Kimani v Meresey (Civil Appeal E087 of 2022)
[2025] KEHC 4819 (KLR) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4819 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E087 OF 2022

GL NZIOKA, J

MARCH 10, 2025

BETWEEN

PAUL NJAU KIMANI ..... APPELLANT

AND

GEORGE KIBIWOT MERESEY ..... RESPONDENT

(Being an Appeal from the decision of Honourable J. Ndengeri Senior Resident Magistrate delivered on 27th day of October, 2022 vide Naivasha CMCC NO. 119 of 2018)

JUDGMENT

1. By a plaint dated 15th February 2018 and amended on 4th May 2021, the plaintiff (herein "the appellant") sued the defendant (herein "the respondent") seeking judgment against the respondent for: -

    a. General damages.

    b. Special damages - Kshs. 44,270

    c. Cost of this suit

    d. Cost of future medical expenses to be stated at the hearing.

2. The cause of action arose from a road traffic accident that occurred on or about 19th November 2017 when the appellant was on motorcycle registration No. KMED 424J along the Nakuru – Naivasha Road riding as a pillion passenger.

3. That at around Delamare area, the respondent by himself or his authorized driver and/or agent negligently drove motor vehicle registration number KBV 038E causing it to collide with the motorcycle registration No. KMED 424J as per the particulars of negligence set out in paragraph 5 of the plaint.

4. That as a result of the accident, the appellant sustained the following injuries:

    a. Fracture of the distal end of left femur

    b. Shattered left patella

    c. Fracture proximal end of the left tibia with bone loss.

    d. Severe soft tissue injuries of the left knee joint

5. However, the respondent vide a statement of defence dated 7th October 2019 denied each and every allegation in the plaint and put the respondent to strict proof thereof.

6. However, on a without prejudice basis, the respondent pleaded that if at all an accident occurred, it was contributed to by the negligence of the owner and/or rider of motorcycle registration No. KMED 424J as per the particulars of negligence in paragraph 7 of the statement of defence. The respondent indicated that they would seek for leave to take out third-party proceedings against the owner and/or driver of the motorcycle.

7. The case proceeded to full hearing and subsequently the trial court by a judgment dated 27th October 2022 found the respondent 100% for causing the accident and entered judgment as follows: -

    a. Liability ----------100% (by consent)

    b. General damages ----------Kshs 600,000

    c. Special damages ----------Kshs 42,200

    Total----------Kshs 642,200

8. It is against the afore decision that the appellant has filed the appeal herein based on the following grounds: -

    a. That the learned trial Magistrate erred in law and fact by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellant's case.

    b. That the learned trial Magistrate erred in law and fact by failing to consider the plaintiff/ appellant's submissions on quantum payable and therefore awarding general damages which were too low comparable to the injuries sustained by the appellant.

    c. That the trial Magistrate erred in law and fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before her.

9. Consequently, the appellant prays that the judgment/decree of the trial court be reviewed and/or set aside and the court reassesses the damages payable. That the respondent bears the cost of the appeal.

10. The appeal was canvassed vide filing of submissions. The appellant in submissions dated 24th April 2023, argued that the injuries he sustained were serious and required specialized treatment as evidenced by the treatment notes, the P3 form and medical reports by Dr. Omuyoma and proposed an award of Kshs. 2,000,000 as general damages. That in the circumstances the general damages awarded by the trial court were too low that necessitate this court's intervention.

11. The appellant cited the case of, Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A. M. Lubia and Olive Lubia [1982-88] KAR 727 where the Court of Appeal set out the circumstances where an appellate court can interfere with an award of damages by the trial court being that; the

trial court took into account an irrelevant factor or left out a relevant one, or that the amount was inordinately low or inordinately high that it is a wholly erroneous estimate of damages.

12. The appellant faulted the trial Court for failing to consider his submissions filed by the appellant and relied on the submissions of the respondent which cited authorities with less severe injuries proposing general damages of Kshs. 600,000.

