



**Mwololo v Mulandi (Civil Appeal E035 of 2022)  
[2023] KEHC 23280 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23280 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E035 OF 2022**

**RK LIMO, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**LUKE NYALA MWOLOLO ..... APPELLANT**

**AND**

**DENNIS PETER MWALIMU MULANDI ..... RESPONDENT**

*(Being an Appeal that arose from the Judgement of Hon. S. Mbungi-  
CM delivered on 24th June, 2022 vide Kitui CMCC No. 1 of 2019)*

**JUDGMENT**

1. This appeal arose from the Judgement of Hon. S. Mbungi delivered on 24th June, 2022 vide Kitui Chief Magistrate Civil Case No. 1 of 2019.
2. In that suit, the Respondent, a pillion passenger on motor cycle Registration No. KMDV 446W sued the appellant the owner and driver of motor vehicle registration No. KBV 011X for negligence that resulted in an accident on 8<sup>th</sup> October, 2017 along Kitui-Kanyonyo road near Katutu Market.
3. The Respondent in the said suit claimed that he sustained serious injuries and claimed general damages as well as special damages of Kshs. 802,144 from the appellant.
4. The appellant in his defence denied liability and instead blamed the rider of the motorcycle who perished in the accident claiming that he rode onto his lane and hit his motor vehicle head on and hence the accident.
5. The trial court evaluated the evidence tendered and found the appellant 100% liable for the accident.
6. On quantum, the trial court awarded the Respondent Kshs. 1,600,000 in general damages and special damages of Kshs. 679,899. The total amount awarded was Kshs. 2,279,899 plus cost and interests.



7. The appellant felt aggrieved on quantum of damages awarded and filed this appeal raising the following grounds namely: -
  - i. That the learned Magistrate erred in fact and in law in awarding the Respondent Kshs. 1,600,000 as general damages and Kshs. 679,899 as special damages which amount according to the appellant is inordinately high and constitute an erroneous estimate.
  - ii. That the learned Magistrate erred and misdirected himself in law and fact when he misapprehended and misunderstood the applicable principles in assessing general damages and thereby arrived at an excessive award in the circumstances.
  - iii. That the learned trial magistrate erred by failing to consider submissions and authorities cited by the appellant which he opines were guiding in respect to appropriate quantum in light of similar decided cases with similar injuries.
  - iv. That the learned Magistrate erred in law and fact in finding that the Respondent was entitled to a total of Kshs. 2,279,899.
8. In his written submissions through Counsel, the appellant submits that a Court should be guided by the principle that the awarded damages should be commensurate with the injuries sustained adding that the award must be consistent with similar awards given in other cases. He cites the decisions in the following cases to buttress his contention;
  - a. *Jeremiah & AMP Brothers Contractor and Another v Francis Egusangu Kaguli.*
  - b. *Simba Platinum Limited v Nicholas Auma Wandera* [2021] eKLR.
9. The appellant submits that the Respondent suffered the following injuries namely: -
  - i. Compound Fracture of the right femur.
  - ii. Compound fracture of the right tibia.
10. He cites the decision in *Joseph Mwangi Thuita v Joyce Mwole* [2018] eKLR where the court awarded Kshs. 700,000 for fractures of right femur, compound fracture of right tibia and compound fracture of the right fibula which resulted in shortening of the right leg. The appellant contends that the respondents' injuries were less severe as compared to the above case.
11. He also cites the decision in *Pauline Gesare Onami v Another* [2017] eKLR where the Appellate Court upheld an award of Kshs. 600,000 for a plaintiff who suffered the following injuries;
  - i. Fracture of the right tibia and fibula bore.
  - ii. Fracture of left tibia.
  - iii. Laceration on the neck
  - iv. Blunt trauma to the chest and deep cut wound on the both legs.
12. The appellant contends that the award given by the trial court should be reduced to reflect the jurisprudence in the above cited cases.
13. In respect to the special damages, the appellant submits that the Respondent should be awarded what was specifically pleaded and proved. He has however not stated what he contends was specifically proved.



