



REPUBLIC OF KENYA



KENYA LAW
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**Barret v Barret & another (Civil Appeal 137 of 2019)
[2023] KEHC 2586 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 137 OF 2019**

**MW MUIGAI, J
MARCH 28, 2023**

BETWEEN

KEVIN JOHN BARRET APPELLANT

AND

MICHAEL JOHN BARRET 1ST RESPONDENT

VIOLET CATHERINE BARRET 2ND RESPONDENT

(APPEAL FROM THE JUDGMENT AND DECREE OF THE HONOURABLE C. A. OCHARO (SPM) DELIVERED ON 30TH JULY 2019 IN MACHAKOS CMCC 557 OF 2013)

JUDGMENT

Trial Court Record

Amended Plaintiff

1. By an amended Plaintiff dated 21.04.2015, the Plaintiffs contend that the cause of action arose on or about 20.06.2010 when they were lawfully travelling passengers in motor vehicle Reg KAH 444 Y along Loitoktok- Emali road when the Defendant so carelessly, negligently and/ or recklessly drove, managed and/or controlled the Motor Vehicle that caused it to lose control and overturn as a consequence, the Plaintiff sustained serious injuries.
2. The negligence was particularized as follows;
 - a. Driving too fast or too fast in the circumstances
 - b. Failing to keep any or any proper look out
 - c. Failing to have any or sufficient regard to any lawful passengers who were or might reasonably expected to be in the motor vehicle



- d. Failing to stop in time or at all so as to prevent the accident
 - e. Failing to slow down, stop, swerve, brake or in any other way maneuver the motor vehicle under his control so as to prevent the accident
 - f. Attempting to overtake another motor vehicle at a bend and/or without due regard to oncoming vehicles.
3. The 1st Plaintiff averred that he sustained the following injuries; closed head injury, dislocation of the left acromioclavicular joint, multiple bruises and cut on the scalp, forehead, lower abdomen and chest, soft tissue injuries to both the upper extremity and chest and friction burns around left shoulder and scapular region.
 4. The 2nd Plaintiff averred that she sustained the following injuries; closed head injury, dislocation of the right shoulder with a fracture greater tuberosity right humerus, circular bone deep cut proximal to the left elbow on extensor aspect with transverse cut triceps tendon and undisplaced fracture superior and interior ramus on the left side, soft tissue injury (cervical spine, chest, scapular region, abdomen, left groin, gluteal region and both lower extremities) and lacerations and friction burns on the left forearm.
 5. The Plaintiffs contended that as a result of the injuries, they received intensive medical attention in Nairobi and further medical attention upon repatriation to Spain. In addition, that between June 2010 to December 2011, the Plaintiffs on their own account together with the Plaintiff's on their own account together with the Plaintiff's insurers by virtue of the Plaintiff's travel insurance policy with Citybond Suretravel UK (underwritten by europ assistance) incurred various costs with respect to amongst others; medical care, repatriation home (Spain) for further medical attention, nursing care and medication.
 6. The Plaintiffs outlined particulars of special damages incurred by 1st Plaintiff and incurred by Insurer on behalf of 1st Plaintiff.
 7. The Plaintiffs outlined particulars of special damages incurred by 2nd Plaintiff and incurred by Insurer on behalf of

2nd Plaintiff.

8. Further, they would require future medical attention and management which may include orthopedic surgery, physiotherapy and/ plastic surgery which he claimed.
9. The Plaintiffs sought the following prayers from the court;
 - a. General damages for pain, suffering and loss of amenities
 - b. Special damages in the amount of Kshs 187 916.00;
Michael John Barret Kshs 12,248
Violet Catherine Barret Kshs 129,748
Shared expenses Kshs 45,920
 - c. Future medical treatment and management
 - d. Costs of the suit
 - e. Interest on a,b,c,d above at 14%
 - f. Any other or further relief as the Honorable Court may deem just and fair to grant



