



REPUBLIC OF KENYA



KENYA LAW
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**Mghanga v Said (Civil Appeal E018 of 2024)
[2025] KEHC 3830 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3830 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E018 OF 2024
AN ONGERI, J
MARCH 12, 2025**

BETWEEN

BRIGHTONE MSENGETI MGHANGA APPELLANT

AND

PHILIP JACKSON SAID RESPONDENT

*(Being an appeal from the Judgment of Hon. D. Wangeci (SPM) in
Wundanyi SPMCC No. E024 of 2022 delivered on 29th February 2024)*

JUDGMENT

1. The Respondent filed Wundanyi SPMCC No. E024 of 2024 seeking general damages and special damages and future medical expenses.
2. The suit arose out of a Road Traffic Accident (RTA) which occurred on 18th June 2022 involving motor vehicle registration No. KCG 171B and motor vehicle registration No. KAT 140P along Mwatate – Voi road.
3. The parties entered into a consent on liability and apportioned liability at 85.15% in favour of the Plaintiff against the Respondent.
4. The trial court assessed damages as follows:-
General damages 1,800,000/=
Future medical expenses 180,000/=
Special damages 9,340/=
Total 1,999,340/=
Less 15% contributory negligence 1,690,401/=



5. The Appellant has filed an appeal on the following grounds:-
- i. That the learned trial Magistrate misdirected herself in law by assessing damages that were manifestly excessive and incomparable to the current judicial awards in analogous circumstances.
 - ii. That the learned trial Magistrate erred in law and fact in failing to take into account relevant factors in evaluating the evidence on record on quantum.
 - iii. That the learned trial Magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages.
6. The parties filed written submissions as follows:-
- a. The Appellant submitted that the learned trial court erred in law and in fact in failing to properly analyze the evidence before her in assessment of damages and thereby awarded damages that are manifestly excessive.
 - b. That there were conflicting medical reports by Doctor Kiema who assessed the degree of disability at 18% and Doctor Udayan Sheth who assessed the degree of permanent incapacity at 5%. That at the time Doctor Udayan examined the Respondent, two months had expired and therefore his report is more accurate as the Respondent had healed.
 - c. Further that Doctor Udayan noted that there was no shortening of the right lower limb and neither was there tenderness or deformity.
 - d. The Appellant urged the court to reduce the award of damages downwards.
 - e. The Appellant also submitted that the Kshs. 180,000/= made in respect of future medical expenses was excessive. Further that no receipts were produced in respect of physiotherapy or pain killers.
 - f. The amount of Kshs. 120,000/= in respect of removal of the implant was excessive that Doctor Udayan opined that Kshs. 15,000/= was sufficient. The Appellant urged the court to reduce the same to Kshs. 15,000/= taking into consideration the professional qualification of Doctor Udayan who is an Orthopedic Surgeon vis a vis that of Doctor Kiema who is a general practitioner.

The Respondent's Submissions

- a. The Respondent submitted that the issue of assessment of general damages is the preserve of the discretionary power of the trial court.
- b. Further, that the appellate court cannot interfere with the exercise of discretion unless the trial court applied the wrong principles, or took into account irrelevant factors or failed to take into account relevant factors or misapprehended the evidence on record and/or the award in excessively high or low.
- c. The Respondent relied on the case of *Catholic Diocese Of Kisumu v Tete Kisumu* CA No. 284 Of2011 [2004] eKLR where the Court of Appeal held 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 different 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

- d. The Respondent also submitted that the principles applicable in the assessment of damages for bodily injuries are comparable injuries and inflationary trends in the country.

(Relying in the case of Kisumu Civil Appeal No. 344 of 2001 Arrow Car Ltd =Versus= Elijah Shamalla & 2 Others (2003) eKLR)
- e. Further that the authorities submitted by the Respondent were comparable.
- f. The Respondent also submitted that the injuries cannot be the same and further that the parties submissions may provide a guide.
- g. On the issue of the future medical expenses, the Respondent submitted that the removal of the implant which is still in site was not a matter of professional opinion.

7. This being the first appeal, the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

8. The only issue for determination is whether the award of damages is excessive.

9. I have considered the submissions by both parties.

10. The Respondent suffered the following injuries:-

- a. Segmental fracture right femur bone with displacement.
- b. Incomplete intertrochanteric fracture right femur bone. The fractures led to:-Leading to stiffness right hip and knee joint.Leadng shortening of the right lower limb.He was taken to theatre for open reduction and fixation of the fractures with metal implants.
- c. Surgical scar right thigh lateral.
- d. The level of disability 18%

11. The trial court relied on the following cases:- Swalleh C. Kariuki & Another =versus= Violet Owiso Okuyu(2021) eKLR where Respondent suffered a displaced fracture of right ulna and radius, displaced



fracture of right femur, tears of the patella tendon of knee joint, soft tissues of the last parietal region and soft tissue injuries to the chest.

12. In that case, the court set aside an award of Kshs. 3,500,000/= and substituted it with an award of Kshs. 1,500,000/=.
13. The trial court also relied on the case of *Macom Limited & Another v Hassan Mohamed Adan* [2009] eKLR on the issue of future medical expenses.
14. I find that the award herein is reasonable. The only time when the appellate court would interfere with an award is when it is too excessive or too low as to warrant interference.
15. In the case of *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenja v *Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal held as follows:

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.” (Also see *Butt v Khan* [1981] KLR 349).”

16. I dismiss the appeal with costs to the respondents.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2025 IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Maina/Millicent

