



REPUBLIC OF KENYA



**KENYA LAW**  
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**Machogu v Kirui (Civil Appeal E040 of 2021)  
[2023] KEHC 4148 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 4148 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E040 OF 2021**

**RL KORIR, J  
APRIL 28, 2023**

**BETWEEN**

**JAMES BOSIRE MACHOGU ..... APPELLANT**

**AND**

**BRIAN KIPKEMBOI KIRUI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Honourable Evans Muleka (PM) dated 9th November 2021 in the Principal Magistrate's Court at Sotik, Civil Case Number 98 of 2019)*

**JUDGMENT**

1. The Plaintiff (now Respondent) sued the Defendant (now Appellant) for General and Special Damages arising out of an accident that occurred on 25<sup>th</sup> March 2019 between Motor Vehicle Registration Number KCE 916C owned and driven by the Defendant or his agent and Motor Cycle Registration Number KMCQ 273Q on which the Plaintiff was a pillion passenger.
2. In its Judgment delivered on 9<sup>th</sup> November 2021, the trial court apportioned liability at 70:30 in favour of the Plaintiff/Respondent. The Plaintiff was also awarded General and Special Damages of Kshs 974,200/= plus costs and interest of the suit.
3. Being dissatisfied with the Judgment of the trial court, the Defendant/Appellant appealed to this court against the trial court's findings on quantum of damages through the Memorandum of Appeal dated 17<sup>th</sup> November 2021. He raised the following grounds:-
  - I. That the learned trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award of Kshs 1,000,000/= that was overly in excess in the circumstances of the case.
  - II. That the learned trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.



- III. That the learned trial Magistrate's exercise of discretion in assessment of quantum was injudicious.
4. The Appellant prayed that this court set aside the trial court's Judgment and replace it with its own assessment.

#### **The Plaintiff's/respondent's Case**

5. It was the Plaintiff/Respondent's case that he was involved in a road accident on 25<sup>th</sup> March 2019 between Motor Cycle Registration Number KMCQ 273Q and Motor Vehicle Registration Number KCE 916C which was driven by the Appellant's driver or agent.
6. It was the Respondent's case that the Appellant was negligent in the accident. The particulars of the negligence were stated in paragraph 4 of the Plaintiff.
7. That as a result of the accident, he suffered the following injuries: -
- a. Weber C right ankle fracture.
  - b. Deep cut wound on the right supra-orbital region.
  - c. Bruises on the left hand.
  - d. Right sub-conjunctival haemorrhage.
8. The Respondent prayed for Special damages, General damages and future medical expenses against the Appellant.

#### **The Defendant's/appellant's Case**

9. In his statement of defence, the Defendant (now Appellant) denied the occurrence of the accident on 25<sup>th</sup> March 2019 involving Motor Cycle Registration Number KMCQ 273Q and Motor Vehicle Registration Number KCE 916C. The Appellant further denied being the insured, beneficial or registered owner of the aforementioned Motor Vehicle.
10. It was the Appellant's case that if the accident occurred then it was caused by the negligence and carelessness of the Respondent and the rider and/or owner of the aforementioned Motor Cycle. The particulars of negligence of the Respondent and the rider were contained in paragraph 10 of the Defence.
11. This court directed the parties to canvass the appeal through written submissions.

#### **The Appellant's Written Submissions**

12. The Appellant submitted that Dr. Morebu Peter Momanyi's Medical Report dated 25<sup>th</sup> March 2019 confirmed the injuries in the Plaintiff.
13. It was the Appellant's submission that an award of Kshs 500,000/= would be a sufficient and adequate compensation to the injuries sustained by the Respondent. He relied on S A O (Minor suing thro next friend) M O O vs Registered Trustees, Anglican Church of Kenya Maseno North Parish (2017) eKLR, Edward Shoboi Gambo v Fatma Osman Ahmed & Another (2020) eKLR and Savanna International Ltd v Muka (Civil Appeal 31 of 2018) (2022) KEHC 675 (KLR) (14<sup>th</sup> June 2022) (Judgment) to buttress this submission.