Defence

10. The Defendant filed a defence dated 19.06.2015 in which he admitted to being the owner of Motor Vehicle registration number KAH 444Y and that an accident occurred on 20.06.2010 along Loitoktok – Emali road but denied that the same was caused by his negligence and said that the accident was caused by the negligence of the driver of the Lorry.
11. Negligence of the lorry driver was particularized as follows;
 - a. Failure to steer a proper or safe course
 - b. Attempting to make a right turn without prior indication whatsoever
 - c. Failing to adhere to basic traffic rules and regulations
 - d. Failing to heed the presence of motor vehicle KAH 44Y on the said road.
 - e. Failing to have any or sufficient regard for motor vehicles on or reasonably expected to be on the said road in particular motor vehicle KAH 444Y
 - f. Driving without due care and attention.
12. The Defendant denied the other contents of the Complaint, averred that the suit was time barred and asked the court to dismiss the suit.

Hearing

13. By Complaint filed on 25/6/2015, the Plaintiffs served the Defendant who did not file Defense and a default judgment was entered. The matter proceeded for Formal Proof. PW1 Michael John Barret testified on 20/6/2014 that he was a passenger in KAY 444Y travelling from Amboseli-Nairobi. They approached a lorry ahead and he shouted to the driver to make him aware to avoid hitting the lorry ahead. The driver tried to swerve to the left side of the road. The driver lost control, overturned and rolled and as a result he sustained injuries. He was rushed to a nearby clinic and later was admitted in Nairobi Hospital for 8 days.
14. PW2 Violet Cathrine Barret relied on her Witness Statement which was adopted as evidence. PW2 stated she was involved in road traffic accident of 20/6/2010. She sustained injuries amongst them was injury on the pelvis and fracture of the left arm and she was treated and later went for physiotherapy. The treatment costs incurred came to Ksh 264,700/- and future physiotherapy was estimated at Ksh 120,000/-. She prayed to be compensated. The defendant was charged and pleaded guilty in criminal proceedings.
15. The Trial Court delivered judgment on 14/7/2014
16. The Defendant vide Application filed on 19/11/2014, sought stay of execution of the judgment and decree. The Defendant/Applicant sought the default judgment and all consequential orders set aside and the Applicant granted leave to defend the suit.
17. By Consent of parties through Counsel, the proceedings and judgment were set aside. The Plaintiff filed Amended Complaint and the Defendant filed defense. The parties went through Pre-Trial and the matter was set down for hearing.
18. By application by Plaintiffs filed on 4/7/2018 seeking the Court to rely on their Affidavits as evidence as the matter took long and the Plaintiffs relocated to Spain and would take long and would be expensive to come to Kenya and testify, the Trial Court granted the application vide Court order of 12/3/2019.



