



**Mwangi v Mutsoli (Civil Appeal E008 of 2024)  
[2024] KEHC 15059 (KLR) (Civ) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15059 (KLR)

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

**CIVIL**

**CIVIL APPEAL E008 OF 2024**

**TW OUYA, J**

**NOVEMBER 28, 2024**

**BETWEEN**

**SAMUEL WACHIRA MWANGI ..... APPELLANT**

**AND**

**KENNEDY LISUTSA MUTSOLI ..... RESPONDENT**

*(Being an Appeal against on Quantum in the Judgment and decree of Hon. A.N. Makau (SPM) delivered on 16.09.2022 in Nairobi CMCC No. E052 of 2021)*

**JUDGMENT**

**Background**

1. This appeal is in respect of the judgment delivered on 16.09.2022 in Nairobi CMCC No. E052 of 2021 (the suit). The same was commenced by way of the plaint dated 16.12.2020 and amended on 14.01.2021 (the amended plaint) filed by Kennedy Lisutsa Mutsoli being the plaintiff in the lower court (hereafter the Respondent) against Samuel Wachira Mwangi, the 1<sup>st</sup> defendant in the lower court (hereafter the Appellant) and John Munuhe (being the 2<sup>nd</sup> defendant in the lower court). The reliefs sought therein were in the nature of general and special damages amounting to Kshs. 22,638/- arising out of a road traffic accident which occurred on or about 18.10.2020 along Juja Road at Oil Libya stage. The Appellant and the 2<sup>nd</sup> defendant were sued in their respective capacities as the driver and registered owner of the motor vehicle registration No. KAL 566J (hereafter the subject motor vehicle).
2. It was alleged that on the material date, the Respondent was lawfully walking along the abovementioned road when the Appellant so negligently and/or carelessly drove, controlled and/or managed the subject motor vehicle that it lost control and hit the Respondent, causing him to sustain bodily injuries particularized as fracture of the left tibia and fracture of the left fibula. The particulars of negligence were equally set out under paragraph 4 of the amended plaint.



3. Upon the Respondent's request, interlocutory judgment was entered against both the Appellant and the 2<sup>nd</sup> Defendant on 23.02.2021 for their failure to enter appearance and/or put in their statement(s) of defence. The record however shows that subsequently, the Respondent proceeded to withdraw the suit as against the Appellant who was the 1<sup>st</sup> Defendant in the suit, with no order on costs, vide the notice of withdrawal dated 12.04.2022. Consequently, the interlocutory judgment subsisted as against the 2<sup>nd</sup> Defendant.
4. The matter therefore proceeded for formal proof, with the Respondent's testimony.
5. In the end, the trial court delivered its judgment in favour of the Respondent and against the 2<sup>nd</sup> Defendant, in the following manner:  
Liability 100%
  - a. General damages for pain, suffering and loss of amenities Kshs. 800,000/-
  - b. Special Damages Kshs. 22,638/-Total Award Kshs. 822,638/-

### **The Substratum of the Appeal**

6. It is interesting to note that notwithstanding the fact that the suit as against the Appellant had previously been withdrawn; as earlier mentioned and as indicated in the lower court record; the said Appellant has now moved this court by way of the present appeal. It therefore remains unclear whether the reference made to the Appellant in the appeal was the result of a typographical or inadvertent error, and/or whether the appeal was filed on behalf of the 2<sup>nd</sup> Defendant instead. It is also interesting to note that the above discrepancy was not pointed out by the Respondent, in the appeal.
7. Be that as it may, the court will proceed to set out the grounds of appeal contained in the memorandum of appeal dated 8.12.2023, thus:
  - I. That the Learned Magistrate in the matter herein delivered judgment on 16<sup>th</sup> September 2022 in favour of the Respondent contrary to the law and facts availing before the Honourable Court.
  - II. That the Learned Magistrate erred in fact and law in finding that the Respondent was entitled to General damages Kshs. 800,000/=, that were too high in view of the fact that compared to the injuries suffered by the Respondent.
  - III. That the Learned Trial Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
  - IV. That the Learned Trial Magistrate erred in law and fact in failing to appreciate that the Respondent's pleadings, submissions and the evidence tendered in support thereof was incapable of sustaining the award of damages.
  - V. That the Learned Trial Magistrate erred in law and fact in entering judgment in favour of the Respondent against the Appellants in spite of the Respondent's miserable failure to establish her case more especially on quantum. (sic)
8. The appeal therefore seeks to have the trial court's judgment disturbed accordingly. Costs of the appeal are likewise sought.



