



**Kimani v Mwangi & 2 others (Civil Appeal E071 of 2023)
[2024] KEHC 6744 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E071 OF 2023**

GL NZIOKA, J

JUNE 6, 2024

BETWEEN

JOHN MBURU KIMANI APPELLANT

AND

SAMUEL MWANGI 1ST RESPONDENT

JOHN NDUNGU 2ND RESPONDENT

STEPHEN WAWERU 3RD RESPONDENT

*(Being an appeal from the decision of Honourable J. Ndengeri (SRM)
delivered on 25th July 2023, vide Naivasha CMCC No. E333 of 2022)*

JUDGMENT

1. By a plaint dated 19th May 2022 the plaintiff (herein “the appellant”) sued the defendants (herein “the respondents”) seeking for judgment against the respondents for:
 - a. General damages.
 - b. Future medical expenses.
 - c. Kshs 2, 550
 - d. Costs of the suit.
 - e. Interest at court rates on (a) and (b) above.
2. The appellant case is that on 24th November, 2021 he was travelling as a passenger in motor vehicle registration No KAN 297U along Nairobi-Naivasha road from Naivasha direction towards Nairobi and on reaching Kinugi area the 1st defendant so negligently drove or managed and/or controlled vehicle registration No KAT 377C being driven from the opposite direction that it collided with motor



vehicle registration No KCG 024M causing it to lose control and collide with motor vehicle registration No KAN 297U causing the accident.

3. That motor vehicle registration No KAT 377C was being driven by the 1st respondent and is beneficially owned and registered in the name of the 2nd respondent and the 3rd respondent.
4. That as a result of the accident the appellant sustained the following injuries:
 - a. Fracture of the femur on the right leg.
 - b. Cut wound on the left leg.
5. The appellant attributed the cause of the accident to the negligence of the 1st respondent who drove the motor vehicle registration No KAT 377C negligently by driving in a manner contrary to the Highway Code, at a high speed, failing to stop, slow down or manage the vehicle, losing control of motor vehicle and/or permitting it to collide with motor vehicle registration KAN 297U. Hence the suit herein.
6. However, in response to the appellant's claim the 1st and 2nd respondents filed a statement of defence dated 10th June 2022 and amended 6th July 2022, while the 3rd responded vide a statement of defence dated 10th June 2022.
7. In a nutshell each respondent denied liability of the appellant's claim and in particular the fact that, the accident occurred as alleged, that they were driving, own and/or are registered owners of motor vehicle registration No KAT 377C. The respondents denied all the particulars of the accident attributed to them.
8. However the respondents, averred that on a without prejudice basis, if the accident occurred which is denied, it was caused solely or substantially contributed by the negligence of the appellant and/or the drivers or owners of the other motor vehicles involved in the accident.
9. That the appellant exposed himself by; assuming risk and injury, failing to adhere to the Highway Code, boarding motor vehicle registration No KAN 297U as an excess passenger, failing to take reasonable measures expected of a prudent passenger to avert the occurrence of the accident and injury, and failing to fasten his seatbelt.
10. That the drivers and/or owners of other motor vehicle were negligent by driving defective vehicles, failing to adhere to the [Traffic Act](#) and Highway Code, driving at an excessive speed, failing to have regard for other road users and vehicle on the road, failing to keep a proper look out and heed to the hoots, signal and warnings given by the driver of motor vehicle KAT 377C, driving in an unpredictable manner and encroaching on the lawful path of motor vehicle KAT 377C, and failing to have due regard to the appellant's safety. The respondents averred that the doctrine of Res Ipsa Loquitor applies.
11. The case proceeded to hearing. The appellant's case was supported by his own evidence. He adopted his witness statement as evidence in chief which is a reiteration of the averments in the plaint. He further testified that he sustained a fracture of the femur on the right leg and cut wound on the left leg.
12. That after the accident a good Samaritans assisted him to Naivasha Level 5 Hospital where he was given first aid and transferred to AIC Kijabe Hospital admitted for a day and a plaster applied on his leg. That he was further transferred to St. Peter's Rapha Hospital where he underwent surgery with a K-nail inserted on his right leg.
13. The appellant stated that at the time of testifying he was yet to recover fully and would need to go back to hospital for removal of the plate save for lack of funds.



