judgment of Honourable S. N. Mwangi, Senior Resident Magistrate in Nyahururu CMCC 149 of 2015 delivered on 6th November 2018)*

**JUDGMENT**

1. The appellant lodge an appeal against the judgment of Senior Resident Magistrate Court civil case No 149 of 2015 at Nyahururu dated November 6, 2018 in which the respondent was awarded:
  - a. General damages Kshs 1.5million
  - b. Special damages Kshs 10,000
2. The judgment is five grounds.
  - i. That the learned trial magistrate erred in law and, in fact, in finding the appellant liable contrary to the evidence on record.
  - ii. That the learned trial magistrate erred in making a finding and arriving at an award of damages that is inordinately high as to represent an erroneous estimate of damages payable.
  - iii. That the learned trial magistrate erred in law and in fact, in applying wrong principles and failing to take into account material facts, thus arriving at an erroneous award.
  - iv. That the learned trial magistrate erred in law and, in fact, in disregarding the appellant's submissions and on all points of fact and law in as far as the award of damages is concerned.



- v. That the learned trial magistrate erred in law and in fact, in awarding Kshs 1,500,000/= as general damages, which is excessive and unrealistic in circumstances against the injuries allegedly sustained.
3. The parties were directed to canvass appeal via submissions.

### **Appellants Submissions**

4. The appellant submitted that the respondent had not provided enough evidence to prove the negligence pleaded in the plaint. Reliance is made on *Kiema v Kenya Cargo Hauling Services* [1991] KLR 464.
5. The trial court did not consider the appellant's submissions and did not use the right principal correct applicable in the assessment. Accordingly, we opine and submit that the learned magistrate in the trial court erred in law and facts in awarding the respondent herein Kshs 1,500,000/= which is not only excessive but unjustified.
6. Magistrate failed to take into consideration guiding authorities on quantum as submitted the defendant /appellant in trial court rt as was clearly stated in *Butt v Khan* [1978] eKLR,  

“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 arrived at a figure which inordinately high or low.”
7. The principles in the assessment of damages are those set out in the case of *West (H) & Son Ltd v Shepherd* (1964) AC 326 at page 345, which, is received l endorsement in *Cecilia Mwangi v Ruth W. Mwangi* CA No 251 of 1996.
8. In *West (H) & Son Ltd v Shepherd* (1964) Lord Morris, is stated that:  

“But money cannot renew a physical frame trial has been battered and shattered. All that judges and courts can is to award sums, which must be regarded as giving reasonable compensation. In the process there must be to endeavours to secure some uniformity in the general method of approach. By consent awards must be reasonable and assessed with moderation...”
9. The respondent herein allegedly sustained the following injuries:
  - a. Fracture of the pelvis
  - b. Soft tissue injuries of the right temporo parietal region
  - c. Soft tissue injuries of the chest
  - d. Soft tissue injuries of the hip joint
10. The respondent was examined by Dr Kiamba who prepared, ed a medical report dated April 25, 2017. The medical report was adopted as exhibit 38. The doctor stated that there were no visible scars or swelling on the right tempo region and respondent had recovered fully from the soft tissue injuries on the region. Chest x-ray also showed no abnormalities.
11. That an award of 1,500,000/= as general damages is excessive and unfair for the appellant herein, as the same cannot be justified.



12. An award of Kshs 400 000 would be reasonable and fairly compensate the respondent and rely on the following decisions:
13. *Muthamiab Isaac v Leah Wangui Kanyingi* Nrb HCCA No 653 of 2011 [2016] eKLR, the plaintiff sustained a fracture of the right superior and inferior pubic rami and blunt injury to the left leg. The court awarded Kshs 400,000/- as general damages.
14. *Lilian Wania v Cyprian Mugendi Igonga and 2 others* CKA HCCA No 24 of 2015 [2016] eKLR the plaintiff sustained a fracture/dislocation of the hip and multiple soft tissue injuries, and the court awarded Kshs 500,000/-.
15. *George Osewe Osawa v Sukari Industries Limited* [2015] eKLR the plaintiff sustained a fracture of the pelvis fracture awarded Kshs 400,000/ = in general damages.
16. *Jane Muthoni Nyaga v Nicholas Waniobi Thuo & Another* [2010] eKLR the court, awarded Kshs 300,000/= as general damages for a fracture of the right superior and inferior public rami of the pelvis; a cut on the right leg and central dislocation of the hip

