



**Mukura v Kamure & another (Civil Appeal 115 of 2023)
[2024] KEHC 16042 (KLR) (Civ) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CIVIL
CIVIL APPEAL 115 OF 2023
CM KARIUKI, J
DECEMBER 18, 2024**

BETWEEN

SAMSON SAMBIGI MUKURA APPELLANT

AND

JULIUS MBURU KAMURE 1ST RESPONDENT

NYANDARUA COUNTY ASSEMBLY 2ND RESPONDENT

*(Being an appeal against the Judgment and decree of the Hon. E. Sure Resident Magistrate,
in Engineer PMCC No. 1277 of 2021, dated and delivered on 26th October 2021)*

JUDGMENT

1. The matter herein arose as a result of a road traffic accident in which motor vehicle KCM 491F hit motor cycle KMFJ 972J, which was being driven along Naivasha Kinangop road.
2. The judgment was delivered on 26/10/2022, and an award in favor of the claimant in general damages was assessed at Kshs—1,200,000/= and future medical costs Kshs 200,000/=.
3. The parties recorded Consent on the liability thus issue thereof..
4. The Appellant, being aggrieved by the trial court judgment, lodged an instant appeal setting out five (5) grounds:
 - a. The Learned Trial Magistrate erred and misdirected herself as to the exact nature of the first Respondent's injuries and, therefore, erred in law in her assessment of damages awardable to the Respondent, which was manifestly excessive.



- b. The Learned trial Magistrate erred in law and, in fact, failed to consider and analyze the appellants' submissions; hence, it adequately arrived at a wrong determination on the aspect of quantum awardable to the plaintiff.
 - c. That the Learned Trial Magistrate erred in law and, in fact, in making an excessive award under the head of future medical expenses.
 - d. That the Learned trial Magistrate erred in law and, in fact, by awarding an excessive amount of general damages considering the injuries sustained by the Respondent.
 - e. The Learned Trial Magistrate erred by failing to apply the principles applicable to the award of damages and comparable awards made for analogous injuries.
5. Parties were directed to canvass appeal via submissions appellant submissions.

Appellants Submissions

6. On quantum, the Appellant appeals solely against general damages and the award on future medical expenses. As such, special damages stand proven and have been uncontacted.
7. The 1st Respondent testified that he sustained the following injuries from the accident;
 - a. Comminuted Fracture of the left tibia and fibula
 - b. Severe Soft tissue injuries on the left leg
 - c. Blunt injury to the lower back leading to soft tissue injuries
8. The 1st Respondent produced two medical reports from Dr. Omuyoma as P exhibit and P Exhibit 12 found on Pages 19 and 36 of the Record of Appeal, respectively, and in one of the Reports, the Doctor did not award any permanent disability, but on the 2nd he awarded 20% permanent disability. While that may be the case, Dr. Omuyoma, in his 2nd Report " P exhibit 12 dated 20th June. 2022, confirmed that the Respondent's fractures are fully healed. This is found in the paragraph under the head 'LOWER LIMBS'.
9. This position is further confirmed by a radiological report from Ranalo Medical Imaging Centre-P Exhibit 13 dated 20th June. 2022, found on Page 38 of the Record of Appeal, which also confirmed that the fractures are fully healed. It is important to note that P Exhibit 12 and P Exhibit 13 were prepared on the same date, i.e., 20th June. Two thousand twenty-two four months after Dr. Malik's report, Exhibit I found on Page 55 of the Record of Appeal was prepared on 3rd February. 2024 and thus held a more accurate picture of the condition of the Respondent. Moreover, even then, Dr. Malik found that the Fibular fractures had united fully.
10. The trial magistrate in the judgment found on Page 79 of the Record of Appeal erroneously concluded that the Respondent "is still laboring from his injuries," which is contrary to the evidence on record, i.e., P exhibit 12 and Exhibit B both confirming the 1st Respondent to be fully healed.
11. Furthermore, there was no evidence that the Respondent had undergone three surgeries, as the trial magistrate found in the judgment.
12. Thus, it is submitted that the erroneous conclusion of the trial court amounted to the excessive award of general damages, which is manifestly excessive and should be lowered.