14. In cross-examination he stated that he was admitted at St. Peter's Uthiru for seven (7) days. That, had availed the P3 form and all treatment notes. That, he blamed the respondents for causing the accident.
15. The defence did not call any witness. The parties were accorded an opportunity to file submissions only the appellant's submissions are on record.
16. By a judgment delivered on 25th July, 2023, the trial court held the respondents 100% liable and made an award on quantum follows: -
 - a. Liability----- 100%
 - b. General damages-----Kshs 450,000
 - c. Special damages-----Kshs 3,050
 - Total-----Kshs 453,050
17. However, the appellant is aggrieved by the decision of the trial court specifically on the amount awarded as general damages and the court's failure to award future medical expenses. He appeals against it on the following grounds as verbatim reproduced: -
 - a. That the learned trial magistrate erred in law by awarding the Appellant general damages of Kshs 400,000/= which was extremely low as to make it, an entirely erroneous estimate of the damages to which the Appellant was entitled.
 - b. That the learned trial magistrate erred in law by misapprehending the evidence in some material respect, and so arrived at a figure which was inordinately low.
 - c. That the learned trial magistrate erred in law by disregarding principle of law that comparable injuries should receive comparable awards.
 - d. That the trial magistrate erred in fact by failing to award the Appellant future medical expenses despite the same having been specifically pleaded and proved.
 - e. That the trial magistrate erred in fact by failing to consider the Appellant's submissions and authorities and arriving at an award which was not supported by any legal authority.
18. As a result, the appellant prays for the following orders: -
 - a. That the appeal be allowed and judgment of the learned trial Magistrate on quantum be set aside.
 - b. This Honourable do re-evaluate the evidence and submissions that were tendered and renders a judgment on the issue of quantum.
 - c. The costs of this appeal are awarded to the appellant.
19. The appeal was disposed of vide filing of submissions. The appellant tendered submissions dated; 20th November, 2023 and relied on the case of, *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] 2 KLR 55 where the Court of Appeal set out the circumstances under which an appellate court may interfere with an award of damages.
20. That the subject factors were identified as; where the trial court applied the wrong principles by taking into account some irrelevant factors and leaving out relevant factors, or misapprehended the evidence and arrived at a figure so inordinately high or low to represent an erroneous estimate.



21. The appellant submitted that, the award of general damages should have been in line with recent cases with similar injuries and/or award as held in the case of; *Sbeikh Mustaq Hassan v Nathan Mwangi Transporters & 5 others* [1986] KLR 457.
22. The appellant also relied on the case of; *Southern Engineering Company Ltd. v Musingi Mutua* [1985] KLR 730 where the Court of Appeal stated that, measurement of damages is a matter of discretion of the trial court to be exercised judicially with regard to the general conditions prevailing in the country and prior decisions that are relevant.
23. The appellant faulted the court for awarding Kshs 450,000 as general damages without citing any authorities on comparable injuries sustained. That the respondents did not file any submissions to assist the trial court assess general damages.
24. That the appellant had sought an award of; Kshs 800,00 as general damages and relied on the cases of; *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR where the victim sustained a mid-shaft fracture of the left femur and swollen tender thigh. That the appellate court substituted the trial court award of Kshs 1,400,000 and awarded Kshs 800,000 as general damages.
25. That the appellant also relied on the case of; *Kiautha v Ntarangwi* [2022] KEHC 10595 (KLR), where the victim suffered bruises on the right upper arm and shoulder, tender upper back, bruises on the left foot, tender and swollen right thigh, and a mid-shaft femur fracture. That the trial court awarded Kshs 2,00,000 as general damages but the appellate court set it aside and substituted it with an award of; Kshs 800,000.
26. The 1st and 2nd respondents did not file any submissions but the 3rd respondent filed submissions dated 6th December, 2023 and concurred with the appellant on the circumstances under which an appellate court may interfere with an award of damages. He relied on the case of; *Catholic Diocese of Kisumu v Sophia Achieng Tete* (*supra*) as quoted in the case of; *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] eKLR.
27. The 3rd respondent submitted that, the award of Kshs 400,000 was in line with comparable awards and relied on the case of; *Simon Kimote v Agro Solutions Limited* [2021] eKLR where the victim sustained a right femoral fracture, tibia plateau fracture, and blunt injuries to the head and neck with a permanent disability assessed at 60%. That the appellate court upheld the award of Kshs 350,000 as damages as reasonable.
28. The 3rd respondent further, cited the case of; *Reamic Investment Limited v Joaz Ameyna Samuel* [2021] eKLR where the victim suffered a fracture of the femur and soft tissue injuries. That the appellate court considered the authorities relied and held that an award between Kshs 200,000 and Kshs 300,000 was reasonable and reviewed the trial court award from Kshs 600,000 to Kshs 350,000.
29. In, *Hashim Mohamed Said & another v Lawrence Kibor Tuwei* [2018] eKLR, the court awarded Kshs 200,000 where the victim suffered a fracture of the left femur, bruises and lacerations on the face and soft tissue injuries with swelling on the left leg.
30. The respondent further cited the case of; *Jitan Nagra v Abidnega Nyandusi Oigo* [2018] eKLR where the court awarded Kshs 450,000 for lacerations on the occipital area, deep cut wound on the back right knee and lateral knee, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, and segmental distal fracture of the right femur.



