



REPUBLIC OF KENYA



**Njihia v Kipkutol (Civil Appeal 6 of 2019)
[2023] KEHC 18094 (KLR) (Appeals) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18094 (KLR)

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

APPEALS

CIVIL APPEAL 6 OF 2019

AN ONGERI, J

JUNE 2, 2023

BETWEEN

DAVID NJIHIA APPELLANT

AND

SAMUEL CHEPKOK KIPKUTOL RESPONDENT

*(Being an Appeal from the Judgment of Hon. S. G. Gitonga (RM)
in Milimani CMCC no. 4367 of 2016 delivered on 17/12/2018)*

JUDGMENT

1. The parties in this appeal entered into a consent on liability and apportioned the same at 70:30 in favor of the Plaintiff against the Defendant.
2. The trial court assessed liability as follows:
General damages for pain & suffering 2,300,000
Special damages 2,000
3. The Appellant has appealed against the said quantum of damages on the following grounds:
 - a. That the learned magistrate proceeded on wrong principles in entering judgement for the respondent for the sum of Kshs. 2,300,000 in general damages.
 - b. That the learned trial magistrate erred in failing to scrutinize/evaluate the evidence tendered in support of the injuries suffered by the respondent and to correctly relate them to case law cited to her and thereby failed to arrive at a fair and reasonable compensation to the respondents for her injuries.



- c. That the learned trial magistrate erred in failing to give her reasons for finding that the sum of Kshs. 2,300,000 in general damages to the respondent was reasonable and/or adequate compensation.
 - d. That the learned magistrate erred in law and in fact in failing to find the nature of injuries suffered by the respondent did not warrant an award of Kshs. 2,300,000.
 - e. That the learned magistrate erred in law in failing to uphold the doctrine of precedent.
 - f. That the learned trial magistrate erred in awarding such an inordinately high award of damages for such injuries that have resolved and that the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the respondent.
4. The parties filed written submissions as follows; the appellant submitted that Discharge summary from MP Shah Hospital and medical reports by Dr. Rhoda dated 29/6/2015 and Dr. Waithaka Mwaura dated 13/ 12/2016 set out the respondent's injuries primarily as Fractures of the right ulna proximal 1/3, left tibia and 2nd -6th ribs. The respondent was healed and in good physical condition at the time of reexamination with the right upper limb being grossly normal save for tenderness on palpitation. The left lower limb had a small scar and the respondent had already resumed light duties.
 5. The appellant contended that the award given was way too high and the trial Magistrate erred in failing to give her reasons for finding that the sum of Kshs 2.300,000/= was reasonable and/or adequate compensation. As such the Appellant argued that the computation of damages was totally erroneous and should be set aside. In support he cited Civil Appeal No. 602 of 2009 *Robert Ngatia & Another v Marco Ndome Madina* [2011] The Respondent sustained the following injuries; Compound fracture of the right humerus with a degloving injury in the right arm; Fracture of the radius; Fracture of the right ulna; Profuse hemorrhage; Lacerated scars on the right arm and elbow and that he experienced recurrent pains in the arm weakness of the right hand and as a result he lost his job. The doctor concluded that the respondent's degree of permanent incapacity was about 30%. On appeal, Justice Aburili upheld the trial court's award of Kshs. 700,000 in General damages on 18/12/2014.
 6. The appellant submitted that out of all the medical reports filed, only one alluded to future medical expenses. That the respondent did not even attempt to plead them or to amend the pleadings to include such a prayer and thus not awardable.
 7. The respondent on the other hand submitted that Kshs. 2,300,000 as general damages were adequate as the respondent suffered a fracture of the right ulna and left tibia, multiple rib fractures on the right side affecting the 2nd-6th ribs, displaced segmental fracture of sterna body, difficulty in breathing, open wound on the right forearm, marked tenderness of the left lower leg and reduced expansion of the right chest. He was admitted for 15 days at M.P Shah Hospital and underwent surgery to fix the left tibia and right ulna. The surgery entailed k-nail, plates and screws being inserted and/or fixed in his body as indicated in the medical report by Dr. H.R. Rhoda from the M.P Shah Hospital dated 29th June, 2015.
 8. The respondent relied on the case of *Christine Mwigina Akonya v. Samuel Kairu Chege* [2017] eKLR pleaded the following injuries a fracture of the right femur; Fracture of the ribs 3-6; Pain in the right side of the chest and the right thigh; Persistent pain in the right knee and was awarded Kshs. 4,000,000.
 9. The respondent indicated that there is no material before the court that the trial magistrate in assessing damages took into account irrelevant factors and therefore the appeal herein lacks merit



10. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the findings of the trial court. *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held;

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.”

11. The said principles are applicable when the High court is sitting as the first appellate court in the same way they are applied when the Court of Appeal is hearing appeals from the High Court as the first appellate court.
12. The sole issue for determination in this case is whether the assessment of damages was erroneous.
13. The Plaintiff sustained the following injuries
- i. Fracture of the right ulna
 - ii. Fracture of the left tibia
 - iii. Multiple rib fracture on the right
 - iv. Wound on the right forearm
 - v. Tenderness of the left lower leg.
 - vi. Blunt injury on the chest.
14. I have considered the authorities relied on by both parties. The appellant relied on the following cases;
- i. Machakos HCCC No. 6 of 2007 *Thomas Muendo Kimilu vs Ann Maina & 2 Others* where the plaintiff sustained fractures of the right tibia fibula, left humerus, amputation of one finger and multiple bruises and lacerations. Justice Lenaola assessed General Damages at Kshs. 700,000/= in his judgment delivered on 09/07/2008.
 - ii. Kericho HCCC No. 91 of 2004 *David Kiplangat Sang v Richard K. Langat & 2 Others* where the plaintiff sustained severe head injuries with loss of consciousness for four days, blunt chest injury with fracture of two ribs, fracture of the tibia fibula, upper tibia (tibial plate) and left acetabulum, with hip dislocation. The plaintiff further sustained a fracture of the left medial malleolus. His degree of permanent injury was assessed at 30%. Justice Kimaru assessed General Damages at Kshs. 550,000/= in his judgment delivered on 07/06/2006
15. The respondent relied on the following cases;
- i. *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another* [2015] eKLR where Hon. Justice Muchemi awarded Kshs. 1,500,000 where the injuries sustained by the plaintiff were; Multiple soft tissue injuries; Blunt injury to the head; Failure fracture to the radius/ulna (left); Compound fracture to the right tibia/fibula; Compound fracture to the left tibia/fibula.



- ii. *Charles Mathenge Wabome v Mark Mboya Likanga & 2 others* [2011] eKLR where Hon. Justice H.P.G Waweru awarded Kshs.1,500,000.00 where the injuries sustained by the plaintiff were; Broken right upper leg; Deep cut at the back of the head; Minor bruises on the right hand.
16. I find that general damages for pain and suffering of ksh. 1,500,000/= are comparable.
17. I set aside the award of general damages for pain & suffering of Kshs. 2,300,000 and substitute it with Kshs. 1,502,000.
18. Special damages of 2000 were proved making a total of Kshs. 1,502,000/= less 30% contribution=1051.400
19. I enter judgment in favor of the respondent against the Appellant in the sum of Kshs. 1,051,400 plus costs and interest at court rates from the date of the judgment in the Trial court (17/12/2018) until payment in full.
20. Since the appeal succeeded partially, each party to bear its' own costs of this appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
2ND DAY OF JUNE, 2023.**

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A. ONGERI

JUDGE