19. The Defendant did not offer any evidence at trial.

Plaintiff's Case: Affidavits Filed on 11/1/2019

20. Pursuant to leave granted on 12.11.2018, the Plaintiffs presented their evidence vide affidavit statement.
21. In the affidavit deposed by the 1st Plaintiff filed on 11.01.2019. who resides in Spain, it was contended that together with the 2nd Plaintiff, his wife, they were in Kenya on holiday on or about June 2010 and at 3.00pm they were headed to Nairobi in the company of Seana and Somaly Hall from Amboseli National Park towards Nairobi in Motor Vehicle KAH 444Y which was owned and driven by the Defendant.
22. On their way to Nairobi along Loitoktok/ Emali road near Meruishi Maasai Mara Reserve, the motor vehicle was involved in an accident which arose from the unsuccessful and negligent attempt by the Defendant to overtake a lorry that was in front of them. The Defendant hit the lorry and immediately lost control resulting in the Motor Vehicle swerving to the right and rolling several times off the road.
23. 1st Plaintiff said he sustained the following injuries as a result; closed head injury, dislocation of the left acromioclavicular joint, multiple bruises and cut on the scalp, forehead, lower abdomen and chest, soft tissue injuries to both the upper extremity and chest and friction burns around left shoulder and scapular region. He was treated at a nearby hospital and thereafter airlifted for further medical attention at Nairobi Hospital on the same day of the accident and was discharged on 28.06.2010. Due to the injuries, he averred that they had to receive intensive medical attention at Nairobi Hospital and further medical attention upon repatriation to Spain.
24. He deposed that Somaly Hall filed personal injury claim being Machakos CMCC No 1271 of 2010- Somaly Lyn Hall vs Kevin John Barret and obtained judgment in which the court found the defendant 100% liable and that he should pay the Plaintiff therein Kshs. 3,561,800.
25. 1st Plaintiff contended that the Defendant was charged with the offence of reckless driving contrary to Section 47 (1) of the [Traffic Act](#) and causing grievous harm to Somaly Hall and Seanna and on his own unequivocal pleas of guilty was convicted and sentenced for the offence.
26. The 2nd Plaintiff's Affidavit deposed on 15.06.2018 and filed on 11.01.2019 in which she stated that she and her husband had travelled to Kenya on holiday on or about June 2010. They were headed to Nairobi from Amboseli National Park 3.00pm in Motor Vehicle KAH 444Y on 20.06.2010 . In the motor vehicle were her husband, Seana , Somaly Hall, Kevin Barret and herself. She contended that Kevin John Barret was the owner and the driver of the motor vehicle.
27. On their way to Nairobi along Loitoktok/ Emali road near Meruishi Maasai Mara Reserved the motor vehicle was involved in an accident which arose from the unsuccessful and negligent attempt by the Defendant to overtake a lorry that was in front of them. The Defendant hit the lorry and immediately lost control resulting in the Motor Vehicle swerving to the right and rolling several times off the road.
28. She deposed that she sustained the following injuries; closed head injury, dislocation of the right shoulder with a fracture greater tuberosity right humerus, circular bone deep cut proxima; to the left elbow on extensor aspect with transverse cut triceps tendon, undisplaced fracture superior and interior ramus on the left side, soft tissue injury (cervical spine, chest, scapular region, abdomen, left groin, gluteal region and both lower extremities) and lacerations and friction burns on the left forearm.
29. She was treated at a nearby hospital and thereafter airlifted for further medical attention at Nairobi Hospital on the same day of the accident and was discharged on 28.06.2010. Due to the injuries, he



averred that they had to receive intensive medical attention at Nairobi Hospital and further medical attention upon repatriation to Spain.

30. She deposed that Somaly Hall filed personal injury claim being Machakos CMCC No 1271 of 2010- Somaly Lyn Hall vs Kevin John Barret and obtained judgment in which the court found the defendant 100% liable and that he should pay the Plaintiff therein Kshs. 3,561,800.
31. The Plaintiffs produced;
 - a. Passport copies
 - b. Copies of motor vehicle search
 - c. Police abstract copy
 - d. Copies of medical reports
 - e. Copies of receipts for expenses incurred
 - f. Copy of travel insurance policy with city Bond Sure Travel UK
 - g. Copy of Judgement in Machakos CMCC No 1271 of 2010- Somaly Lyn Hall vs Kevin John Barret
 - h. Proceedings in Kajjado Criminal Case 926 of 2010
 - i. Copy of judgment in Machakos CMCC 557 of 2013

Trial Court Judgment

32. The Trial Court noted that the Defendant did not file any witness statement nor documents in support of his case despite being given a chance to do so. While relying on the case of Kirugi & Anor vs Kabiya & 3 others (1987) KLR, the Trial court stated that the burden of proof on a balance of probabilities is on the Plaintiff.
33. On Liability, the Trial Court found that the Plaintiffs were mere passengers who could not have controlled the manner in which the Defendant managed the vehicle and further that the only explanation as to how the accident occurred was the explanation given by the Plaintiffs. 1st Plaintiff deposed that the Defendant attempted to overtake a lorry that was ahead of them in the process hitting the lorry. The court found that the fact that the Defendant was charged in Traffic Case No 926 of 2010 where he pleaded guilty and was convicted was not a pointer of negligence but a presumption that he went wrong somewhere. It was found that the Defendant owed a duty of care to the passengers in his vehicle and he was found 100% liable for the accident.
34. The court found that the documentary evidence was admissible and as to the veracity, that would be in each and every document produced. It was found that leave for the Plaintiffs to bring evidence through filing Affidavits included documentary evidence.
35. Thirdly, the Court found that the injuries as pleaded in the Plaint were confirmed by the medical report by Dr. Prakash M Heda dated 24.6.2010 hence was satisfied that the Plaintiffs were indeed injured as pleaded. However it was noted there was a lapse on the Plaintiff part for failure to produce treatment notes or discharge summaries from Nairobi Hospital where they received treatment and were allegedly admitted. Further that some documents were in a foreign language without translations which the Trial Court stated it was a stranger as there was no translation and could not interpret them.



