



REPUBLIC OF KENYA



**Kibisu v Njuguna & another (Civil Appeal E016 of 2023)
[2024] KEHC 9283 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9283 (KLR)

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

CIVIL

CIVIL APPEAL E016 OF 2023

H NAMISI, J

JULY 26, 2024

BETWEEN

KELVIN LWANGU KIBISU APPELLANT

AND

ISAAC MUCHIRI NJUGUNA 1ST RESPONDENT

ONESMUS WAWERU 2ND RESPONDENT

(Being an Appeal from Judgement of Hon. S.G. Gitonga (Mrs), Resident Magistrate in Milimani CMCC No. 6877 of 2017 delivered on 6th March 2019)

JUDGMENT

1. This appeal arises from a suit filed by Appellant against the Respondents, jointly and severally, for:
 - (i) General damages for:
 - (a) pain, suffering and loss of amenities of life;
 - (b) future medical costs – Kshs 100,000/=
 - (ii) special damages of Kshs 33,405/-
 - (ii) Costs and interest
2. The particulars of the suit are that on 26 June 2016, the Appellant was riding a bicycle along Karen Road, Nairobi, when the 1st Respondent negligently drove, managed and/or controlled motor vehicle Registration number xxxx that it collided with the Appellant. The motor vehicle was owned by the 2nd Respondent.



3. As a result of the accident, the Appellant sustained a fracture of the right femur, which was operated on and fixed with screws. The Appellant averred that the cost of removal of the metal would be Kshs 100,000/=.
4. At the hearing, only the Appellant testified. He adopted his witness statement and produced a bundle of documents, which included P3 Form, Medical Report prepared by Dr. Wokabi dated 26 July 2016, X-Ray Report dated 15 August 2016 and Case Summary from Kenyatta National Hospital. The Respondent did not call any witnesses or adduce any evidence.
5. The trial court entered judgement in favour of the Appellant, awarding Kshs 400,000/= for general damages and Kshs 31,395/= for special damages.
6. Aggrieved by this decision, the Appellant lodged this appeal on the following grounds:
 - i. That the learned Magistrate erred in her assessment of general damages for pain, suffering and loss of amenities
 - ii. That the learned magistrate erred by failing to make an award of damages for future medical costs.
7. The Appeal was canvassed by way of written submissions.

Analysis and Determination

8. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that, "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 demeanor of a witness is inconsistent with the evidence in the case generally".
9. In an appeal on quantum, the court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were set out in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

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 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.
10. In the trial court, the Appellant testified that he suffered a fracture to the right femur. To support his claim, at the hearing, the Appellant produced P3 Form as well as a Medical Report dated 26th July



2016 prepared by Mr. Wokabi, MB ChB. At the time of examining the Appellant, the Doctor observed that the Appellant complained of pain on his upper part of the right leg and hip joint, he could not walk without support and he could not kneel or squat. The Appellant walked with the aid of crutches. There was a surgical scar on the upper outer right thigh. The X-rays showed presence of a fracture of the neck of the right femur.

11. It was the Doctor's opinion that the Appellant was expected to achieve reasonable rehabilitation within a period of 12 to 15 months. The final permanent disability was assessed at 12%. The Doctor also noted that the cost of removal of the metal implants would be Kshs 100,000/-.
12. The Case Summary from Kenyatta National Hospital revealed that the Appellant had been admitted on 28 June 2016 and discharged on 13 July 2016. The diagnosis was fracture right neck of femur.
13. In its judgement, the trial court noted that the authorities cited by the Appellant were not comparable to this case since the victims therein suffered more serious injuries and the degree of permanent incapacitation in some of the cited authorities were higher than in the instant case. The trial court found the authorities cited by the Respondent to more comparable to the instant case.
14. In its submissions to the trial court, the Appellant relied on three cases. In *Jackline Kamunyi Kamau v Simon Njoki Kiiru* the Court of Appeal upheld an award of Kshs 1,200,000/- where the Appellant had suffered a fracture of the femur with internal fixations. In the case of *Joseph Musee Muia v Julius Mbogo Mugo & 3 Others*, the court awarded Kshs 1,300,000/-.
15. In addressing whether the general damages awarded by the trial court were exceedingly low, I am guided by the principle in the assessment of damages that an award must reflect the trend of previous, recent and comparable awards. In the case of *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR, the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

16. Having stated that, I am alive to the fact that no two cases are exactly the same. It is incumbent upon this court to analyse the damages awarded by the trial court in light of cases that may have comparable injuries.
17. In *Kihara & another v Mutuku*, Civil Appeal no 27 of 2018 [2022] KEHC 15626 (KLR), the trial court awarded Kshs 700,000 in general damages to a plaintiff who had suffered a fracture of the right femur, blunt injuries to the chest, minor injuries to the upper limbs and received treatment for 4 months. Her incapacitation was assessed at 12%. In the appeal, the High Court maintained the award of the trial court.
18. In *Joseph Mwangi Thuita v Joyce Mwole* [2018] eKLR, the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support. The court awarded Kshs. 700,000 as general damages.
19. In *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR, the court, in awarding Kshs 600,000/- in general damages, stated this:

“In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower



leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body.”

20. In view of the foregoing, I am persuaded that the award by the learned trial magistrate fell on the lower side in comparison to comparable awards. However, I am not persuaded that the sum proposed by the Appellant is reasonable and fair, in light of the injuries suffered.
21. Upon considering the damages awarded in the authorities I have just cited, and their age, I find that an award of Kshs 700,000/= to be reasonable and adequate to compensate for the injuries suffered in this case.
22. On the issue of future medical expenses, I see no reason why the same was not awarded by the trial court. The Appellant produced a Medical Report that indicated that he would require Kshs 100,000/= for the removal of the metal implants. This evidence was not controverted by the Respondent. In view of the same, I award the future medical costs of Kshs 100,000/-.
23. Accordingly, I allow the appeal and set aside the award of the trial court and substitute it with the following award:
 - i. General Damages - Kshs 700,00/=
 - ii. Special Damages - Kshs 31,395/-
 - iii. Future medical expenses - Kshs 100,000/-
 - iv. Costs and interest
24. The Appellant shall have costs of the appeal assessed at Kshs 35,000/=.

DATED AND DELIVERED AT NAIROBI THIS 26 DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

N/A..... for the Appellant

Ndegwa..... for the Respondent

