



**Matheka v Mackenzie Educational Centre Limited (Civil Appeal
180 of 2022) [2024] KEHC 7143 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 180 OF 2022**

**FR OLEL, J
JUNE 19, 2024**

BETWEEN

JOYCE MUTINDI MATHEKA APPELLANT

AND

MACKENZIE EDUCATIONAL CENTRE LIMITED RESPONDENT

*(Being An Appeal from the Judgement And Decree of the Hon Ole Keuwua, Chief
Magistrate Dated 28Th November 2022 In Kangundo CMCC NO E152 of 2022)*

JUDGMENT

A. Introduction

1. The Appellant was the Plaintiff in the primary suit, where she sued the respondent for Special damages of Kshs.45,330, general damages for pain suffering and loss of amenities, costs of future medical surgery of Kshs.150,000, costs of the suit and interest arising from a road traffic accident which occurred on 21.12.2021 at 14.30 hours along Kenol-Koma road at Masokani area Within Kangundo Sub county.
2. It was alleged that on the said date the Appellant was lawfully travelling in motor vehicle registration number KBN 298D Probox (herein after referred to as the 1st suit motor vehicle),when respondents Motor vehicle registration number KBL 658D,Toyota Land Cruiser(hereinafter referred to as the 2nd suit motor vehicle) which was being managed and controlled by the respondent, and/or his driver, agent or employee was driven in a negligent and/or reckless manner, that he caused it to lose control, leave its lane and violently collide into the 1st suit motor vehicle, as a result of which the Appellant suffered serious bodily injuries, to wit; fracture on the right femur and deep cut wound on the right eyebrow.



3. The Defendant did enter appearance but did not file any statement of defence, despite service. After hearing, judgement was entered against them for a total of Kshs.545,330/= plus costs and interest of the suit. The court award was made up as follows;
 - a. Special damages of Kshs.45,330,
 - b. General damages for pain suffering and loss of amenities Kshs.350,000/=
 - c. costs of future medical surgery of Kshs.150,000/=
 - d. costs of the suit and ;
 - e. interest

B. The Appeal

4. Dissatisfied by the said judgment/decree, the Appellant filed their memorandum of appeal on 8.12.2022 seeking to have the award of quantum of damages set aside and substituted with a higher award which is commensurate with the Appellant's injuries and raised the following grounds of Appeal;
 - a. The learned Magistrate erred in law and in fact by awarding the Appellant Kshs.350,000/= in general damages which award was inordinately low compared to the severity of the injuries sustained by the Appellant, the serious health complications cause by the injuries and the current court awards for similar injuries.
 - b. The learned Magistrate erred in law and in fact by not putting sufficient weight and not considering the Appellant's evidence, submissions, medical documents and authority in support thereof.
5. The respondent did not take participate in the trial before the Magistrate and in this Appeal. The Appeal was disposed of by way of written submissions.

C. The Appellants Submissions

6. The Appellant filed submissions on 29.06.2023, wherein it was submitted that the award of Kshs.350,000/= was not commensurate with the injuries that had been sustained and when compared to similar injuries the said award was low. An award of Kshs.2,000,000/= to 2,500,000/= would have been sufficient in the circumstances and reliance was placed on the case of *Ziporrah Nangila v Eldoret Express Limited and 2 others* HCCC NO 403 OF 2012 Nakuru & *John Mutunga Kamau v Kanini Haraka Enterprises Limited*.
7. The Appellant thus urged the court to reconsider the award and increase the same. He also prayed for the costs of this suit.

D. Analysis & Determination

8. I have considered the grounds of Appeal raised, the lower court record and the submissions on record and I note that the Appellant only takes issue with the award of general damages of Kenya Shillings Three Hundred and Fifty Thousand Shillings (Kshs.350,000) and prayers for the court to reconsider the same.



9. 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 analyse the evidence before it and arrive at its own independent conclusion. I am guided by the case of *Selle & Another v 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 Hammed saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270

10. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case of *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others* Civil Appeal Case No. 192 Of 1992 where the Court of Appeal stated that;

“Those principles were well stated by Law, J.A in *Bashir Ahmed Butt v. Uwais Ahmed Khan*, By M. Akmal Khan [1982-88]I KAR 1 at pg 5 as follows-

‘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 either inordinately high or low ...

11. The same court in the case of *Johnson Evan Gicheru v Andrew Morton & another* [2005] Eklr stated that: -

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.

12. Similarly in *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30 the same court held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.”

13. The Respondent, though served did not participate in the proceedings before the Trial Court and neither did they participate in the Appeal. The contention as pleaded, by the Appellant therefore remain uncontroverted. The Appellant according the plaint sustained the following injuries; fracture



on the right femur and deep cut wound on the right eyebrow. She was admitted at Kangundo Level 4 hospital according to the discharge summary on 21.12.2021 and discharged on 12.01.2022. A medical Report by Dr. Muoki dated 30.4.2022 was produced and it reiterated the injuries sustained and indicated that the Appellant has a permanent disability of 10 %. The injuries were thus proved based on the evidence presented.

14. I have considered the authorities cited by the Appellant in the Appeal and I note that only one was used in the Trial court submissions. The injuries sustained in the case of *Ziporrah Nangila v Eldoret Express Limited and 2 others* HCCC NO 403 OF 2012 Nakuru were too severe and are not similar to the injuries sustained herein. In the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR the respondent sustained the following injuries; fracture of the left femur and 5 % incapacity. He was hospitalized for 3 months and was awarded Kshs.800,000/= in 2022.
15. In *David Kimathi Kaburu v Dionisius Mburugu Itirai* (2017) eKLR the plaintiff suffered a dislocated hip, and fragmented fractures to the right femur and was awarded Ksh.630,000/= in 2017. In *Said Abdullahi & another v Alice Wanjira* (2016) eKLR the High Court set aside the lower court's award of Ksh.600,000/= and substituted it with an award of Ksh.300,000/= for fracture of the right humerus bone with 10% permanent incapacity.
16. In *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR, Odunga J. as he then was found the award of ksh.350,000/= not commensurate with the injuries sustained and substituted the award with one of Ksh.600,000/= where the Appellant sustained blunt injury to the right shoulder and fracture of the right femur. In the opinion of the doctor, the Appellant would suffer from degenerative osteoarthritis at a later stage and would need further surgery was necessary to remove the nail.
17. The court in *Lim Poh Choo v Health Authority* (1978)1 ALL ER 332 the court quoted the dicta by Lord Morris *Borth-y-Gest in West (H) v Sheperd* (1964) AC 326, at page 345 as where it was stated as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”

E. Disposition

18. Guided by the above authorities, I do find that the award given by the Trial Court on general damages was low as to constitute an entirely erroneous estimate of the damage to which the appellant was entitled to and I do therefore substitute the award of Kshs.350,000/= with that of Kshs.500,000/=.
19. The judgment/decreed of Kangundo CMCC No E152 of 2022 will be amended on the aspect General damages to that extent but all the other awards will remain as awarded therein.
20. The Respondent never participated in this Appeal, and for that reason, each party shall bear their own costs.
21. It is so ordered.

JUDGMENT WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 19TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL



JUDGE

Delivered on the virtual platform, Team this 19th day of June, 2024.

In the presence of: -

Mr Mutinda for Appellant

No appearance for Respondent

Sam Court Assistant