36. On quantum, the Trial Court while making reference to the case of Kim Pho Choo vs Camden & Islington Area Health Authority [1979] 1 ALL ER 332 and the submissions of parties, awarded the 1st Plaintiff Kshs 500,000 and the 2nd Plaintiff Kshs 1,500,000 as general damages.
37. Under the head of special damages, the Trial Court found that the invoices and bills were not proof of payment. Secondly, and in the absence of translation of the documents in a language the Court would understand and money currencies converted to Kenya Shilling, the Trial Court found that the only documents proved were receipts from Acacia Apotheke and Nairobi hospital and a total of Kshs 34,588 was awarded under this head.
38. In summary, the award was as follows
 - a. Liability at 100% against the Defendant
 - b. General damages
 - i. 1st Plaintiff Kshs 500,000
 - ii. 2nd Plaintiff Kshs 1,500,000
 - c. Special damages
 - i. 1st Plaintiff Kshs 26,568
 - ii. 2nd Plaintiff Kshs 16,568
 - d. Costs
 - e. Interest

The Appeal

39. Dissatisfied by this judgment, the Appellant has appealed to this court seeking the following orders;
 - a. Spent
 - b. The judgment and decree of the subordinate court in Machakos CMCC no 557 of 2013 be set aside and the same be substituted with an order striking out or dismissing the suit for being time barred.
 - c. The learned Trial Magistrate's awards on general damages be set side and the same be substituted with such awards as this Hon. Court may deem appropriate
 - d. The costs of the Appeal be borne by the Respondents.
40. The Appeal is founded on two grounds;
 - a. THAT the learned Trial Magistrate erred in law and fat in failing to consider and find that the Respondent's suit was time barred.
 - b. THAT the learned Trial Magistrate erred in law and fat in making awards on general damages which were inordinately high.
41. The Appeal was canvassed by way of written submissions.



Submissions

Appellant's Submissions

42. The Appellant filed submissions on 21.07.2022 in which he raised 2 issues. The first issue was whether the suit was statute barred. It was submitted that the suit was filed on 25.06.2013 for recovery of damages arising of a road traffic accident which occurred on 20.06.2010. Therefore, the suit ought to have been filed on or before 19th June 2012.
43. That the suit was based on the tort of negligence and under Section 4 (2) of the *Limitation of Actions Act*, Cap 22, such an action may not be brought after the end of three years from the date of which the cause of action accrued. Reliance was placed on the case of Haron Onyancha vs National Police Service Commission & Another [2017] e KLR and the court was urged to dismiss the suit with costs.
44. On General damages, it was submitted that the respondents did not seek and were not granted orders regarding production of documents and the documents were therefore not properly before the court and should not be relied upon.
45. Further, the 1st and 2nd Respondent did not produce the P3 form, treatment notes or discharge summary from Nairobi Hospital where they claim they received treatment. While relying on the case of Paul Karimi Kithinji vs Joseph Mutai Kireria [2018] eKLR, it was submitted that Kshs 300,000 would be sufficient under this head upon proof for the 1st Respondent and while relying on the case of Benard Muinde Kilonzo vs Andrea M. Maiko Mogi & Another [2021] eKLR submitted that Kshs 500,000 would be sufficient.