31. Lastly, the 3rd respondent placed reliance on the case of; *Ibrahim Kalema Lewa v Estelle Company Limited* [2016] eKLR where the appellant sustained intertrochanteric fracture of the left femur with physical and psychological pains and 25% permanent incapacity. The court upheld the award of Kshs 300,00 as damages.
32. The 3rd respondent argued that the authorities relied on by the appellant were in respect to more severe injuries as the appellant did not suffered any long term temporary or permanent incapacity.
33. Finally, the respondent submitted that future medical expenses was not pleaded in the plaint nor proved by the appellant. That, it was only stated in the prayers. Further the medical report of Dr Wokabi referred to in the appellant's submissions in the trial court was not part of his list of documents.
34. In considering the appeal, I note the role of first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123.
35. The Court of Appeal thus observed: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

36. To revert to this matter, I have considered the appeal in the light of the material before the court. I note the law is settled that, the 1st appellate court will not interfere with the trial court’s discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another v Shab* (1968) EA and *Mkube v Nyamuro* 1983 KLR 403.
37. In the same vein, the Court of Appeal in the case of; *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2)* [1985] eKLR stated that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.



38. On the award of quantum, the Court of Appeal in the case of; *Coastal Kenya Enterprises Limited v Muchiri* (Civil Appeal 84 of 2017) [2023] KECA 897 (KLR) (24 July 2023) (Judgment) stated that:

“In making these awards we identify ourselves with the words of Potter, JA in *Rahima Tayab & others v Anna Mary Kinanu* [1983] KLR 114; where it was held while relying on the oft-cited case of *H West and Son Ltd v Shephard* [1964] AC 326 at 345 that:

“Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”

39. The appeal herein is on quantum and in particular the general damages awarded and future medical expenses. As regard general damages, the appellant pleaded that he suffered a fracture of femur on the right leg and cut wound on the left leg.

40. He produced a list of documents in support of his claim which includes a medical examination report, P3 form which indicates he sustained a scar on the left leg 4cm long, incision scar on the right thigh and x-ray was done which showed fracture of right femur mid-shaft. The P3 form was prepared eight (8) months after the accident.

41. The next document produced is from St. Peter Rapha Hospital dated 11th March 2018 in which Dr. Wasena Angira, Consultant Orthopedic Surgeon states that the appellant was scheduled for operation costing Kshs 150,000. That NHIF would contribute Kshs 50,000 and the was to pay the balance of Kshs 100,000.

42. The last medical document is dated 15th August 2018, from the same facility signed by Dr. Wasena Angira which indicates the femur intramedullary aniline was one under spinal anaesthesia. That he was doing well post operation and was discharged home with scheduled physiotherapy and outpatient visits. No other medical documents were availed.

43. The plaintiff sought for a sum of; Kshs 800,000 as general damages and relied on two cases; *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR and *Kiautha v Ntarangwi* [2022] KEHC 10595 (KLR).

44. The respondent’s submissions on the general damages are not within the record of appeal. The appellant avers that, they did not file any.

45. In making the award of Kshs 450,000 as general damages the trial court stated as follows:

“I have considered the authorities cited with regard to the awards of general damages for pain and suffering and loss of amenities. Courts have held that damages for injuries suffered must be within consistent limits. The damages should represent a fair compensation but should not be excessive.”



The trial court further stated:

“I will endeavor to consider the different scenarios as presented in the authorities cited in this matter. Considering the injuries suffered by the plaintiff this court opines under the vote general damages, an award of Kshs 450,000 will be sufficient compensation.”

