



**FKM (Suing as the Next Friend and Mother of DK–Minor) v
Security Group Cash in Transit Limited & 2 others (Civil Appeal
61 of 2021) [2023] KEHC 17764 (KLR) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 61 OF 2021**

RK LIMO, J

MAY 29, 2023

BETWEEN

FKM PLAINTIFF

SUING AS THE NEXT FRIEND AND MOTHER OF DK–MINOR

AND

SECURITY GROUP CASH IN TRANSIT LIMITED 1ST RESPONDENT

MARTIN MULWA KILONZO 2ND RESPONDENT

MARTIN MUTUA 3RD RESPONDENT

JUDGMENT

1. This is an appeal that arose from the Judgement of Hon M Kimani Resident Magistrate delivered on 14th January, 2021 *vide* Kitui Chief Magistrate Civil Case No 334 of 2016.
2. In that case, the Appellant sued the Respondent for negligence that caused a road traffic accident on August 16, 2015 along Kitui-Mbusyani Road involving motor vehicle registration No KAZ 123F belonging to the 1st Appellant and Motor Cycle Registration No KMDE 721 that was carrying DK, a minor as a pillion passenger and caused her to suffer injuries. The Appellant, the mother to the minor (the pillion passenger) claimed compensation for her daughter against the Respondents.
3. This appeal is basically on quantum. The appellant contends that the award of Kshs 300,000 as general damages given to her by the trial magistrate was manifestly too low.
4. The Appellant’s injuries as particularized in the plaint were listed as follows: -

“a deformed and painful right leg on movement with x-ray showing a fracture on the mid-shaft femur.”



The appellant had also claimed Kshs 200,000 costs of fracture medical expenses and Kshs 19,595 as Special damages which were all awarded.

5. The Appellant however, felt aggrieved and filed this appeal raising the following grounds namely: -
 - i. The Learned Magistrate erred in law and in fact awarding the Plaintiff a quantum of Kshs 300,000/- plus costs and interest at the rate which was inordinately low to amount to an error in the circumstance.
 - ii. The Learned Magistrate's award of damages in particular considering the injuries sustained by the minor was inordinately low in that it was an erroneous estimate of damages without due regard to the injuries and comparable cases.
 - iii. The Learned Magistrate misdirected herself in arriving at a wrong decision in awarding damages which were against the weight of evidence adduced.
 - iv. The Learned Magistrate erred in law and fact in relying on her own authority which contained less severe injuries than those actually suffered by the minor hence arriving at her judgment and totally disregarding the authorities cited by both parties.
6. In her written submissions; the appellant contends that the amount awarded in general damages were too low in comparison with the injuries sustained.
7. In addition to the cases relied upon in the trial court, the Appellant has cited two decisions where the court awarded damages ranging between Kshs 700,000/- and Kshs 800,000/-. These decisions are;
 - a. *Eagle Vet Kenya Limited & Anor vs David Mbavu* HCCA No 34 of 2019 (unreported) where this court made an award of Kshs 800,000/- for general damages. The Respondent in the appeal was hospitalized for eight days after sustaining injuries which were particularized as follows;
 - i. Bruises on both upper limbs
 - ii. Compound fracture of the right femur
 - iii. Lacerations on the right leg
 - iv. Pain on the right upper leg
 - v. Lacerated scars on the right arm
 - vi. Lacerated scars on the left arm
 - vii. Lacerated scars on the lower leg
 - viii. Degree of permanent incapacity at 40%
 - b. *James Tom Mulekye vs Mativo Kovi* [2022] eKLR where this court awarded general damages at Kshs 700,000/- for a fractured left distal femur which was reported to have healed well with no major complications. The examining doctor in that case however cited that there was a possibility that the Respondent would develop osteoarthritis in later in life.
8. The Appellant pleads with this Court to interfere with the award made by the trial court and enhance it.
9. The Respondents have opposed this appeal and supported the decision of the trial court on quantum and that the award of Kshs 300,000 as general damages was commensurate to the injury sustained by the minor which was a fracture of mid-shaft right femur.