Respondent's Submissions

46. The Respondents filed joint submissions on 14.11.2022 in which they contended that to avoid the suit being time barred as per the *Limitation of Actions Act*, their advocates advised them to tender via email their duly signed copies of the verifying affidavit to the Plaintiff and their individual Witness statements filed on 19.06.2013. It was contended that this was explained in the Affidavit of George Muchiri Mwangi Advocate sworn on 18.06.2013. Subsequently, the original copies of the verifying affidavit were filed on 25.06.2013.
47. It was submitted that the Respondents reside in Spain and waiting for the original pleadings would have occasioned delay and that is why copies were filed awaiting the original documents. It was therefore contended that the suit was not time barred.
48. On General damages, while relying on the case of Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal no. 284 of 2001 [2004] 2 KLR 55 and Southern Engineering Company limited vs Musingi Mutia [1985] KLR 730 it was submitted that the award of the Trial Magistrate was fair and reasonable in consideration of the injuries sustained bearing in mind previous awards on similar injuries.
49. With regard to the 1st Respondent award, reliance was placed on the case of Civil Appeal Case No113 of 2018 Alex Wanjala vs Pwani Products Limited & Duncan Gichini where an award of Kshs 600,000 was given as general damages where the appellant suffered closed head injury, soft tissue injury and fracture on the right leg, Joseph Muthee Mua vs Julius Mbogo Mugi & 3 others [2013] e KLR where an award of Kshs 1,300,000 for a head injury, multiple bruises to the scalp and forehead and soft tissue injuries, Coast Broadway Co. Limited vs Elizabeth Alaka Achebi [2015] where an award of Kshs 300,000 was given for dislocation of the shoulder and the case of H. Young & Company E.A. Limited vs Edward



Yumatsi [2013] eKLR where an award of Kshs 500,000 was awarded for head injury and fracture to the clavicle area.

50. As regards the 2nd Respondent general damages award, Reliance was placed on the cases of Denshire Mutetu Wambua vs Kenya Power & Lighting Company Limited [2013] eKLR where an award of Kshs 1,500,000 was given for an appellant who had suffered a dislocation of the elbow and shoulder, Joseph Kimanthi vs Johnson Macharia [2019] e KLR where an award of Kshs 800,000 was given for head, chest and lower limb injuries, Judy Ngochi vs Kamakia Ele Selelo Ledamoi [2019] e KLR where an award of Kshs 1,000,000 was given for head injury, fracture of clavicle, chest injury and shoulder injury, Ali Malik Brother Motor (K) Limited and Another vs Emmanuel Oduor Onyangi [2018] e KLR where the plaintiff who sustained a fracture of the right superior and inferior pubic rami was awarded Kshs 700,000 and the case of Penina Waithira Kaburu vs Lp [2019] e KLR where an award of Kshs 2,000,000 was upheld for fracture of pelvic region and reconstruction of his urethral area.
51. In the circumstances, the court was urged to uphold the award of the Trial Court at Ksh 1,500,000/=

Determination

52. This Court considered, the Trial Court record, the Record of Appeal and the submissions of parties through their respective Advocates on record and the only issues that are up for determination as outlined by memorandum of appeal are;
- a. Whether the suit was statute barred
 - b. Whether this court should interfere with the award of general damages as they are inordinately high.
53. It is not in contention that there was an accident on 20.06.2010 along Loitoktok- Emali road involving Motor Vehicle registration number KAH 444Y and a lorry. The 1st and 2nd Respondent were lawfully travelling as passengers in Motor Vehicle registration number KAH 444Y. The award on liability, special damages, costs and interest are also not contested. The injuries sustained are also not in issue.
54. This being a first Appeal, the duty of this Court is to re-evaluate the evidence and arrive at the Court's own independent conclusion as stated by the Court of Appeal in the case of Peters –vs- Sunday Post Limited [1958] EA 424. The Court stated as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

Suit Statute Barred

55. The 1st issue is whether the suit was time barred. Section 2 of the *Civil Procedure Act* defines a suit as
- “all civil proceedings commenced in any manner prescribed.”
56. Section 19 of the same Act provides that;
- “Every suit shall be instituted in such manner as may be prescribed by rules”



57. Order 3 of the Civil Procedure Rules, 2010 provides that

Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

58. Order 4 Rule 1 provides that a Plaint must be accompanied by a verifying affidavit sworn by the Plaintiff. In this case the Plaint was accompanied by an alleged copy of the verifying affidavit but 6 days later, the original copy was filed.

59. The Appellant relied on the case of Haron Onyancha vs National Police Service Commission & Another [2017] e KLR and Iga vs Makerere University [1972] E.A.65 where the Court observed;

‘ a Plaint which is barred by limitation is a Plaint barred by law. Reading these provisions together it seems clear to me unless the Appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on presumably because none existed. The Limitation Act does not extinguish a suit or action but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought.

