



REPUBLIC OF KENYA



PKN (Suing as Next Friend to AWK - A Minor) v Wangai & another (Civil Appeal E272 of 2023) [2025] KEHC 5946 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E272 OF 2023**

A MSHILA, J

MAY 9, 2025

BETWEEN

PKN (SUING AS NEXT FRIEND TO AWK - A MINOR) APPELLANT

AND

SAMUEL MBUGUA WANGAI 1ST RESPONDENT

MARGAREET KANYUA 2ND RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate Hon. M.A Opondo at Kiambu Court dated 19th July, 2023 in CMCC NO. 362 of 2017)

JUDGMENT

Background

1. By a Plaint filed on 28th July, 2017, the Appellant sued the Respondents seeking compensation for general damages, special damages of Kshs. 115,000/=, costs of this suit and interest thereon.
2. The Appellant testified that on or about 15th May, 2016 his daughter AWK was a lawful fare-paying passenger in an auto rickshaw 'Tuk Tuk' registration number KTWB xxxC along Limuru-Ruaka road when the Respondents by themselves or their driver so negligently drove motor vehicle registration number KAY xxxZ that they caused the same to collide with the said Tuk Tuk as a result of which the Appellant's daughter suffered injuries.
3. The Respondents failed to enter appearance and/or file their defence as such the Appellant requested for judgment to be entered against them.
4. The matter was set down for formal proof. In the end the trial magistrate found the Respondent to be 100% liable. On quantum, the trial court awarded Kshs. 150,000/= as general damages and special damages of Kshs. 10,000/=.



5. The Appellant being dissatisfied with the lower Court's judgment has preferred the present appeal and has listed four grounds of appeal in his Amended Memorandum of Appeal as follows:-
 - a. That the Learned Magistrate erred in fact and in law by awarding Kshs. 160,000/= as special and general damages in the circumstances.
 - b. That the Learned Magistrate erred in fact and law by failing to appreciate that the Plaintiff has suffered a fracture of the right hand clavicle in assessing damages.
 - c. That the Learned Magistrate erred in law and fact by holding that the future medical expenses had not been proved.
 - d. That the Learned Magistrate erred by failing to appreciate that the Appellant had proved his case on a balance of probability.
6. The appeal was canvassed by way of written submissions. The Respondents were non-participatory in this appeal.

Appellant's Submissions

7. The Appellant submits that future medical expenses are but estimates of a qualified professional that are anticipated in future and therefore not receipt able. It was submitted that the future medical expenses were estimated by Dr. J.N. Muiru who estimated the specialized orthopedic follow up and analgesic at Kshs.100,000/=. The cases cited by the trial court were said to be distinguishable with the current suit as the nature of injuries in those cases are soft tissue injuries while the Appellant herein suffered severe injuries being fracture of the right clavicle, contusion of the head and contusion of the chest. The Appellant placed reliance on among the case of Joseph Kimanathi Nzau vs Johnson Macharia (2019) eKLR where Odunga J. awarded Kshs.800,000/= where the Appellant sustained fracture of the skull, right clavicle, left 1st and 2nd ribs and multiple soft injuries. The Appellant suggested that an award of Kshs.1, 000,000/= would be sufficient as well as special damages of Kshs.115,000/= and future medical expenses of Kshs.100,000/=. In the circumstances, the court was urged to allow the appeal and set aside the decision of the trial court.

Trial Court's Evidence

8. PKN (PW1) wished to adopt his witness statement as his evidence. He stated that the accident involving his daughter and the tuk tuk registration number KTWB xxxC was reported at Rweno Police Station. He produced the police abstract, the OB, P3, medical report and treatment notes. Further, he stated that KAY 998Z was found liable. He testified that her daughters face was swollen, she had a fracture on her right clavicle, had contusion of the head and chest. He took his daughter to Kihara Hospital where they did an x-ray and discovered the fracture. They were referred to Kiambu District Hospital for further treatment. The minor was in class eight but had to stop school for 6 months. Her injuries are permanent and still undergoes therapy. He prayed for damages for her daughter's future as she cannot work for long.

