



**Karia v Muriithi & 2 others (Civil Appeal E827 of 2022)  
[2024] KEHC 9946 (KLR) (Civ) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9946 (KLR)

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

**CIVIL**

**CIVIL APPEAL E827 OF 2022**

**BM MUSYOKI, J**

**JULY 24, 2024**

**BETWEEN**

**ESTHER NGIMA KARIA ..... APPELLANT**

**AND**

**ERIC MURIITHI ..... 1<sup>ST</sup> RESPONDENT**

**JUSTUS PETER NJERU ..... 2<sup>ND</sup> RESPONDENT**

**PROGRESSIVE CREDIT LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from judgement and decree of Honourable E.M. Kagoni PM dated 21-09-2022  
in Milimani Chief Magistrate's Courts (Commercial Courts) civil case number 2006 of 2019)*

**JUDGMENT**

1. The appellant was involved in an accident with motor vehicle registration number KAS 286C on 27-12-2017 where she sustained injuries. Following the accident, she sued the respondents claiming that the 1<sup>st</sup> defendant was the driver of the motor vehicle whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were the registered owners. She accused the 1<sup>st</sup> respondent for causing the accident by the negligent way he drove the motor vehicle. She joined the 2<sup>nd</sup> and 3<sup>rd</sup> respondents pleading vicarious liability. She pleaded the following as injuries sustained in the accident;
  - i. Swelling of the right lower limb.
  - ii. Intramedullary nail in situ.
  - iii. Permanent scar.
  - iv. Inability to don closed shoes.



2. After a full hearing with participation of the 3<sup>rd</sup> respondent, the court found the respondents 100% liable and awarded the appellant Kshs 80,000.00 for general damages for pain and suffering and loss of amenities. In assessing the damages, the trial court considered only the first injury which was the swelling of the lower limb. It held and rightly so in my opinion, that the other itemized injuries were not actually injuries but results, effect or treatment for the injuries.
3. The appellant has filed this appeal and pleaded the following grounds;
  1. The learned magistrate erred in law and fact by failing to consider the applicable principles of law in assessment of damages in respect to personal injury claims thus occasioning miscarriage of justice.
  2. The learned magistrate erred in law by making an award on general damages that was manifestly low.
  3. The learned magistrate erred in law and facts in holding that the appellant's injuries were minor injuries.
  4. The learned magistrate erred in law and facts in arriving at the conclusion that the appellant did not plead the injuries suffered.
4. I have read the pleadings, the evidence produced in the lower court and the submissions of the parties. It is clear to me that the appeal is on the failure by the magistrate to take into consideration that the appellant sustained a fracture of the tibia/fibula because it was not itemised in the particulars of injuries in the plaint. The following excerpt from the trial court's judgement is the core of this appeal;

'According to paragraph 6 of the plaint before the court for consideration, the plaintiff sustained the following injuries;

  - i. Swelling of the right lower limb.
  - ii. Intramedullary nail in situ.
  - iii. Permanent scar.
  - iv. Inability to don closed shoes.
5. However, according to paragraph 13 of the plaintiff's submissions, she placed reliance on exhibits 3, 4 and 6 as evidence of the injuries sustained by her and which injuries she highlighted as
  - a. compound of fracture of the tibia/fibula
  - b. blunt head injury
6. However, these are not the injuries pleaded. It is settled law that parties are bound by their pleadings. In view of this, the court will only consider what is in the plaint before the court.'
7. In a nutshell, the court expressly declined to take into consideration injuries not pleaded in the plaint although the same had been proved as per exhibits 3, 4 and 6. It is important to note at this juncture that these exhibits were produced without objections by the 3<sup>rd</sup> respondent. The main issue for consideration in this appeal is whether the court can assess damages based on injuries which are not pleaded even though they have been proved.
8. The appellant has referred me to the following authorities;



- a. National Land Commission vs Munubi & 4 Others (2022) KECA 391 (KLR) where the Court of Appeal held that;