13. It is trite law that their pleadings bind a party on that premise. The assessment of general damages, in this case, must be by reference to the particulars of injuries proven in court and as enumerated by the plaintiff.
14. In considering this award, it is submitted that the objective of the court in awarding damages is to compensate the injured party for pain and suffering, and it is not meant to enrich the injured party.
15. Thus, the court Imposed the contemplation of the impact of excessive awards both on the economy and the general public, as was considered in Joseph Musee Mua vs. Julius Mbogo Mugi & 3 Others [2013] eKLR, where it was held that: -

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Extensive damages are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees. See the case of Osman Mohammed and another. Vs Saluro Bundit Mohammed Civil Appeal No. 30 of 1997 (Emphasis added)

16. The court is urged to consider the following excerpt from the case of West (H) & Son Ltd. V. Shepherd 919640 A.C. 326 at page 345 in deciding on the general damages awardable to the Appellant/Plaintiff:

"But Money cannot renew a physical frame trial has been battered and shattered. All that judges and courts can do is award sums, which must be regarded as giving reasonable compensation; in the process, there must be an endeavor to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed in moderation. Furthermore, it is eminently desirable that, so far as possible, comparable injuries be compensated for with comparable awards. When all this is said, it still must be determined what amounts are awarded that are, to a considerable extent, conventional."

17. From the foregoing, it is sufficient to state that the Appellant's injuries are not disputed and that the injuries have been confirmed as pleaded. In the premises, therefore. The court is urged in the assessment of damages to be guided by the case of Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR, where it was held that the general method of approach for assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
18. In consideration of the above submissions. It is proposed that an award of Ksh be given. 1,200,000 awarded by the Trial Magistrate was manifestly excessive given that recent decisions have found the sum of Kshs. 450.000 as being commensurate and proportionate with the injuries in the instant case.
 - i. Reliance is made on the case of Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR in which the High Court awarded the Respondent General Damages of Kshs. 450,000/- where the Respondent suffered lacerations on the occipital area. The deep cut wound on the back, right knee, and lateral lane. Bruises at the back extend 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.
 - ii. Civicon Limited V Richard Njomo Ornwancha & 2 Others (2019) eKLR where the 2nd Respondent suffered a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow. Bruises



on the left elbow. Cut wound on the left foreleg, Fracture of the left tibia and fibula, and dislocation on the left hip joint. She was awarded Kshs.450.000 general damages.

Future Medical Expenses.

19. In his plaintiff, the 1st Respondent claims for future medical expenses. It is trite that a claim under this head is Special Damages and must be specifically pleaded and proved—the figure of Kshs. 200,000.00 was not specifically pleaded and thus cannot be allowed. This was the holding in the case of Kenya Bus Services Ltd vs. Gituma (2004) EA 91. The Court of Appeal stated:

“And as regards future medication (physiotherapy), the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded”.

20. In the case of Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR, the court stated:

“It is on the foregoing basis that, in my humble view. Awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the Law of Torts. Such an award is an affront to the general principles governing the award of special damages. Even if such a claim is pleaded, it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings. (See WINFIELD & JOLOWICZ on Torts, 17th Edition 2002 at page 760)”.

21. Dr. Omuyoma, a general physician being no expert/specialist in the branch of surgery dealing with the preservation and restoration of the function of the skeletal system, has not referred the plaintiff or called an expert in physiotherapy to prove the allegation that, indeed, his injuries would require further treatment. Therefore, the assertion cannot be proven. In Ndolo Vs. Ndolo [1995] LLR 390 (CAK), The Court of Appeal stated thus:

“The evidence of PW1 and the report Munga was, we agree, entitled to proper and careful consideration, the evidence being that of experts, but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and the trial court still must decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say: Because this is the evidence of an expert, I believe it.”

22. It is also trite in law that the court can disregard expert witness evidence if the court finds no basis or foundation in such evidence. This was the basis of the Trial Magistrate's refusal to award future medical expenses as the same was not strictly proved. This reasoning is supported by law on the premise that special damages must be proved with particularity and certainty. Based on the foregoing. It is submitted that the claim for future medical expenses is unmeritorious and ought to be DISMISSED.



