



**Kamau & another v Omare (Civil Appeal E835 of 2021)  
[2024] KEHC 9243 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9243 (KLR)

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

**CIVIL**

**CIVIL APPEAL E835 OF 2021**

**S MBUNGI, J**

**JULY 30, 2024**

**BETWEEN**

**DAVID MUTHURA KAMAU ..... 1<sup>ST</sup> APPELLANT**

**DAVID MUTHIE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GAMALIEL ASWANI OMARE ..... RESPONDENT**

*(eing an appeal from the Judgment of Hon. E.Wanjala, PM,  
given on 24/9/2021 in Nairobi, CMCC No. E4648 OF 2019)*

**JUDGMENT**

1. Gamaliel Aswani Omare being the respondent herein sued David Muthura Kamau (1<sup>st</sup> appellant herein) and David Muthie (2<sup>nd</sup> appellant herein) before the lower court in CMCC No 4648 of 2019 claiming General Damages, Special Damages plus costs and interest. Upon full hearing, the trial court entered judgment in favor of the plaintiff and against the Defendant on the following terms:

Liability .....100% in favour of the plaintiff

General Damages for pain and suffering..... Kshs. 950,000.00/=

Special Damages.....Ksh. 17,350/=

Award Kshs. 967,350/=

**Background of the appeal**

2. Aggrieved, the appellant has filed this appeal against the said judgment. The memorandum of Appeal filed herein on 20/12/2021 and dated 15/12/2021, lists the following grounds of appeal:-



- i. That the learned trial magistrate erred in law and fact in awarding general damages that are too high in the circumstances.
  - ii. That the learned magistrate erred in fact in finding that the respondent were entitled to the general damages of kshs.950,000/- which is too high in the circumstances.
3. The appellant prays that the judgment and decree be set aside or otherwise reviewed and substituted with a suitable award. He also pleads for costs of the appeal to be borne by the respondent. The Respondent opposes this appeal.
4. The appeal herein is therefore only on the issue of quantum of damages awarded. In the case of *Selle -vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123*, the Court of Appeal spelt out the jurisdiction of the first appellate court. It is to reassess and re-evaluate the evidence and to come up with its own conclusions. It is therefore the duty of this court to consider such evidence as was produced before the trial court and for this court to come up with its conclusion and determination of the same.
5. Regarding the issue of quantum, the record of proceedings before the trial court shows that it was the evidence of the plaintiff, based on the treatment notes and the filed plaint that he sustained the following injuries:
  - a. Comminuted fracture of the distal right tibia
  - b. Fracture of the right fibula
  - c. Recurrent pain on the right lower leg
  - d. He walks with a limp
  - e. The fracture sites on the lower leg are palpable and tender on palpation.
  - f. Permanent incapacity of 30%
6. Both parties referred to the medical report by Dr Cyprinus Okoth Okere dated 5.4.2019 which confirmed injuries as pleaded and in which permanent disability was assessed at 30% and injuries classifies as grievous harm. The same was treated at Kenyatta National Hospital.
7. The defendant, on the other hand, referred to a medical report by Dr Ruth Ichamwenge which stated that the respondent had normal right knee and ankle movement. The doctor further stated upon re-examination that the x-rays confirmed that the tibia fibula fractures had adequately reunited and the plaintiff would not suffer any permanent disability.
8. The appeal was canvassed by way of written submissions.

#### **Appellant's submissions**

9. On the side of the appellant, it was submitted that the P3 dated 26/10/2018 and medical report date 5/4/2019 from Dr. C.O. Okere lists the same injuries as those that are in the plaint. However, the treatment notes from Kenyatta National Hospital dated 26/10/2018 indicates that the respondent sustained fracture of the tibia and fibula with no splint and no fixation. The award of Kshs.950,000/- was therefore high for soft tissue injuries and submitted that the sum of Kshs. 350,000/- will be sufficient and adequate as compensation.



10. On the quantum of damages, counsel relied on *Power Lighting Company Limited & Another v Zakayo Saitoti Naingola & Another* (200)eKLR cited in case *Jeniffer Mathenge v Patrick Muriuki Maina*(2020)eKLR.,the court held;

In determining whether to interfere with the same or not,the court has to bear in mind the following principles on assessment of damages;

- a. Damages should not be inordinately too high or too low
- b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
- c. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
- d. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.....

11. He further relied on *Atunga v Mogambi* (Civil Appeal E009/2021)(2022)KEHC 9854 9KLR(3 june (judgment)

The respondent’s provisional diagnosis on admission was that he had sustained a fracture of the right tibia and fibula; he suffered dislocation in his right wrist and hip joint. This diagnosis was arrived at after conducting an x-ray on the pelvis, right tibia/fibula and right hand.