‘It is axiomatic that parties are bound by their pleadings. However, there are exceptions as was held in the case of Odd vs Mubea (1970) EA 476 where the Court held that a court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed.
  - b. Riga Ali & Another v Commodity House Limited & 3 Others (2021) eKLR where the court dealt with the issue of dispensation of substantive justice in determining cases. This authority seems to suggest that the failure to plead the fracture of the tibia/fibula was a mistake and human error.
9. The 3<sup>rd</sup> respondent has not referred me to any authority on the issue at hand. The authorities it cited touched on circumstances under which an appellate court could interfere with an award of damages by the trial court and proof or lack of it of injuries.
  10. I take guidance from the authority of National Land Commission cited by the appellant. It is not disputed that the injuries of the tibia/fibula were proved. It is also clear to me that the same was fully canvassed at the hearing. The appellant testified through his adopted statement that she sustained a broken leg. There were three medical reports produced by the appellant which attest to the fact that the appellant sustained fracture of the tibia/fibula. The record shows that the proceedings of 30-02-2022 were conducted in presence of Mr. Kioko holding brief for Mr. Mutua for the plaintiff and Mrs. Munene for the 3<sup>rd</sup> defendant. The production of the documents was not objected to. Mrs. Munene cross examined the appellant who stated that she reported the matter after she recovered in April 2018. Among the documents produced by the appellant is a discharge summary from Nairobi Women’s Hospital which shows that the appellant was admitted to the hospital between 27-12-2017 and 8-01-2018. The discharge summary shows that the injuries sustained by the appellant included fracture of the right tibia/fibula.
  11. When 3<sup>rd</sup> respondent’s witness took the witness stand, he did not make any references to the injuries suffered by the appellant. He concentrated on transferring liability to the 1<sup>st</sup> and 2<sup>nd</sup> respondent. In the circumstances I find, hold and take position that the 3<sup>rd</sup> respondent had been put on notice on the nature of injuries the appellant was litigating over. Further, the 3<sup>rd</sup> respondent’s submissions in the lower court framed only two issues which were on liability and ownership of the motor vehicle. I also note that the 3<sup>rd</sup> respondent had drawn and filed its version of issues dated 27<sup>th</sup> January 2020 which did not include the nature of injuries as an issue. The above coupled with the fact that the 3<sup>rd</sup> respondent chose not to challenge medical documents which indicated the injuries, it lost the right to challenge the plea for damages based on the said documents. I therefore hold that the magistrate should have considered the fracture of the tibial/fibula in assessment of damages.
  12. I am also persuaded by reasoning of the Judge in Blue Horizon Trade Limited v Kenneth Njoroge (2020) eKLR where the lower court had considered fractures of the in awarding general damages. The appellant appealed for the same reason that the fractures had not been pleaded. The Honourable Judge stated that;

‘It is my considered view that failure to plead was an error on the part of the Respondent’s Counsel. Ordinarily in running down claims such as this one, all the claimant does is to deposit the relevant documents with his/her advocate and wait for instructions on the way



forward. The claimant has legitimate expectation that such an advocate, being an expert in legal matters, will represent and pursue the claim as expected.....

It is unfortunate that counsel did not even realise the omission on time to amend the pleadings. It is trite that parties are bound by their pleadings but I am of the view that mistake of counsel should not be visited on the respondent and justice will be served if all legitimate injuries are considered.’

13. It follows that had the magistrate put into consideration the said injuries, he would have awarded much more than Kshs 80,000.00. I have looked at the authorities cited to me in respect of the issue of quantum. The appellant has relied on *Daneva Heavy Trucks & Another vs Christine Otieno (2022) eKLR* in which the respondent was award a sum of Kshs 800,000/= for a fracture of tibia/fibula and *Loise Mwangi Kahari vs Martin Muithya & Another (2020) eKLR* where the court awarded a sum of Kshs 500,000.00 for a fracture of the tibia/fibula.
14. As I have stated above, all the medical documents produced in court were in agreement that the appellant sustained blunt injury to the head and a compound fracture of the distal third tibia/fibula. She was admitted for a period of 12 days and discharged on crutches. Dr. Mwaura was of the opinion that she stood a risk of developing post traumatic osteoarthritis. The bones had united well although she had residual pain. In my opinion, there is no evidence of further complications. I think that the authority of *Ndwiga & Another v Mukimba (2022) KEHC 11793 (KLR)* where the respondent who had sustained tenderness and swelling of the left leg and fracture of tibia and fibula left leg was awarded a sum of Kshs 500,000.00 by Honourable Justice Aburili on 13<sup>th</sup> July 2022 is more comparable to the appellant’s case than the ones she has quoted and, in my assessment, and taking into consideration the general trend of awards for similar injuries, an award of a sum of Kshs 500,000/= for pain and suffering and loss of amenities is fair and sufficient.
15. In conclusion, I set aside the lower court’s judgment on general damages for pain and suffering and instead thereof award the appellant a sum of Kshs 500,000.00 against the respondents. The award shall attract interest from the date of judgment of the trial court until payment in full. I make no orders as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

