



REPUBLIC OF KENYA



**KENYA LAW**  
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**Johnson & another v Kirya (Civil Appeal 52 of 2019)  
[2023] KEHC 18138 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 18138 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL 52 OF 2019  
RK LIMO, J  
JANUARY 30, 2023**

**BETWEEN**

**MUSUMBI JOHNSON ..... 1<sup>ST</sup> APPLICANT**

**MULUNGU MUSUMBI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MUTURA KIRYA ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arose from the Judgement of Hon. K. Sambu-SPM in Mwingi SRM’s Court Civil Case No 69 of 2016. In that case the Appellants were sued by the Respondent for tort of negligence in respect to a road traffic accident that occurred on 26/08/2015 along Mwingi-Garrisa Road involving the Appellant Tractor Registration No. KTxxx and the Respondent who was riding his motor cycle Registration No. KMxxx and carrying a Pillion passenger. The Respondent pleaded that as a result of the accident he sustained serious injuries.
2. The injuries were particularized in the Amended plaint were as follows;
  - i. Fracture of the right femur
  - ii. Pain and swelling of the right leg
  - iii. Fracture of the right patella (knee cap)
  - iv. Multi-ligamentous injury of the right knee joint
  - v. Cut on the right side of the face (right zygomatic region)
3. The Appellant sought judgment against the Respondent herein as follows;
  - i. General damages



- ii. Special damages at Kshs 270,840/-
  - iii. Costs of the suit
4. Judgment was entered on 12<sup>th</sup> June 2019, entered in favour of the Respondent on the following terms;
- a. The Appellants were jointly and severally held 100% liable for the accident
  - b. Kshs 2,000,000/- as general damages
  - c. Kshs 270,510/- being special damages
  - d. Costs and interest
5. The Appellants were however dissatisfied with the trial court's judgment on quantum and filed this appeal vide a Memorandum of Appeal dated 30<sup>th</sup> August 2019 on 4<sup>th</sup> September 2019 raising the following grounds That;
- i. The Learned Magistrate erred in law and in fact in making an award on general damages for pain and suffering that was inordinately high.
  - ii. The Learned Magistrate erred in law and fact by failing to rely on relevant case law in assessing general damages for pain and suffering and thus arrived at an erroneous estimate thereof.
  - iii. The Learned Magistrate erred in law and fact by failing to consider the Appellants' submissions on general damages and case law cited therein.
6. In their submissions dated 23<sup>rd</sup> August 2022 and filed on 15<sup>th</sup> September 2022, the Appellants fault the trial court's decision on quantum for being too high and submit that a sum of Kshs 500,000/- would have sufficed as compensation to the Respondent.
7. The Appellants have cited the following authorities as comparative decisions to guide this court in its determination on quantum;
- a. *Lazaro Mangeni Oundo v Sony Driving School Limited* (2018) eKLR where the court confirmed an award of Kshs 600,000/- in general damages for the following injuries fracture of the left femur bone, fracture of right clavicle bone and injury to the right shoulder.
  - b. *Civicon Limited v Richard Njomo Omwancha & 2 Others* (2019) eKLR referring to an award of general damages of Kshs 500,000/- which was awarded to the 3<sup>rd</sup> Respondent who sustained the following injuries fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on right knee, fracture of the right tibia and fibula. Permanent disability was also assessed at 30%.
  - c. *Robert Kithinji Kithaka v AG* (2018) eKLR
  - d. *Catherine Gatwiri v Peter Mwenda Karaai* (2018) eKLR where the court on appeal set aside an award of general damages at Kshs 1,500,000/- to Kshs 500,000/- for the following injuries. Scars on the face, deformity of the left clavicle, pain over the scapula, surgical scar on the right shin, shortening of the right lower limb by 2cm and paresthesia over the right shin.
  - e. *Bethwel Mutai v China Road & Bridge Corporation* (2008) eKLR where the Appellant sustained fractures in the left clavicle, right humerus and right femur. The Appellant also underwent surgery and was awarded general damages at Kshs 800,000/-