10. This Court has considered this appeal and the response made by the Respondents. This is a first appeal and the duty of this Court is to reanalyze and re-evaluate the evidence tendered and arrive at own conclusions.
11. This appeal as indicated above is only on quantum and so the only issue for determination is whether the award on general damages was fair in light of the injuries sustained in the accident.
12. The trial court assessed the injuries sustained and awarded the appellant Kshs 300,000 in general damages. There were two medical reports tendered during trial one prepared by Dr, PN Mutuku dated 22nd April 2016 and another by Dr PM Wambugu dated January 25, 2016 (exhibits tendered are not clearly marked in the Court Proceedings).
13. The prognosis made by both doctors indicates that the minor suffered a fracture of mid shaft femur with both doctors making a finding that the fracture had healed well with no major complication. Dr Mutuku opined that the minor may require a corrective surgery in future and in her estimation the costs would be Kshs 200,000. That amount was pleaded by the appellant and the trial court awarded it based on the doctor's opinion.
14. In assessing the quantum payable in general damages, the trial court in her judgement states that she had considered authorities cited by the parties and the injuries sustained by the minor. The trial in particular considered the decision in *Civicon Ltd versus Richard Njomo Omwancha & 2 Others* [2019] eKLR where the High Court on appeal set aside an award given by the Lower Court of Kshs 1,000,000 to Kshs 450,000 in respect to 2 claimants who had suffered soft tissues injuries, dislocations and fractures of pelvic bone and left tibia and fibula respectively.
15. An award on damages is usually a discretionary matter by the trial court and the general principle applicable is that an appellate court would rarely interfere with such exercise of discretion unless it is shown that the discretion has been exercised injudiciously or that the award is manifestly too high or low as to reflect a wrong estimate.
16. In *Gitobu Imanyara & 2 Others versus Attorney General* [2016] eKLR the Court of Appeal held as follows: -

“...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.”
17. The general method of approach in awarding damages should be 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.”
18. The two cases cited by the Appellant, specifically the case of *Eagle Vet Kenya Limited & Anor vs David Mbavu* HCCA No 34 of 2019 (unreported), the Claimant sustained several injuries and had a degree



of permanent incapacity assessed at 40%. It is therefore not the best comparative decision in relation to the injuries sustained by the minor herein who was said to have healed without any complications. The other case of *James Tom Mulekye vs Mativo Kovi* [2022] eKLR is more comparable.

19. In the decisions cited by the Respondent, the injuries are relatively similar to those sustained by the minor herein and the range of award by the court is between Kshs 350,000/- and Kshs 450,000/-
20. Comparative cases;
 - a. *Daniel Otieno Owino & Anor vs Elizabeth Atieno Owour* (2020) eKLR where the court set aside an award of Kshs 600,000/- for general damages with that of Kshs 400,000/-. The Respondent in the matter sustained a compound fracture of the right leg, tibia and fibula. The fracture was treated through application of plaster of paris (P.O.P).
 - b. *Civicon Limited vs Richard Njomo Omwancha & 2 Others* (2019) eKLR where the court set aside an award of Kshs 1,000,000/- as general damages with that of Kshs 450,000/-. The 2nd Respondent in the matter sustained a single fracture of the tibia and fibula and dislocation of the hip joint. Like the case above and the minor herein the fracture was treated through application of Plaster of Paris (POP).
21. Flowing from the above, it is quite evident that the award made by the trial court on general damages cannot be termed as too low as to invite for the intervention by this court. The award of Kshs 300,000 was conservative yes but reasonable and fair.

In the premises, this Court finds no merit in this appeal. The same is disallowed with costs to the respondent. The only rider I would add is that in view of the fact that the amounts awarded is in respect of a minor, and in Order to protect the interest of the said minor, I will direct that a trust account be opened in the name of the mother to be operated only with the supervision of a children's officer Kitui until the child reaches the age of majority. That way, the money in the trust account will only cater for the interest of the child and no one else which should always be the case when dealing with cases involving minors.

DATED, SIGNED AND DELIVERED AT KITUI THIS 29TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