### **Respondent Submission**

17. This appeal emanates from a Nyahururu CMCC No 149 of 2015, where the respondent herein sued the appellant seeking compensation for the injuries she sustained as a residue a traffic accident that occurred on June 5, 2015.  
  
The matter Nyahururu CMCC No 149 of 2015 formed part of a series of matters where file cases Nyahururu CMCC No 49 of 2016 was selected as a test suit by consent of the parties.
18. That judgment on liability was delivered in the test suit where the appellant was found 100% liable for the accident. This is clearly noted balance court in her judgment notes at page 66 of the of record of appeal.
19. It is important to note that since ta test suit was elected where judgment affects this matter, the appellant cannot purport to appeal on liability in this particular matter. Therefore, it is only prudent that the appeal on liability emanates from the test suit file. This would give this appellate court a chance to go through the proceedings since it does not have the benefit of hearing the witnesses in order to make a decision on liability and decide whether or not it will uphold or vary the same which is not the case herein.
20. The proceedings on liability do not form part of the appeal record, and the appellant cannot, therefore purport to ask this honorable court to evaluate afresh the evidence adduced in the trial court as submitted court his submissions.
21. The respondent submits that the trial court did not error in finding the appellant 100% liable as that was the holding in the test sit and properly applies to the case giving rise to this appeal. There is no appeal that has been filed against the decision on liability in the test suits and the appellant cannot appeal in this particular file while the judgment in the test suit is intact and binding on him.
22. It is therefore the respondent's submission that this appeal be found to lack merit and that the same fails on liability for the reasons advanced. They pray that this appeal be dismissed with costs to the respondent.
23. The respondent in her testimony at the trial court testified on these injuries and confirmed that she had not healed from the injuries. The injuries were confirmed by Dr Kiamba in his medical report which is at page 14-15 of the record of appeal



24. In his medical report, Dr Kiamba stated as follows;
- “... she has undergone a lot of pain and suffering since she was involved in the accident. ... she suffers from severe backache and pain in the left side of the pelvis and hip joint which makes her unable to perform heavy duties or stand for a long time or walk long distances. .... I classify the degree of injury as ‘grievous harm’ she should be awarded a total temporary disability of 6 months and a permanent disability of thirty percent (30%)”.
25. The respondent in his submissions at the trial court submitted for Kshs 2,500,000/= to be reasonable compensation. The respondent took into consideration the factors of inflation, the age of authority relied on and the severity of the injuries sustained in arriving at the proposed award.
26. The plaintiff placed reliance on the case of *Jericho Furniture Ltd T/A George Wood Funeral Society v Norah Chepngetich Bett* (2015) eKLR in which the court awarded Kshs 1,200,000/= for pain, suffering and loss of amenities for a fracture of the pelvis and soft tissue injuries as seen at page 43 of the record of appeal.
27. The trial court noted that doctor Kiamba did confirm the injuries sustained by the respondent as noted in her judgment notes at page 67 of the record of appeal. Taking a look at the trial court's judgment notes at page 67-68 of the record of appeal. It is clear that the trial court took into consideration the submissions of both the respondent and the appellant. The trial court proceeded to note as follows;
- “On one hand, case cited by the advocate for the plaintiff shows that the plaintiff therein suffered more injuries with the plaintiff herein. I however do note that the case was decided 3 years ago while those of the defendant were decided between 29 years ago and with inflation and the rising cost of living, the Kshs 150,000/= may not be fair and reasonable today.”
28. The court having taken into consideration the injuries sustained and the submissions of the parties proceeded to award Kshs 1,500,000/=. it is therefore the respondent's submission that the court did consider the appellant's submissions when reaching at its award contrary to the allegations made by the appellant underground 4 of the memorandum of appeal.
29. The respondent submits that the award made by the trial court was not inordinately high in any way and in fact, the award was within the reasonable range of awards made for injuries which are as severe.
30. On the case of *Kenya Power & lighting Co Ltd v Mathew Kagage Wanyiri* [2016] eKLR where the Respondent has sustained only one fracture being the fracture of the femur and the court awarded Kshs 1,200,000/= as general damages in the year 2012 which was upheld upon appeal in the cited case upon appeal.
31. The trial court in the matter having made an award of Kshs 1,500,000/= in the year 2018 for one fracture and soft tissue injuries was reasonable considering the injuries were more in the present case than in the case referred to above, the factors of inflation taken into account and the fact that the decision in this case was made about 5 years later after he the decision in the authority relied on was made.
32. On the case of *Isaac K. Chemjor & Peter Kemboi v Laban Kiptoo* (2019) eKLR where the trial court made an award of general damages of for one fracture and other minor injuries in the year 2016 and the appellate court upheld the same.
33. From the above submissions, it is important for this honourable court to note that the trial court did not take into consideration anything it ought not to consider or fail to consider anything it ought to



