



REPUBLIC OF KENYA



**Muasya v Kivuva & another (Civil Appeal E109 of 2022)
[2024] KEHC 3807 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E109 OF 2022**

**FR OLEL, J
APRIL 12, 2024**

BETWEEN

CHARLES MUTUKU MUASYA APPELLANT

AND

FRANCIS KIVUVA 1ST RESPONDENT

MOSES MUNYAO KYEMWA 2ND RESPONDENT

***(BEING AN APPEAL FROM THE JUDGEMENT AND DECREE OF HON W NJUGUNA
(RM) DATED 14th July 2022 delivered in KANGUNDO SPMCC No E66 of 2021)***

JUDGMENT

A. Introduction

1. This appeal arises from the judgement/decree of Hon. W. Njuguna(RM) dated 14th July 2022 delivered in Kangundo SPMCC No. E66 of 2021, where he found that the respondents liable for the accident that occurred on 3rd November 2020, which resulted in the Appellant fracturing his leg and proceeded to award the appellant Kshs.553,750/= as damages plus cost and interest.

B. Pleadings

2. The Appellant, who was the plaintiff in the primary suit did file his plaint dated 29th March 2021, wherein he did allege that on 3rd November 2020 at about 7.00am at Kamulu Area off Kangundo road, he was lawfully and carefully standing at a safe distance from motor vehicle registration Number KCV 343A,(herein after referred to as the suit lorry) which was offloading construction material at a site, when suddenly and without due care and attention, the 1st respondent drove, controlled and/or managed the same in a negligent manner that he caused the said suit motor lorry to knock down the Appellant by its rear tires consequent of which the Appellant sustained serious bodily injuries for which he held the Respondent's liable. The Appellant particularized the negligence alleged, the injuries



suffered and prayed to be awarded damages for pain and suffering, diminished earning capacity and future medical expenses.

3. The Respondents filed a joint statement of defence, wherein they denied all the averments made in the plaint and stated in the alternative that if the accident did occur, then the same was occasioned by the Appellants negligence and/or carelessness, details of which were particularized in the said statement of defence. The respondents further denied that the Appellant was injured as a result of the said accident and put him to strict proof thereof. The Appellant did file a reply to defense, where he joined issues raised by the respondents in their statement of defense. He reaffirmed that indeed the accident did occur and put the respondents to strict proof to the contrary.

B. Evidence at Trial.

4. The Appellant did adopt his witness statement and produced all the documents filed in his list of documents as Exhibits. In the said witness statement, the Appellant averred that on 03.11.2020 at about 7.00am, he was at Kamulu-Makogeni area off Kangundo road, at a construction site, where the suit motor lorry arrived to offload construction material. He further averred that he was standing at very safe distance from the suit lorry and workers proceeded to offload the material manually, as the suit lorry offloading hydraulics had failed. While the process was ongoing, the lorry turn boy entered the cabin, and attempted to drive off, but due to his inexperience overstepped on the fuel pedal and consequently lost control of the said lorry.
5. The Appellant averred that he scampered for safety, but due to its high speed, he was not able to escape and consequently, the suit lorry rear wheels over run his right leg fracturing his right femur, which had to be fixed with a metal plate. The Appellant blamed the driver of the suit motor vehicle as he was inexperienced judging by the high speed at which he started driving after the construction goods had been offloaded. He therefore prayed for compensation. On cross examination, the Appellant stated that he was at the construction site with permission of the owner, and the suit lorry driver had not intended to knock him. He attempted to escape, but he lorry crushed his leg. He reiterated that it was the suit lorry conductor who was driving the said lorry at the time of the accident.
6. The 1st Respondent also testified and stated that he was the driver of the suit motor vehicle, which belonged to the 2nd respondent. He confirmed that on 03.11.2020, they delivered building stones to a construction site at Kamulu. Once at the construction site, they were directed where to reverse and offload the building stones. In that process of getting the right angle for reversing, he drove forward and since it had drizzled, the lorry skid towards a heap of ballast, where the victim/Appellant stood and unfortunately his leg was overrun by the rear left tires. The construction works shouted and he stopped to check what had transpired only to find the victim lying unconscious. They carried the Appellant onto the lorry and rushed him to Kangundo Level 3 Hospital and later reported the incident at Kangundo Police station. The suit lorry was inspected and later released. He was not charged in court over this incident.
7. The 1st respondent further confirmed that at the construction site, he handed over the suit lorry to his lorry conductor/ turn boy, who at the time of the incident was driving the suit lorry and that had the lorry not slid the accident would not have occurred. According to the police abstract, they were to blame for the accident.
8. The trial magistrate did consider the evidence tendered and proceeded to award the Appellant, general damages of Kshs.350,000/=, Damages for diminished earning capacity Ksh.100,000/=, future medical expense's Kshs.100,000/= and special damages Kshs.3,750/=. The total award thus arrived at was



