



**JMM (minor suing through Mother and next friend MMM) v  
Board of Governors Kithingiisyo Secondary School (Civil Appeal  
E045 of 2021) [2024] KEHC 4537 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4537 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E045 OF 2021  
MN MWANGI, J  
APRIL 19, 2024**

**BETWEEN**

**JMM (MINOR SUING THROUGH MOTHER AND NEXT FRIEND  
MMM) ..... APPELLANT**

**AND**

**THE BOARD OF GOVERNORS KITHINGIISYO SECONDARY  
SCHOOL ..... RESPONDENT**

*(An Appeal from the judgment of Hon. F.M. Nyakundi, Senior Resident  
Magistrate, delivered on 22nd July, 2021 in Voi PMCC No. 199 of 2017)*

**JUDGMENT**

1. In the lower Court, the appellant sued the respondent through a plaint dated 28<sup>th</sup> July, 2017 for special damages of Kshs.5,550/=, future medical expenses of Kshs.4,800,000/=, general damages for pain, suffering, and loss of amenities, costs and interest of the suit at Court rates. The appellant’s suit was that on or about 14<sup>th</sup> April, 2017 while she was lawfully travelling as an authorized passenger aboard motor vehicle registration No. KCE xxxD, along the Nairobi-Mombasa road at Ndara area, the said motor vehicle was so carelessly, recklessly, and/or negligently driven, managed and/or controlled by the respondent’s authorized driver, agent and/or servant, that it was allowed to lose control and fall (sic), thereby occasioning the appellant severe and extensive injuries. She stated that as a result of the said accident, she suffered loss and damage.
2. She asserted that at all material times relevant to the instant suit, the respondent was the sole registered owner of motor vehicle registration No. KCE xxxD and as such, it is vicariously liable. She averred that she relied on the doctrine of res ipsa loquitor, the Traffic Act Cap 403, and the Highway Code.



3. The respondent filed a statement of defence dated 1<sup>st</sup> September, 2017, where it denied all averments contained in the plaint and averred that if an accident occurred as alleged, then the same was inevitable, and it could not have been avoided by any driving skill, care, maneuver and/or prudence on the part of its driver, agent and/or servant. It further averred that if any accident occurred as alleged it was caused and/or substantially contributed to, by the negligent and willful acts and omissions on the appellant's part. The respondent alleged that the appellant was travelling in the suit motor vehicle as an unauthorized and unlawful passenger.
4. Judgment in the lower Court was delivered on 22<sup>nd</sup> July, 2021. The Trial Court held that the suit herein was part of a series, in a self-involving road traffic accident that took place on 14<sup>th</sup> April, 2017 along Nairobi-Mombasa highway involving a school bus belonging to the respondent and in which the appellant among others who were in the said bus got injured, and as a consequence thereof, the issue of liability was determined in the test suit Voi PMCC No. 171 of 2017 at 100% against the defendants jointly and severally. The Court awarded the appellant Kshs.300,000/= in general damages for pain, suffering and loss of amenities, Kshs.5,500/= as special damages, costs of the suit and interest from the date of judgment until payment in full.
5. The appellant being dissatisfied with the judgment on quantum filed a Memorandum of Appeal dated 16<sup>th</sup> August, 2021 raising the following Grounds of Appeal-
  - i. That the learned Magistrate erred in law and fact by making an award on general damages of Kshs.300,000/= to the appellant which award was inordinately low;
  - ii. That the learned Senior Resident Magistrate erred in law and fact in applying the wrong principles of law in assessing general damages hence arriving at manifestly low damages;
  - iii. That the learned Senior Resident Magistrate erred in law and fact in failing to appreciate and be guided by the prevailing range of comparable awards in cases of a similar nature;
  - iv. That the learned Magistrate erred in law and fact in failing to take into account the appellant Advocate's written submissions and authorities whilst making the award; and
  - v. That the learned Magistrate erred in law and fact and misdirected himself when he failed to consider the appellant's supporting documents adduced as evidence whilst making the award.
6. The appellant's prayer is for this Court to allow the appeal with costs and, set aside the judgment on quantum delivered on 22<sup>nd</sup> July, 2021 by Hon. F.M Nyakundi (SRM) in Voi PMCC No. 199 of 2017 and for the award made therein to be re-assessed and substituted with a fair and just one. In addition, the appellant prays for costs of the case in the Trial Court, and costs for this Appeal.
7. The Appeal was canvassed by way of written submissions. The appellant's submissions were filed on 16<sup>th</sup> September, 2022 by the law firm of Annie W. Thoronjo & Co. Advocates, whereas the respondent's submissions were filed by the law firm of Mogaka, Omwenga & Mabeya Advocates on 4<sup>th</sup> October, 2022.
8. Ms Gicharu, learned Counsel for the appellant submitted that the issue of liability was settled in a test suit being, Voi PMCC No. 171 of 2019, wherein the respondent was held 100% liable for the occurrence of the accident in issue. Counsel contended that as a result of the said accident, the appellant sustained a crush injury of the right upper limb, and loss of the right upper limb below elbow level. She stated that the appellant was treated as an inpatient at Makueni Referral Hospital where she was referred to from Taita Taveta Hospital and was admitted from 19<sup>th</sup> April, 2017 to 25<sup>th</sup> May, 2017.