60. This Court refers to Coast Development Authority v Adam Kazungu Mzamba & 49 others [2016] eKLR, C.A. stated:

... Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In Salat v. IEBC & 7 Others, Petition No. 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in Lamanken Aramat v. Harun Maitamei Lempaka, Petition No 5 of 2014 the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The Court concluded thus:

“The Court’s authority under Article 159 of *the Constitution* remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice.”

As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. ...

61. This suit was filed on 19th June 2013 with a photocopy of the verifying affidavit. Summons to enter appearance were issued on 19th June 2013. A replying affidavit was filed by the advocate and deposed on 18.06.2013 and explained that they intended to file original documents once they arrived in Kenya. Subsequently the Plaint dated 20.06.2013 was filed on 25.06.2013.

62. The Summons the court referred to in its order dated 13.02.2014 were issued on 19.06.2013 and allowed that they were to be served upon the Defendant by way of advertisement in the newspaper.

63. In exercising this Court’s discretion and in line with Article 159 (2) (d) of *the Constitution*, 2010, the Court finds that the suit was filed with the photocopy was a procedural issue. The Respondents have been able to explain why they filed as they did at the time. Summons were to issue when the suit was filed and the Appellant honored them.



64. On the suit being time barred, the cause of action arose on 20.06.2010 and the Plaintiff was filed on 19.06.2013. The Limitation of action Act, Cap 22 Laws of Kenya is a proviso on filing of tort-based suits, it provides under Section 4(2);

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

65. The Appellant contended that the suit was filed on 25th June 2013 while the Respondents contend that the copies of the pleadings were filed on 19th June 2013 and once the advocate received the original documents, he filed them on 25th June 2013. The Court perused the Trial Court record and noted that there are two Plaintiffs and one Amended Plaintiff; as follows; there is one dated 17th June 2013 and filed on 19th June 2013, the second one dated 20th June 2013 and filed on 25th June 2013 and an Amended Plaintiff dated 21st April 2015 and filed on 9th June 2015.
66. The suit was filed at the nick of time; within the provided guidelines; as at 20/6/2013; 3 years from the date the cause of action occurred 20/6/2010, there was a plaintiff filed on 19/6/2013 albeit with copies awaiting originals from Spain; therefore, the suit was not statute barred.

Quantum

67. The second issue is that of general damages. According to Medical Report by Dr Prakeshi M. Heda for 1st Respondent dated 24.06.2010, apart from the injuries the 1st Plaintiff/Respondent sustained it was noted that ;

“Post operative period was uneventful. On 2nd post operative day it was noticed that stabilizing ‘K’ wires cut through acrominium process, but position of acromioclavicular joint maintained in acceptable position/. This was explained to the patient. External figure 8 slings was applied to maintain position. With extensive soft injury, he is recovering slowly but steady. He is put on gradual rehabilitation. He is under observation for close head injury.”

68. The Medical Report by Dr Prakeshi M. Heda for 2nd Plaintiff/Respondent dated 24.06.2010, apart from injuries, the 2nd Plaintiff sustained, it was noted that ;

“Post operative period was uneventful. For further injuries, she was put on conservative line of treatment. She is closely monitored for infection and head injury. Her progress is satisfactory. She needs more nursing assistance as both her upper extremities are immobilized, cannot walk due to pelvic fracture an multiple soft tissue injury including bruises at pressure points”

69. In *Mbogo & Another v Shah* [1968] EA 93, the Court, (Sir Newbold, P.) the court stated that:

“A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”



70. Furthermore, in *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR, the Court of Appeal stated:

It is trite 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 small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

