



**Mbiti v Ngure (Civil Appeal E003 of 2022)  
[2023] KEHC 17287 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17287 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E003 OF 2022  
GMA DULU, J  
APRIL 26, 2023**

**BETWEEN**

**SAMUEL KINYUA MBITI ..... APPELLANT**

**AND**

**CLIVE MWAINO NGURE ..... RESPONDENT**

*(Being an appeal from the Judgment of Honourable F. M. Nyakundi in  
SPMCC No. 326 of 2018 delivered on 18<sup>th</sup> day of January, 2022)*

**JUDGMENT**

1. This appeal arises from a judgment delivered by the Magistrate’s court on January 18, 2022, in which the court entered judgment for the respondent (plaintiff at the trial) in the following terms:

‘Conclusively therefore judgment is hereby entered against the defendant as follows –

1. Liability 90% to 10%
2. General damages Kshs. 650,000/=
3. Special damages Kshs. 4,750/=
4. Future medical expenses Kshs. 60,000/=

Total Kshs. 714,750

Less 10% Kshs. 643,275/=

The plaintiff is also awarded costs and interest of the suit.

2. Aggrieved by the decision of the trial court, the appellant who was the defendant at the trial has come to this court on appeal on the following grounds:-



1. The learned Magistrate misdirected himself and erred in law and fact by failing to consider the 1<sup>st</sup> defendant's witness exhibit on record and hence arrived at an erroneous finding on quantum.
  2. The learned trial Magistrate misdirected himself and erred in fact and in law by finding the respondent to have suffered injuries.
  3. The learned Magistrate misdirected himself in applying the wrong principles to award quantum of damages and disregarding the authorities cited in written submissions presented and filed by the appellant.
  4. The learned Magistrate erred in law and in fact by awarding general damages that are so manifestly excessive as to be erroneous vis a vis the injuries sustained by the plaintiff.
  5. The learned Magistrate erred in law and fact by awarding future medical expenses that were unsubstantiated.
  6. The learned Magistrate judgment was quite brief and did not disclose any proper reasoning in reaching the decision and was thus unjust against the weight of the evidence, submissions and authorities relied upon by the appellant and was based upon misguided points of fact, and wrong principles of law and has occasioned miscarriage of justice.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kitony Maina Karanja Advocates for the appellant, and Nyakoni Ratemo & Company Advocates for the respondent. Both side cited decided court cases.
4. I will start by reminding myself of the long held legal principle that this being a first appeal, I must subject the whole evidence on record to fresh scrutiny and come to my own conclusions and inferences – see the case of *Selle & Another = Versus= Associated Motor Boat Company Ltd & Another* (1968) EA 123, as well as the case of *Williamson Diamonds Ltd = Versus= Brown* [1970] EA 1 wherein the court reiterated the applicable principle and stated that:-
- ‘An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that the court must reconsider the evidence, evaluate 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 for this respect.’
5. From the record, only two witnesses testified. It was PW1 Doctor Mohamed Ali Hanif, a general practitioner at Voi who examined the respondent on November 2, 2018 and stated that the respondent suffered a fracture on external bone from the accident which occurred on October 24, 2018 but there was no incapacity suffered.
  6. The other witness was DW1 Doctor Udayan Sheth an orthopaedic surgeon from Mombasa who examined the respondent on September 20, 2020. He stated that the CD report failed to open and noticed no injuries or trauma on both sides and the soft tissues.
  7. In the submissions on appeal, the appellant's counsel does not quantify the quantum they propose for general or special damages. They however strongly oppose the award for future medical expenses. On their part, the respondent's counsel have submitted on appeal that this court should uphold the award of the trial court, and maintained that the award of Kshs. 60,000/= for future medical treatment was lawful.



8. In my view, the trial court was correct to rely on the medical report of Doctor Mohamed Ali as the said examination and medical report were done within a month of the accident. The medical report of Doctor Udayan Sheth on the other hand, was done almost two years after the accident.
9. I appreciate that assessment of quantum of damages is an exercise of discretionary power by a trial court. An appellate court should be slow to interfere unless the trial court misapprehended the facts. See *Butt =Versus= Khan* Civil Appeal No. 40 of 1977 and *Kenfro Africa Ltd =Versus= A. M. Lobia* (1982 – 88) KLR. Even though the external bone fracture healed, the fact that the medical report of Dr. Mohamed Ali confirms that the respondent suffered a fracture, in my view, the award of Kshs. 650,000/= for general damages was within range of awards for such injuries and reasonable. I will uphold that award.
10. With regard to the award of future medical costs of Kshs. 60,000/= however, the evidence on record shows that there was no incapacity suffered by the respondent. In addition, there is no evidence or even suggestion from any of the two doctors, that the respondent will require future medical attention. I therefore find that the award for future medical costs had no justification, as it was not supported by the evidence on record. Thus the Magistrate misapprehended facts as there was no evidence to justify such award. I will set aside that award.
11. With regard to special damages, there does not appear to be any dispute. I will uphold the award for special damages.
12. For the above reasons, I allow the appeal in part by setting aside the award for future medical treatment, but uphold the other awards.
13. The final order of this court is thus as follows:-
  - (i) Liability 90% to 10%
  - (ii) General damages Kshs. 650,000/=
  - (iii) Special damages Kshs. 4,750/=Total Kshs. 654,750/=  
Less 10% (Kshs. 65,475/=) Kshs. 589,275/=
14. The appellant will pay the respondent 60% of the costs of appeal, as well as interest till payment in full.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> DAY OF APRIL, 2023.**

**GEORGE DULU**

**JUDGE**