### **The Respondent's Written Submissions.**

14. The Respondent submitted that this court should not interfere with the trial court award as it was fair. That it was not inordinately high or low as to represent an erroneous estimate. He relied on the *Kemfro Africa Limited t/a Meru Express Services (1976) & Another vs Lubia and Another (1987) KLR 30*, *Catholic Diocese of Kisumu vs Sophia Achieng Tete (2004) 2 KLR 55* and *Butt Vs Khan (1982-88) 1KAR* to support this submission.
15. It was the Respondent's submission that his injuries were confirmed by both the Appellant's and his doctor. That the injuries had rendered him physically incapable of competing in the labour market as they had made him permanently disabled. It was his further submission that both doctors had confirmed that he needed to undergo further surgery to correct the fractures and remove the metal implants.
16. In regards to the injuries suffered by the Respondent, he relied on *Kennedy Oseur vs Musa Locho & 2 others (2009) eKLR*, *David Ndonge Wanderi & Another vs Raita Ole Tekei (2019) eKLR* as comparative cases.
17. The Respondent submitted that the principles which ought to guide the court in awarding damages were set out in *Southern Engineering Company Limited vs Musingi Mutia (1985) KLR 730*.
18. It was the Respondent's final submission that the trial court did not err in awarding the amounts and that the same ought not to be disturbed by this court.
19. In *Kiilu & Another vs. Republic (2005) 1 KLR 174*, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses”.
20. I have considered the Record of Appeal dated 5<sup>th</sup> June 2022, the Appellant's Written Submissions dated 12<sup>th</sup> October 2022, the Respondent's Written Submissions dated 26<sup>th</sup> July 2022 and I find that the only issue for my determination is the quantum of damages.
21. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 of the *Evidence Act* provide as follows:
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
22. It was not in dispute that the Respondent (Plaintiff in the trial court) was involved in an accident on 25<sup>th</sup> March 2019. The apportionment of liability of 70:30 in favour of the Respondent by the trial court was also not disputed.



23. The Appellant's argument is that the Award of Kshs 1,000,000/= was excessive. He suggest an award of Kshs. 500,000/=.
24. As this is an appeal on quantum of damages, this court is guided by the well-known principle pronounced by the Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) (1987)* KLR 30 that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”
25. In *Civil Holdings Co. Ltd v Hellen Anyango Okeyo & another (2020) eKLR*, Ougo J held that:-

“Awards in general damages vary however in considering the award the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. Further in assessing damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards noting that no two cases are exactly alike....”
26. The Respondent produced a Discharge Summary from St. Clare's Kaplong Mission Hospital dated 2<sup>nd</sup> April 2019 and a Medical Report by Dr. Morebu Peter Momanyi that were marked as P. Exh 2 and 1 respectively. The Medical Report stated that the Respondent had suffered Webster C right ankle fracture, a deep cut wound on the right supra-orbital region, bruises on the left hand and a right sub-conjunctivae haemorrhage.
27. It was the conclusion of Dr. Morebu Peter Momanyi that after examining the Respondent, he had suffered grievous injuries i.e. a right fibula fracture with multiple severe body injuries and that his recovery was expected to take a long time.
28. In his Defence, the Appellant called upon DW2 (Dr. Jenipher Kahuthu) who produced a Medical Report dated 14<sup>th</sup> September 2020 and marked as D. Exh 1. The doctor testified that the Respondent sustained fractures of the right distal tibia fistula and soft tissue injuries. That at the time of the examination, the Respondent was in a fair general condition and walked normally. It was her further testimony that the Respondent had healed surgical scars and had a normal range of movement on the right knee and ankle joints.
29. According to her Medical Report, DW2 found that the Respondent had the initial confirmed fracture and that the fracture was in a good position with fixation nail in situ.
30. In regard to General Damages, the Respondent stated in paragraph 5 of the Complaint that he suffered the following injuries: -
  - a. Weber C right ankle fracture.
  - b. Deep cut wound on the right supra-orbital region.
  - c. Bruises on the left hand.
  - d. Right sub-conjunctival haemorrhage.



31. In the case of *Kigaragari vs. Aya* (1982 - 1988) I KAR 768, it was stated: -
- “Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees.”
32. In the case of *Stanley Maore vs Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 (2004)eKLR, the Court of Appeal stated that:-
- “Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
33. Similarly, the Court of Appeal in *Mbaka Nguru and Another vs James George Rakwar* (1998)eKLR stated 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.”
34. The Respondent suffered bone fractures on his right side and soft tissue injuries to the scalp, right shoulder and the right leg. I have found the following cases quite helpful in terms of comparison:-
- I. *Francis Ochieng and Another v Alice Kajimba* (2015) eKLR where the plaintiff sustained a head injury with bilateral temporo-parietal scalp haematoma, back pain, bleeding from the left ear, sub conjunctival haemorrhage and parietal scipnosis on both eyes. He was awarded KShs.350, 000/=.
  - II. *Tirus Mburu Chege & Another vs J K N (minor suing through the next friend and mother D W N & Another)* (2018) eKLR, where the Respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness the court lowered the award for general damages from Kshs.800, 000/= to Kshs.500, 000/=.
  - III. *Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor* (2020) eKLR the court gave an award of Kshs.400,000/= for a compound fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg
  - IV. *Savanna International Ltd v Muka* (Civil Appeal 31 of 2018) (2022) KEHC 675 (KLR) (14 June 2022) (Judgment) where an award of Kshs 500,000/= was reduced to Kshs 400,000/= for a fractured medial malleolus of the left ankle joint and severe soft tissue injury.
35. In the case of *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR, the Court of Appeal set out the parameters within which an appellate court will interfere with an award of general damages:-
- “An appellate court will not disturb an award for general 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..”