have considered when reaching at its award of general damages. This therefore means that there are no circumstances presented before this-honourable court to warrant it disturbing the trial court's award.

### Issues, Analysis And Determination

34. The only issue court discerns from materials herein is on whether the award by trial court is inordinately high. This is so because the liability had been determined by the test suit and same has not been challenged. The trial court made a finding that in Nyahururu CMCC No 49 of 2016 which was a test suit liability was determined at 100% in favour of the plaintiff as against the defendant. Same has not been rebutted.
35. On quantum, trial court placed reliance on the case of *Jericho Furniture Ltd T/A George Wood Funeral Society v Norah Chepngetich Bett* (2015) eKLR cited by the claimant in which the court awarded Kshs 1,200,000/= for pain, suffering and loss of amenities for a fracture of the pelvis and soft tissue injuries thus awarding respondent Kshs 1,500,000.
36. The appellant has proposed an award of Kshs 400 000 to be reasonable and fair compensation for the respondent and relies on the following decisions: *Muthamiab Isaac v Leah Wangui Kanyingi* Nrb HCCA No 653 of 2011 [2016] eKLR, the plaintiff sustained a fracture of the right superior and inferior pubic rami and blunt injury to the left leg. The court awarded Kshs 400,000/- as general damages. *Lilian Wania v Cyprian Mugendi Igonga and 2 others* CKA HCCA No 24 of 2015 [2016] eKLR the plaintiff sustained a fracture/dislocation of the hip and multiple soft tissue injuries and the court awarded Kshs 500,000/- . *George Osewe Osawa v Sukari Industries Limited* [2015] eKLR the plaintiff sustained a fracture of the pelvis and was awarded Kshs 400,000/ = in general damages. *Jane Muthoni Nyaga v Nicholas Waniobi Thuo & another* [2010] eKLR the court awarded Kshs 300,000/ = as general damages for a fracture of the right superior and inferior public rami of the pelvis; a cut on the right leg and central dislocation of the hip.
37. The common thread of all the cited cases by the parties is that they were adjudicated between 2010 and 2016 with injuries inflicted on the claimants with a same range of gravity. However, when it comes to awards, the diversity is very wide ranging from Kshs 300,000 to Kshs 500,00/= for appellant and for respondent Kshs 1,200,000/=.
38. Thus, the court has to strike a balance of Kshs 300,000/= lowest and Kshs 1,200,000/= which fairly lies at Kshs 750,000/=. Thus, court makes the order;
  - i. The appeal succeeds to the extent that, the award by trial court is reduced to Kshs 750,000.
  - ii. Parties to bear their costs in the appeal.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 15<sup>TH</sup> DAY OF FEBRUARY 2023.**

.....  
**CHARLES KARIUKI**  
**JUDGE**