9. Counsel submitted that the appellant was examined by Dr. Kimuyu on 26<sup>th</sup> May, 2017. That at the time of examination, the appellant complained of difficulty in walking due to loss of limb. The doctor was of the opinion that the appellant's loss of limb at such a tender age would affect her development, and that she would benefit from functional prosthesis at the age of around eight years at an estimated cost of Kshs.400,000/=. The Doctor also stated that the prosthesis would require change after every five years, therefore if the appellant's life expectancy was capped at 70 years, the cost of future medical expenses was Kshs.4,800,000/=.
10. The Doctor further stated that the appellant and her parents would require counselling and occupational therapy. In addition, he stated that the appellant would never achieve complete recovery. He categorized the degree of her injuries as grievous harm, and awarded her permanent disability of 67%. Ms Gicharu urged this Court to hold Dr. Kimuyu's report as uncontroverted since no contrary report was produced by the respondent.
11. In submitting that an award of Kshs.8,000,000/= would be sufficient in compensating the appellant for the injuries sustained as a result of the accident. Counsel relied on the case of James Njau Kariuki v Mary Goretti Wakwibubi & Joseph Wafula Ndieyira Eldoret HCCC No. 2 of 2005, where the plaintiff sustained similar injuries and was awarded Kshs.3,000,000/= as general damages and the case of Regina Mwikali Wilson v Stephen M. Gichuhi & Peter M. Muinde HCCC No. 728 of 2007 where the plaintiff was awarded Kshs.2,500,000/= for similar injuries. Ms. Gicharu urged this Court to uphold the Trial Court's finding on special damages.
12. Ms. Gicharu cited the Court of Appeal decision in Tracom Ltd & another v Hassan Mohamed Adan [2009] eKLR, where the Court of Appeal held that 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, to support the appellant's claim for future medical expenses of Kshs.4,800,000/=,
13. Mr. Abaja, learned Counsel for the respondent cited the case of Arrow Car Limited v Elijah Shamalla Bimomo & 2 others [2004] eKLR and submitted that when it comes to assessment of general damages, the legal principle is that comparable injury should as far as possible get comparable compensatory award. He stated that the appellant sustained a crush injury on the right upper limb and loss of right upper limb below elbow level, therefore the Trial Court's award of Kshs.300,000/= in general damages was reasonable. He relied on the case of Kennedy Mutinda Nzoka v Basco Product (Kenya) Limited [2013] eKLR, where the appellate Court made an award of Kshs. 210,000/= in general damages for a crush injury with fracture of the middle phalanx right index finger which is almost similar to the injuries suffered by the appellant herein.
14. He also relied on the case of Mumias Sugar Company Ltd v Francis Wanalo [2007] eKLR, where the appellate Court made an award of Kshs. 200,000/= in general damages for traumatic amputation of the small finger of the right hand, crush injury to the fourth finger of the right hand. Mr. Abaja submitted that the authorities cited by the appellant to justify an award of Kshs.8,000,000/= in general damages entail severe injuries which are not comparable to the injuries sustained by the appellant herein.
15. In submitting that future medical costs must be specifically pleaded before they can be awarded, Counsel cited the Court of Appeal case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR. Mr. Abaja contended that the appellant had not pleaded future medical costs in the Memorandum of Appeal, and since parties are bound by their pleadings, anything which goes beyond the scope of the pleadings must be disregarded. He contended that with the appellant having failed to specifically plead future medical costs in the Memorandum of Appeal, this Court lacks the inherent jurisdiction to award the same.