Amongst the procedures conducted to manage the injuries were the application of a plaster of Paris (pop)to the fractured leg, reduction was also performed because the respondent had suffered dislocation of the right wrist and hip joint. The medical report and he P3 form were prepared based on the medical opinion of Dr Ombati. According to Dr.Ombati, the respondent had sustained a multiple injuries including a fracture of the tibia that would need to be aligned by ORIF and therefore the respondent would require another surgery to remove the metal implants at a cost of Kshs 200,000/-.The High Court awarded Kshs.550,000/-

12. The appellant cited many other authorities on the issue of quantum of damages. In total, counsel pleaded for an award of Kshs.350,000/= on 100% basis.

### **Respondent’s submissions**

13. The Respondent, on the other hand, submitted that before the trial court, both parties filed relevant documents. That their case was based on the medical report by Dr. Cyprianus Okere and treatment notes from Kenyatta National Hospital, which confirmed that the plaintiff sustained a comminuted fracture of the distal right tibia, fracture of the right fibula which was treated at Kenyatta National Hospital. The doctor indicated that the plaintiff had healed but was walking with a limp and had a permanent incapacity of 30%. on the quantum of damages, the Respondent relied on *Mutua Kaluka v Muthini Kiluto* (2018)Civil Appeal 180 of 2008,Hon Justice P. Nyamweya while upholding the judgment of the trial court he stated that;

“I am guided by the legal principles that apply to an award of damages in such circumstances, which area that sum should be awarded which is in its nature of a conventional award, in the sense that awards for comparable injuries should be comparable, and the amount of the



award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made.”

14. He further relied on Civil Appeal 132 of 2012, *Peter Namu Njeru v Philemon Mwagoti* (2016)eKLR, Hon. Justice P.J. Otieno stated that;

“In order for an appellate court to interfere with an exercise in discretion by a trial court in assessing damages, it must be demonstrated that the award was inordinately too high or too low as to present an entirety erroneous estimate of compensation to which the respondent was entitled or that the court took into account irrelevant factors or failed to take into account relevant factors and that the exercise of discretion was wholly injudicious not expected of a reasonable adjudicator”

He further stated; “this court takes notice that no two cases are precise similar injuries hence the decided cases are merely but a guide as much as they would be of binding nature on the trial court being a subordinate court. However, the duty to assess damages remains a discretionary factor and there must be clear and demonstrable show that there was an error to invite interference by an appellate court”

### **Issues for determination**

15. The appellant in his submissions identified quantum as the only issue for determination.
16. The respondent in his submissions identified one issue for determination in his appeal as;
- a. Whether the learned trial magistrate applied the correct principles of law available and available facts in assessment on general damages payable to the respondent.
17. The court finds that the issue placed by the parties for determination of the appeal are with regard to the assessment of general damages and formulates the issue for determination in the appeal as follows:
- a. Whether the learned trial magistrate applied the correct principles of law available and available facts in assessment of general damages payable to the respondent.

### **Determination**

18. On quantum, an award of damages is discretionary and the appellate court would not interfere with that discretion unless the award is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the trial court proceeded on wrong principles or that it misapprehended the evidence in some material respect and therefore arrived at a figure which was either inordinately high or low.
19. Further the trial court should be guided by comparable awards for similar injuries sustained. The trial should also put consideration as to the case cited in support of the award so as to allow for inflation.
20. In this case, it is not disputed that the respondent sustained comminuted fracture of the right tibia, fracture of the right tibula, recurrent pains on the right lower leg, walks with a limp, tender palpation permanent incapacity 30% which were proved by treatment records from Kenyatta National Hospital and a P3 form which classified the injuries as grievous harm.
21. The trial court considered the case of *Lucy Waruguru Gatundu v Miriam Nyambura Mwangi* (2017)eKLR where the respondent by her plaint pleaded the following injuries, right mid-shaft femur fracture, comminuted compound tibia/fibula fracture, right thigh ecchymosis and



tenderness, right leg 10cm cut wound, septic bone loss and tenderness of the right hip. The high court upheld an award of Kshs. 2,000,000/- in general damages for pain and suffering.

### **Conclusion**

22. This court is satisfied that the trial court took into account the proper principles and was guided by the more recent judicial decision with close proximity as to the nature of injuries sustained by the respondents. In the circumstances, this court sees no reason to interfere with the award of general damages and the award is hereby upheld. The appeal fails.
23. The respondent did not file a submission. Therefore, no order as to costs. Each party to bear his cost.  
Right of appeal within 30 days.

**DATED, SIGNED AND DELIVERED ON THE 30<sup>TH</sup> JULY, 2024 AT KAKAMEGA HIGH COURT.**

**HON. JUSTICE S. MBUNGI**

**HIGH COURT JUDGE**

**In the Presence of:-**

1. The Appellant - Absent
2. The Respondent - Absent
3. Court Assistant - Elizabeth Angong'a

