



REPUBLIC OF KENYA



**Muchemi v Tarus (Civil Appeal 93 of 2021)
[2022] KEHC 17143 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 93 OF 2021
REA OUGO, J
NOVEMBER 22, 2022**

BETWEEN

PHILIP MATHENGE MUCHEMI APPELLANT

AND

CHRISTOPHER KIMAIYO TARUS RESPONDENT

*(Being an appeal from the whole of the Judgment delivered by the
Honourable D.O Macandere Resident Magistrate on the 6th August 2021)*

JUDGMENT

1. The appeal before this court is both on quantum and liability. The respondent filed his plaint before the subordinate court on November 20, 2019 seeking damages on account of a road traffic accident involving the appellant's motor vehicle registration no xxxx and the respondent who was a pedestrian. The respondent claims that the accident took place on March 18, 2019 in Kisii Township. The appellant filed his statement of defence dated January 6, 2020 and denied occurrence of the accident. In the alternative, the appellant pleaded that if an accident occurred then it was solely caused by the respondent's negligence.
2. The trial court after considering the evidence tendered at the hearing of the suit, awarded the respondent general damages of Kshs 1,200,000/-, special damages of Kshs 24,859/- and costs. The appellant dissatisfied with the finding of the trial court filed a memorandum of appeal on September 24, 2021. The appeal raises 11 grounds which are summarized as follows, that the learned magistrate: erred in law and fact by solely basing his judgment on the plaintiff's evidence and thereby finding the appellant 100% liable; made a wrong finding as regards the nature of the plaintiff's injuries; and proceeded on wrong principles when assessing damages therefore awarded the plaintiff an inordinately high amount.



3. The appeal was canvassed by way of written submissions. This being the first Appellate Court there is need to look at the evidence adduced before the lower court afresh bearing in mind that I had no benefit of seeing or hearing the witnesses as they testified. (See the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, 126).
4. The appellants are aggrieved by the trial court's finding on negligence. In order to consider the question of liability, I must first evaluate the evidence of the witnesses that testified before the trial court.
5. Christopher Kimaiyo Tarus (Pw2) testified that on March 13, 2019 he was around Kisii main stage walking by the side of the road. He heard people screaming and that the appellant's vehicle was coming from the upper side. He moved away from the road but was hit by the vehicle. His left leg was fractured, he suffered stiffness of the leg and had a deep cut wound on the head. He was taken to Kisii Teaching and Referral Hospital and later referred to Moi Teaching and Referral Hospital. Pw2 then visited Dr Morebu (Pw1) who prepared his medical report. According to the report Pw1 sustained the following injuries: fracture of the left tibia and fibula bone; blunt injury of the left ankle; cut wound on the back of the head and stiffness of the left knee. He testified that Pw1 sustained grievous harm and assessed permanent disability was at 30%. He blamed the driver for hitting him while walking by the side of the road.
6. Dr Ruth Ichamuenge (Dw1) produced the medical report by Dr Janipher Kuhuthu. According to the report Pw1 fractured the lateral tibia, condyl soft tissue injuries and permanent disability was assessed at 12%.
7. The appellant in his submissions argue that the trial court's award at 100% liability was erroneous considering that the police abstract listed the case as one pending investigations. According to the appellant the respondent did not prove its case to the required standard and therefore proposed that liability be equally shared in the ratio of 50:50.
8. The only person who witnessed the accident was Pw1 who testified that he was walking by the side of the road when he was hit by the vehicle. The appellant's witness Dw1 only testified in regard to the injuries sustained by the respondent. The plaintiff's case on liability therefore remained unchallenged by the appellant. The trial magistrate recognized that Pw1 in his testimony and pleadings blamed the respondent for the accident. She noted that the police abstract produced in court showed that the accident did occur and that the appellant did not controvert this evidence in the defence hearing. I am constrained to agree with the finding of the trial court as the respondent's evidence on liability was not challenged or controverted in any manner whatsoever.
9. I now turn to consider whether the damages awarded were excessive. The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in *Bashir Ahmed Butt vs Uwais Ahmed Khan* (1982-88) KAR as follows:

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.’
10. According to the plaint the respondent sustained a fracture of tibia and fibula, trauma to the left ankle, deep cut wound on the optical region and ankylosis of the left knee. Dr Morebu in his report confirmed that the respondent indeed sustained the injuries listed in his plaint and that he suffered permanent disability at 30%. The fractures were also confirmed by the medical report of Dr Janipher Kahuthu, however she assessed disability at 10%.



11. The appellant in his submissions submitted that an award of Kshs 400,000/- would be sufficient considering comparable injuries. They cited the case of *Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR*; and *Zacharia Mwangi Njeru v Joseph Wachira Kanoga, Nyeri HCCA No 9 of 2012* where the plaintiff's sustained soft tissue injuries and fracture of the tibia/fibula and were awarded Kshs 400,000/-. In *Mbithi Muinde William v Rose Mutheu Malatia [as quoted in DG (Minor suing through next of friend MOR v Richard Otieno Onyisi [2021] eKLR)*, the respondent was awarded Kshs 400,000/- as compensation for swollen, tender left wrist and left leg, fracture of the left of 5th metacarpal bone and fracture of the right tibia.
12. The respondents in his submissions proposed a sum of Kshs 1,500,000/- as general damages. He cited the court's decision in *Joseph Kimantbi Nzau v Johnson Macharia (2019) eKLR* and *Francis Murangiri Josiah and another v Stanley Kiuram'mtungu (2017) eKLR*.
13. In *Hussein Sambur Hussein v Shariff A Abdulla Hussein & 2 others [2022] eKLR* the plaintiff before the lower courts sustained fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and he complained of pain in the injured areas and a permanent incapacity of 18%. The court maintained the award of Kshs 700,000/-. In *Moses Kirimi & another v GKI (suing as the next friend of JK minor) [2019] eKLR* where the respondent sustained bruises and fracture right upper 1/3 tibia and fibula and disability assessed at 5%, the court awarded Kshs 800,000/-.
14. In the end, I find this appeal partially successful. I set aside the award of general damages of Kshs 1,200,000 and substitute the same with an award of Kshs 700,000. The award of special damages is sustained. The appellant is awarded half the cost of the appeal.

Dated, Signed, and Delivered at KISII this 22nd day of November 2022.

R.E. OUGO

JUDGE

In the presence of:

Miss Cheruiyot For the Appellant

Miss Ndemo For the Respondent

Ms. Aphline Court Assistant

