



REPUBLIC OF KENYA



**Kurgat & another v Onyiero (Civil Appeal E425 of 2021)
[2024] KEHC 7162 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E425 OF 2021**

REA OUGO, J

JUNE 4, 2024

BETWEEN

MESHACK KIPKEMBOI KURGAT 1ST APPELLANT

NICHOLAS KIPKOSGEI KITILIT 2ND APPELLANT

AND

ENOCK OCHIENG ONYIERO RESPONDENT

*(Being an appeal from the judgment of Hon. P. Muholi Principal
Magistrate delivered on 3/6/2021 in Milimani Civil Suit No. 9271 of 2019)*

JUDGMENT

1. The suit in the subordinate court arose after a road traffic accident which occurred on 2nd August 2019. The 1st appellant was the owner of motor vehicle registration number KBS 055E and the 2nd appellant was his authorised driver. The respondent was riding motorcycle registration number KMDY 995S along Jakaya Kikwete Road Junction and at Ralph Bunche, the 2nd appellant drove his vehicle recklessly causing it to collide with the motorcycle causing the respondent injuries. The respondent sought general and special damages, costs and interest. The appellants were found to be 100% responsible for the accident and judgment was entered in favour of the respondent as follows:
 - a. General damages Kshs 950,000/-
 - b. Special damages Kshs 3,550/-

Total Kshs 953,550/-



2. The appellants now challenge the decision of the trial magistrate and have filed a memorandum of appeal dated 15th July 2021 raising the following grounds:
 1. The Learned Magistrate erred in law and in fact in awarding excessive damages not commensurate with the injuries pleaded and without any legal and or evidential justification.
 2. The Learned Magistrate erred by awarding future medical expenses not pleaded and without legal basis.
 3. The Learned Magistrate erred in law and in fact by not considering the written facts, evidence, submissions made and case law filed by the appellant.
3. The appellants in their submissions fault the lower court for using the wrong principles to assess the quantum of damages which were excessive for a fracture right femur with 10% permanent incapacitation as Dr. G.K. Mwaura’s Medical Report on pages 10 and 11 of the Index of Documents on the Record of appeal. The lower court proceeded to award the respondent Kshs 950,000/- in general damages for pain and suffering. They submit that an award of general damages between Kshs 200,000 - Kshs 400,00 would be sufficient. In the case of Daniel Otieno Owino & Another v Elizabeth Atieno Owuor [2020] eKLR the court made an award of Kshs 400,000/- for a compound fracture of the tibia and fibula bones.
4. The respondent submits that the award of Kshs 950,000/- by the trial court cannot be described as an erroneous estimate of the severity of the injuries sustained by the respondent. They invited the court to consider the following authorities: Charles Niaumenge Wachama v Melek Ukongo [2011] eKLR; Michael Njoroge Maina v Peter Karanja Njoroge [2018] eKLR and Lucy Waruguru Gatundu v Francis Kinyanjui Njuku [2017] eKLR.

Analysis and Determination

5. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were outlined in the case of Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

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.
6. The injuries sustained by the respondent are not contested. According to paragraph 6 of the plaint, the respondent sustained a fracture of the right femur neck. Permanent degree of incapacity was assessed at 10%. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. In the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR where the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should



be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

7. The appellant in his submissions proposed an award ranging between Kshs 200,000/- to Kshs 400,000/-, however, he did not cite any current decision where such an award had been given for a fractured femur. In *John Mwangi v Rajab Mrabu* [2019] eKLR, the case cited by the appellant, the injuries in question were compound fractures of the tibia and fibula. The appellant at the subordinate court relied on the decisions made in 2004, 2011, and 2014 which were made over ten years ago. The respondent on the other hand submitted that the award by the trial magistrate was within the range awarded by courts for comparable injuries.
8. The court in *Kiautha v Ntarangwi* (Civil Appeal E050 of 2021) [2022] KEHC 10595 (KLR) (30 June 2022) (Judgment) awarded Kshs 800,000/- to a respondent who suffered soft tissue injuries and a fracture of the mid-shaft femur. The court in *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR while discussing the appropriate award for an appellant who sustained a fracture of the femur observed as follows:
 - “ 14. In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint)... In my view a fracture of the femur is a more serious injury than a fracture of the radius and the authorities in respect of a fracture to one cannot be used as the basis for awarding damages to the other...”
 15. ...it is my view and I find that an award of Kshs 600,000.00 is reasonable.”
9. In this case, however, it is not disputed that the disability was assessed at 10%. I have taken into consideration the current awards, the rate of inflation, and the injuries sustained by the respondent herein as well as the fact that disability was assessed at 10% and in the circumstances, I find that the award of Kshs 950,000/- was excessive.
10. Consequently, the appeal succeeds and I set aside the award of general damages of Kshs 950,000 and substitute the same with an award of Kshs 850,000 general damages. The appellant shall have the cost of the appeal.

DATED, SIGNED AND DELIVERED ONLINE AT BUNGOMA THIS 4TH DAY OF JUNE 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Miss Kisangani -For the Respondent

Wilkister/ Diana -C/A

