



REPUBLIC OF KENYA



**Mutembei v Sulubu alias Asha Sulubu Ngala (Civil Appeal 10 of 2023)  
[2023] KEHC 27530 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27530 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 10 OF 2023  
F WANGARI, J  
NOVEMBER 24, 2023**

**BETWEEN**

**MOSES MUTEMBEI ..... APPELLANT**

**AND**

**CHRISTINE ASHA SULUBU ALIAS ASHA SULUBU NGALA .... RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of Hon. EM. Muchoki, Senior Resident Magistrate dated 26/1/2023 arising from Mombasa CMCC No. E294 of 2020.
2. The Memorandum of Appeal substantially raises the following Grounds:
  - a. The Trial Court erred in the assessment of General Damages and arrived at an erroneous estimate of damages.
  - b. The Trial Court misapprehended the evidence in awarding future medical expenses.
3. The Plaintiff dated 3<sup>rd</sup> November 2020 claimed damages arising from an accident that occurred on 10<sup>th</sup> August 2019. The accident involved the Plaintiff and the Defendant's Motor Vehicle Registration No. KBX 912X.
4. The Plaintiff set forth particulars of negligence for the accident motor vehicle. The Plaintiff pleaded Kshs. 636,090/= as Special Damages and also pleaded General Damages.
5. The Respondent entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaintiff.
6. The Trial Court heard the parties and proceeded to render Judgement on 26<sup>th</sup> January 2023. Liability was agreed by consent of the parties at 80:20 in favour of the Plaintiff.
7. In the Judgement, the Court awarded the Respondent herein as follows:



General Damages Kshs. 800,000/=

Future Medical Expenses Kshs. 120,000/=

Medical Report Kshs. 3,000/=

Medical Expenses Kshs. 480,000/=

Total Kshs. 1,403,740/=

8. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

### **Evidence**

9. During the hearing, the Plaintiff testified and relied on the bundle of documents filed in Court. It was her case that she suffered a compound fracture to the tibia and fibula following the accident. She further stated that she had pains whenever it was cold and that she required expenses to remove the metal plate implant.
10. Further, Dr. Udayan also testified for the Plaintiff. He relied on the Medical Report filed in Court and informed the court that the Plaintiff suffered a compound fracture to the tibia and fibula.
11. On his part, the Defendant did not call any witnesses.

### **The Appellants' Submissions.**

12. The Appellant submitted that the award on general damages by the trial court did not reflect comparable injuries and was excessive. Counsel submitted that the award not be inordinately high and should reflect the injuries suffered base on comparative cases. They relied inter alia on the case of Southern Engineering Company Ltd v Musinga Mutia (1985) KLR 730.
13. It was the submission that in the circumstances, the Plaintiff was entitled to compensation of Kshs. 200,000/-. Reliance was placed on the cases of Triad Coaches Ltd v Mary Mutheu Kakemu (2020) eKLR, Naomi Momanyi v G4s Security Services Ltd & Another (2018) eKLR.
14. The Respondent filed submissions and submitted that the Trial Court was correct in its estimate of the damages and the resultant award was based on evidence and was not inordinately high.
15. I have perused the submissions and authorities filed by the parties. I note that the Appellant's proposed authorities are not more candid and typical to compare the injuries. Therein, the injuries were fracture on the tibia and fibula while in this case, it is a compound fracture of the tibia and fibula.

### **Analysis**

16. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
17. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:

“ It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

18. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 this court must reconsider the evidence, evaluate it 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 in this respect...”

19. This Appeal is on quantum only. The issue is whether the Learned Trial Magistrate erred on his award of General Damages and Medical Expenses. The Appellant submitted that the Trial Court misapprehended evidence and ended up to an erroneous verdict.

20. I have noted that the Learned Magistrate awarded Kshs. 800,000/- for general damages while considering the injuries suffered by the Respondent being, compound fracture of the tibia and fibula.

21. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or that had this court handled the case in the subordinate court, it would have awarded a different figure.

22. Damages must be commensurate with similar injuries. I note that the Respondent suffered a compound fracture of the tibia and fibula. This was correlated by the evidence of the Medical Doctor called by the Respondent.

23. Fact finding is primarily the duty of the trial court and once evidence is presented before it, it is the basis of which it would arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*.

24. It is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

25. Furthermore, in *Parvin Singh Dhalay vs. Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: - “Because this is the evidence of an expert, I believe it...”



26. There is no dispute that the Respondent suffered compound fracture of the tibia and fibula. The Trial Court relied on the case of Daniel Otieno Owino & Another v Elizabeth Atieno Owuor (2020) eKLR. I note that this case was proposed by the Respondent but is not typically comparable to this case. Therein, the Plaintiff suffered fracture to the right and injuries to the eye.
27. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that “comparable injuries should attract comparable awards.”
28. The principle on the award of damages is settled. In Charles Oriwo Odeyo v Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  - 2) The award should be commensurable with the injuries sustained.
  - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
  - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  - 5) The awards should not be inordinately low or high.
29. Therefore, I find the following cases to present similar fact situation to the Appeal herein. In EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR the Plaintiff sustained a fracture of the right mid shaft femur with tibia fibular fracture and facial injuries with bruises. The court upheld the award of Kshs. 800,000/= in general damages in 2018.
30. In Sammy Mugo Kinyanjui & Another vs Kairo Thuo (2017) eKLR, Kshs. 600,000/= was awarded for the Plaintiff who had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula. In Daneva Heavy Trucks & another v Chrispine Otieno [2022] eKLR, an award of Kshs. 1,300,000/= was reduced to Kshs. 800,000/= on appeal. In that case, the Respondent had sustained fractures of the tibia, fibula and pelvis.
31. All these authorities show that the Appellant’s proposed award of Kshs. 200,000/= is inordinately low and not a fair estimate of general damages. The Respondent sustained compound fractures which mean the bones broke to the extent of tearing the skin open. The award of Kshs. 800,000/- proposed by the trial court in my view is consistent with awards on similar injuries factoring in lapse of time from the time the cited decisions were rendered and the inflation trend. I thus see no reason to disturb the award made by the Trial Court on this limb.
32. On future medical expenses, I note that the contention by the Appellant is that whereas the Respondent’s medical doctor proposed Kshs. 120,000/- at Aga Khan Hospital being the cost of removal of implants, the same doctor proposed Kshs. 15,000/- as the requisite cost in a public facility.
33. The Respondent was injured and treated at the Aga Khan Hospital. She has the reasons why she chose Aga Khan Hospital and not a public health facility. Such reasons were not placed before the court. I am unable to exercise my discretion to disturb the finding of the trial court who had the opportunity



in the first instance to examine the witnesses. I also do not find the amount of Kshs. 120,000/- excessive based on the evidence produced per the lower court record.

34. I note that the Appellant did not appeal against the medical expenses award by the trial court. I will not disturb the award under this head.

35. In the upshot, I make the following orders: -

- a. Judgement of the Lower Court on General Damages is hereby upheld
- b. The Appeal on Future Medical Expenses is dismissed.
- c. Costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**F. WANGARI**

**JUDGE**

In the presence of: -

Mr. Hamisi Advocate h/b for Mr. Jengo Advocate for the Appellant

Mr. Njoroge Advocate for the Respondent

Mr. Barile, Court Assistant

