



REPUBLIC OF KENYA



**Murugi v Onyango (Civil Appeal E792 of 2022)
[2025] KEHC 4673 (KLR) (Civ) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E792 OF 2022

REA OUGO, J

APRIL 3, 2025

BETWEEN

BRENDA MURUGI APPELLANT

AND

ERIC OCHIENG ONYANGO RESPONDENT

(Being an appeal from the judgment of the Hon. S.A Opande (PM) dated 12th September 2022 in Milimani Chief Magistrate's Court Civil Case No E2826 of 2021)

JUDGMENT

1. The respondent sustained injuries from a road traffic accident on the 6.11.2020. Parties entered a consent on liability in the ratio of 80:20 in favour of the respondent. The respondent claimed to have fractured the right tibia and fibular and suffered soft tissue injuries (swollen, painful, tender right leg). The trial magistrate awarded damages as follows:
 - a. General damages Kshs 1,000,000/-
 - b. Special damages Kshs 14,688/-
2. The appellant dissatisfied with the award of damages has filed this instant appeal on the following grounds:
 1. The learned magistrate erred in law in assessing general damages for pain and suffering at that sum was so inordinately high as to constitute an entirely erroneous estimate having regard to the nature and extent of the injuries sustained by the respondent.
 2. The learned magistrate erred in law by placing reliance on authorities cited by the respondent, to wit, the case of Francis Ndungu Wambui & 2 Other v VK (a minor suing through next friend



and mother MCWK) eKLR and John Mwendwa Kuti & 2 Others v Ibrahim Kunyaga [2020] eKLR which cases were incomparable and well distinguishable from the cases before the court.

3. The learned magistrate erred in law by failing to give appropriate weight and consideration to submissions filed by the appellant's advocates and authorities cited therein.
4. The learned magistrate's judgment was rendered/delivered per incuriam.
3. The appellant seeks that the judgment of the trial magistrate be set aside/ varied, or reversed. The appellant submits that although Dr. G.K. Mwaura outlined the injuries to include soft tissue injuries and fracture of the right tibia and fibular with 5% permanent incapacity, Dr Wambugu in re-examination conformed that the respondent had healed with no permanent disability as envisaged.
4. It was argued that an award of Kshs 450,000/- was appropriate as the respondent's injuries were not severe. They cited the case of Daniel Otieno Owino & Another v Elizabeth Atieno Owuor [2020] eKLR where the plaintiff sustained fracture of the tibia and fibula as well as soft tissue injuries and was awarded Kshs 400,000/-. In the case of Third Engineering Bureau China Construction Group Limited v Edwin Kinanga Atuya [2021] eKLR the plaintiff sustained soft tissue injuries and compound fracture of the left tibia and fibula and was awarded Kshs 500,000/-. The appellant noted that while the trial magistrate relied on the cases of Francis Ndungu Wambui & 2 Other v VK (a minor suing through next friend and mother MCWK) eKLR and John Mwendwa Kuti & 2 Others v Ibrahim Kunyaga [2020] eKLR the injuries sustained in the two cases were distinguishable to those suffered by the respondent. He also faulted the trial magistrate for failing to give weight to the cases they cited before it.
5. The respondent in opposing the appeal argue that they proved the injuries sustained by the respondent through the discharge summary from Kenyatta National Hospital, P3 for and the medical report by Dr G.K. Mwaura. According to Dr. Mwaura the respondent suffered severe skeletal injuries and permanent disability was assessed at 5% as the respondent could not perform his duties for at least 18 months. The trial magistrate justifiably awarded the respondent net damages of Kshs 814,688/-. The injuries in Francis Ndungu Wambui & 2 Other v VK (a minor suing through next friend and mother MCWK) eKLR and John Mwendwa Kuti & 2 Others v Ibrahim Kunyaga [2020] eKLR the plaintiff therein sustained compound fracture of distal tibia fibula shaft and due to severity of the fracture he was at a high risk of secondary stress fracture on the same site. He also lost consciousness for 30 minutes after the accident and was awarded Kshs 1,000,000/-. They further cited the case of Daniel Oduor Shieunda v Chrispher Wambugu [2021] eKLR where the court awarded Kshs 800,000/- where the plaintiff sustained fracture of the tibia fibula and permanent incapacity was assessed at 12%. The respondent therefore submits that the appeal lacks merit and the same should be dismissed.

Analysis And Determination

6. I have carefully considered the appeal, the rival submissions, and evidence before the court. The only issue raised by the appeal is whether the award of damages was excessive. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2) (1987)* KLR 30 stated that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”



7. The injuries sustained by the respondent were largely not contested save for the degree of permanent disability. According to the medical report by Dr Mwaura, the respondent sustained a fracture of the right tibia and fibular and was expected to heal within 1 ½ years. Permanent disability was assessed at 5%. The medical report by Dr Wambugu presented by the appellant was that the respondent's fractures have united with no permanent incapacitation. Both parties did not avail any of the doctors to give testimonies and be cross-examined on their positions taken so as to guide the court. In *China Road and Bridge Corporation (Kenya) v Job Mburu Ndungu* [2021] KEHC 8928 (KLR) the court held that where two medical reports disagreed on the assessment of permanent incapacity to reconcile this discrepancy, it is appropriate to take the average of the two assessments. Therefore, I find that the degree of permanent disability was 2.5%.
8. The authorities cited by the appellant are not of comparable injuries as they do not take into account that the respondent suffered some degree of permanent disability. The respondent cited the case of *Francis Ndungu Wambui & 2 Other v VK* (supra) however, the same does not reflect the trend of current awards of plaintiffs who have sustained injuries similar to those of the respondent. In *Daniel Oduor Shieunda v Chrispher Wambugu* [2021] eKLR it is important to reconcile the award with the degree of permanent incapacity which was assessed at 12%.
9. I have considered that in *Karanja & another v Mwachala* (Civil Appeal E749 of 2021) [2024] KEHC 7171 (KLR) (4 June 2024) (Judgment) - Civil Appeal E749 of 2021 the respondent sustained a compound (open) fracture of the left tibia and compound (open) fracture of the left fibula and permanent incapacity assessed at 10%. In *Sereni Fries Limited & another v Kuria* [2024] KEHC 9097 (KLR) the plaintiff sustained after sustaining a fragmental fracture of the left tibia on the lateral and the degree of permanent incapacity 5%. The court awarded Kshs 500,000/- as general damages.
10. Having considered the respondent's injuries and the current comparable awards, I find that Kshs 1,000,000/- as an award on general damages was excessive and the same is substitute it with an award of Kshs 600,000/-. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF APRIL 2025.

R.E. OUGO

JUDGE

In the presence of:

Miss Mutinda For the Appellant

Miss Machira For the Respondent

Wilkister -C/A

