



**Kironyo v Nene (Civil Appeal E197 of 2021)
[2022] KEHC 15604 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E197 OF 2021
MM KASANGO, J
NOVEMBER 24, 2022**

BETWEEN

WAINAINA KIRONYO APPELLANT

AND

PETER WANG'ANG'A NENE RESPONDENT

(Being an appeal from the judgment in the Senior Magistrate's Court at Kikuyu (Hon. G. Onsarigo, SRM) dated 30th September, 2021 in Kikuyu Civil Suit NO. E116 of 2021)

JUDGMENT

1. This is an appeal from the Chief Magistrate's court at Kikuyu. The appellant being aggrieved by that trial court's award in general damages has filed the appeal. This is the first appellate court. The principal which will guide this Court in consideration of this appeal has been restated in several decisions of the courts: see the case *Selle & Another Vs Associated Motor Boat Co Ltd & Others (1968) EA 123*. That principle is that the first appellate court is not bound to accept the finding of fact of the trial court, rather this Court should consider an appeal as retrial. To that end, this Court is expected to reconsider the trial court's evidence, evaluate that evidence and draw its own conclusion however in doing so this Court is expected to bear in mind that it has neither seen nor heard the witnesses who testified at trial.
2. The trial court's case which is the subject of this appeal did not go to full trial. The parties entered into a consent, dated July 5, 2021, and on the trial court adopting the consent as an order of the court parties requested the trial court to deliver judgment on the basis of that consent and their written submission.
3. The trial court delivered its judgment on September 30, 2021. By that judgment the trial court awarded the respondent Kshs 1,400,000 in general damages and Kshs 200,000 for future medical costs. That award was reduced by 15% which the respondent bore as his liability for the accident. It is those awards that are the subject of this appeal.
4. The trial court in making the above award had before it two medical reports.



5. The medical report prepared by Dr Obed Omuyoma, dated April 30, 2021 was presented by the respondent. The medical report of One Health dated June 17, 2021 was presented by the appellant. The injuries suffered by the respondent captured in both medical report are:-
 - a. Fracture lateral malleolus of the right ankle joint.
 - b. Severe soft tissue injuries of the right ankle joint.
 - c. Compound fracture of the right femur.
 - d. Severe soft tissue injuries of the right thigh.
 - e. Fracture medial malleolus of the right ankle joint.
6. The appellant being aggrieved by the trial court's award in general damages has brought the following grounds for consideration in this appeal.
 - ' (a) The learned trial magistrate erred in law and in fact in awarding the respondent inordinately high general damages as to amount not a gross exaggeration of the loss suffered.
 - (b) The learned trial magistrate erred in law and fact in disregarding the appellant's submissions and authorities as regards quantum.
 - (c) The trial magistrate erred in law and in fact by failing to consider that all the injuries sustained by the respondent were on one leg.'
7. This being an appeal against an award of damages the general principle applicable is that an appellant court should be slow to interfere with discretion of the court in awarding damages. An appellate court would be justified to interfere with trial court's award of damages where the trial court acted on wrong principles by taking into account irrelevant factor or it failed to take into account relevant factors and the award it grants is consequently inordinately low or inordinately high resulting in erroneous award of damages: See the case of *Butt v Knan (1982-88) IKAR I*.
8. Appellant before the trial court proposed the respondent be awarded Kshs 700,000 in general damages. In this appeal, appellant by his grounds of appeal did not suggest how much the award of general damages should be adjusted but requested the trial court's award in general damages be substituted with this Court's decision.
9. The main issue of contention in this appeal is whether the trial court awarded the respondent inordinately high damages.
10. The appellant brought to the fore in this appeal, the trial court's finding that the respondent suffered 30% disability.
11. My first response is that the appellant and respondent erred in failing to adduce evidence to assist the trial court make a considered determination on the quantum of damages the respondent should be awarded. The trial court was presented with the parties' consent dated July 5, 2021 which stated:-
 - ' (a) By consent liability be entered in the ratio of 85:15 in favor of the plaintiff [here the respondent] as against the defendant [here the appellant].
 - (b) The court to make a determination on the quantum payable.'