## Submissions on the Appeal

9. Directions were given for the appeal to be canvassed by way of written submissions. However, it is apparent that at the time of writing this judgment, the Appellant had not complied with the said directions.
10. The Respondent through his counsel, naturally defended the trial court's findings in their totality. Counsel upon reiterating that the appeal lies solely against quantum, has anchored his submissions on the decision in *Harun Muyoma Boge v Daniel Otieno Agulo* [2015] KEHC 5660 (KLR) where the court set out the germane principles for consideration by an appellate court in determining whether to interfere with the award made by a trial court. Counsel supports the award made by the trial court on general damages, arguing that the same was made on the foundation of the medical evidence tendered by the Respondent, adding that no contrary evidence was tendered to controvert the Respondent's injuries. Counsel further argues that the award made by the trial court under that head is reasonable and within the range of awards made in respect of comparable injuries, and should therefore not be disturbed. In that regard, counsel cites inter alia, the case of *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Moses Kiasalu Kilonzi* [2015] KEHC 5586 (KLR) where the court awarded a sum of Kshs. 1,500,000/- to a plaintiff who sustained a fracture of left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula; and the case of *Martin Ireri Namu & Dickson Kariuki Nyaga v Alicalinda Igoki Kiringa* [2019] KEHC 1773 (KLR) where an award of Kshs. 800,000/- was made in respect of injuries particularized as left shoulder dislocation and fractures on the right tibia fibula and left radius ulna.
11. On the premise of the foregoing grounds, it is asserted that the appeal lacks merit and that it therefore ought to be dismissed with costs.

## Analysis and Determination

12. The court has considered the original record, the record of appeal and the submissions on record plus the authorities cited in support thereof. As a first appellate court, the duty of this court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

13. Upon review of the memorandum of appeal and submissions on record, it is apparent that the appeal turns solely on quantum, namely the awards made under the heads of general damages for pain, suffering and loss of amenities; and special damages. The court will first address the award made on general damages.
14. The main contention raised concerning the general damages in particular, is that the same is inordinately high and was awarded on the basis of wrong principles and without proper consideration of the evidence on record.



15. In that respect, the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55* set out the circumstances under which an appellate court can interfere with an award of damages, in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

16. The same court previously stated in *Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5* that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low”.

17. As earlier set out, the Respondent’s injuries as particularized in the amended plaint are fracture of the left tibia and fracture of the left fibula, which injuries are confirmed by the medical evidence constituting the Respondent’s bundle of documents adduced at the trial, especially the medical report prepared by Dr. W.M. Wokabi and dated 3.12.2020 (P. Exhibit 3). Therein, the doctor stated that the aforesaid fracture injuries would take approximately 8 to 10 months to unite; and that upon removal of the plaster, the left leg in particular would take a similar period of 8 to 10 months to rehabilitate maximally. Consequently, permanent disability was assessed at 10%.
18. At the submissions stage, the Respondent proposed an award of Kshs. 1,500,000/- whilst placing reliance on the *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & Moses Kiasalu Kilonzi [2015] KEHC 5586 (KLR)* also cited in his submissions on appeal and referenced hereinabove; as well as the case of *Frankline Chilibasi Spii v Kirangi Liston [2017] KEHC 675 (KLR)* where the High Court awarded a sum of Kshs. 1,800,000/- under a similar head in respect of injuries particularized as comminuted fracture lower end of the right tibia – fibula, fracture lower end of the right radius, fracture Zygomatic process left side extending to lateral wall of left orbit, haematoma over temporal scalp, friction burn over left forearm and hand. No submissions were filed in retort thereto.
19. By way of her judgment, the learned trial magistrate upon setting out the award proposed by the Respondent coupled with the authorities cited in support thereof, ultimately awarded a sum of Kshs. 800,000/- under the head of damages for pain, suffering and loss of amenities.
20. Upon considering the above-referenced authorities cited by the Respondent, in the suit, the court is of the reasoned view that they involve injuries of a more severe nature than those suffered here.
21. That being the case, the court took into account the case of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR* in which an award in the sum of Kshs.600,000/- was made to a plaintiff with a compound fracture of the tibia/fibula bones on the right leg inter alia. The court was equally persuaded by the decision in *Emuria v Registered Trustees Catholic Diocese of Maralal [2024] KEHC 10083 (KLR)* involving fracture distal end of the left femur; fracture proximal end of the left



tibia and fibula; and severe soft tissue injuries of the left leg. In that case, the High Court sitting on appeal upheld an award of Kshs. 800,000/- made under the relevant head.

22. Taking into account all the foregoing factors and circumstances as well as the comparable authorities cited above, this court is satisfied that the trial court awarded a reasonable and comparable sum on general damages for pain, suffering and loss of amenities, within the range of comparable awards. This court therefore sees no reason to disturb the said award.
23. This leaves the special damages. The standing legal position on this is that special damages must be specifically pleaded and strictly proved. This was reaffirmed by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated thus:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;

“Plaintiff must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.’”

24. From a glance at the pleadings on record, it is clear that the Respondent pleaded the sum of Kshs. 22,638/- under the head of special damages. Upon a re-examination of the evidence tendered by way of medical related receipts as well as the receipt issued to the Respondent as payment for obtaining the copy of records in respect of the subject motor vehicle, the court observed that the same totals the pleaded sum of Kshs. 22,638/. In the circumstances, the court is satisfied that the trial court acted correctly in awarded the above sum, in line with the above principles pertaining to special damages.

### **Disposition**

25. In the end therefore, the appeal stands dismissed, for lack of merit. The judgment delivered by the trial court is hereby upheld. The Respondent shall have the costs of the appeal, in the circumstances.
  - i. This Appeal is hereby dismissed.
  - ii. Cost of the appeal to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024**

ROA 14 days.

**HON. T. W. OUYA**

**JUDGE**

For Appellant.....n/a

For Respondent.....ms. Nambalu

Court Assistant.....martin

