



**Mutembei v Mutembei & another (Civil Appeal E002 of 2021)  
[2024] KEHC 6770 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6770 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL E002 OF 2021**

**JR KARANJA, J**

**JUNE 6, 2024**

**BETWEEN**

**DERICK MUTEMBEI ..... APPELLANT**

**AND**

**SALOME MUTEMBEI ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD KENNEDY OCHIENG AHENDA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Hon. D.  
A. Ocharo, Principal Magistrate delivered on 7th April 2021)*

**JUDGMENT**

1. This appeal is against the award of general damages made by the Principal Magistrate on 7<sup>th</sup> April 2021 in PMCC NO. 228 of 2018, in which the Plaintiff/ Appellant sued both Defendants/ Respondents, Solome Mutembei and Richard Kennedy Ochieng Ahenda for damages arising from a road traffic accident which occurred on the 15<sup>th</sup> September 2018 along the Chavakali/ Kapsabet road involving the Defendant's Motor Vehicle Registration No. KBK XXXX Toyota Matatu in which the Appellant was travelling as a lawful passenger.
2. It was pleaded that on the material date the said motor vehicle was negligently driven to the extent of losing control and rolling down a slope several times. In the process, the Plaintiff/Appellant suffered serious bodily injuries as well as loss and damages. He therefore prayed for general and special damages together with costs of the suit against the Defendants/ Respondents.
3. The Respondents statement of defence was a denial of the allegations made against themselves by the Appellant and a contention that if the accident occurred, that it was caused by the Appellants reckless, negligence and/or careless acts or omissions.

The Respondents therefore prayed for the dismissal of the suit with costs.



4. At the trial, the Plaintiff (PW1) testified and called three witnesses including Dr. Paul Rono (PW2), Dr. Joseph Sokobe (PW3) and a Police Officer, CPL Miriam Martim (PW4).

The defendants did not lead any evidence in support of their pleadings.

In its conclusions, the trial court found both Defendants jointly and severally fully responsible for the accident, hence liable to compensate the Plaintiff for loss and damage resulting from the accident.

5. The trial court therefore awarded the Plaintiff the total amount of Kshs. 356,800/- made up of Kshs. 350,000/- general damages for pain and suffering and Kshs. 6,800/- being special damages. The Plaintiff was also entitled to the costs of the suit and interest. Being aggrieved by the award herein above, the Appellant proffered the five (5) ground of appeal set out in the memorandum of appeal dated 20<sup>th</sup> April 2021 and prays for the appeal to be allowed with the setting aside of the trial courts judgment on the quantum of damages.
6. The hearing of the appeal was by written submissions which were filed on behalf of the Appellant by Oduor, Munyua and Gerald Advocates and on behalf of the Respondents by Kimondo Gachoka and Company Advocates.

The appeal and the supporting grounds was duly considered by this court in the light of the rival submissions.

7. Being mindful that the trial court had the advantage of seeing and hearing the witnesses, the evidence was reconsidered by this court with a view to arriving at its own conclusions with a bias on the quantum of damages which is the gravamen of the appeal.

In that regard, what emerged as the basic issue for determination was whether the appellant offered sufficient grounds in proving that the trial court applied wrong principles in making the impugned award or that the award was inordinately low as to represent an erroneous estimate of the damages or that the award was against the weight of the evidence or was plainly wrong.

8. The leading authority on such issue is the decision of the Court of Appeal in the case of *Kemfro Africa Limited t/a Meru Express Services and Another v. A.M. Lubia and Another* (9182 – 88) KAR 727, where it was held: -

“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 that the judge in assessing the damages took into account on 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.”

9. It was also held in the same case that: -

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an erroneous estimate.”



10. Basically, general damages for pain, suffering and loss of amenities are dependant on the injuries suffered by the victim of an accident. Such damages must however, be within consistent limit and should represent a fair and reasonable compensation.

In this case, the medical evidence by Dr. Sokobe (PW3) as detailed in the medical report dated 10<sup>th</sup> April 2019 (P. Exhibit 8(b) showed that the Plaintiff/ Appellant suffered soft and bony tissue injuries for which he required expensive medical procedures and suffered 20% permanent disability due to breathing difficulty and predisposition to frequent lung infections.

11. In an earlier report dated 19<sup>th</sup> April 2018, the same good doctor indicated that the Plaintiff/ Appellant had recovered from his injuries without permanent disability of any nature. However, the latest of his reports ought to have carried the day.

A third medical report by Dr. Jenipher Kahuthu dated 7<sup>th</sup> November 2019 was produced by consent of the parties at the behest of the Defendants/ Respondents. Other than indicating that the fat embolism to the lungs was a non-confirmed provisional diagnosis, the report did not show any remarkable departure from the findings made by Dr. Sokobe (DW3).

12. In his final submissions before the trial court, the Appellant proposed an award of Kshs. 2 million in terms of general damages for pain and suffering and a further award of Kshs. 500,000/- for future medical expenses.

The Defendant/ Respondents proposed an award of Kshs. 200,000/- for general damages and an award of Kshs. 40,000/- for future medical expenses.

Both parties cited necessary authorities in support of their respective proposals.

13. The court, having considered the injuries suffered by the Plaintiff/Appellant and the resultant effect to his future wellness and welfare would hold the opinion that the trial court did indeed apply wrong principles and misapprehended the evidence and the Appellant's submissions when it made the award of Kshs. 350,000/- as general damages for pain, suffering and loss of amenities. In so doing, the trial court ended up making an award which was inordinately low under the head.

14. Consequently, this appeal is well merited and is hereby allowed to the extent that the award of Kshs. 350,000/- made by the trial court is now set aside and substituted for an award of Kshs. 1.5 million being general damages for pain, suffering and loss of amenities.

The special damages of Kshs. 6,800/- were unquestioned and remain intact. The Appellant will also be entitled to Kshs. 100,000/- which would be reasonable and adequate compensation for future medical expenses.

15. In sum, judgment be and is hereby entered for the Appellant against the Respondent for the total sum of Kshs. 1.6 million general damages together with costs at the trial court and in this appeal.

Ordered accordingly.

**DELIVERED AND DATED THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

**J. R. KARANJAH,  
JUDGE**

