



**Mwangi v Siloma & another (Civil Appeal E102 of 2022)
[2023] KEHC 26140 (KLR) (27 November 2023) (Interim Judgment)**

Neutral citation: [2023] KEHC 26140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E102 OF 2022
DAS MAJANJA, J
NOVEMBER 27, 2023**

BETWEEN

JOSEPH NGIGI MWANGI APPELLANT

AND

MILTON SILOMA 1ST RESPONDENT

SEMPEINE OLE SINA 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Ndegeri, SRM dated 15th December 2022 at the Magistrates Court, Naivasha in Civil Suit No. 12 of 2020)

INTERIM JUDGMENT

1. The appeal arises from a suit filed at the Subordinate Court seeking damages for injuries sustained in a road traffic accident that occurred along the Mai-Mahiu – Naivasha road at around Kihoto area on 29.08.2019 involving the Respondents’ motor vehicle KBU 005G and the Appellant’s motor cycle KMDF 937Y.
2. The issue of liability was resolved by consent and agreed at 85:15 as against the Respondents. The trial court proceeded with assessment of damages and rendered judgment on 15.12.2022 where it awarded the Appellant Kshs. 800,000.00 and Kshs. 62,320.00 as general and special damages respectively. The Court did not award future medical expenses on the ground that it could not adopt either of the medical reports since the makers were not called as witnesses.
3. Based on the Memorandum of Appeal dated 16.12.2022, the Appellant appeals against the award of general damages and failure by the court to award future medical expenses. He contends that the award of general damages is insufficient compared to the injuries he suffered. That even though the trial court agreed with him that he had submitted relevant and comparable authorities, it deviated from the precedents and gave an inordinately low award without giving reasons for the deviation.



4. The Respondents support the judgment and urge the court to retain the award given by the trial court terming it commensurate in terms of the injuries suffered and comparable to awards in cases composed of similar injuries. The Respondents point out that the Appellant pleaded more injuries in the Plaint as compared to those sustained by him as evidenced by the Hospital Discharge Summary from Kinangop Catholic Hospital. Essentially, they submit that the Plaint consists of made-up injuries which may not have been sustained by the Appellant on the date of the accident. Quoting the case of *Fadna Issa Omar v Malne Sirengo Chipo & 3 Others* [2016] eKLR, the Respondents further contend that the failure by the Appellant to produce initial treatment notes from Naivasha County Referral Hospital ought to have dealt a fatal blow to the case leading to its dismissal.
5. This being a first appeal, this court is mandated to re-analyze the evidence and arrive at its own independent conclusion (see *Sumaria & another v Allied Industrial Ltd* [2007] 2 KLR). In addition, it is settled that an Appellate court will not disturb the award on quantum of damages awarded by a trial court unless the trial court in assessing the damages took into account an irrelevant factor or left out a relevant one or that, the amount awarded is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damages (see *Butt v Khan* [1982 – 1988] 1 KAR 1 and *Mariga v Musila* [1982 – 1988] 1 KAR 507).
6. I have considered the submissions tendered together with the authorities cited by the parties. As the Respondents did not cross-appeal against the finding and conclusion of the trial magistrate, I think the issue is simply whether the award was too high or too low as contended by the Appellant.
7. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab v Kinanu* [1983] KLR 114 and *West (H) & Son Ltd v Shephard* [1964] AC 326, 345).
8. It is not in dispute that the Appellant was injured, hence the question is what was the nature and extent of the injuries and what award should they should attract. According to the Amended Plaint dated 31.01.2021, the Appellant sustained the following injuries:
 - a. Fracture distal end of the right tibia and fibula.
 - b. Fracture left lateral malleolus of the left ankle joint.
 - c. Fracture left medial malleolus of the left ankle joint.
 - d. Blunt injury to the lower back leading to soft tissue injuries.
 - e. Blunt injury to the left hand leading to post traumatic radial nerve palsy.
 - f. Fracture proximal end of the left humerus.
 - g. Soft tissue injury of the right leg.
 - h. Soft tissue injuries of the left ankle joint.
9. The above injuries were pleaded on the basis of the medical report dated 03.12.2019 prepared by Dr Obed Omuyoma when he examined the Appellant. He had the advantage of reading the Discharge Summary from North Kinangop Catholic Hospital dated 09.10.2019, medical imaging request from



PGH Nakuru dated 12.11.2019 and the P3 medical form dated 12.11.2019. When he was examined the Appellant, the doctor noted that he was unable to move without a wheel chair and had traumatic radial palsy of the left hand which reduced muscle power. X-ray of the tibia and fibula showed fracture on the distal end of the right tibia and fibula and the left ankle joint showed bimalleolar fractures on the left ankle joint. He assessed permanent disability at 30% and suggested that an implant would be removed at a cost of Kshs. 200,000.00.

10. The Appellant was also examined by Dr Malik on 23.04.2021 who prepared a report of the same date. At the time of examination, the Appellant was walking without the support of crutches. He noted that the left arm had a wrist drop which indicated that the left radial nerve was damaged at the site of the fracture of the humerus. That both legs had normal muscle power and sensory perception. The tibia of the right lower leg was straight and fully united and the right knee and ankle joints were fully mobile. Likewise, the left ankle joint was normal and with a full range of movement. The doctor reviewed the X-rays and concluded that all the fractures had healed and while the left hand was weak as a result of nerve damage, it was expected to heal. He stated that the Appellant suffered incapacity of a temporary nature for one year and partial incapacity of a permanent nature of about 15%. He noted that removal of the implants would cost about Kshs. 150,000.00.
11. The parties in this case agreed to admit the medical evidence and the best the court could do is to interrogate what had been agreed on by consent. In this respect I would accept what Court of Appeal stated in *Ali Ahmed Naji v Lutheran World Federation* [2010]eKLR that,

“If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant’s claim as to the nature of the injuries he had sustained as a result of the accident.” (Emphasis supplied).