14. The Respondent on the other hand, has opposed this appeal vide written submissions by Counsel dated 6.04.2023. He urges this Court to not just look at the mere descriptions of the injuries but look deeper into the effect of those injuries. He submits that he underwent a lot of pain and suffering as a result of the injuries sustained. He points out that he was admitted at Neema Hospital in Kitui for 2 weeks before being transferred to PCEA Kikuyu Hospital where he was hospitalized for a period of 28 days.
15. He submits that even after being discharged, the doctors recommended further treatment in light of non-union of fracture of the femur sustained.
16. He submits that his work entails plant operation of heavy machinery and contends that his working capacity has since diminished which in his view, means that his life will not be the same again.
17. He submits that the award of Kshs. 1,600,000 as general damages was justified in light of the above cited misfortune.
18. He submits that the appellant in the Lower Court had proposed Kshs. 800,000 for general damages. He relies on the decision in *Mwawa Muiruri & Another* [2014] eKLR where a plaintiff was awarded Kshs. 1,450,000 for injuries which the Respondent contends were similar to what he sustained.
19. He submits that the authorities cited by the appellant are not relevant because in his view, the injuries cited in the authorities are incomparable to what he sustained.
20. He contends that the case cited by the appellant in the case of *John Kaindo Ngugi v Alice Wanjiru Njoroge* (*Supra*) is distinguishable with his case because in the cited case, there was no history of hospitalization unlike his case. He submits that he has not yet healed.
21. He contends in the case of *Simba Platinum Ltd. v Nicholas Aumo Wandera* [2021] eKLR, the Court declined to interfere with an award of 2 million for pain and suffering because the Plaintiff had lost use of one upper limb. He contends that his case is similar because he has similarly lost use of his lower limbs.
22. He further contends that the authority cited by the Appellant in the case of *Joseph Mwangi Thuita v Joyce Movole* [2018] eKLR is not comparable to his because the time spent in hospital for treatment is not given. He contends that the authority is not comparable with his situations because of the prolonged suffering he underwent while undergoing treatment.
23. He also contends that the decision of *Pauline Gesare Onami v Samuel Changamure & Another* [2017] eKLR is not relevant to his case because the injuries he suffered are much more serious in his view.
24. On Special damages, the Respondent submits that he specifically pleaded for Kshs. 802,694 in his plaint and that he was able to prove the same through receipts tendered adding that trial court correctly subtracted Kshs. 130,000 paid by National Hospital Insurance Fund leaving a balance of Kshs. 609,974. He supports the trial court's decision to award him Kshs. 609,974 in special damages stating that he was able to prove the same during trial.
25. This Court has considered this appeal and the response made by the Respondent. This appeal is only on quantum and the mandate of this Court is to re-evaluate or re-assess the evidence tendered during trial and make own conclusions.
26. The assessment of damages is a discretionary matter and being a matter of discretion for the trial court, the position of an appellate court on matters of discretion is now well settled. An appellate would rarely



interfere unless it is demonstrated that the trial court awarded excessively high damages or used wrong principles in arriving at the award made such as to represent an erroneous estimate.

27. This Court has gone through the pleadings made in respect to the claim by the Respondent on both general as well as special damages. The Respondent pleaded that he suffered the following injuries namely: -

- i. Compound fracture of the right femur
- ii. Compound fracture of the right tibia

28. The trial court in its judgment found that the authorities filed by the appellant were similar in terms of injuries suffered to the injuries by the Respondent in this appeal.

The trial court however, took into consideration the fact that the decisions cited were of 2011 and 2018 and therefore took into account inflation and the fact that the Respondent had been left with permanent injuries as the fractures had not healed well. On that basis, the Respondent was awarded Kshs. 1.6 million in general damages.

29. The appellant has submitted that the award was excessive but fell short by failing to give what he considers fair award. The authorities cited by the appellant are in the range of Kshs. 600,000 to Kshs. 700,000.