12. It is obvious that the above consent did not indicate which finding by the two doctors would be considered when determining quantum. The trial court in determining the quantum was therefore left to consider the two medical reports presented by the appellant and the respondent since none of the two medical reports was discounted by oral evidence.
13. The medical report of Doctor Obed Omuyoma the respondent's medical report, noted that the respondent was: in fare state of health, he had a surgical scar on the right ankle and a permanent scar on the right thigh. The report also noted that the respondent could require to have the screws that were applied to the two fractures removed in the future at the cost of Kshs 200,000. The doctor concluded the report by stating that the respondent had suffered permanent disability of 30%.
14. The medical report submitted by the appellant prepared by Doctor Michelle Muhanda stated that the respondent had open reduction and internal fixation of the fractures of the thigh of the femur. The doctor further stated in that report that the respondent had no deformity but had reduced range of motion in the right knee. The reduced range of motion of the right knee. The appellant' doctor's report failed even though it referred of that reduced range of motion, to state what if any was the percentage of disability.
15. The trial court cannot be faulted in my view for stating that appellant's medical report did not give an opinion on the issue of respondent's disability. That indeed is the correct statement. That doctor who prepared appellant's medical report although noting respondent continued to suffer reduced range of motion of the right knee failed to attribute any percentage of disability to that reduced range of motion.
16. Appellant relied on the case [*Benuel Bosire Vs Lydia Emunto Mokora \(2019\) eKLR*](#). The claimant in that case suffered multiple serious soft tissue injuries and a compound fracture. In that case, where the claimant's disability was set at 40% the award at appeal was reduced to Kshs 700,000. Appellant also cited the case [*Civicon Limited Vs Richard Njomo Omwancha & 2 Others \(2019\) eKLR*](#) where the claimant suffered fracture of four teeth, cut wound on upper and lower lip and swollen tender upper lip bruises on the chin, dislocation of the left shoulder and bruises on the right knee and fracture of the right tibia fibula. The award at the appeal was reduced to Kshs 500,000. Appellant also cited the cases of [*Florence Njoki Mwangi vs Peter Chege Mbitiru \(2014\) eKLR*](#) and of [*Jutan Nagra vs Abidnego Nyandusi Oigo \(2018\) eKLR*](#) which case I have had opportunity to consider.
17. I would wish to remind the parties to this appeal what was held in the case [*Harun Muyoma Boge v Daniel Odtieno Agula Mgr Hcca No 7 of 2015 eKLR*](#) as follows:-

' The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessive high awards and that the claimant is fairly compensated for his or her injuries.'
18. The decision cited by the appellants were made in the years 2007, 2018, 2019 and even 2014. The trial court's decision was in 2021. Bearing in mind that award of damages is not an exact science and because of passage of time I do not find the appellant's authorities persuasive in respect to this present case.
19. On the other hand, the case of [*SOPhia Wanyama Njuguna Vs Kyoga Hauliers Enya Lmiited \(20202\) eKLR*](#) had far more serious injuries than those reported of the respondent.
20. In my view, balancing the authorities presented by the parties and bearing in mind the injuries suffered by the respondent, I would reduce the award of general damages from Kshs 1,400,000 to Kshs 1,000,000.



Disposition

21. The judgment of this Court is that the appeal succeeds only in respect to the award for general damages. The other awards of the trial court are upheld.
22. The award of general damages of Kshs 1,400,000 is set aside and is substituted by an award of Kshs 1,000,000 less the 15% respondent's liability making it Kshs 850,000. The respondent is awarded costs of this appeal assessed at Kshs 50,000/=.
23. Orders accordingly.

JUDGMENT DATED and DELIVERED at KIAMBU this 24TH NOVEMBER, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant:- Mourice/Julia

For Appellant Ms. Wainaina :- Instructed by Oundo Muriuki advocates:-

Mr. Owuor for respondent : - Instructed by Achieng Ouwor & Co. Advocates:-

Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