Kshs.553,750/=. Being wholly aggrieved and dissatisfied by the award, the appellant did file his memorandum of Appeal on 02nd August 2022 and raised the following grounds of appeal namely: -

- a. That the learned trial Magistrate erred in law and in fact in awarding the Appellant Kshs.350,000/= as general damages which award was inordinately low, in view of the injuries sustained by the Appellant and the current inflation rate.
 - b. That the learned trial Magistrate erred in law and in fact by disregarding the appellants submissions on quantum and authorities cited by the appellant and entirely relied on the respondent's submissions thereby awarding the appellant General damages that were inordinately low.
 - c. That the learned trial Magistrate erred in law and fact by awarding the appellant Kshs 100,000/= as future medical expense's thereby disregarding the expert opinion of Dr Titus Ndeti.
 - d. That the learned Magistrate erred in law and in fact by considering irrelevant factors and leaving out relevant ones in arriving at his award on both General damages and future medical expenses.
 - e. That the learned trial Magistrate judgement was arrived at in a cursory and perfunctory manner without properly analyzing evidence presented in the suit on quantum and the entire award of General damages and future medical expenses to the appellant is inordinately low.
9. The Appellant thus urged this court to find that this Appeal has merit and re assess afresh the amount due to the Appellant as General Damages and future medical Expenses payable to the Appellant. He also prayed for costs of this Appeal.

B. Submissions

i. The Appellants Submissions

10. The Appellant submitted that he was dissatisfied by two awards being General damages award of Kshs.350,000/= and cost of future treatment Kshs.100,000/=: which he submitted was low and constituted an error in the estimation of damages by the trial Magistrate. As a result of the accident, he had sustained a fractured mid shaft right femur and soft tissue injuries to the right thigh, which injuries were confirmed by the discharge summary from Kangundo level 4 Hospital, the P.3 form and medical report by Dr Titus Ndeti. The injury suffered were severe and debilitating and the quantum award of Kshs.350,000/= did not consider the current similar injury citation's and current rate of inflation. Reliance was placed on Akbar Mohammed Haji Ali Vrs Jacton Ouma Okello (2018) eklr, Jackline Kamunyi Kamau Vs Simon Kiiru Njoki (2018) eklr, & Kiautha Vs Ntarangwi (Civil Appeal E050 of 2021), (2022) KEHC 10595(KLR) where for similar injuries the courts awarded damages to the tune of Kshs.800,000/= to Kshs.1,200,000/=:
11. On the issue of future medical expenses, Dr.Titus Ndeti's medical report was produced as Exhibit P-4 and therein it was clearly indicated that the Appellant required a sum of Kshs.200,000/= to remove the metal implants at a low-cost hospital and Kshs.300,000/= for the same procedure at a high cost hospital. The respondent had also produced their medical report dated 10th November 2021, by Dr W.M. Wokabi where it was indicated that removing the metal implant would cost Kshs.80,000/=: The Appellant faulted the trial court for using guesswork to arrive at a figure of Kshs.100,000/=: yet the Appellant was entitled to the best medical care which would conservatively cost him Kshs.200,000/= as pleaded to access good medical care at a low-cost hospital.



12. The Appellant therefore urged the court to consider current inflationary trends and proceed to increase the award of general damages and cost of future treatment to Kshs.200,000/=.

ii. The Respondent submissions.

