



REPUBLIC OF KENYA



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**Muinde v Muthama (Civil Appeal E083 of 2023)
[2025] KEHC 6579 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E083 OF 2023**

RC RUTTO, J

MAY 19, 2025

BETWEEN

GREGORY KIVUVA MUINDE APPELLANT

AND

EMMANUEL MUMO MUTHAMA RESPONDENT

*(Being an appeal from the judgment delivered by Hon. C. N Ondieki
(PM) on 29th March 2023 in Machakos MCCC No. E319 of 2021)*

JUDGMENT

1. This is an appeal against the assessment of quantum. In the trial court, the Respondent herein sued the Appellant for general and special damages of Kshs1,550/= arising from an accident that occurred on 11th September 2020 along Mathatani Kaloleni Road. In the Plaint, the Appellant was sued as the registered owner of motor vehicle registration number KCV 172B while the Respondent was a passenger in Motor Cycle Registration No. KMEY 158M.
2. It was alleged that the Appellant's motor vehicle was negligently controlled that it veered off its lane and collided with the Motor Cycle thereby causing the Respondent severe bodily injuries. In response, the Appellant filed a defence denying liability. However, the parties recorded a consent on liability in the ratio of 80:20 in favour of the Respondent. The matter thereafter proceeded by way of written submissions on the issue of quantum. Subsequently, the trial court entered judgment in favour of the Respondent in the following terms:
 - a. The Plaintiff is awarded general damages for pain and suffering in the sum of Kshs3,000,000. However, the Plaintiff will contribute 20% out of this award, making the net award kshs.2,400,000.
 - b. Special damages Kshs.57,425/=.



- c. Future medical expenses Kshs.480,000/=
 - d. Costs of the suit
 - e. Simple interest of the suit on a, c and d above at court rates from the date of the judgment until payment in full.
 - f. Simple interest on b above at court rates from the date of filing the suit until payment in full.
3. Being aggrieved by the Judgment the Appellant filed this appeal on the grounds that the Learned Magistrate court erred in law and fact in awarding the Respondent general damages of Kshs.3,000,000 which was excessive considering the injuries sustained by the Respondent; misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed on behalf of the Appellant; awarding sums in respect of damages which was inordinately high and was excessive in the circumstances occasioning a miscarriage of justice; in awarding the Respondent special damages amounting to Kshs.57,425/- without strict proof by production of receipts as required by law.
 4. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 22nd October 2024 and as at the time of writing this judgment, the Respondent's submissions were not on record.

Appellant's submissions

5. The Appellant submitted on the grounds of appeal. In respect of Grounds 1, 2, 3, and 4 of the Memorandum of Appeal, the Appellant argued that the trial court erred in relying on the case of John Kipkemboi and Another v. Morris Kedolo [2019] eKLR. He contended that the Plaintiff in that case had sustained more severe injuries, including amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury, and crush injury, with permanent incapacitation assessed at 50%. By contrast, the Appellant argued that the Respondent's primary injury was a traumatic amputation at the left knee, while the other injuries were soft tissue in nature. Consequently, the Appellant submitted that the award of Kshs.3,000,000 in general damages was excessive and should be substituted with an award of Kshs.2,500,000.
6. The Appellant further submitted that the trial court failed to explain why it disregarded the authorities cited in the Appellant's written submissions, which supported an award of Kshs. 1,500,000 for injuries comparable to those sustained by the Respondent. The authorities relied upon were: Bayusuf Freighters Limited v. Patrick Mbatha Kyengo [2014] eKLR; Charles Kiplang'at Koech v. Bernard Ng'etich [2021] eKLR; Yobesh Makori v. Elmerick Mobisa Bota [2021] eKLR; and Ruth v. Makau (Civil Appeal E441 of 2021) [2024] KEHC 1411 (KLR) (Civ) (16 February 2024).
7. On Grounds 3 and 5 of the Memorandum of Appeal, the Appellant submitted that the special damages awarded were not properly pleaded. Specifically, in the Plaint dated 13th January 2021, the only amount claimed under special damages was Kshs. 1,550, yet the trial court awarded a higher figure without strict proof, contrary to the trite legal principle that special damages must be specifically pleaded and strictly proved. The Appellant also faulted the trial court for aggregating the estimates proposed by two doctors in assessing future medical expenses, without sufficient legal basis or proper evidentiary examination of the Respondent's claim for Kshs..500,000 as set out in the Plaint.
8. With regard to Ground 6 of the Memorandum of Appeal, the Appellant submitted that the trial court erred by failing to subject the awards of special damages and future medical expenses to the agreed apportionment of liability. He contended that it was not open to the court to exercise discretion on this