## **Analysis and Determination.**

16. I have re-examined the Record of Appeal and given due consideration to the submissions by Counsel for the parties. As a first appellate court, this Court's role is to subject the whole evidence adduced before the Trial Court to a fresh and exhaustive scrutiny and make its own conclusions about it, while bearing in mind that it did not have the opportunity of seeing and hearing the witnesses testify first hand. This duty was well stated by the Court of Appeal in the case of *Kenya Ports Authorities v Kuston (Kenya) Limited* [2009] 2EA 212, as hereunder-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

17. This being an appeal on quantum, this Court will only interfere with the Trial Court's judgment if the same is founded on wrong principles of law or a misapprehension of the evidence adduced. In the case of *Kemfro Africa Limited t/a “Meru Express Services [1976]” & Another v Lubia & Another* [1985] eKLR, the Court held as follows-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

18. The appellant's Counsel urged this Court to uphold the Trial Court's finding on special damages at Kshs.5,500/=. The same was not challenged by the respondent as is hereby upheld. This Court is left to determine whether the award of Kshs.300,000/= in general damages for pain, suffering, and loss of amenities is inordinately low in the circumstances of this case, and whether the appellant is entitled to Kshs.4,800,000/= as costs for future medical expenses.

19. The respondent submitted that the Trial Court's award of Kshs.300,000/= in general damages is reasonable. I have considered the authorities cited by the respondent's Counsel and I am of the considered view that they are of no probative value since the injuries sustained by the plaintiffs therein were not as severe as those suffered by the appellant herein. The appellant's Counsel submitted that an award of Kshs.8,000,000/= would adequately compensate the appellant for her injuries.

20. I have searched for the authorities relied on by the appellant's Counsel in the Kenya Law Reports website, but I was unable to find the case of *James Njau Kariuki v Mary Goretti Wakwibubi & Joseph Wafula Ndieyira Eldoret HCCC No. 2 of 2005*. I however found the case of *Regina Mwikali Wilson v Stephen M. Gichuhi & Peter M. Muinde HCCC No. 728 of 2007* but the one on the Kenya Law Reports website is different from the one filed by the appellant's Counsel. Nevertheless, the injuries sustained by the plaintiffs in the said cases were much more severe than the injuries suffered by the appellant herein.



21. Courts have held that comparable injuries should attract comparable awards. The Court of Appeal in *Jabane v Olenja* [1986] KLR 661, laid down the principles that guide Courts in assessing general damages as hereunder-

“The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

1. Each case depends on its own facts;
2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
3. comparable injuries should attract comparable awards;
4. inflation should be taken into account; and
5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”

22. The appellant herein suffered a crush injury on right upper limb, and loss of right upper limb below elbow level. From the record, Dr. Kimuyu examined the appellant on 26<sup>th</sup> May, 2017, approximately six weeks from the date when the accident occurred, and at that time, the appellant complained of difficulty in walking due to loss of limb. In his report, the Doctor observed that the appellant had an amputated right upper limb at below elbow level and since she had lost the said limb at eleven months, it will affect her development. He stated that the appellant would benefit from functional prosthesis at the age of around 8 years at an estimated cost of Kshs.400,000/=, and the prosthesis will require change after every five years. He gave future medical expenses an amount of Kshs.4,800,000/= up to the of 70 years. Dr. Kimuyu assessed the appellant’s permanent disability at 67%.

23. The Trial Magistrate in arriving at the award of Kshs.300,000 in general damages, relied on several authorities such as the case of *Odinga Jactune Ouma v Moureen Achieng Odera* [2016] eKLR, *Kamenju Charles v Gideon Muia Mutisya* [2014] eKLR, and *Patrick Mwitii Manene & another V Kevin Mugambi Nkuja* [2013] eKLR and stated that Courts awarded Kshs.180,000/=, Kshs.170,000/= and Kshs,170,000/=, respectively, for similar injuries. On perusal of the said decisions, it is evident that the plaintiffs therein suffered multiple soft tissue injuries, which are less severe compared to the injuries sustained by the appellant herein.