13. The respondents filed their submissions on 22nd May 2024 and invited the court to look at the medical report by Dr .W. Wokabi dated 10th November 2021, which outlined the injuries sustained; being fracture of the right femur, which had healed and united well and the leg had been maximally rehabilitated. The court had correctly assessed the quantum and relied on Reamic Investment Limited Vs Joaz Amenya Samuel (2021) eKLR, where for similar injuries the court had revised downward an award of Kshs.600,000/= to Kshs.350,000/= for left femur fracture, abrasion on the left knees, face, neck and right upper limbs as well as contusion on the anterior chest. Reliance was also placed on Ibrahim Kalema lewa Vs Esteel company limited (2016) eKLR, where the court awarded a quantum of Kshs.300,000/= for similar injuries.
14. The court was urged to disregard the citations relied on by the Appellant as they were not of similar injuries and in the said citation's, the parties seeking compensation had suffered more severe injuries as compared with the instant case. The Appellant had thus not shown that the General damages awarded was too high or low, or that the magistrate based the said award on wrong principles and/ or misapprehended the evidence. There was therefore no basis upon which this court could interfere with the said judgment. Reliance was placed on Bashir Ahmed Butt Vs Uwais Ahmed Khan (1982-1988) KLR.
15. On the award of future medical expenses, the two medical reports gave contradictory figures and the trial court could not be faulted for finding that the award of Kshs.100,000/= to be adequate. The same was therefore not based on guesswork and should not be disturbed .The respondents thus prayed that the court do find that this Appeal was misconceived and proceed to dismiss the same with costs.

B. Analysis and Determination

16. I have considered the entire proceedings of the trial court, the entire record of Appeal and the submissions of the parties herein. I note that this is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor, however the court will analyze the evidence before it and arrive at its own independent conclusion. I am therefore guided by the case of Selle & Another Vs Associated Motor Boat Company Limited & others (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion 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. (Abduk Hamed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270.



17. In *Coghlan vs. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

18. In this Appeal, the Appellant is clear that he is only challenging the award under General Damages for pain and suffering and the amount awarded for cost of future medical treatment. Basically, the Appeal is against the quantum awarded.

19. With regards to interference of the award of damages, it was observed in the case of *H. West & Son Ltd vs. Shephard* [1964] AC 326, that:

“...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

20. The Court of Appeal in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 held that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

21. As noted in *Akbar Mohammed Haji Ali Vrs Jackton Ouma Okello* (2018) eklr & *Jackline Kamunyi Kamau Vs Simon Kiiru Njoki* (2018) eklr in both instances, the injury suffered was a fractured femur and the court awarded General damages for a sum of Kshs.800,000/= to 1,200,000/=. The Respondent on the other hand urged the court to rely on the case of *Reamic Investment Lts Vrs Joaz Amenyua Samuel*, Kisii HCCA No 105 of 2019, where the court awarded Ksh.350,000/= for similar injuries.

22. I do find that the trial Magistrate made an error in assessing the damages suffered and therefore justifies interference of the same by this court. The award of Kshs.350,000/= for fracture of the femur is too



low as to constitute an error. The Authority relied upon by the trial court made reference to cases decided between 2008 to 2015. Taking into account the inflationary rate and also the fact that this incident occurred in 2020, I find that an award of Ksh.800,000/= would have been more appropriate to compensate the Appellant under this heading.

23. On cost of future medical treatment, the Appellant did not specifically plead the sum sought in his prayers and pleaded for the same in General terms. But since it was a live issue for determination at trial and evidence presented, the court could proceed to make a determination on the same. I do find that since there were contradictory reports Medical Reports presented, the trial court cannot be faulted in awarding the Appellant Kshs 100,000/= as it is not enough to simply fault another Judge/magistrate for making a different award. If the same falls within acceptable limits then that would suffice as adequate compensation

B. Disposition

24. The upshot and from analysis of the pleading and the law I do find that this Appeal partially succeed. The Judgement/decree of Honourable W. Njuguna (RM) delivered in Kangundo CMCC No E66 of 2021, with respect to General damages is set aside and the same is increased to Ksh.800,000/=. The other findings therein will remain the same.
25. The Appellant shall have half costs of this Appeal which Is Assessed at Ksh.100,000/= all inclusive.
26. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 12th day of April 2024.

In the presence of;

Mr. Muluvi for Appellant

Mr. Tembo for Respondent

Sam Court Assistant