36. Guided by the aforementioned case law and the injuries suffered by the Respondent, I find that the Kshs 1,000,000/= awarded as General Damages by the trial court as excessive. It was not comparable to decided cases that had almost similar injuries. I therefore substitute the award of Kshs 1,000,000/= with the award of Kshs 500,000/=.

37. The Respondent prayed for future medical expenses to remove the metal implants. The two Medical Reports indicated that he would need Kshs 200,000/= and Kshs 80,000/= for the surgery. In the case of *Tracom Limited & another vs Hassan Mohamed Adan (2009) eKLR*, the Court of Appeal stated: -

“...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91*, this Court, stated:

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“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 damage and is a fact that must be pleaded if evidence thereof 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 infringement of a person’s legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

38. This court is faced with two Medical Reports with conflicting estimates as to the future removal of the Respondent’s metal implant. The existence of the metal implant is not in dispute, the probability, as is common in similar cases, is that the metal implant will be removed. I consider an award of Kshs. 100,000/= to represent a fair and just estimate cost in removing the said metal implant.

39. With regards to the other pleaded Special damages, the Respondent particularized them as follows:-

Medical Expenses Kshs 153,780/=

Medical Report Kshs 6,500/=

Transport Expenses Kshs 30,000/=

Copy of Records Kshs 550/=

40. The Respondent produced a bundle of receipts marked as P.Exh 6 and 7 which indicated that he had paid, Kshs 30,000/= on various dates, Kshs 550/= for the Motor Vehicle Search and Kshs 153,780/= for medical expenses.



41. I however note that the receipt that was issued for medical expenses contained payment of Kshs 150,000/= made by NHIF and that the Respondent was further given a discount of Kshs 3,780/=. Section 43 of the *National Hospital Insurance Fund Act* states that:-

“Where a contributor to the Fund is entitled, whether under the Workmen’s Compensation Act (Cap. 236) or otherwise, to recover compensation or damages in respect of any injury or illness, he shall not, to the extent to which such compensation or damages are recoverable, be entitled to any benefits in respect of any treatment undergone by him as a result of such injury or illness, and any benefits paid in respect of such treatment, shall to the extent to which such compensation or damages have been recovered, be repaid to the Board:

Provided that the payment of any benefits as aforesaid shall not preclude the right of the contributor to recover any compensation or damages.”

42. I am persuaded by the case of John Mwangi Munyiri & another vs Paul Wachira Njuguna (2020) eKLR, where Wendoh J held that:-

“.....I agree with counsels submission that the Respondent having admitted that Kshs.107,800/- which he incurred in medical expenses for treatment and admission, were paid by NHIF, just like any monies paid by any insurance, the respondent could not be compensated for it again.....”

43. It is my finding therefore that the Respondent was not entitled to the entire amount of Kshs 153,780/= but rather an award of the discount that he was granted i.e. Kshs 3,780/=. I am satisfied that the Respondent pleaded and proved his claim for Kshs 30,000/= as transport expenses. The total sum of Special Damages therefore comes to Kshs 40,830/=.

44. The General Damages of Kshs 600,000/= inclusive of Kshs. 100,000/= for future medical expenses less 30% contribution by the Respondent comes to Kshs 420,000/=.

45. The summation of the General Damages, Special Damages and future medical expenses awarded is Kshs 460,830/=.

### **Conclusion**

46. The Memorandum of Appeal 17<sup>th</sup> November 2021 succeeds to the extent that the Damages awarded to the Respondent are reduced from Kshs 974,200/= to Kshs 460,830/=.

47. Each party shall bear their own costs on this Appeal. The Respondent shall get costs on the suit as awarded by the trial Court.

Orders Accordingly

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

**R. LAGAT-KORIR**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed



**DEPUTY REGISTRAR**

**Judgement delivered in the absence of the Appellant, and in the presence of**

Ms. Kebaya holding brief for Ms. Gogi for the Respondent and Siele (Court Assistant)

