



REPUBLIC OF KENYA



EAA ((Minor Suing through her Father and Next Friend AAA)) v Abdalla (Civil Appeal E179 of 2022) [2024] KEHC 5646 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E179 OF 2022**

DAS MAJANJA, J

MAY 22, 2024

BETWEEN

EAA APPELLANT

(MINOR SUING THROUGH HER FATHER AND NEXT FRIEND AAA)

AND

SALMA HEMED ABDALLA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Nyariki J, SRM dated 20th October 2022 at the Magistrates Court at Mombasa in Civil Case No. 1453 of 2019)

JUDGMENT

Introduction and Background

1. The Appellant is dissatisfied with the Subordinate Court's judgment dated 04.10.2022 where he was awarded Kshs. 350,000.00 and Kshs. 46,342.00 general and special damages respectively but was denied future medical expenses of Kshs. 329,500.00. The judgment was in respect of an accident that occurred on 25.05.2019 involving the Appellant who was travelling as a fare paying passenger aboard a Tuk Tuk of Registration Number KTWB W from Marikiti Market towards King'orani Mvita. In her plaint, the Appellant claimed that when the Tuk Tuk reached Family Bank along Abdelnasser road, it overturned as a result of the Respondent's driver's negligence, carelessness and as a result whereof the Appellant was occasioned severe physical injuries to wit; fracture distal third right femur with displacement, post traumatic arthritis and stiffness right knee, 20cm surgical scar lateral aspect of right thigh & tenderness (pain) right knee joint with flexion movement limited to 70 degrees.
2. The Subordinate Court, in its judgment held that the Respondent was 100% liable for the accident. On quantum of damages, the Subordinate Court relied on the medical report of the Respondent's witness, Dr. Udayan Sheth (DW 1) as opposed to that of the Appellant's witness, Dr. Douglas Kiema (PW 1) to find that the Appellant sustained a fracture on the 1/3 right femur. It referred to the case of



Reamic Investment Limited v Joaz Amenya Samuel [2021]eKLR cited by the Respondent and Pestony Limited & another v Samuel Itonye Kagoko [2022]eKLR cited by the Appellant to award the general damages of Kshs. 350,000.00.

3. The present appeal is grounded in the memorandum of appeal dated 19.10.2022. The appeal has been canvassed by way of written submissions which I have considered and will make relevant references and highlights in my analysis and determination below.

Analysis and Determination

4. As submitted by both parties, I am mindful of the role of this court as a first appellate court which is to re-evaluate and re-assess the evidence before the court of first instance and at the same time, keep in mind the fact that the trial court interacted first hand with the parties (see *Selle v. Associated Motor Boat Co.* [1968] EA 123). In addition, the Appellant is aggrieved with the quantum of damages awarded. Generally, 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 trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low (see *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5).
5. I am in further agreement with the Appellant's submission that a court should also be mindful to make fair and consistent awards in line with the principle that similar injuries must attract similar awards (see *Maore v Geoffrey Mwenda* [2004]eKLR). The Appellant submits that the subordinate court did not take into account the severity of the injuries suffered by the Appellant and also did not also consider the fact that the Appellant was left with a 10% permanent disability and that there is a possibility of the fracture she suffered to re-fracture in future. That the trial court did not also consider the submissions made by the Appellant's advocates and the authority cited in which the Plaintiff therein suffered comparable injuries as the Appellant herein. As a result, the Appellant submits that the sum of Kshs. 350,000.00 awarded was inordinately low and should be reviewed upwards and a sum of Kshs. 1,100,000.00 awarded.
6. As stated, there were two medical reports on record which sought to give the subordinate court guidance on the injuries sustained by the Appellant. The Subordinate Court elected to rely on the medical report of DW 1 on the ground that that the medical examination was conducted on a later date and that DW 1 was an orthopaedic surgeon having specialized in the field in question. In arriving at this decision, it was guided by the court's decision in *Simon Mutisya Kavii v Simon Kigutu Mwangi*[2013]eKLR. I do not find any error in principle with this conclusion by the Subordinate Court. The trial magistrate was guided by a superior and binding decision of this court in arriving at the said decision which was similar to the matter before it. The medical report of DW 1, having been prepared later than that of PW 1 gave better clarity as to the extent of the injuries suffered by the Appellant and since it was made by a doctor who specializes in the area of interest of the Appellant's injuries, it was proper to give that report more weight. I therefore find that the Subordinate Court did not err in relying on the medical report of DW 1 where it was concluded that the Appellant had suffered a fracture of the 1/3 right femur and did not require future medical attention and expenses as claimed by the Appellant.
7. In arriving at the decision to award the Appellant Kshs. 350,000.00 as general damages, the subordinate court in the judgment considered authorities cited by both parties and the learned magistrate decided to rely on the decision cited by the Respondent, *Reamic Investment Limited v Joaz Amenya Samuel* (supra). This decision bears relevance to the injuries sustained by the Appellant and as such, I cannot



fault the Subordinate Court for awarding the said Kshs. 350,000.00. This amount is not inordinately low as averred by the Appellant and I reject this ground of appeal.

8. The Appellant also faults the Subordinate Court for not awarding the sum of Kshs. 101,708.00 as pleaded. The Subordinate Court, while acknowledging that the Appellant had produced receipts of this amount applied a NHIF rebate of Kshs. 55,366.00. Whereas the Respondent also admits that the Appellant had pleaded and proved special damages to the tune of Kshs. 101,708.00, she submits that there was an NHIF rebate of Kshs. 55,366.00. While it is correct that NHIF rebates are taken into account and credited in calculating the special damages payable (See Boniface Nzioka Malundu v Jeremiah Kariuki Mwaniki [2020] eKLR), my perusal of the record, more so the said receipts do not indicate that a NHIF rebate was to be credited to the Appellant's hospital bill. What is on record are receipts totaling Kshs. 101,780.00 with no endorsements of an NHF rebate. I therefore fault the trial magistrate for not awarding the entire Kshs. 101,708.00 that was pleaded and proved satisfactorily with receipts. I therefore set aside the special damages award of Kshs. 46,342.00 and substitute it with Kshs. 101,708.00. This ground of appeal by the Appellant therefore succeeds.

Disposition

9. The Appellant's appeal succeeds only to the extent that the judgment of the Subordinate Court in respect of special damages is set aside and substituted with the court's judgment of Kshs. 101,708.00. Interest on this amount shall accrue from the date of filing suit. The Appellant should also have costs of this appeal assessed at Kshs. 20,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MAY 2024.

OLGA SEWE

JUDGE

