



**China Henan International Cooperation Group Co. Limited &
another v Muriithi aka Peter Gicharu Mureithi (Civil Appeal
E104 of 2021) [2024] KEHC 1590 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E104 OF 2021
SM MOHOCHI, J
FEBRUARY 13, 2024**

BETWEEN

**CHINA HENAN INTERNATIONAL COOPERATION GROUP CO.
LIMITED 1ST APPELLANT**

ANTHONY MANYU MUSOGA 2ND APPELLANT

AND

**PETER GICHERU MURIITHI AKA PETER GICHARU
MUREITHI RESPONDENT**

*(Being an appeal arising out of the judgment and decree of Hon.
Orege K.I. (Principal Magistrate) in Nakuru Chief Magistrate's
Court Civil Case No. 94 of 2019 delivered on 23rd September, 2020)*

JUDGMENT

Introduction

1. By consent of the parties dated 1st April, 2021 and filed on 23rd April, 2021 in Nakuru CMCC No. 94 of 2019; Peter Gicheru Muriithi AKA Peter Gicharu Mureithi v China Henan International Cooperation Group Limited & Anthony Manyu Musoga, liability was entered in favor of the Respondent (the Plaintiff therein) as against the Appellants (the Defendants therein) in the ratio of 70:30.
2. In his Complaint dated 31st January, 2019 and filed on 1st February, 2019 the Respondent sought general damages for pain and suffering, diminished/loss of future earning capacity, cost of future medical expenses, loss of income at Kshs. 20,000.00 per month or any other sum for such period deemed fit, special damages in the sum of Kshs. 40,750.00, costs and interest.



3. According to the averments set out therein, on 28th November, 2018, the Respondent was a lawful pillion rider aboard motorcycle registration number KMDS xxxE Boxer. While at Maili Kumi-Solai Road Nakuru County, the 1st Appellant's motor vehicle registration number KCL xxxX, driven by the 2nd Appellant, collided with the motorcycle as a result of which the Respondent sustained bodily injuries. He thus sought the reliefs as enumerated in his Pleat.
4. By judgment of the trial court dated 23rd September, 2020, the trial court awarded the Respondent general damages of Kshs. 1,200,000.00 subject to the agreed 30% contribution, special damages of Kshs. 40,750.00 together with costs of the suit and interest at court rates.

The Appeal

5. The Appellants aggrieved by the trial court's award filed a joint Memorandum of Appeal dated 24th September, 2021. Raising three (3) grounds impugning the findings of the trial court, the Appellants complained
 1. That the Learned Honourable Magistrate erred in law and in fact in failing to properly evaluate the medical evidence tendered and therefore awarded the Respondent general damages for pain and suffering and loss of amenities which is excessive and incongruent with the injuries being addressed.
 2. That the Learned Magistrate erred in law in making the award of general damages is not consistent with the principle governing the award for damages or the purposes of which damages are awarded.
 3. That he Learned Magistrate erred in the general damages was excessive, punitive and unjust in the circumstances.
6. In the premised circumstances, the Appellants prayed that the Appeal be allowed by reviewing the award of general damages on a downward scale. They further prayed for costs of the appeal.

Hearing of Appeal

7. The appeal was heard on the basis of the parties' rival written submissions. The Appellants submissions dated 13th June, 2023 and filed on 14th June, 2023 framed two issues for determination. On the first issue, they argued that the trial magistrate erred in law and in fact in awarding Kshs. 1,200,000.00 general damages as it failed to meet the qualitative and quantitative tests.
8. In their view, the trial magistrate ignored the medical report dated 19th February, 2020 submitted in evidence by the Appellants. They questioned why the trial court failed to elaborate why reference was only made to the Respondent's medico-legal report. For those reasons, the trial court failed to consider the principles governing the same. Several authorities were cited fortifying that argument.
9. Finally, on whether the award on general damages was grossly and manifestly excessive, punitive and unjust, the Appellants reproduced the Respondent's particulars of injury and cited several authorities of this court to advance that the Respondent was entitled to an amount ranging from Kshs. 400,000.00 to Kshs. 600,000.00.
10. The Respondent opposed the Appeal. Praying that the same be dismissed with costs, he filed his written submissions dated 3rd July, 2023 on 5th July, 2023. Lauding the findings of the trial court, the Respondent beseeched this court not to interfere with those findings that they were bereft of error.