23. Thus, the court is urged to consider that an appellate court has the discretion to interfere with a trial court's award of damages if the principles on which the award was made were erroneous. Reliance is made to the authority that is *Butt vs. Khan*, which states:

“...an appellate Court will seldom interfere with the trial court's award on damages. The rationale for this is that the assessment of damages is considered an exercise of discretion, and as such, the appellate court will only interfere with the award if it is inordinately high or low. Constituting an erroneous estimate.”

Respondent Submissions

24. It is also a well-established principle of law that an appellate court can only interfere with a trial court's discretion to assess damages where it is shown that the court has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must interfere. *Robert Musyoki Kitavi v Coastal Bottlers Ltd (1985) 1 KAR 891* Also see *Butt vs. Khan* civil appeal no.40 of 1977 and *Valley Bakery Ltd And Another Vs. Mathew Musyoki*.
25. It is submitted that the award reached by the trial magistrate was based on principles as set out in the law, and the court did consider the evidence tendered by the 1st Respondent and the Appellant and, of course, the written submissions and the authorities cited by both Advocates.
26. The 1st Respondent sustained the following injuries;
- i. Comminuted Fracture of the left tibia and fibula
 - ii. Severe soft tissue injuries on the left leg
 - iii. Blunt injury to the lower back leading to soft tissue injuries
27. He was admitted to Naivasha District Hospital for 7 days, where he underwent an operation, and an interlocking nail and metal plate were inserted in his left leg. He was discharged and later went back for further treatment. He was again admitted for another 4 days and underwent a second operation wherein the interlocking nail was removed.
28. The plaintiff underwent the third operation, wherein the plate was inserted into his left leg. He was subsequently discharged with crutches,
29. The 1st Respondent adduced further evidence that he was examined by Dr. Omuyoma on 20th June 2022 and compiled a medical report thereof. In the said report, Dr. Omuyoma concurred with the plaintiff's testimony about the operations.
30. The Doctor compiled another report dated 20th June 2022, in which he formed the opinion that the plaintiff sustained the injuries, as particularized in his medical report. At the time of examination, the 1st Respondent;
- a. She was still walking with crutches. The Fracture had healed with deformity.
 - b. Had a permanent scar on the left shin where the ORIF was done. Check x-rays to see if an intramedullary rod is adequately reducing tibial mid 1/3 fractures.
 - c. The left leg was shorter than the right leg by 3 inches.
 - d. Had sustained 20% permanent disability.
31. The plaintiff was also examined by Dr. Malik, who noted the following;



- a. There is a 7cm long, vertical operation scar on the anterior surface of the left knee joint.
 - b. There is a 13cm long operation scar on the anterior surface of the lower leg.
 - c. There is a small discharging sinus within the scar, which is draining blood-stained fluid.
 - d. There are scars of puncture wounds on the tibia showing the sites of the external fixator clamps insertion.
 - e. The tibia is solidly united and slightly bowed to the lateral side.
 - f. The left knee and ankle joints are fully mobile and free of pain; He walks with a slight limp.
 - g. His normal right leg measures 88cm from the anterior superior iliac spine to the bottom of the right medial malleolus. The exact measurement was taken on the left le, which is 86cm.
32. As per Dr. Malik, the 1st Respondent underwent an operation, and the clamps were removed and immobilized in a plaster cast. He again underwent another operation, and open reduction and fixation of the fractures was done with an intra-medullary, interlocking metal nail and screws. He later developed a discharging sinus in his operation scar, which had not healed due to the fragment of the bone at the fracture site or infection of the metal nail.
 33. It was the Doctor's opinion that the 1st Respondent would also undergo the fourth operation for the removal of the metal in situ. He was awarded a permanent physical disability of 10⁰/0. The cost of future operations was not challenged as Dr. Malik did not capture the same.
 34. All the supporting documents produced in court to wit Discharge summary from Naivasha District Hospital (Exhibit 3), P3 form (P Exhibit 4), Dr. Omuyoma's medical reports (P Exhibit 8 & 11), and Dr. Malik's medical report (D exhibit 1), all confirmed the extent and seriousness of the 1st respondent's injuries.
 35. In light of the above, it was submitted that Kshs. 1,500,000/= would fairly Compensate the 1st Respondent considering inflation relying on the authority of;
 - a. Siaya HCCA NO. 1 OF 2020
George William Owuor Vs Beryl Awuor Ochieng
 - b. EMbu HCCÄ No. 62 OF 2017
Francis Ndungu Wambui & Others Vs VK (a minor suing through next friend and mother MCWK)
 36. The appellants, on the other hand, submitted Kshs. 400,000.
 37. It is clear as it stands that the injuries sustained by the 1st Respondent herein were more severe than all the others submitted by the appellants.
 38. As a matter of fact, the authorities cited by the appellants were for injuries not in tandem with the ones in the present case.
 39. It cannot, therefore, be said that the trial magistrate erred in awarding Kshs. 1,400,000 since there was no dispute that the injuries sustained by the 1st Respondent were so severe. In her judgment, the trial magistrate duly outlined her reasoning and how she arrived at the award.