issue in the absence of any express agreement between the parties excluding such apportionment. The Appellant relied on the authorities of *KIP Melamine Limited & 2 Others v. Violet Waitir Gichia* [2017] eKLR and *Kenya Bus Rapid t/a Kenya Bus Services Management Co. Ltd v. Patrick Irungu Gichure* [2018] eKLR to support the position that all awards must be subjected to the agreed percentage of contributory liability.

9. In conclusion, the Appellant submitted that he had demonstrated sufficient grounds to warrant this Court's intervention. He urged the Court to allow the appeal, set aside the judgment and decree of the trial court, and substitute it with one that reflects the correct application of the law and principles governing the assessment of damages.

Analysis and Determination

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
11. After careful analysis of the record of appeal and the Appellant's submissions, the only issue for determination is whether the Trial Magistrate misdirected himself in assessment of damages.

Regarding general damages:-

12. The Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -

“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...”

13. In *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* [CA 142/2003](#) the Court of Appeal held 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 *Mariga V Musila* [1984] KLR 257).”

14. In the present case, the trial Magistrate awarded the Respondent a sum of Kshs.3,000,000/= as general damages for pain and suffering, less 20% contributory negligence, resulting in a net award of Kshs.2,400,000/=. The Appellant challenged this award as excessive. It was submitted that the trial court erred in relying on the decision in *John Kipkemboi & Another v. Morris Kedolo* [2019] KEHC 8736 (KLR) as a comparable authority, arguing that the injuries sustained in that case were far more severe than those suffered by the Respondent herein.
15. The Appellant proposed a reduced award of Kshs.1,500,000/= and urged the Court to consider the precedents cited in his submissions before the trial court. These included: *Bayusuf Freighters Limited v. Patrick Mbatha Kyengo* [2014] eKLR; *Charles Kiplang'at Koech v. Bernard Ng'etich* [2021] eKLR;



Yobesh Makori v. Elmerick Mobisa Bota [2021] eKLR; and Ruth v. Makau (Civil Appeal E441 of 2021) [2024] KEHC 1411 (KLR) (Civ) (16 February 2024). The Appellant contended that these cases were more appropriate comparators, given that the nature and extent of injuries therein were more aligned with those sustained by the Respondent.