Several authorities were quoted urging this court to dismiss the appeal since it was not demonstrated that the trial court misapprehended the evidence or applied wrong principles.

11. The Respondent continued that the medical evidence and the viva voce testimony confirmed the injuries sustained and resultant effects of those injuries to justify the award of Kshs. 1,200,000.00. In his impetration of the trial court's judgment, the award was made under pain and suffering as well as loss of earnings. That the award followed the current jurisprudence of comparable circumstances. He adduced several authorities in support of that submission.
12. Noting that an Appeal is not a new trial but an error correction process and relying on several authorities, the Respondent urged this court to disregard any authorities not adduced at the trial court. He then submitted that the proposed award of between Kshs. 400,000.00 and Kshs. 600,000.00 was not only untenable but also whimsical and inordinately low. Be that as it may, he submitted that the authorities were not comparable to the present circumstances.

Analysis and Disposition

13. This being a first appeal, this Court is obligated to re-evaluate and re-appraise and re-consider the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified as such give due allowance to it. [*Selle v Associated Motor Boat Company Ltd* [1968] EA 123.], [*Gitobu Imanyara & 2 others v Attorney General* \[2016\] eKLR](#).
14. The Parties having entered a consent on liability the Appeal is mainly on the quantum of damages awarded.
15. As a general principal, assessment is a matter of discretion that ought to be exercised judiciously. An Appellate Court would not be quick to interfere with such discretion unless it is absolutely necessary in the circumstances. The Court of Appeal in [*Bashir Ahmed Butt v Uwais Ahmed Khan* \(1982-88\) KAR](#) stated:

“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.”
16. The proceedings at trial revealed that it was only the Respondent that gave his oral evidence in the witness dock. He adopted his witness statement(s) as his evidence in chief. It is however not clear whether he elected to adopt 1 or both witness statements dated 31st January, 2019 and 9th April, 2021 and filed on 1st February 2019 and 21st April, 2019 respectively.
17. That regardless, his evidence was that on 28th November, 2018 as a lawful pillion passenger aboard motorcycle KMDS xxxE, the Respondent met with the careless, negligent and reckless driving of the 2nd Appellant, with authority from the 1st Appellant, to drive the suit motor vehicle registration number KCL xxxX. So much so that the vehicle collided with the Respondent thereby causing an accident.
18. That following the accident, the Respondent sustained the following bodily injuries as set out in his Complaint and medical reports by Dr. Wellington K. Kiamba dated 17th September, 2019 and 11th August 2020 produced in evidence and marked P-Exh.6 and P-Exh.9 respectively:
 1. Displaced fracture of the right tibia and fibula
 2. Mild head injury – lost consciousness and brain oedema;



3. Lacerations and abrasions on the right arm and wrist;
 4. Soft tissue injuries of the back – multiple lacerations on the back and tenderness along the spine;
 5. Soft tissue injuries of the right shoulder joint – lacerations and restriction of movements of the joints.
19. According to the discharge summary marked P-Exh.5, P-Exh.6 and P-Exh.9, the Respondent was admitted in Nakuru Provincial General Hospital between 28th November, 2018 and 3rd December, 2018. A closed reduction was done and a plaster cast applied to his right lower limb from the foot to above the knee joint. On discharge, he was put on treatment drugs and used crutches to walk.
 20. During his second medical examination on 17th January, 2019, the Respondent complained of pain in the right shoulder joint, right lower limb, persistent headache and was unable to walk without crutches. He had scars on his right shoulder joint and wrist and back. He was with the plaster cast. The prognosis was that the Respondent had not recovered from most of the injuries he had sustained and he was on treatment. He had not resumed his usual duties since the accident with his degree of injury classified as grievous harm.
 21. On 11th August, 2020, the doctor observed that the plaster was removed 1 month after his discharge from Nakuru Provincial General Hospital, he complained of pains in the right leg when walking long distances and pain in the right shoulder joint when lifting heaving objects and an additional scar was observed on the right lower limb. The doctor’s prognosis was that he had recovered from the accident. Although the fracture on the right tibia and fibula had united, he had an angulation deformity on the right leg. His degree of injury was classified as grievous harm with a temporary disability of 6 months and a permanent disability of 10% percent.
 22. The Respondent maintained that he had never resumed working and was thus unable to earn a living. He recalled that as a mason, prior to the accident, he earned Kshs. 20,000.00 per month. He prayed that the reliefs sought be granted as prayed.
 23. Although the Appellants never called any witnesses to the stand, they relied on Dr. Otara’s medico-legal report dated 19th February, 2020. It was observed that the Respondent complained of a headache and pain on the lower limbs but was otherwise in fair general condition. The doctor observed that he had a normal gait, a prominent protrusion at the distal end of the tibia and fibula that was non-tender and there was bone continuity. His opinion was that the Respondent was involved in a traumatic accident. He sustained soft tissue injuries and a distal fracture of the right tibia fibula bones. He was treated adequately and healed with no residual deformity. His degree of injuries was classified as harm with an 8-weeks disability.
 24. Liability and ownership of the suit vehicle is undisputed. Those findings are thus not disturbed. However, what is hotly contested by the Appellants is the award on general damages which they opined was excessive, punitive, unjust and erroneously arrived at.
 25. The court in *Price and another v Hilder* {1996} KLR 95 laid down the following guidelines:

