



**PMA (A minor Suing Through His Next Friend and Mother ENM) v Swalleh & another
(Civil Appeal E796 of 2021) [2024] KEHC 7159 (KLR) (Civ) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7159 (KLR)

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

CIVIL APPEAL E796 OF 2021

REA OUGO, J

JUNE 4, 2024

BETWEEN

**PMA (A MINOR SUING THROUGH HIS NEXT FRIEND AND MOTHER
ENM) APPELLANT**

AND

SHAMIM ABDALLA SWALLEH 1ST RESPONDENT

AHMED NASSA RAJAB 2ND RESPONDENT

*(An appeal from the decision and decree of the Chief Magistrate's Court
Nairobi Milimani Commercial Courts CMCC No. E7034 of 2020
delivered by Honourable Edgar Kagoni (PM) on 11th November 2021)*

JUDGMENT

1. The 1st and 2nd respondents were the registered and beneficial owners of KCT 783X respectively. On 13th September 2020, the appellant minor was cycling along Kenyatta Avenue in Nairobi when the 2nd respondent's driver negligently drove the vehicle that it knocked down the appellant. As a consequence, the appellant sustained a fracture of the right arm and injuries to the abdomen. Liability was entered in the ratio of 80:20 in favour of the appellant and judgment was entered as follows:
 - a. General damages Kshs 250,000/- less 20%
 - b. Special damages Kshs 3,550/-Net award Kshs 203,550
2. The trial magistrate also granted interest at court rates from the date of the judgment. The appellant dissatisfied with the judgment of the lower court filed this instant appeal on the following grounds:



1. That the learned Magistrate misdirected himself on the evidence and the applicable law.
 2. The learned Magistrate erred in not considering the submissions made by the plaintiff's counsel on quantum.
 3. The learned Magistrate failed to consider the severity of the plaintiff's injuries and the incapacity suffered as set out in the medical reports produced in court.
 4. The learned Magistrate erred in awarding general damages which were manifestly low and which were not commensurate with the severe injuries sustained by the plaintiff minor.
 5. The learned Magistrate erred in not taking into account the cited authorities in the submissions filed by the plaintiff.
 6. The learned Magistrate erred in law and in fact in basing his findings on irrelevant issues not supported by evidence or the applicable law as clearly captured in his judgment.
 7. The learned Magistrate's decision is against the weight of evidence.
 8. The learned Magistrate erred in law and fact in erroneously awarding an inordinately low award in general damages which was not a fair estimate of the compensation for serious injuries sustained by the plaintiff.
 9. The learned Magistrate erred in law and in fact in finding that the claimant was entitled to general damages of Kshs 250,000/- which was inordinately low in view of the grievous injuries suffered by the plaintiff minor that it presented a miscarriage of justice.
 10. The learned Magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering.
 11. The learned Magistrate failed to consider the severity of the plaintiff minor's injuries and the permanent incapacity suffered as set out in the medical reports produced in court.
3. The appellant prays that the appeal be allowed and the court enhances the general damages awarded by the lower court.
 4. The appellant in her submissions contends that the grounds of appeal can be condensed to one principal ground: that the sum of Kshs 250,000 less 20% as awarded was manifestly low considering the injuries sustained. The medical report by Dr. Kayo had an error as it was referring to a fracture of the lower limb. The said report was therefore unhelpful and reliance would be placed on the 2nd medical report, the P3, and the medical treatment notes from Kenyatta National Hospital which all pointed out to the appellant sustaining a fracture of the right radius and ulna. They submit that the award of the trial court should be enhanced to an award of Kshs 800,000/- and relied on the case of *Pestony Ltd & another v Samuel I. Kagoko* [2022] eKLR and *Joseph Njuguna Gachie v Jacinta Kavuu Kyengo* [2019] eKLR.
 5. The respondent submits that the award of damages was rightly entered by the trial court having analysed the injuries sustained by the plaintiff vis-à-vis the previous findings made on similar injuries. It was submitted that the appellant suffered the following injuries: bruises on the scrotum and a fracture of the right forearm. The trial court considered the finding of Dr. Madhiwalla contained in his medical report and medical documents from Kenyatta National Hospital which confirmed that the nature of the injuries was a fracture of the forearm and that no physical incapacity was assessed.



6. The respondent further submitted that the appellant did not produce any independent evidence during the trial including a medical report to justify an award of future medical expenses neither was the same pleaded in the pleadings to warrant the court determine it. See [Caltex Oil \(Kenya\) Ltd v Rono Limited](#) [2016] eKLR. I agree with this submission. Parties are bound by their pleadings.

Analysis And Determination

7. 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."

8. The injuries sustained by the respondent were contested. The appellant in his submissions before the trial court submitted that he sustained soft tissue injuries and a fracture of the mid tibia/fibula. This was contrary to his pleadings where it was averred that he fractured the right arm. According to the treatment notes from Kenyatta National Hospital, an X-ray was done on the radius and ulna. The P3 form shows that the appellant sustained a fracture of the forearm. According to the medical report of Dr. Ashwin Madhiwala, the appellant suffered a fracture of the right mid ulna and radius.
9. The medical report of Dr. Roger Hannington Kayo introduced the fracture of the right mid-tibia/fibula. The appellant's treatment notes and his plaint do not support the allegation that he sustained a fracture of the right mid-tibia/fibula. In the circumstances, the trial magistrate was correct in holding that the medical report by Dr. Hannington Kayo was exaggerated.
10. The appellant in his submissions has urged the court that the appropriate award in this case would be Kshs 800,000/-. They further submit that the medical report by Dr. Kayo had errors and that the appellant sustained a fracture of the ulna and radius. He cited the decision in [Pestony Limited & another v Samuel Itonye Kagoko](#) [2022] eKLR where the respondent therein, sustained a fracture of the left femur (mid-shaft) and was awarded Kshs 800,000/-. Interestingly, at the subordinate court, the appellant relied on the case of [Frankline Chilibasi Spii v Kirangi Liston](#) [2017] eKLR where the court awarded Kshs 1,800,000/- to a plaintiff who had sustained a fracture of the right distal tibia and fibula. In this case, the appellant did not sustain a fracture of the tibia/fibula.
11. The respondent at the lower court relied on the decision of [David Momanyi Matonda v Baharini Consultants Ltd](#) [2019] eKLR where the plaintiff therein sustained multiple fractures of ribs and fracture of the forearm and the court awarded Kshs 170,000/-. The respondent now submits that the award of general damages was rightly entered.
12. I have carefully read the judgment of the subordinate court and the trial magistrate considered the submissions by the parties, however, in arriving at its decision it was guided by the case of [Christine Agnes Omanyoo v Matilda Akumu Khabhuli](#) [2014] eKLR where the plaintiff therein was awarded Kshs 170,000/- for a fracture of the radius and ulna. However, the decision was dated 10.12.2014 and therefore the magistrate did not consider current comparable awards.



13. 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.”

14. In *Njenga & another v Kinyanjui* (Civil Appeal E117 of 2021) [2024] KEHC 3810 (KLR) (12 April 2024) (Judgment) the respondent therein sustained a fractured right ulna and radius bone and he was awarded Kshs 400,000/-.
15. Consequently, the appeal succeeds and I set aside the award of general damages of Kshs 250,000 and substitute the same with an award of Kshs 400,000 general damages which is subject to the percentage of liability as agreed by the parties herein. The appellant shall have the cost of the appeal.

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

R.E. OUGO

JUDGE

In the presence of:

Appellant – Absent

Miss Olunga -For the Respondent

Wilkister/Daina -C/A