13. The appellant reiterated that an award of Kshs. 2,000,000 will be adequate compensation for the injuries he suffere. He further relied on the case of Gilbert Nicholas Otieno vs Oil Crop Development Co. Ltd & Another (2009) eKLR where the plaintiff sustained a fracture of the right inferior and superior pubic ramii, fracture of the socket hip and fracture of the pubic body which healed with no permanent disabilities and the High Court awarded general damages of Kshs. 1,200,000.

14. Further, reliance was placed on the case of; Christine Mwigina Akoya vs Samuel Kairu Chege (2017) eKLR, where the High Court awarded Kshs. 4,000,000 as general damages for pain, suffering and loss of amenities where the plaintiff sustained a fracture of the right femur, fracture of 3 -6 ribs, pain in the right side of the chest and right thigh, and persistent pain in the right knee.

15. Furthermore, that in Fanuel Karanja Wanaswa vs Butali Sugar Millers Ltd (2018) eKLR the appellant sustained a fracture of the pelvis, rapture of the urinary balder, and crush injury of the right foot which was amputated above the ankle joint with permanent disability assessed at 40% and the High Court did not interfere with the trial court award of Kshs. 1,500,000.

16. The appellant further submitted that the trial Magistrate failed to make a finding on future medical expenses despite the report of Dr. Omuyoma stating that he would require Kshs. 350,000 which was not rebutted by the respondent.

17. He relied on the case of; Tracom Limited & Another vs Hassam Mohammed Adan (2009) eKLR where the Court of Appeal held that the respondent had properly pleaded for costs of future medical expenses in his plaint to be ascertained later and that even if future medical expenses had not been pleaded, it was framed as an issue and left to the court to make a decision.

18. However, the respondent in submissions dated, 5th February 2024 and supplementary submissions dated 3rd July 2024 argued that the appeal was purely on quantum and cited the case of Imanyara & 2 others v Attorney General [2022] KESC 78 (KLR) and Savana Saw Mills Ltd V George Mwale Mudomo [2005] eKLR where the courts considered the factors an appellate court should consider before it can interfere with an award of damages as already stated herein.

19. The respondent argued that the damages awarded should be commensurate to injuries suffered and that past decisions are considered as mere guides in that each case depends on its own facts. Furthermore, inflation should be taken into account as well as the purchasing power of the Kenyan shilling at the time of judgment.

20. The respondent further submitted that the appellant in proof of injuries sustained, produced two medical conflicting reports by Dr Omuyoma on the nature of the injuries sustained. That even then, Dr Omuyoma was never called to testify in order to reconcile his findings, thus the trial court cannot be faulted for adopting the medical reports only to the extent they proved a fracture distal end of the left femur and a shattered left patella.

21. The respondent argued that the purpose of an award of general damages is to compensate the injured as near as possible and not to punish the tortfeasor and cited the case of; Jane Wanja Mwangi vs Anestar Secondary School (2020) eKLR where the High Court stated that pain cannot be quantified and that an award is a token in an attempt to restore the injured party to the state before the accident.

22. That the trial court in awarding the general damages is guided by the principle set down by the Court of Appeal in Odinga Jacktone Ouma vs Moureen Achieng Odera (2016) eKLR that comparable injuries should attract comparable awards. Consequently, the award of Kshs. 600,000 is not inordinately low but adequate compensation.

23. The respondent further submitted that the award by the trial court is not inordinately low and relied on the case of Aloise Mwangi Kahari vs Martin Mvitya & Another (2020) eKLR where the plaintiff sustained a compound fracture of the right tibia and fibula, bleeding from the left lower limb and a swollen leg and was awarded damages of Kshs. 500,000.

24. Further, reliance was placed on the case of; Daniel Otieno Owino & another vs Elizabeth Otieno Owour (2020) eKLR where the plaintiff sustained compound fractures of the right tibia and fibula bones, a deep cut wound and tissue damage on the right leg, head injury with a cut on the nose, blunt chest injury, and soft tissue injuries on the left lower limb at the thigh and ankle region and the High Court set aside the trial court award of Kshs. 600,000 and substituted it with an award of Kshs. 400,000.

25. Lastly, on the failure by the trial court to award costs for future medical expenses, the respondent argued that the appellant did not plead the same as a ground in his memorandum of appeal.

