



REPUBLIC OF KENYA



**Ruth v Makau (Civil Appeal E441 of 2021)
[2024] KEHC 1411 (KLR) (Civ) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1411 (KLR)

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

**CIVIL
CIVIL APPEAL E441 OF 2021**

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

WANYONYI RUTH APPELLANT

AND

JULIAN NZILANI MAKAU RESPONDENT

*(Being an appeal from the judgment and decree of Hon. A. N. MAKAU
(CM) in Milimani CMCC No. 8421 of 2019 delivered on 29/06/2021.)*

JUDGMENT

1. The respondent was involved in a road traffic accident (RTA) on 11/1/2019 along Kangundo Road when the appellants' motor vehicle registration no. KBP 145G collided with motor cycle registration no. KMEN 850Z where the respondent was riding as a pillion passenger causing the respondent serious injuries.
2. The respondent filed Milimani CMCC No. 8421 of 2019 seeking special damages, general damages and costs and interest for injuries she sustained as a result of the road traffic accident.
3. After hearing the respondent's evidence, the trial court found that the appellant did not testify during the trial.
4. The trial court held that the appellant was 100% liable.
5. The trial court assessed and awarded damages as follows;
 - i. General damages for pain & suffering ksh.2,000,000/=
 - ii. Future medical expenses ksh.1,250,000/=



- iii. Loss of future earnings ksh. 837,648/=
 - iv. Special damages ksh. 67,160/=
 - Total ksh.4,154,808/=
6. The appellant has appealed to this court on the following grounds;
- i. That the learned magistrate erred in fact and in law in awarding general damages that are too high in the circumstances.
 - ii. That the learned magistrate erred in fact in finding that the respondents were entitled to general damages of kshs.2,000,000/= which are too high in the circumstances.
 - iii. That the learned magistrate erred in fact in failing to take into account the totality of evidence tendered before her.
7. The parties filed written submissions as follows; the appellant submitted that the award of Kshs. 2,000,000 as general damages were inordinately high. The appellant proposed an award of Kshs. 1,500,000 and relied on the following cases;
- a. *John Kipkemboi & Another vs Morris Kedolo* [2019] eKLR where the Respondent suffered amputation of the left leg and the court awarded a global sum of Kshs 1,500,000/= for loss of earning capacity
 - b. *Nelson Njibia Kimani v. David Marwa & Anor.* [2017] eKLR who suffered an amputation of lower right limb with 40% incapacity, an award of Ksh.1,500,000/ was considered to be reasonable.
8. The respondent on the other hand submitted that the nature and the extent of the injuries sustained by the respondent are not in dispute. The respondent aligned himself with the lower courts findings on general damages and in support cited
- a. *Daniel Kosgei Ngelechei v Catholic Trustee Registered Diocese of Eldoret & Another* [2013] eKLR an award of Kshs. 2,100,000 was made for comparable injuries.
 - b. *Josee Mwangi v Davis Nyakenyanya Onsare* [2019] eKLR where an award of Kshs. 2,500,000 was made for less severe injuries that included below the knee amputation.
9. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. The sole issue for determination in this appeal is whether the general damages for pain and suffering awarded by the trial court were inordinately high.
11. The respondent sustained severe crush injuries to the right leg which was amputated.
12. The trial court found that the respondent suffered permanent disability of 50% and further that she would require an artificial prosthesis every five years.
13. I have considered the authorities relied on by the trial court. I have also considered the following comparable cases where injuries were similar.
 - a. In *Roba Doti Guyo vs. Jiang Zhongmei Engineering Company* [2015] eKLR, the plaintiff, therein suffered a crushed hand which was amputated leaving him with an ugly stump. In 2015 the plaintiff was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities.
 - b. In *Umoja Rubber Products Limited vs. Bobson Rimba Lewa* [2015] eKLR, the Respondent therein suffered an amputation of the left hand below the elbow. In 2015, he was awarded Kshs 2,200,000/= as general damages for his pain and suffering which sum was upheld on appeal.
 - c. In *Kurawa Industries Ltd –Vs- Dama Kiti & Another*, Malindi HCCA No. 37 of 2015 where an award of Ksh. 2,000,000/= was upheld for amputation of the left leg at the knee joint.
14. I find that the ksh.2,000,000 awarded was reasonable in the circumstances of this case.
15. 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”.
16. I find that this appeal lacks in merit and I dismiss with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