46. The appellant argued that, the court did not substantiate the award. That, no authority was cited on which the court arrived at a figure of Kshs 450,000. That, the 3rd respondent did not cite any authority relied on, the court cannot be faulted as its award was within the range of authorities cited.
47. Pursuant to the aforesaid, it is a fact that, the trial court did not cite any authority upon which the award for general damages was based. It is also not clear whether the trial court relied on the decision cited by the plaintiff or distinguished them. Hence, the argument by the plaintiff that the figure awarded is not supported.
48. In evaluating the evidence and submissions I note that the medical documents produced confirmed plaintiff suffered a fracture of femur on the right leg and cut wound on the left leg. There is evidence he had to undergo and went through surgery stated to cost Kshs 150,000, part of which the appellant was to pay. The said sum if paid should have been pleaded and proved as special damages. In that regard, the appellant lost that sum of money which would have enhanced the damages awarded.
49. Further, although the medical documents dated 15th August 2018, indicated that he was discharged to go home, there is no evidence of how long he was in hospital (if he was admitted at all). Furthermore, there was no medical document indicating the healing process after surgery and whether he has fully healed with or without any permanent disability. The last medical document dated 15th August 2018 indicates he was doing well post operation. In the absence of any contrary evidence, he should have healed well.
50. To revert to the authorities relied on by the appellant I note that in the case of; *Pestoy Limited & another -v Samuel Itonye Kagoko* (2022) eKLR the plaintiff sustained fracture of the left femur shaft and swollen tender thigh as per Dr. Mwaura’s report dated 5th December 2016. The injuries were classified as grievous harm and was awarded 5% permanent incapacity. The respondent required Kshs 180,000 for removal of the implants. In further report of Dr. Wambugu he indicated that, the plaintiff in had adequately recovered by union, but was predisposed to early onset of osteoarthritis hence assessing permanent incapacitation of 4%. The appellant court awarded Kshs 800,000 as general damages.
51. In the case of; *Joseph M’Munjuri Kautha v Iren Gakii Ntarangwi* HCCA No E050 of 2021 (KEHC 10595) KLR the plaintiff sustained injuries bruises on the right upper arm, right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and a mid-shaft femur fracture. The doctor concluded the injuries suffered were of a degree of grievous harm post-accident, injuries which left the plaintiff with both anatomical, a functional defect. Further the plaintiff’s normal career was interfered with for a duration of 6 months. The appellate court awarded the plaintiff a sum of Kshs 800,000 as general damages.
52. The afore authorities indicate that the victims suffered much more serious injuries than the appellant herein, hence the amount of Kshs 800,000 sought for general damages by the appellant is not tenable.
53. In my considered opinion the appellant denied the trial court adequate evidence to assess the general damages. At the expense of repeating what is already stated, an updated medical report by an expert before filing of the suit would have assisted.



54. Be that as it were, the parties having consented to the production of the medical report indicating there was a cost of Kshs 100,000 to be paid for surgery to be done and it was confirmed that, the surgery was done and the appellant was to continue with physiotherapy, the sum awarded should have considered the same hence the sum of Kshs 450,000 will be subject to review.
55. I have considered all authorities cited by the 3rd respondent on appeal and they were rendered in the year 2016 and 2018. That is over eight (8) and six (6) years respectively. In the instant case I am guided by the decision cited by the appellant that are more recent and adjust the amount herein as the injuries the appellant suffered are less severe. I set aside the award of Kshs 450,000 and award Kshs 550,000 as general damages.
56. As regards future medical expenses I find that although the same was stated as such in the prayers in the plaint it was not supported by any evidence. An expert medical report should have been availed to support it. None was produced hence no proof thereof.
57. The upshot of the aforesaid is that, the award of Kshs 450,000 as general damages is set aside and substituted with an award of Kshs 550,000. The award on special damages, costs and interest as stated in the trial court decision is upheld. The appeal arose out of the award of the court and not fault of respondent. Therefore, each party to meet its cost of appeal.

DATED, DELIVERED AND SIGNED THIS 6TH DAY OF JUNE 2024

GRACE L. NZIOKA

JUDGE

In the presence of

Mr. Irungu for appellant

Mr. Kairu for 3rd respondent

Ms. Ogutu: Court assistant