71. The Appellant raised the issue that the Respondents did not seek and were not granted orders regarding production of documents. The Respondents Documents were not properly before Court and should not therefore be relied on as evidence. On the ground alone, the claim for damages fail.
72. The Appellant filed an application under Certificate of urgency of 17/11/2014 to have stay of execution and the judgment issued set aside. The Respondents did not object, but conceded the application and were paid throwaway costs. The suit was to proceed to Trial.
73. On 9/6/2015 the Respondents filed Amended Plaintiff and Amended Plaintiff's List and bundle of Documents and served the Appellant.
74. On 25/7/2018, the Plaintiffs filed application to have their evidence admitted vide production of Affidavits. The Trial Court delivered Ruling on 12/11/2018 and granted the Application. The Plaintiffs filed their Affidavits with copies of documents annexed on 11/1/2019.
75. This Court finds that the Affidavits by Plaintiffs annexed documents that were already produced in Court as pleadings. The Amended Plaintiff was filed with Amended List of Documents as contained in Trial Court record and Record of Appeal. The documents were already on record. Secondly, as the Trial Court held, leave was granted to Plaintiffs to file Affidavits as evidence, the presumption is that evidence includes documentary evidence.
76. The, 1st Respondent was awarded Kshs 500,000 while the 2nd Respondent Kshs 1,500,000. The injuries pleaded are indeed those in the medical reports filed by the Respondents. I have considered the authorities cited by the parties and the injuries in comparison to what is before the court as well as other cases with similar injuries.
77. In the case of *Angela Katunde Musau v China WuYi Ltd & Anor* [2020]e KLR where the plaintiff suffered multiple fractures to the ribs, fracture of the right ulna bone, displaced and comminuted fracture of the right mandible, fracture of the right superior and inferior pubic ramus of the pelvic bone fracture of the left scapula among other injuries and was awarded Kshs. 1,000,000 general damages.
78. In *Francis Kagunda Mwangi v. Samuel Ngugi & 2 Others* [2017] eKLR, the respondents sustained the fracture of the left femur, fracture of the 3rd, 4th, 5th, 6th and 7th ribs, lacerations on the left chest wall, fractures of the right metacarpals and bruises on the right hand. The degree of incapacity was assessed at 25%. He was awarded Kshs.500,000/-
79. In *Mariqueta Nkoyai M'thiringi v Shadrack Mwendwa & another* [2020] eKLR an award of Ksh 500,000 was upheld for soft tissue injuries.
80. In the case of *James Mbugua & Another v John Mbugua Mburu* [2020] eKLR where the plaintiff suffered injuries of loss of 2 upper incisors teeth with fracture of the teeth, deep cut wound on the lower lip and chin, comminuted fracture of the left femur, comminuted fracture of the right acetabulum



and dislocation of the right hip joint and fracture of the right inferior ramus of pelvis. The plaintiff underwent surgery and was exposed to future medical procedures. The High Court upheld an award of Kshs. 2,263,693/- by the Trial Court.

81. In the Millicent Atieno Ochuonyo v Katola Richard HCCC No. 38 of 2012 [2015] eKLR in which the plaintiff sustained pelvic injuries with fracture of the right pubic ramus and diastasis of the pubis symphysis was awarded Kshs.2,000,000.
82. In the case of Lilian Wanja versus Cyprian Mugendi Igonga & 2 Others (2016) eKLR the claimant was awarded Kshs.500,000/= in general damages for a fracture of the pelvis, a dislocation of the hip and multiple soft tissue injuries to the face, chest, the right wrist and elbows.
83. In Penina Waithira Kaburu v LP [2019] eKLR the Respondent who had inter alia had a history of fracture of the pelvis with the bilateral involvement of the superior and inferior pubic ramii was awarded Kshs 2,000,000.
84. The claim that the general damages are inordinately high, the Court found from the record that the injuries the Plaintiffs sustained are not contested or in issue as outlined by the medical Reports by Dr Prakash M.Heda of 24/6/2010.
85. Taking into consideration the nature of the injuries, more specifically, those of the 2nd Respondent who suffered as both of her upper extremities are immobilized and could not walk due to pelvic fracture and multiple soft tissue injury including bruises at pressure points and comparative case laws and inflationary trends and monetary value over the years, this Court now upholds general damages as follows;
 - a. 1st Respondent Kshs 500,000/-
 - b. 2nd Respondent Kshs 1,500,000/-

Disposition

86. Consequently, the Appeal fails and is dismissed with costs to the Respondents.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28TH MARCH 2023
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI

JUDGE