26. That Order 42 rule 4 of the Civil Procedure Rules states that an appellant shall not urge or be heard on a ground of objection not set forth in the memorandum of appeal except with the leave of court. That although the court has discretion to consider such an issue, it will be prejudicial to the respondent.

27. However, the respondent cited the case of; Forwarding Company Limited & another vs Kisili Gladwell (third party) (2022) KECA 96 KLR where the Court of Appeal stated that the failure to plead future medical expenses as a specific sum to be proved like special damages will not be prejudicial the other party or unreasonable as it is not always clear as at the time of filing the case what the costs may be as the prognosis could change for better or for worse.

28. The respondent argued that the medical reports relied on by the appellant gave conflicting information as the one dated 9th December 2017 gave a cost of Kshs. 200,000 for the removal of interlocking nails, while the report dated 1st October 2020 gave a cost of about Kshs. 350,000 for further surgery to correct the shortened left leg.

29. That, the trial court was extremely embarrassed by the conflicting medical report and as stated in the case of; David Ndungu Macharia vs Samuel K Muturi & Another (Nairobi HCCC No. 125 of 1989) that where a court is confronted with two or more medical reports that are inconsistent and the doctors are not called, the court is embarrassed.

30. The respondent submitted that the trial court considered the issue of future medical expenses and found that the same was not proved. That the court should not allow speculation on a sum the appellant thinks he ought to have been awarded.

31. Having considered the arguments of the parties as stated in their respective submission, I note that assessment of damages is a matter of discretion by the court. Consequently, an appellate court will only interfere with that exercise of discretion if in exercising its discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968) EA and Mkube -vs - Nyamuro 1983 KLR 403.

32. In that regard, the Court of Appeal in Loice Wanjiku Kagunda vs. Julius Gachau Mwangi *CA 142/2003* (unreported) stated that: -

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257)."

33. The evidence adduced by the appellant in proof of the injuries suffered is, first and foremost, the pleadings. In an amended plaint dated 4th May 2021, he pleads that he suffered the following injuries: -

a. Fracture of the distal end of left femur

b. Shattered left patella

c. Fracture proximal end of the left tibia with bone loss.

d. Severe soft tissue injuries of the left knee joint

34. The appellant, then testified and produced the following documents in support of his claim: -

a. Discharge summary from Naivasha District Hospital (Pexh 1)

b. Discharge summary from Provincial General Hospital Nakuru (Pexh 2)

c. Discharge summary from AIC Kijabe Hospital (Pexh 3)

d. P3 form (Pexhibit 4)

e. Medical report by Dr. Obed Omuyoma (Pexh 7a)

35. An analysis of the afore documents reveal that the discharge summary from Provincial General Hospital Nakuru details injuries the appellant suffered as; distal left femur fracture and proximal tibia with bone loss, while the discharge summary from AIC Kijabe Hospital indicate distal femeral plate and bone grafting and the discharge summary from Naivasha is illegible in certain parts but classifying the injuries as grievous harm.

36. The medical report of Dr. Obed's shows fracture distal end of the femur, shattered left patella, and intercondylar fracture of the left femur.

37. Notably, the common injuries in all reports are fracture distal end of left femur and shattered left patella. Whereas proximal tibia bone loss is indicated in discharge summary from Provincial Hospital Nakuru. This injury is supported by the diagnosis in the discharge summary from AIC Kijabe hospital where it is indicated that, the appellant underwent a procedure of bone grafting. It is therefore not far-fetched.

38. The history of hospitalization of the appellant also supports the nature and extent of injuries he suffered. The evidence reveals the following that he was admitted at Naivasha District Hospital for two (2) days from 19th November 2017 to 21st November 2017. He was then admitted for two (2) months at Provincial Hospital at Nakuru from 21st November to 18th January 2018 and finally at AIC Kijabe for eight days from 22nd February to 1st March 2018.

39. It suffices to note that as detailed in the medical reports, that the appellant underwent several procedures including; surgical debridement, open reduction and internal fixation of the fracture and distal femur plating and bone grafting, and he was advised to continue with LQM exercises and wound dressing after discharge. All this supports the nature of injuries the appellant suffered and the extent thereof.