16. The Respondent herein sustained the following injuries; dislocation left shoulder, multiple cuts on both hands, traumatic amputation left lower limb following crushed injury of left leg below the knee and multiple cuts on right knee. I have also reviewed the medical report dated 9th December 2020, the doctor's opinion stated that the degree of permanent incapacitation is estimated at 50%.
17. I have reviewed the authorities submitted by the Appellant herein;
 - a. In Bayusuf Freighters Limited v Patrick Mbatha Kyengo [2014] KECA 437 (KLR), the plaintiff herein suffered Traumatic amputation of the left leg, fractures of the radius and right ulna, severe degloving injuries to the right forearm and hand, and a laceration wound on the right gluteal region. And the court awarded the plaintiff general damages of Kshs 1, 600, 000/=
 - b. In Davis v Otieno aka Emmaculate & another (Civil Appeal E034 of 2023) [2024] KEHC 14603 (KLR) (30 October 2024) (Judgment), the Plaintiff suffered severe injuries that led to amputation of her leg above the Knee and the court awarded the Plaintiff damages of Kshs 2, 800, 000/=.
 - c. In Yobesh Makori v Elmerick Mobisa Bota [2021] KEHC 8145 (KLR), the Plaintiff suffered crushed left tibia fibula bones which led to amputation of the leg below the left knee. He also had a left clavicle fracture, mild head injury, dislocation of the right tarsal bone and multiple soft tissue injuries that had healed with permanent scars. The doctor assessed permanent disability at 50% and stated that the respondent would require a prosthesis every two years. The court awarded him general damages of Kshs.2,000,000/=
 - d. In Ruth v Makau (Civil Appeal E441 of 2021) [2024] KEHC 1411 (KLR) (Civ) (16 February 2024) (Judgment), the Plaintiff suffered severe crush injuries to the right leg resulting in amputation and the court awarded him the sum of Kshs 2,000,000/=.
18. Having considered the authorities submitted by the Appellant and the case that the trial court relied upon, I find that the award of Kshs.3,000,000/= as reasonable in the circumstance of the case. The appellate court can only interfere with an award of the trial court if the same is inordinately high or low as to warrant interference of where the trial court applied the wrong principles. In Butt =vs= Khan [1982] 1 KAR. 5 the court correctly said;

“An appellate court will not disturb an award of 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”.

Regarding special damages;

19. I have looked at the plaint filed by the Respondent dated 13th January 2021, the Respondent pleaded special damages of Kshs 1, 550/=. It is trite law that special damages must be strictly pleaded and proved. Having noted that the special damages of Kshs 1, 550/= was pleaded and was proved, it is only this amount that the Respondent should be compensated.



Regarding future medical expenses;

20. The Appellant has submitted that this award was not anchored in law and that the court should have examined whether indeed the Respondent had proved the claim for Kshs 500, 000 as sought in the Plaintiff.

21. In the case of Kenya Bus Services Ltd. - v _ Gituma, (2004) EA 91, this Court stated:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded”.

22. I note that the Respondent pleaded for the amount of special damages at Kshs.100,000/= to be renewed every 7 years at Kshs.500, 000/=. The trial court in awarding the sum of Kshs.480, 000/= stated that;

“One of the ways of proving future medical expenses is by assessment of the future need and quantification in writing by an appropriate medical professional. Just like was done in this case, the amount required for future removal of metal implants was set out in the Medical Report which had been prepared by the medical doctor who examined her.....

“Whereas Dr. Mutunga opined that the Plaintiff will need to be fitted with a prosthesis to improve mobility and it will need renewal every 7 years at a cost of Kshs.100, 000 which using 70 years as the upper limit works to Kshs.600, 000/=: Dr. Wambugu opined that he will need a prosthesis replaceable after every 8-10 years and using the same upper limit of 70 years, the expenses will be approximately 360, 000. Having no other formula, I will use the average of the two which is 600, 000 plus 360, 000 divided by two, making a sum of Kshs.480,000 which I hereby award.”

23. Noting that the Appellant could not point out any irrelevant factor in interfering with the award of future medical expenses which the trial court based on its discretion awarded, I see no need of interfering with the award.

24. The Appellant also raised the ground that the court did not subject the awards for special damages and future medical expenses to the apportioned liability. Noting that the consent on liability was in the ratio 80:20, I am persuaded by the authorities cited by the Appellant in holding that the percentage on liability is applicable to all awards.

25. In light of the above, the appeal partially succeeds as follows;

Liability shall be applicable to all the award as follows;

- a. General damages of Kshs.3,000,000 is upheld.
- b. Special Damages is revised to Kshs.1, 550/=.
- c. Future medical expenses of Kshs.480, 000/= is upheld.

Total Kshs.3,481,550/= Less 20% liability Kshs.2,785,240/-



26. Each party to bear their costs of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Sam Court Assistant

