



**Ngugi v Kabutha & another (Civil Appeal E589 of 2022)
[2024] KEHC 9599 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9599 (KLR)

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

CIVIL

CIVIL APPEAL E589 OF 2022

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

ANGELICAH WANGECHI NGUGI APPELLANT

AND

JOYCE WANJIKU KABUTHA 1ST RESPONDENT

SHADRACK KALIA MWANIA 2ND RESPONDENT

(Being an appeal against the Judgment in the Chief Magistrate's Court Milimani CMCC No. E10125 of 2021 delivered by Hon Edgar Kagoni Principal Magistrate on 15th July, 2022)

JUDGMENT

1. The appellant who was the plaintiff in the Magistrate's Court filed this suit against the respondents seeking general and special damages plus future medical expenses arising from a road traffic accident which occurred on 28th November, 2018. She claimed to have been knocked down by motor vehicle registration No. KCG 680R along Kariti road in Nairobi while she was a lawful pedestrian. As a result, she suffered two fractures on the left arm and left little finger plus other injuries on the head, left forehead, lower back and both thighs.
2. The defendants filed a defence dated 2nd December, 2023 denying the claim. They claimed that the accident occurred as a result of the appellant's negligence.
3. On 22nd April, 2022 the parties entered into a consent on liability in the ration of 85:15 in favour of the appellant. They also agreed to file their list of documents and the same to be produced without calling their makers. Lastly, they agreed to submit on quantum.
4. The parties complied and filed the documents as agreed.



5. Upon consideration of the evidence placed before the court the trial court assessed quantum as follows: General damages - Ksh 250,000/= less 15% Special damages - Ksh 3,550/= Future medical expenses - Ksh 100,000/
- He entered Judgment for Ksh 316,050/= plus costs and interest from date of Judgment.
6. Being dissatisfied with the judgment, the appellant filed this appeal dated 27th July, 2022 on the following grounds:
- i. That the learned trial Magistrate misdirected himself on the evidence and the applicable law.
 - ii. The learned trial Magistrate erred in not considering the submissions made by the Appellant's counsel on quantum.
 - iii. The learned trial Magistrate erred in awarding general damages which were manifestly low and which did not commensurate with the severe injuries sustained by the Appellant.
 - iv. The learned trial Magistrate erred in not taking into account the cited authorities in the submissions filed by the Appellant.
 - v. The learned trial Magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence or the applicable law as clearly captured in his judgment.
 - vi. The learned trial Magistrate's decision is against the weight of the medical evidence.
 - vii. The learned trial Magistrate erred in law and fact in erroneously awarding an inordinately low award in general damages which was not a fair estimate of the compensation for serious injuries sustained by the Appellant.
 - viii. The learned trial Magistrate erred in law and in fact in finding that the appellant was entitled to general damages of Ksh 250,000/= which was inordinately low in view of the grievous injuries suffered by the Appellant that it presented a miscarriage of justice.
 - ix. The learned trial Magistrate erred in law and fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering.
 - x. The learned trial Magistrate failed to consider the severity of the Appellant's injuries and the permanent incapacity suffered as set out in the medical reports produced in court.
 - xi. The learned trial Magistrate erred in awarding general damages which were manifestly low and which did not commensurate with the injuries sustained by the appellant.
7. The respondents never appeared before this court and neither did they file any submissions as directed by the court.
8. The appellant's submissions dated 23rd February, 2024 were filed by Ombuna Ongeri and Company advocates. Counsel referred to the medical report by Dr. Roger Hannington Kayo and submitted that as result of the injuries suffered the appellant was admitted at two different facilities namely: Mariakani Cottage Hospital and North Kinangop Catholic Hospital. She was treated for the following injuries: Fraction of the left ulna, Fracture of the radius, Fracture of the little finger, Had a metal implant fixed on the left upper limb, Injury on the head, Injury on the lower back, Hyperpigmented scars on the left upper limb where implants were fixed, Cuts and lacerations on both thighs which have left ugly scars of cosmetic significance, Pains on the left upper limb which worsens when cold, Permanent disability of 20%, Requires Kshs 100,000/= for the removal of the metal implant. Likely to suffer post – traumatic osteoarthritis in the long term according to the doctor.



9. Relying on the case of Richard Kirimi and another V Mercy Kathambi [2017] eKLR where damages of Ksh 800,000/- were awarded in respect of a fracture of the radius causing a deformity of the right wrist, counsel sought for an award of Ksh 1,500,000/=.
10. He further submitted that the cited decision was made ten (10) years ago hence his prayer for it to be enhanced for the appellant.