40. Additionally, I note from Dr. Obed's report dated 9th December 2017 that, the X-rays of left femur showed the appellant sustained a fracture of distal end of left femur and X-ray of the left knee joint showed left patella with intercondylar fracture of the left femur. In his report dated, 1st October 2020 he includes fractures proximal end of the left tibia with bone loss and omits intercondylar fracture of the left femur. It suffices to note that the medical reports were admitted in evidence without calling the maker.

41. The respondent was served with both reports, having been part of the documents filed with the initial plaint which was subsequently amended. If the respondent held the view that, there was a discrepancy in the two reports, they should have insisted on calling the maker. The respondent cannot tear into the reports through submissions. Even then, I find that the X-rays referred to herein confirmed two (2) fractures.

42. Furthermore, Dr Obed assessed permanent disability at 70% as the leg is shorter by 15cm and indeed soft tissue injuries are uncontested.

43. In its judgment, the trial court stated as follows before assessing the damages:

> " 15. The parties herein filed medical reports without calling the makers. To the mind of the court, this was evidence that was certainly not tested. In that regard, the court shall adopt the medical reports only to the extent that they are in tandem. Anything disputed did not have the benefit of being tested specifically, the issue of future medical expenses and the degree of disability resulting from the accident.
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> 16. Given the extent of the injuries sustained by the plaintiff, the court opines that an award of Kshs. 600,000 shall be sufficient compensation."

44. From the afore it is not evident whether the trial court considered the submissions of the parties in determining the award on quantum.

45. Be that as it may, as the 1st appellate court, I have considered the submissions and authorities of the parties on quantum and find that, the case of; Kennedy Ooko Ouma Dachi vs vs Joseph Maina Kamau & another [2018] eKLR which the appellant cited was of comparable injuries as herein, albeit, the sum awarded was for both pain and suffering and loss of amenities. The appellant herein did not claim for loss of amenities.

46. On his part, the respondent, though correctly faulted by the trial court for not annexing copies of any of the authorities cited, nonetheless indicated the nature of injuries each victim suffered in the respective authorities cited. In the first two authorities cited, Orion Hauliers Ltd vs Michael Semper Esikhati [2012] eKLR and Julius Edwin Muriuki & another v George Kithinji Mwiandi [2014] eKLR a sum of Kshs 800,000 was awarded, while in Paul N. Njoroge vs Abdul Sabuni Sabonyo [2015] eKLR a sum of Kshs 500,000. However, the authorities are quite old at 10, 8 and 7 years respectively as at 2022, when the award herein was made.

47. Therefore, the sum awarded herein must take into account the inflation, the period of 7 years from the date of the accident, and the serious injuries the appellant suffered, plus prolonged treatment referred to herein. Consequently, the award of Kshs 600,000 awarded as general damages is relatively too low.

48. It is also suffices to note that, this matter was initially heard ex parte on formal proof and general damage awarded at Kshs 1,000,000. Therefore, the difference of Kshs 400,000 between that award and the award herein is too high and would call for an explanation, noting that, liability in both cases was at 100% against the respondent.

49. Be that, as it were, for reasons stated herein, I set aside the award of Kshs 600,000 as general damages and substitute it with an award of Kshs 1,200,000. The special damages are not contested. As for future medical expenses, it was pleaded but no evidence was led to support the same. The medical report indicates the cost of the further surgery to correct the anomaly of the shorter leg, is approximately Kshs 350,000. The court cannot award an amount that is approximated. The appellant should have adduced evidence from a hospital where the procedure will be carried out. I therefore decline to award any sum of money. The appellant will have to meet that cost from the sum awarded as general damages.

50. The cost of the suit in trial court was awarded to the appellant and interest on the sum awarded will accrue from the date of this judgmentand each party will meet its own costs of the appeal.

51. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 10TH DAY OF MARCH 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Wainaina H/B for Mr. Owour for the appellant

Ms. Anguko for the respondent

Ms. Hannah: court assistant