



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiama v Mutiso (Civil Appeal 40 of 2023) [2024] KEHC 5135 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5135 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL 40 OF 2023**

**DAS MAJANJA, J**

**MAY 13, 2024**

**BETWEEN**

**DANIEL MAGOCHI KIAMA ..... APPELLANT**

**AND**

**MUSYOKA MUTISO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. E. Muchoki, SRM dated 17th February 2023 at the Magistrates Court at Mombasa in Civil Case No. 565 of 2020)*

### **JUDGMENT**

1. In his Memorandum of Appeal dated 22.02.2023, the Appellant prays for the court to re-assess the general damages awarded by the Subordinate Court. The Respondent was injured in an accident that took place on 23.07.2020 when the Appellant's motor vehicle lost control and knocked him down and pressed him against the pillars of a gate thereby occasioning him injuries. The issue of liability was settled by consent in the ratio 80:20 against the Appellant. The trial court awarded Kshs 700,000.00 as general damages thus precipitating this appeal.
2. According to the plaint, the Respondent suffered a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh. The Appellant produced the medial report prepared by Dr Ajoni Adede dated 05.08.2020. The doctor assessed 8% permanent partial disability and noted that there would be stiffness of the left knee and that the fracture site would be predisposed to arthritis and would suffer accelerated bone and joint wear and tear. He observed that the soft tissue would leave no residual disability. Dr Udayan Sheth who examined the Respondent on 05.08.2022 noted that he had fully recovered with no deformity or permanent incapacity.
3. Before the Subordinate Court, the Respondent contended that Kshs 1,500,000.00 would be sufficient as general damages. He relied on *Robert Jeriot v Geoffrey Nyakundi Aberu* [2021]eKLR where the claimant sustained a head injury accompanied with loss of consciousness for one hour, fracture of the right pelvic bone, fracture of the right acetabular bone, fracture of the right radius and the left radius, a



- deep extensive cut wound on the anterior neck and contusion on both shoulders. Permanent disability was assessed at 8%. The court affirmed an award of Kshs 1,500,000.00 as general damages. He also called in aid *Mwaura Muiruri v Suera Flowers Limited and Another* [2014]eKLR where the court awarded Kshs 1,450,000.00 for the plaintiff who sustained multiple lacerations on the face, soft tissue injuries to the chest cage, comminuted fractures of the right humerus and lower thirds of the tibia and compound double fractures of the right leg upper and lower 1/3 of the tibia fibula.
4. The Appellant submitted that Kshs 200,000.00 was sufficient compensation. He cited several cases among them *Triad Coaches Ltd and Another v Mary Mutheu Kakemu* [2020]eKLR where the court awarded Kshs 250,000.00 to the claimant who suffered a fracture of the distal tibia fibula and soft tissue injuries on the wrist. In *Naom Momanyi v G4S Security Services Kenya Limited and Another* [2018]eKLR the court awarded Kshs 300,000.00 for a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm leading to permanent incapacity of 30%. In *Maselus Eric Atieno v Unitel Services Limited* [2017]eKLR, the claimant suffered fractures of the right leg tibia and fibula bones, bruises on the right elbow joint, tender swelling on the right knee, injury to the right thigh and right elbow joint and pain on the abdomen without any permanent disability. In *Gladys Lyaka Mwombe v Francis Namatsi and 2 Others* [2019]eKLR the court sustained an award of Kshs 300,000.00 for the claimant who has suffered a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face.
  5. As stated, the Appellant is aggrieved with the lower court's assessment of the general damages and award of Kshs 700,00.00. The general principle upon which an appellate court can interfere with an award of damages was stated in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 is that 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 inordinately high or low.
  6. In determining general damages, the trial court has to examine the extent and gravity of the injuries suffered by the plaintiff, relevant and comparative case law to ensure fairness and where necessary take into account the rate of inflation. In sum, as was stated by the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR, "comparable injuries should attract comparable awards."
  7. In this case, the nature and extent of the Respondent's injuries is not in doubt. He suffered a fracture of the upper 1/3 of the left tibia bone and related soft tissue injuries. From the subsequent medical report, the Respondent's injuries had fully healed without and disability. Looking at these injuries vis-à-vis the authorities sustained, I hold that the decisions cited by the Respondent bear little relation to the injuries sustained by him. The claimants in those cases suffered multiple fractures and soft tissue injuries coupled with some level of disability. Those cited by the Appellant were closer to the case at hand.
  8. The question then is whether Kshs 700,000.00 was excessive in the circumstances. The cases cited by the Appellant were decided between 2017 and 2020 thus even taking into account the element of inflation, I would think the award is on the higher side. I therefore hold that the award of Kshs 700,000.00 is excessive in the circumstances. I reduce the amount to Kshs 400,000.00.
  9. I allow the appeal to the extent that I set aside the award of Kshs 700,000.00 awarded as general damages and substitute it with an award of Kshs 400,000.00 subject to the agreed liability. The Appellant is awarded costs of Kshs 20,000.00 as against the Respondent.

**SIGNED AT NAIROBI**



**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT MOMBASA THIS 13<sup>TH</sup> DAY OF MAY 2024.**

**OLGA SEWE**

**JUDGE**