Analysis and determination

11. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence afresh, and arrive at its own conclusion. This was the holding in *Selle vs Associated Motor Boat Co. Ltd* [1968] E.A 123
12. Similarly, in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR the court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
13. I have carefully considered the evidence on record, grounds of appeal, both submissions in the lower court and the appellant’s submissions before this court. Judgment on liability at 85:15 in favour of the appellant was entered by consent in the lower court. The only issue for determination is whether the award by the trial court was too low.
14. The trial court in awarding the Ksh 250,000/= was guided by the decision in *Patrisia Adhiambo Omolo V Emily Mandala (Supra)* where Aburili J awarded Ksh 180,000/= for a fracture of the left forearm radius and ulna bones. The Hon Judge in the said Judgment indicated that the appellant therein had listed 4 types of injuries as if they were different yet they were one and the same. The trial court noted that the injuries suffered by the appellant were slightly more serious than those suffered by the appellant in the *Patrisia Adhiambo* case.
15. From the Judgment of the lower court its clear that the trial Magistrate found some inconsistencies in the medical reports by Dr. Kayo Madhiwaka, and the referral note from Mariakani Cottage Hospital Limited, and also North Kinangop Catholic Hospital.
16. I have read the referral note at page 16 of the record of appeal. This was the first facility to attend to the appellant. It’s shown that provisionally she had suffered: Fractures of the radius, ulna An X-ray left arm/head was to be done.
17. She was on the same day admitted at North Kinangop Catholic University Hospital upto 14th December, 2018 when she was discharged. The notes from the said facility are at page 17 of the record of appeal. The injuries shown are:
 - i. Left radial/ulna fracture
 - ii. Head injury at the peripheral facility
 - iii. Loss of consciousness
18. The next document is the report by Dr. Hannington Kayo – dated 28th July, 2021 at page 38 – 39 of the record of appeal. The report shows other injuries besides those shown above. They are: blunt injury on lower back, stiff left little finger, soft tissue injuries plus physical and psychological pains.



19. There is mention of a report by Dr. Madhiwala which I have not traced in the original lower court file nor record of appeal.
20. It is true that Dr. Hannington Kayo examined the appellant but the extra injuries allegedly noted by him ought to have been reflected in the reports from the two facilities that attended to the appellants. Secondly this court has not had the advantage of seeing the 2nd medical report by Dr. Madhiwala.
21. The appellant relied on the case of Richard Karimi V Mercy Kathambi (2017) eKLR where the court upheld an award of Ksh 800,000/= for a radius fracture causing deformity. She thus submitted through counsel urging the court to set aside the award of Ksh 250,000/= and enhance the same.
22. Dr. Kayo also assessed the level of disability to be at 20%. Besides making mention of scars of cosmetic significance he did not state what disability the appellant suffered. He was the doctor and he ought to have clearly stated what the disability was, for the court to appreciate the same.
23. This court is alive to the fact that the appellant suffered the injuries stated by the medical facilities which produced the medical notes already referred to. The fracture and head injury were serious injuries.
24. In assessing these injuries, I have considered the case of Gogni Rajope Construction Company Ltd v Francis Ojuok Olewe [2015] eKLR where an award of Ksh 350,000/= was given for similar injuries. Similarly, in Bernard Musuu Joh V Jesman Distributors Ltd & Another 2020 eKLR where the court awarded Ksh 450,000/= for almost similar injuries.
25. The superior courts are always careful not to interfere with awards made by the lower courts unless such awards are too low or too high considering the circumstances of each case. This was the position held in the case of Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia & Another (No. 2) (1987) KLR 30 and Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR.
26. In the circumstances of this case I find that the award arrived at by the trial Magistrate was too low, making me to interfere with it. I therefore set aside the award of Ksh 250,000/= and substitute it with one of Ksh 450,000/= less 15% contribution = Ksh 382,500/=. The rest of the awards remain intact i.e special damages Ksh 3,550. Future medical expenses Ksh 100,000/=.
27. I therefore set aside the Judgment entered by the trial court on 15th July, 2022 and substitute it with a Judgment for Ksh 486,050 (Four hundred and eighty-six thousand, and fifty shillings) plus interest and costs from date of Judgment in the subordinate court.

(b) Costs of the Appeal to the Appellant.

28. Orders accordingly

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

