



REPUBLIC OF KENYA



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**Ngumi v Tahir Sheikh Said Transporters Limited (Civil Appeal
E021 of 2020) [2025] KEHC 3550 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E021 OF 2020
M THANDE, J
FEBRUARY 21, 2025**

BETWEEN

EUNICE NGUMI APPELLANT

AND

TAHIR SHEIKH SAID TRANSPORTERS LIMITED RESPONDENT

*(An Appeal from the judgment of Hon. Stephen K. Ngii S. R. M.
delivered on 18.11.2020 in Mariakani SRMCC No. 348 of 2018)*

JUDGMENT

1. The Appeal herein arises from the judgment delivered in Mariakani SRMCC No. 348 of 2018 instituted by the Appellant by way of a plaint dated 2.10.18 against the Respondent. The Appellant claimed both general and special damages for injuries sustained in a road traffic accident. The Appellant's case is that she was on 16.12.16 lawfully travelling as a fare paying passenger in motor vehicle registration number KBN 652N along the Mombasa-Nairobi Road, when upon reaching Bonje, the Respondent's driver so negligently and carelessly drove and/or controlled the said motor vehicle that he lost control of the same causing it to overturn. As a consequence thereof, the Appellant sustained severe injuries and suffered loss and damage.
2. Following a hearing, the trial Magistrate entered judgment in favour of the Appellant in the following sums:
General damages Kshs. 650,000/=
Special damages Kshs. 67,337/=
Total Kshs. 717,337/=
Less 5% contribution Kshs. 35,867/=
Net award Kshs. 681,470/=



3. Being aggrieved by the decision of the trial Magistrate, the Appellant preferred the Appeal herein on the following grounds:
 1. The Learned Senior Resident Magistrate erred in law and in fact by awarding general damages that were inconsiderably low and incommensurate to the nature of injuries suffered by the Appellant.
 2. The Learned Senior Resident Magistrate erred in law and in fact by failing to award the Appellant incurred medical expenses of Kshs. 169,056.70/= and further erred in law and in fact in disregarding the documentary evidence in support of the said medical Cost of Kshs.169,056.70/=.
 3. The Learned Senior Resident Magistrate erred in law and in fact in failing to make any award on future medical costs and generally misapprehended the law and disregarded the medical report produced by the Appellant.
 4. The Learned Senior Resident Magistrate erred in law and in fact in failing to consider all the evidence adduced by the Appellant.
4. The Appellant prayed that the entire award on quantum of general and special damages be set aside and the court be pleased to reassess and enhance the same. Further that the Court awards the incurred medical expenses of Kshs.234,393.70/= and further make an award for future medical costs of not less than Kshs.100,000/= The Appellant further prayed with costs of the Appeal.
5. I have re-examined the entire record and given due consideration to the parties' respective submissions. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another –vs- Associated Motor Boat Company Ltd. & Others* (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High 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 made due allowance in this respect.
6. Although the Respondent was given an opportunity to file submissions, at the time of writing this judgment, the submissions had not been filed. The Appeal thus remains unopposed.
7. On general damages, the Appellant submitted that the trial magistrate made an award that was manifestly low which did not constitute reasonable compensation for the injuries she sustained. The Appellant thus urged this Court to review the same upwards.
8. On future medical expenses, the Appellant submitted that Dr. S. K. Ndegwa assessed the degree of permanent incapability at 6% and estimated the cost of removal of the metal surgical implant to be Kshs. 100,000/=. On the other hand, the Respondent's doctor Ruth Ichamwenge assessed permanent incapability at 5% and future medical costs at Kshs. 60,000/=. The Appellant thus faults the trial magistrate for ignoring this medical evidence.
9. The Appellant further submitted that she had incurred medical costs of Kshs. 243,393.70 which were specifically pleaded and proved. She faulted the trial court for awarding Kshs. 65,337/= only, for a receipt issued by Aga Khan Hospital while dismissing the receipts for Kshs. 169,056.70 from Sayyida Fatmah Hospital as incompetent.