Once the reports had been admitted, the duty of the trial court was to examine them and give them due weight depending on the analysis and conclusion.

12. Having considered both medical reports, I do not see any material difference in the reports as regards the nature of injuries sustained by the Appellant. What is evident is that the Appellant was injured on 29.08.2019. He was seen by Dr Omuyoma on 03.12.2019 which about 5 months after the accident while the injuries were still fresh and then by Dr Malik in 2021 about 3 years after the accident when the Appellant’s situation had improved significantly after the traumatic accident. I do not think initial treatment notes would add or subtract to the nature of the injuries since both parties agreed that assessment of damages would be on the basis of the documents submitted. As I stated, the injuries sustained from the two reports were consistent given the time that had lapsed.
13. In light of the injuries sustained, the Appellant, in seeking an award of Kshs. 2,000,000.00 relied on several decisions. In *Damaris Wamucii Kagechu v Joseph Kirui & Another* [2019]eKLR where the court awarded Kshs. 1,600,000.00, the plaintiff suffered bilateral compound fractures of the tibia and fibula to both right and left legs. Subsequently, the fracture showed malunion and at the time of the hearing she could not walk. Permanent disability was assessed at 8%. He also cited *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura and Another* [2015]eKLR where the plaintiff sustained multiple soft tissue injuries, blunt injury to the head, failure fracture of the right radius/ulna, compound fracture of the right and left tibia and fibula and was awarded Kshs. 2,000,000.00. In *Subati Flowers Limited v Walter Wanyonyi Wekesa* [2019] eKLR, the court upheld an award of Kshs. 1,600,000.00 as general damages for the plaintiff who suffered a fracture of the right and left tibia and fibula, fracture of L2 of the lumbar spine and blunt injury to the right side of the chest. Lastly, in *Porim Insurance Brokers*



- Limited v Patrick Rugendo Mugambi* [2021] eKLR, the plaintiff suffered a fracture of the left femur, right tibia, pro lapse of vertebra C6, head injury blunt injuries to the chest, right shoulder and cut on the left knee and whose disability was assessed at 16% and was awarded 1,600,000.00.
14. The Respondents urged the court to award Kshs. 500,000.00 as general damages. They cited several cases among them *Florence Njoki Mwangi v Chege Mbitiru* [2014] eKLR where the plaintiffs sustained fractures of the femurs bilaterally, two degloving injuries on the right knee and the right ankles which required removal of k-nails and screws. In *Mwaura Muiruri v Suera Flowers Limited and Another* [2014]eKLR, the plaintiff suffered multiple lacerations on the face, soft tissue injuries on the chest cage, comminuted fractures on the right humerus upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia and was awarded Kshs. 1,750,000.00 general damages. They also cited *James Gathirwa Ngungi v Multiple Hauliers (EA) Ltd* [2015] eKLR where the plaintiff was awarded Kshs. 1,500,000.00 after sustaining compound comminuted fractures of the right tibia and right fibula, fracture of the left ulna, head injury and deep cut would of the parietal region, soft tissue injuries and bruises on both hands, multiple facial cuts and lacerations and fracture of the right leg. Finally, in *Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd & Another* [2014] eKLR where the plaintiff sustained extensive fractures of the left tibia and fibula, soft tissue injuries on the left leg and fracture of the collar bone, he was awarded Kshs. 2,500,000.00 in general damages.
15. The injuries sustained by the Appellant were less serious than those in the cases cited by him. However, the injuries were serious enough bearing in mind that he suffered total incapacity for one year according to Dr Malik who also assessed permanent disability at 15%. I think the trial magistrate overlooked these facts hence I hold that the award was inordinately low and did not reflect the extent of the injuries sustained by the Appellant. Moreover, it is clear that the decisions cited by both parties are over 2 years old hence the inflation ought to be taken into account. In the circumstances and for these reasons, I would increase the award of general damages to Kshs. 1,200,000.00.
16. Regarding future medical expenses, the governing principle was explained by the Court of Appeal in *Kenya Bus Services Ltd v Gituma* [2004] EA 91 as follows:
- 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 damages and is a fact that must be pleaded, if evidence thereon 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 the infringement of a person’s legal rights should be pleaded.
17. A cursory glance at the Amended Plaintiff shows that the Appellant did not plead or make a claim for future medical expenses. Although the both medical reports alluded to the possibility of future medical expenses being incurred and estimated the cost, such evidence is insufficient to mount a case in the absence of a specific plea in the plaintiff. In *Mbaka Nguru & Another v James George Rakwaro* NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR, the Court of Appeal put it this way;
- We come now to the claim under the heading “Future Medical Expenses”. There is no such claim made in the body of the plaintiff. Nor is there any suggestion in the body of the plaintiff that such a claim would be made. There is no quantification of any sort in the body of the plaintiff in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a



claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head

18. Having considered the appeal, I would dismiss the plea for future medical expenses. I therefore allow the appeal on the following terms:
- a. Subject to the agreed consent on liability, the award of Kshs. 800,000.00 as general damages is set aside and substituted with an award of Kshs. 1,200,000.00.
 - b. The Respondent shall pay costs of the appeal assessed at Kshs. 65,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIVASHA this day 27th of NOVEMBER 2023

G. K. NZIOKA

JUDGE