Costs Of Future Operation

40. There was no objection by the appellants that the 1st Respondent would require costs for future removal of the k-nails. The same was proved at Kshs. Dr. Malik did not challenge this amount equally, as opined by Dr Omuyoma in his medical report.

41. Issues Analysis And Determination

42. After going through the proceedings and parties' submissions, I find the issue is whether the general damages award is inordinately high, thereby constituting an erroneous estimate. Is the award on future medical expenses validly awarded, and what were the costs?
43. Medical report revealed that there Fracture had healed with deformity. Claimant Was still walking with crutches.
- e. There was a permanent scar on the left shin where the ORIF was done. A Check on x-rays indicate an intramedullary rod adequately reduced tibial mid 1/3 fractures.
 - f. The left leg was shorter than the right leg by 3 inches.
 - g. Had sustained 20% permanent disability.
44. On general damages, the Appellant submits that the assessment of damages is to be guided by the case of Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR. It was held that the general method of approach for the assessment of damages is that comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the correct level of awards in similar cases.
45. In consideration of the above submissions. It is proposed that an award of 1,200,000 made by the Trial Magistrate was manifestly excessive given that recent decisions have found the sum of Kshs. 450,000 as being commensurate and proportionate with the injuries in the instant case.
- i) Reliance is made on the case of Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR in which the High Court awarded the Respondent General Damages of Kshs. 450,000/- where the Respondent suffered lacerations on the occipital area. The deep cut wound on the back, right knee, and lateral lane. Bruises at the back extend 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.
 - ii. Civicon Limited V Richard Njomo Ornwanacha & 2 Others (2019) eKLR where the 2nd Respondent suffered a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow. Bruises on the left elbow. Cut wound on the left foreleg, Fracture of the left tibia and fibula, and dislocation on the left hip joint. She was awarded Kshs.450,000 general damages.

On future medical costs, it is contended that it is trite that a claim under this head is Special Damages and must be specifically pleaded and proved—the figure of Kshs. 200,000.00 was not specifically pleaded and thus cannot be allowed. This was the holding in the case of Kenya Bus Services Ltd vs. Gituma (2004) EA 91. The Court of Appeal stated:

“And as regards future medication (physiotherapy), the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be



pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded".

46. In the case of *Zacharia Waweru Thumbi vs Samuel Njoroge Thuku* [2006] eKLR, the court stated:

"It is on the foregoing basis that, in my humble view. Awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the Law of Torts. Such an award is an affront to the general principles governing the award of special damages. Even if such a claim is pleaded, it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings. (See WINFIELD & JOLOWICZ on Torts, 17th Edition 2002 at page 760)".

47. Dr. Omuyoma, a general physician being no expert/specialist in the branch of surgery dealing with the preservation and restoration of the function of the skeletal system, has not referred the plaintiff or called an expert in physiotherapy to prove the allegation that, indeed, his injuries would require further treatment. Therefore, the assertion cannot be proven.

48. In *Ndolo Vs. Ndolo* [1995] LLR 390 (CAK), The Court of Appeal stated thus:

"The evidence of PW1 and the report Munga was, we agree, entitled to proper and careful consideration, the evidence being that of experts, but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and the trial court still has to decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say: Because this is the evidence of an expert, I believe it."