30. The Respondent has faulted him on this, pointing out that, during trial, he submitted that a figure of Kshs. 800,000 would be fair. I have checked at the record of proceedings from the Lower Court and find that the Respondent's contention on the proposal made by the appellant in the Lower Court is indeed correct. He proposed Kshs. 800,000 as general damages.

31. This Court has considered the authorities cited by the appellant both at the trial court and in this appeal and I do agree with the Lower Court finding that the authorities cited are quite similar in terms of the injuries suffered with the injuries suffered by the Respondent in this instance. The decision in *Joseph Mwangi v Joyce Mwole* [2018] eKLR indicates that the Plaintiff sustained compound fractures of right tibia and fibula that resulted in shortening of the right leg which made him unable to walk without support. The award was increased to Kshs. 700,000. The decision in *Pauline Gesare Onami* (*Supra*) with similar fractures attracted an award of Kshs. 600,000.

32. The Respondent has amplified the nature of injuries pointing out the time spent in hospital and that his earning capacity has diminished because he works in plant machinery involving heavy machines.

33. However, in his plaint at the trial, the Respondent did not plead that his earning capacity had diminished as a result of the accident. He also never sought damages specifically on loss or diminished earning capacity. He is therefore wrong to justify the award made by the trial court on account of his diminished earning capacity because that was not a consideration in the assessment of damages or quantum payable.

34. The authority cited by the Respondent in the case of *Mwaura Muiruri v Suera Flowers Ltd. & Another* [2014] eKLR shows more serious injuries because the Plaintiff suffered fractures of both lower limbs and the doctor assessed permanent disability at 70%.

35. In this instance, the Respondent's medical report tendered (P Ex4) did not assess the degree of permanent incapacity. The P3 tendered indicates that he suffered grievous harm. The Respondent appears to have stretched his expectations by comparing the injuries he suffered with those cited in the case of *Mwaura Muiruri* (*Supra*).



36. This Court finds that the Proposal made by the appellant at the subordinate Court of Kshs. 800,000 was not bad but fair. The basis for any conclusion is based on the principle that some degree of uniformity in the award of general damages should be adhered to by looking at recent awards by courts in comparable cases. Apart from the decisions cited by the appellant, I have considered the following cases: -
- i. *David Mwembi v Maurice Ochieng Odoyo* [2019] eKLR. In that case, the Court awarded Kshs. 800,000 for the Respondent who sustained fracture of right femur and proximal fracture of the right femur and proximal fracture of tibia fibula.
  - ii. *EWO (Suing as next friend of COW) v Chairperson Board of Governors Yombe Sec. School* [2018]eKLR.  
In that case, the Plaintiff suffered fractures of femur and tibia fibula.  
The high Court upheld an award of Kshs. 800,000 in general damages.
  - iii. *George William Owuor v Beryl Awuor Ochieng* [2020] eKLR. The Plaintiff suffered fractures of right femur and left tibia fibula. The appellate court reduced an amount of Kshs. 2 million awarded and awarded Kshs. 1.2 million less 20% leaving a balance of Kshs. 840,000.
37. In light of the above decisions this court finds that the award of Kshs. 1.6 million as general damages was excessive of Kshs. 800,000 would be fair in the circumstances.
38. In respect to the special damages, I agree with the Respondents contention that he specifically pleaded for Kshs. 802,694 and proved the same through various receipts tendered and well tabulated by the trial court. The trial Court was keen enough to subtract Kshs. 130,000 paid by NHIF. The appellant has failed to specifically pin point where the trial court's error was in the assessment of special damages probably because there is none.
39. In sum, this court partly finds merit in this appeal and will allow it partly by reducing the award made in general damages from 1.6 million to Kshs. 800,000. The award made of Kshs. 679,899 in special damages is upheld. The appellant will have half costs of this appeal because he had partly succeeded but costs in the lower court shall go to the Respondent.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**HON. JUSTICE R. LIMO-JUDGE**