Issues For Determination

9. Having read and considered the trial courts record as well as the submissions by the Appellant and the case law relied upon, the main issues for determination are;
 - a. whether the trial court misdirected itself in its award for special and general damages as well as the award for future medical expenses.



Analysis

10. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well- founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* (1968) 1EA 123, this principle was enunciated thus;-

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
11. In the case of *Mburu & another v Kinge (Civil Appeal 277 of 2023)* [2024] KEHC 1889 (KLR) (29 February 2024) (Judgment) Muchemi J. had this to say;- “The appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
12. The circumstances under which an Appellate court can interfere with an award of damages were set out in the Court of Appeal case of *Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 in the following terms;-

“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 awarded different figure if it had tried the case at first instance. The appellant 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.”
13. The Appellant’s daughter suffered a fracture of the right clavicle, contusion of the head and contusion of the chest as per the particulars of injuries in the Plaintiff. The trial court awarded Kshs. 150,000/= bearing in mind several case law.
14. The Appellant submitted that an award of Kshs. 1,000,000/= for general damages would be adequate. He placed reliance on among other cases the case of *Joseph Kimanthi Nzau vs Johnson Macharia* (2019) eKLR, where an award of Kshs. 800,000/= was given for a fracture of the skull, right clavicle, left ribs and multiple soft tissues.



15. This court notes that the injuries suffered in the cases relied upon by the trial court are not comparable to the instant case as the victims in the said cases mostly suffered from blunt injuries whereas the Appellant's daughter herein suffered from a fracture of the right clavicle as well as contusion of the head and chest.
16. In arriving at the decision that an award of Kshs. 500,000/= would be appropriate this court places reliance in the following cases which are comparable to the case herein;
17. In the case of Anne Ayuma Harrison v Simon Githure Marungo (2014) eKLR where the court awarded Kshs 500,000/= for a fracture of left clavicle, chest and head injuries. In Sheikh Abdulqadir Mohammed Ahmed Shallo v Julius Mutiso Mumo (2018) eKLR where the court awarded Kshs 500,000/= for displaced fracture of the left clavicle and multiple bruises.
18. With regard to the claim for future medical expenses, the Appellant faults the trial court for failing to award the same by stating that the claim had not been proved yet there was a medical report by Dr. J. N. Muiru on record who had recommended that the minor would need specialized orthopaedic follow up and analgesic which would cost Kshs. 100,000/= which amount was specifically pleaded by the Appellant.
19. Refer to the Court of Appeal case of Tracom Limited & Another vs Hassan Mohammed Adan [2009] eKLR where it was stated that:-

“We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs Gituma (2004) 1 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 damage and is a fact that must be pleaded if evidence thereof 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 raising naturally from infringement of a person’s legal right should be pleaded.’”
20. From a perusal of the record, this court notes that the Appellant pleaded the claim for future medical expenses in the sum of Kshs. 100,000/= which amount was informed by the medical report prepared by Dr. J.N. Muiru dated 21st January, 2017, but this court is not satisfied that the Appellant strictly proved this claim as a special damage and finds no good reason to interfere with the trial courts finding.

Findings And Determination

21. For the foregoing reasons this court makes the following findings and determination.
 - i. The appeal is found to be partially with merit
 - ii. The judgment of the lower court is set aside and substituted with a judgment as follows:-
 - a. Liability upheld
 - b. General damages Kshs. 500,000/-
 - c. Special damages Kshs. 10,000/=
 - d. Future medical expenses – Disallowed



e. Costs and interest at court rates

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 9TH DAY OF MAY, 2025.

A. MSHILA

JUDGE

In the presence of:-

Sanja – Court Assistant

Kibebo for the Appellant

N/A – for the Respondent