8. The Respondent has opposed this Appeal vide his written submission through Counsel dated 3<sup>rd</sup> November, 2022.
9. The Respondent contends that the trial court's assessment of damages was proper and justified pointing out that he underwent a surgical procedure where a metallic plate was implanted on his right femur which suffered fracture. He points out that he also suffered fracture of high clavicle and knee patella. He contends that there is nothing to show that the trial Magistrate took account of irrelevant matters or failed to take account of the relevant ones.
10. This being a first appeal, the duty of the first appellant court was well stated in *Selle v. Associated Motor Boat Co.* [1968] EA 123 where the court of Appeal stated: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”
11. This Appeal is only on quantum and so the only issue for determination is whether the trial court made a proper/correct assessment of damages in relation to the injuries sustained.
12. The trial court awarded the Respondent Kshs. 2,000,000/- on this head. Injuries sustained are not disputed. They are contained in the Amended Plaint dated 10<sup>th</sup> May 2018 and in the medical report dated 4<sup>th</sup> May 2016 prepared by Dr L.K Wagura as follows;
  - i. Fracture of the right femur involving both the intertrancharic region and the shaft
  - ii. Fracture of the right clavicle
  - iii. Fracture of right Patella (knee cap)
  - iv. Multi-ligamentous injury of the right knee joint
  - v. Cut on the right side of the face (right zygomatic region)
13. As per the medical report, it was recorded that the Respondent was treated at Mwingi District Hospital before he was referred to P.C.E.A Kikuyu Rehabilitation Centre where he was admitted from 31<sup>st</sup> August 2015 to 11<sup>th</sup> September 2015. The report also indicated that the Respondent received the following treatment while he was admitted;
  - i. The fractured right femur was repaired surgically using metallic rod (nail) which was inserted
  - ii. The damaged right Patella (knee cap) was surgically repaired and plaster cast (P.O.P) applied above the knee
  - iii. He was given antibiotics and analgesics
14. The doctor assessed the Respondent's general condition as fair but recorded several abnormal findings as particularized in the medical report. The doctor also opined that the metallic implement inserted on the Appellant's right thigh would require review from an orthopedic surgeon from time to time.



15. Another report by Dr. Michael Maru confirmed that the Appellant underwent a surgery on his right knee and popliteal region. After sustaining fracture of distal femur, clavicle and patella. The doctor added that, he had undergone nailing of the femur and ORIF patella. The doctor also opined that the Appellant was making good progress in healing.
16. In making its decision to award Kshs 2,000,000. - in general damages, the trial court considered the injuries that the Respondent sustained and referred to the medical report prepared by Dr L.K Wagura. The trial court also considered the time that the Respondent was hospitalized at P.C.E.A Kikuyu Hospital and the surgical procedure that he underwent.  
Going by the Judgement from the Lower Court, it is quite clear that the trial court took into consideration all the relevant factors in determining the quantum payable.
17. An appellate court rarely interferes with exercise of discretion by a lower court the principles applicable on appeal against quantum of damages were restated in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, where the Court of Appeal held;  

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”
18. The general method of approach in awarding damages are that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal stated as such in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR that:  
“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”
19. Ngugi J ( as he the was), in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR also stated as follows;  
“On my part, taking into consideration the nature of the injuries in this case and the global impact on life quality it has had on the Plaintiff while taking into consideration the guiding principle that in assessing damages for pain, suffering and loss of amenities is to both take into consideration the prevailing conditions in Kenya while ensuring that uniformity must be sought in the award of damages.”
20. For comparison, the trial court stated that it was guided by the settled principles in award of damages, the cited legal authorities by parties, the years the cited decisions were made coupled with monetary inflationary trends.
21. This court has perused through the authorities cited by the trial court.
22. Among the authorities cited by the Appellant, the case of *Bethwel Mutai v China Road & Bridge Corporation* (2008) eKLR contains injuries that are somewhat similar to those sustained by the Respondent. They were, fractures in the left clavicle, right humerus and right femur. The Appellant also underwent surgery and was awarded general damages at Kshs 800,000/- This decision was however rendered in 2008. The decision in *Lazaro Mangeni Oundo v Sony Driving School Limited* (2018) eKLR



where the court confirmed an award of Kshs 600,000/- in general damages for the following injuries fracture of the left femur bone, fracture of right clavicle bone and injury to the right shoulder also comes close in terms of the injuries sustained.

23. The case of *Leonard Njenga Ng'ang'a & another v Lawrence Maingi Ndeti* [2018] eKLR, the court set aside an award of Kshs 2,150,000.00 as general damages and substituted it with an award of Kshs 1,500,000.00 for the following injuries, a deep cut wound on the face, fracture of the right collar bone (clavicle), compound fractures of the right hand, fracture of the femur, deep pierce wound on the lower lip,-- loss of lower teeth denture and injury to the gum, fracture and dislocation of the left foot at the ankle joint and generalized body pain.
24. Looking at the injuries cited by the Respondent, it is obvious that they are less severe of comparison to the injuries in the case of *Leonard Njenga Nganga & Another v Lawrence Maingi Ndeti* (*Supra*). The injuries are comparable with those in the case of *Bethuel Mutai v China Road and Bridge Corporation* (*Supra*) and *Lazaro Mangeni Oundo v Sony Driving School Ltd* (*Supra*). Taking the position in the decision of *Christine Mwigina Akonya v Samuel Kairu Chege* (*Supra*) it is trite that similar injuries should attract similar awards for purposes of uniformity and fairness. In that regard. I find the award made by the trial in general damages was a bit high. The award is hereby revised to Kshs. One million.
25. The award on special damages is uncontested and shall remain undisturbed.

In the end, this appeal partly succeeds the award of Kshs. 2 million is set aside and the Respondent is awarded Kshs. 1 (one million) in general changes and special damages of Kshs. 270,510.

The Appellant will have half cost in this Appeal but the Respondent shall have costs in the Lower Court plus interests of the total sum awarded herein, (1,270,510) from the date of judgement in the Lower Court.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