“In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless it’s satisfied that its decision is clearly wrong, because it has acted on



matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

26. At the kernel of their dissatisfaction is the allegation that the Trial Magistrate failed to holistically take into account the medical evidence on record. In his penultimate paragraph, the trial magistrate said:
- “On the issue of quantum, the Plaintiff medical reports by Dr. W. Kiamba dated 17/12/2019 indicates that the Plaintiff sustained displaced fracture of the right tibia and fibula, mild head injury and laceration to the arm and wrist and soft tissue injuries of the back and the right shoulder. The injuries were classified as grievous harm... guided by these cases, time lapse, inflationary tendencies and severity of injuries, I award the Plaintiff Kshs. 1,200,000.00.”
27. While this court notes that indeed the trial court made no mention of the other 2 medical reports dated 19th February, 2020 and 11th August 2020, it is noted that the medical report dated 17th December, 2019 was cited merely as to formulate the description of the injuries that the Respondent had sustained. However, as rightly argued by the Appellants, the trial court ought to have inter alia, taken all 3 medico-legal reports into consideration in arriving at the award on general damages. Thereafter, it was incumbent upon the trial court to assess the probative value alongside the evidence on record in arriving at a decision, even if a provisional one.
28. What is unanimously agreed upon by the medical reports is that the Respondent sustained injuries to the head, back and lower limbs including a fracture and soft tissue injuries. The Respondent’s medical reports P-Exh.6 and P-Exh.9 described that he suffered a displaced fracture of the right tibia and fibula, head injury where he lost consciousness and brain oedema, lacerations and abrasions on the right arm and wrist, the right shoulder and the back, tenderness along the spine and restriction of movements on the joints. The only point of departure is the classification of harm.
29. Dr. Otara’s report dated 19th February, 2020 classified his injuries as harm with an 8-weeks disability while Dr. Wellington K. Kiamba’s report dated 11th August 2020 classified the Respondent’s injuries as grievous with a temporary disability of 6 months and a permanent disability of 10% percent.
30. I find those contradistinctive opinions as to classification of the injuries as negligible and not weighty enough as to discount the fact that ultimately and most indispensably, the Respondent sustained a fracture of the distal end of the tibia and fibula that caused a prominent protrusion or otherwise a deformity, soft tissue injuries and lacerations and abrasions causing visible scars. This is the focal point of determination as to assessment of damages. So that while the trial court failed to briefly integrally discuss or analyze the medical reports, the conclusion was that the Respondent sustained injuries as a result of the accident. That was not erroneous.
31. The trial court relied on the following authorities in arriving at the award of Kshs. 1,200,00.00 general damages for pain and suffering.
- a. *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR; the Respondent was awarded Kshs. 1,500,000.00 where he suffered segmental fracture of the right femur mid shaft and right tibia shaft (open), fracture of the right fibula and left 3rd metatarsal bone.
 - b. *Sammy Mugo Kinyanjui & another v Kairo Thuo* [2017] eKLR; where the Respondent suffered slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs, fracture of the right and left tibia and left fibula, he was awarded Kshs. 600,000.00.