49. It is also trite in law that the court can disregard expert witness evidence if the court finds no basis or foundation in such evidence. This was the basis of the Trial Magistrate's refusal to award future medical expenses as the same was not strictly proved. This reasoning is supported by law on the premise that special damages must be proved with particularity and certainty.

c. Based on the foregoing. It is submitted that the claim for future medical expenses is unmeritorious and ought to be DISMISSED.

d. On the Respondent's side, in proposing an award of Kshs. 1,500,000/= as fair Compensation relied relying on the case;; *Siaya Hcca No. 1 Of 2020 George William Owuor Vs. Beryl Awuor Ochieng*, where in similar injuries, an award of ksh 800,000 was upheld. *Embu HCCÄ No. 62 of 2017* and in *Francis Ndungu Wambui & Others Vs VK* (a minor suing through next friend and mother MCWK) where claimant sustained soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more than 30 minutes after the accident and was awarded ksh 1,000,000.

50. In a 2023 case, where the claimant sustained compound fractures of the left tibia and fibula bones, a mid-shaft fracture of the femur, and bruises on the upper limb, the High Court upheld an award of ksh 800,000.



51. I have perused various previous recent cases involving similar or comparable injuries and analyzed the awards therein. I find that most awards for such multiple fractures range between Kshs 800,000/- and Kshs 1,200,000/- depending on the severity of the injuries.
52. For instance, in *Daneva Heavy Trucks & another v Christine Odero* [2022] eKLR, Hon. Lady Justice R. Aburili reduced an award of Kshs 1,000,000/- to Kshs 800,000/-. The decision was delivered on 17/01/2022.
53. In *George William Owuor v Beryl Awuor Ochieng* [2020] eKLR, again, Hon. Lady Justice R. Aburili reduced an award of Kshs 2,000,000/- to Kshs 1,200,000/-. The decision was delivered on 15/12/2020.
54. In *Martin Ireri Namu v Aicalina Igoki Kiringa* [2019] eKLR, Hon. Lady Justice F. Muchemi reduced an award of Kshs 2,500,000/- to Kshs 800,000/-. The decision was delivered on 26/11/2019.
55. In *George Raini Atungu v Jared Ogwoka Ondari* [2021] eKLR, Hon. Lady Justice R. Ougo J upheld an award of Kshs 1,000,000/-. The decision was delivered on 27/10/2021.
56. In *Kimathi Muturi Donald v Kevin Achieng Aseso* [2021] eKLR, Hon. Justice S. Chitembwe J reduced an award of Kshs 1,200,000/- to Kshs 800,000/-. The decision was delivered on 21/10/2021.
57. In the instant matter, the claimant suffered slightly more severe injuries comparing the cited cases, as demonstrated below; He Was still walking with crutches. The Fracture had healed with deformity. They had a permanent scar on the left shin where the ORIF was done. Check x-rays to see if an intramedullary rod is adequately reducing tibial mid 1/3 fractures. The left leg was shorter than the right leg by 3 inches. Had sustained 20% permanent disability.
58. In light of the comparable awards cited above and the applicable principles earlier referred to, I find the sum of Kshs 1,200,000/- for general damages as awarded by the trial Magistrate to have been well within the bounds of comparable awards made in similar cases.
 - a. On a claim for ksh 200,000 future medical costs, the same is special damages and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof.
 - b. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) EA 91. the Court of Appeal stated:

“ And as regards future medication (physiotherapy), the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded”.
59. In the case of *Zacharia Waweru Thumbi vs Samuel Njoroge Thuku* [2006] eKLR, the court stated:

“ It is on the foregoing basis that, in my humble view. Awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the Law of Torts. Such an award is an affront to the general principles governing the award of special damages. Even if such a claim is pleaded, it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category



of future loss of earnings. (See WINFIELD & JOLOWICZ on Torts, 17th Edition 2002 at page 760]".

60. As a result, the court makes the orders;
- i. The court upholds an award of ksh 1,200,000 as general damages but sets aside ksh 200,000 as future medical costs.
 - ii. Parties to bear their costs in the appeal.

JUDGMENT, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 18TH DAY OF DECEMBER 2024

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CHARLES KARIUKI
JUDGE