24. In *Simba Platinum Limited v Nicholas Auma Wandera* [2021] eKLR, the Court made an award of Kshs.2,000,000/= where the plaintiff sustained multiple fractures on the left arm leading to complete amputation of the left arm at the shoulder joint. In *Joseph Wang’ethe v Ew* [2019] eKLR, the Court made an award of Kshs.1,500,000/= for amputation of the plaintiff’s right hand. Similarly, in *James Musyoka Nzeke v Kenya Power and Lighting company* [2019] eKLR, an award of Kshs.2,500,000 was made for amputation of left arm amongst other injuries sustained by the plaintiff.

25. Dr. Kimuyu in his report was of the opinion that the appellant suffered permanent incapacity at 67%. In light of the foregoing, and in consideration of the fact that the appellant sustained life changing injuries due to the amputation of her right upper limb, this Court finds that the Trial Court erred by making an award which was manifestly low compared to the injuries sustained by the appellant. That being the case, the said award warrants interference by this Court. In the premise, I am of the considered view that an award of Kshs.2,000,000/= would adequately compensate the appellant for the injuries sustained in the accident herein.



26. In regard to the claim for future medical expenses, Mr. Abaja contended that the appellant has not pleaded future medical costs in the Memorandum of Appeal and since parties are bound by their pleadings, anything which goes beyond the scope of the pleadings must be disregarded. This being the first appellate Court, I have a duty to evaluate and re-analyze the evidence adduced before the Trial Court. A perusal of the plaint dated 28<sup>th</sup> July, 2017 filed before the Trial Court reveals that the appellant pleaded future medical expenses of Kshs.4,800,000/=. The Trial Magistrate in his judgment did not address this claim at all. This Court shall therefore proceed and determine whether the appellant is entitled to the said claim.
27. A claim for future medical expenses falls under special damages, which needs to be pleaded and proved. In the appellant's medical report, Dr. Kimuyu stated that the appellant will benefit from functional prosthesis at the age of around 8 years at an estimated cost of Kshs.400,000/=:, and the prosthesis will require change after every five years giving future medical expenses the sum of Kshs. 4,800,000/= up to 70 years of age. In *Forwarding Company Limited & Another v Kisilu; Gladwell (third Party)* [2022] KECA 96 (KLR), the Court of Appeal held as follows in regard to future medical expenses-
- “In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances.”
28. Dr. Kimuyu applied a productive life span of 70 years for the appellant in assessing the costs of a functional prosthesis arm. In *James Njiiri & 2 others v FPU & another* [2019] eKLR, the Court in addressing the issue of life expectancy held that-
- “Strictly speaking, even the factoring in of the vicissitudes of life concept, one cannot state with certainty the numbering days a right for a human being. I consider that to be in the future and sometimes in the realm of the unknown as even medical science cannot predict with certainty the lifespan of being. I also take judicial notice that from the latest world bank data life expectancy in Kenya is between 64 and 69 years.”
29. Guided by the above authority and bearing in mind the uncertainty of life, I apply a productive life span of 60 years. In so doing, I have considered that the appellant was less than a year old at the time the accident occurred. In computing the cost of future medical expenses, I shall adopt a multiplier of 12 years which is equivalent to the multiplier adopted by Dr. Kimuyu. In the premise and in the absence of any evidence to the contrary, I award the plaintiff Kshs. 4,800,000/= to cover the cost of prosthetic arm in her lifetime.
30. In conclusion, it is this Court's finding that the appeal herein is merited and the same is allowed. I therefore set aside the award of Kshs.300,000/= in general damages for pain, suffering, and loss of amenities and substitute thereof an award of Kshs.2,000,000/=:. I also award the appellant Kshs 4,800,000/= for future medical expenses. The total award is Kshs.6,805,500/= inclusive of special damages. Costs of this appeal and of the case in the Trial Court are awarded to the appellant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF APRIL, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Gicharu for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