- c. *Tirus Mburu Chege & another v JKN & another* [2018] eKLR; the Respondent suffered fractures of the tibia and fibula, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness. He was awarded Kshs. 500,000.00.
32. Considering the authorities cited by the Learned Magistrate and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions and not to punish, the court should strive to ensure that the final award makes sense and fairly compensates the injured party.
33. The authorities relied on by the trial have relatively serious injuries and thus not comparable. This court finds that the authorities relied on were comparable. In *Sammy Mugo Kinyanjui & another v Kairo Thuo*(*supra*) and *Patrick Kinyanjui Njama v Evans Juma Mukweyi* (*supra*) in my opinion the injuries were a bit severe.
34. Having considered the authorities cited by both parties in emphasizing their respective positions, parties are reminded that similar awards for comparable injuries do not necessarily mean exact injuries. The jurisprudence behind comparable injuries attracting comparable awards is that, in as much as possible there should not be consistency on awards given.
35. It is however inevitable that in any system of law there are going to be disparities in awards made by Courts. The courts in making such awards have to consider medical reports availed, time taken after accident for the injury to heal and basically the general healing process. It is therefore not just about the injury itself.
36. In this instant case, looking at the extent and nature of injuries, the pain suffered and the residual effects thereafter and comparing with the authorities relied on by the parties in this Instant Appeal, it is evident that courts have awarded lower amounts even in cases where the victims sustained injuries in addition to fractures of the tibia and fibula of both legs and the courts have also awarded higher amounts in similar cases where similar fractures are on one leg with lesser injuries.
37. Having said that in order to compensate the Respondent for the injuries sustained and the pain and suffering occasions I have considered the following authorities:-
- a. In *Pauline Gesare Onami vs Samuel Changamwe & Another* (2017) eKLR, the Plaintiff sustained fractures of the tibia and fibula bones of both legs in addition to laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft. The Court at the time upheld an award of Kshs 600,000.
- b. In *Tirus Mburu Chege & Another v JKN & Another* (2018) eKLR The Respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness. In that case the Court on Appeal lowered the award for general damages from Kshs. 800,000 to Kshs. 500,000.
- c. *Joseph Mwangi Thuita v Joyce Mwole* (2018) eKLR where the Plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs. 700,000 as general damages.
- d. In *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* [2020] eKLR the Respondent suffered Compound fracture of tibia and fibula bones of the right leg, Deep cut wound and tissue damage of the right leg, Head injury with cut wound on the nose, blunt Chest injuries and Soft tissue injury on the lower left leg Aburirli J. substituted an award of Kshs, 600,000 with an award of Kshs. 300,000



38. With the above authorities, the Court is persuaded that this is a suitable case for it to exercise its discretion to interfere with the Trial Court's finding for the reason that the quantum of damages awarded was so manifestly high and warrants this court's exercise of its discretion and interference. In my assessment, an award of Kshs 700,000/= for pain and suffering would be sufficient taking into account the nature of the injuries and the effects thereafter well as inflation.
39. On general damage for diminished/loss of future earning capacity, cost of future medical expenses, loss of income at Kshs. 20,000.00 per month, the said prayers are denied as they were not established on a balance of probabilities.
40. On special damages, the Respondent pleaded Kshs 40,750 as special damages. Looking at the record and what has been proven by receipts as proof is the amount to Kshs 30,510. Therefore, the award of Kshs. 40,750.00 is set aside and substituted with an award of Kshs. 30,510.00 as the sum proved within the required standard.
41. Accordingly, the Appeal succeeds to the extent
- a. The Award on general damages is substituted with a sum of Kshs. 700,000.00 subject to 30% contribution.
 - b. The Award on special damages is substituted with an award of Kshs. 30,510.00.
 - c. The Respondent shall have costs of the suit in the trial Court from date of Judgement at court rates; and
 - d. There shall be no orders as to costs for the Appeal.
- 42 It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF FEBRUARY 2024.

MOHOCHI S.M.
JUDGE