10. The medical report by Dr. Ndegwa indicated that the Appellant sustained the following injuries: comminuted fracture of the left distal humerus. transverse fracture of the right proximal fibula. a 6m cut wound on the right leg. lacerations on both hands. several lacerations on both thighs and on the left calf.
11. The doctor noted that the Appellant had a 15cm long vertical surgical scar on the lateral aspect of the left upper arm and the metal surgical implants are still in situ. He also noted a depressed 6cm long vertical scar is noted just below the right knee and it deforms the right upper leg. There were other scars on the dorsum of both hands, anterior aspect of both thighs and on the left calf. The doctor assessed permanent disability at 6% due to the multiple weak bone unions that can easily fracture following future lesser traumas, deformity of the right leg in a young lady, chronic pains and large traumatic and surgical scars in exposed areas of her body that ruin her appearance and lower her self-esteem. He estimated the costs for surgical removal of the metal surgical implants to be done after 2 years at Kshs. 100,000/= at Sayyidah Fatimah Hospital.
12. On her part, Dr. Ichamwenge found that the Appellant has 5% permanent disability due to the slight stiffness of the right ankle joint. Further that she might require Kshs. 60,000 for removal of implant at Sayyida Fatima Hospital.
13. In his judgment, the trial Magistrate found that award of Kshs. 2,000,000/= proposed by the Appellant for general damages was too high while the sum of Kshs. 500,000/= proposed by the Respondent was too low. He thus awarded the sum of Kshs. 650,000/= as reasonable compensation for pain and suffering and loss of amenities.
14. Although the trial Magistrate stated that the injuries involved in the case of *Teresiah Ngugi & another v Michael Masia Kimende* [2018] eKLR relied on by the Appellant were more severe and extensive, he did not state which authority he relied on to arrive at the award he did.
15. The Appellant urged this Court to set aside the award of Kshs. 650,000/= under this head, and relied on the case of *PN Mashru Limited v Omar Mwakoro Makenge* [2018] eKLR where Kamau, J. affirmed the award of Kshs. 1,200,000/= for comparative injuries.
16. In assessing damages, the general rule is that comparable injuries should as far as possible be compensated by comparable awards. It must however be recalled that no 2 cases will be exactly similar. In *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002* [2004] eKLR, the Court of Appeal observed:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
17. See also *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR and *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR.
18. The Court is aware that assessment of damages is a matter of discretion of the trial court. This was stated by the Court of Appeal in *Catholic Diocese of Kisumu v Tete* [2004] eKLR as follows:

It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of



damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985]KLR 470).

19. In the *P N Mashru Limited* case (*supra*), the respondent suffered serious injuries necessitating admission in hospital for 17 days which injuries left him with a limp, five (5%) per cent loss of function of the hip joint, painful limbs due to piercing of the leg by the metallic plate and inability to stand for long periods.
20. I have considered the nature and extent of injuries sustained by the Appellant as well as the following authorities:
 - i. In *Robert Mwaniki Ndwiga v Agatha Kaugi Riungu* [2018] eKLR, Muchemi, J. awarded Kshs.1,050,000/= for general damages in respect of fracture of the right the right radius bone and fracture of the right tibia distal end.
 - ii. In *Mwaura Muiruri v Suera Flowers Limited & another* (2014) eKLR the plaintiff sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia fibula. Emukule, J. awarded the sum of Kshs 1,750,000/= for pain and suffering and loss of amenities.
 - iii. In *James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & another* (2015) eKLR Ougo, J. awarded the sum of Kshs 1,500,000/= as general damages for pain and suffering. The plaintiff therein had suffered a compound comminuted fracture of the right tibia, compound fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg.
21. The injuries sustained by the Appellant have left her with a 6% permanent disability due to the multiple weak bone unions that place her at risk of future fractures through lesser traumas. I have considered that as a young woman of 32 years, the deformity of her right leg, chronic pains and large traumatic and surgical scars in exposed areas of her body have ruined her appearance, lowered her self-esteem and placed her at a social disadvantage. Further, the metal surgical implants are still in situ. In light of this, I am of the view that the award by the trial Magistrate was unjustifiably low in the circumstances, warranting interference by this Court. I would consider the sum of Kshs 1,000,000/= to be fair compensation.
22. I now turn to the award of special damages. The, the Appellant had pleaded special damages in the sum of Kshs. 240,093.70. In his judgment, the trial Magistrate found that the only competent receipt for medical expenses is the one dated 24.12.16 for Kshs. 65,337/= from Aga Khan Hopsital. He stated that the other expenses are not supported at all.
23. I have looked at the record. It is not disputed that the Appellant received treatment at both the Aga Khan and Sayyida Fatima Hospitals. Indeed, there is on record a discharge/treatment instructions indicating that she was admitted at the latter hospital from 17.12.16 and discharged on 20.12.16. There are on record receipts from Sayyida Fatima Hospital for various services offered to the Appellant amounting to 169,056.70. It is not clear why the trial Magistrate rejected these receipts as no reason was given for doing so. In the premises, I find that the trial Magistrate erred in his finding that these expenses are unsupported.



24. I now turn to the award for future medical expenses. In her plaint, the Appellant had pleaded future medical expenses in the sum of Kshs. 100,000/=. The record shows that the Appellant's doctor indicated that removal of the metal implants would cost Kshs. 100,000/= at the Sayyida Fatima Hospital. The trial Magistrate made no mention of this claim in his judgment. The Court thus finds that the trial Magistrate erred by disregarding the Appellant's claim for future medical expenses which were in fact pleaded.
25. The upshot is that the Appeal succeeds. The trial Magistrate decision on damages is set aside and the Court substitutes therefor, the following:
- General damages Kshs. 1,000,000/=
- Special damages Kshs. 242,293/70
- Future medical expenses Kshs. 100,000/=
- Total Kshs. 1,342,293/70
- Less 5% contribution Kshs. 67,114.70
- Net award Kshs. 1,275,179/=
26. The Appellant shall have costs.

DATED AND DELIVERED IN MALINDI THIS 21ST DAY OF FEBRUARY 2025.

M. THANDE

JUDGE

