



**Mburugu v Kiambati (Civil Appeal E030 of 2023)
[2024] KEHC 9258 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E030 OF 2023**

LW GITARI, J

JULY 25, 2024

BETWEEN

ERIC MUTWIRI MBURUGU APPELLANT

AND

SAMSON GICHUNGE KIAMBATI RESPONDENT

JUDGMENT

1. The respondent filed a suit *vide* a plaint dated 19th November, 2021 against the appellant seeking general damages for pain, suffering and loss of amenities, loss of earnings from the date of the accident to the date of trial and future earnings or diminished earning capacity, special damages of kshs 113,965, cost of the suit, interest at court rate on (a) (b) and (c) above at court rates and any other better relief the court deems fit to grant.
2. The respondent pleaded that at all material times relevant to the suit the Appellant was the registered beneficial, insured and driver of motor vehicle registration No. KBY xxxG Isuzu Lorry. That on or about 5th April 2020 at around 18.30 hours the respondent was a lawful pedestrian along the Nkubu-Meru road when reaching Gatauga area motor vehicle registration No. KBY xxxG Isuzu lorry being operated by the Appellant or the Appellant's authorized driver was so carelessly, recklessly and/or negligently driven that it veered off the road to where the respondent was walking thus occasioning him serious injuries.
3. The respondent particulars of negligence as driving a vehicle with unclosed doors, driving on the wrong lane, driving too fast in the circumstances, veering of the road onto the path of the respondent, driving in a zig zag manner, failing to heed the presence of other road users and in particular the respondent, causing the accident and driving, managing and/or controlling motor vehicle registration No. KBY xxxG Isuzu Lorry without due care and/or attention to avoid causing the accident.



4. The respondent pleaded that in the alternative and without prejudice to the foregoing the Appellant and his authorized driver was driving a defective motor vehicle incapable of proper control and where applicable the respondent relied on the doctrine of *Res Ipsa Loquitor*.
5. The respondent avers that he suffered serious bodily injuries and special damages. The particulars of injuries are fracture of the left Acetabulum, pelvic fracture APC II and Pubic Ramus Fracture. The respondent further particularized special damages of a police abstract kshs 200, Motor vehicle copy of records kshs 550, Medical report kshs 25,000, statutory/demand notice 15,000 and treatment expenses of kshs 72,215 hence a total of kshs 113,965.
6. The respondent pleaded that due to the injuries in which he became permanently disabled as he no longer is able to work due to the said injuries as his employer was forced to hire another driver and the respondent is now without income and claims lost earnings from the date of the accident to the date of the trial and future earnings or diminished earning capacity.
7. The Appellant filed her statement of defence dated 22nd February 2022 wherein he denied the respondent's claim. The Appellant pleaded that without prejudice to the foregoing and in the alternative the Appellant avers that if there was an accident then the same was wholly caused or substantially contributed to by the negligence of the respondent.
8. The Appellant enumerated particulars of negligence of the respondent as failing to walk on the path designated for pedestrians and choosing to encroach on the part of the road that is meant for motor vehicles, failing to maintain a proper look out for motorist using the road, walking carelessly on the road without due care and attention and failing to observe the traffic rules while walking.
9. The Appellant relied on the doctrine of *volenti non fit injuria*.
10. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the respondent against the Appellant as follows:
 - a. Liability :100%
 - b. General damages and loss of amenities kshs. 1,800,000
 - c. Special damages kshs.46,610
Total award kshs 1,846,610
 - d. Cost and interest
11. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;
 1. The learned Magistrate, while ignoring the evidence and facts as presented during trial and the Defendant's Submission misdirected herself against the weight of evidence and awarded the Respondent General Damages for pain, Suffering and Loss of Amenities of kshs 1,846,610/= which is exorbitant and manifestly high in the circumstances.
 2. The Learned Trial Magistrate failed to appreciate the nature of the injuries suffered by the plaintiff mainly a fracture of the left acetabulum, pelvic fracture (APC 2) and Pubic Ramus Fracture and misdirected herself to award the exorbitant sum of kshs 1,846,610/= as General Damages for pain Suffering and Loss of Amenities.
12. The appellant prays that the appeal be allowed and the decision and Judgement of the Learned Senior Principal Magistrate on quantum in Maua CMCC No. E037 of 2021 be set aside, the court be pleased to re evaluate the evidence and make its own finding and judgement with regard to quantum on the



award for General damages for Pain, suffering and Loss of Amenities and further the Appellant be awarded costs of the Appeal herein and costs of the suit.

13. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 29th April, 2024 through the firm of Wambugu & Muriuki Advocates while the respondent did not file any submissions.

Appellant's Submissions

14. The Appellant submitted on brief facts of the case and identified one issue for submission that is whether the Subordinate Court failed to consider trite principles in awarding general damages comparable to the injuries sustained and as a result the award for kshs 1,846,610 was inordinately high.
15. The Appellant submitted that the respondent suffered fracture of the left acetabulum, pelvic fracture APC II and Public ramus fracture wherefore he sought general damages for pain, suffering, loss of amenities, loss of earnings, costs of the suit and interests thereon.
16. It is the Appellant submission that the respondent produced a Medical Report as exhibit 3 which indicated he had recovered and the only complication was the left lower limb shortening.
17. The Appellant submitted that the trial court awarded an exorbitant sum for general damages in the sum of kshs.1,846,610 while ignoring the Appellant's reliance in the case of *Joseph Njeru Luke & 3 others v Stellah Muki Kioko* (2020)eKLR and *Geofrey Maraka Kimchong v Frechiah Hugiru* (2020)eKLR.
18. The Appellant submitted further that he seeks for the court to find the cited authorities comparable persuasively and find an award of kshs 700,000 for general damages commensurate with the injuries suffered by the respondent.
19. The Appellant submitted that he seeks the court re-evaluates and re-assess the evidence and make its own conclusion as stipulated in section 78 of the *Civil procedure Act*.

Analysis & Determination

20. This being a first appeal, as rightly submitted by the Appellant, it is indeed the duty of the Court to review the evidence adduced before the lower court before drawing its own conclusion. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
21. The only issue for determination in this appeal is on quantum. It is an established principle that an appellate court should not interfere with the assessment of damages by a trial court unless it can be shown that such an assessment is contrary to the well-established guidelines. In the case of *Butt v Khan* (1981-88) KLR 349 the court held as follows:-

“The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.”



22. The trial court awarded kshs.1,846.610 general damages for pain and suffering. Part of the trial court judgment reads as follows;-
- “The doctor noted that he got a complication of the left lower limb shortening with marked weakness and walks with a limp. He is at a risk of developing avascular necrosis in which blood supply to the femoral head is sufficiently damaged leading to the bone subsequently dying and collapsing, resulting in hip pain with significant impact on quality of life. The degree of permanent disability was estimated to be 20%.
23. According to the medical report by Dr. Kimathi Kioga dated 12th May 2021, the respondent suffered the following injuries: -
- Fracture of the left Acetabulum
 - Pelvic Fracture APC II
 - Pubic Ramus Fracture
24. Having found that the trial court addressed the medical report, the only other question in respect of general damages is whether the award made was inordinately high as submitted by the appellant. While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varying awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions for purposes of certainty and uniformity.
25. In the case of *David Kiplangat v Richard Kipkoech* (Kericho HCCC No. 91/04) relied on by the appellants, the plaintiff albeit with comparable similar injuries with the respondent with a 30% permanent disability, was awarded kshs. 450,000 in 2006 i.e 15 years ago. Similarly, in a recent court decision as cited by the appellant, Majanja J. in *Joseph Njeru Luke & Others v Stella M. Kioko* [2020]eKLR awarded the respondent kshs. 750,000 general damages for pelvic fracture and soft tissues injuries. However, this is distinguishable from the present case as there was no assessment of disability.
26. In the case of *Milicent Atieno Ochuonyo v Katola Richard* [2015]eKLR, Onyancha J. awarded the Plaintiff kshs. 2,000,000 for pelvic injuries with fracture of right pubic ramus and diastasis of the symphysis pubis with a small abdominal wall haematoma and minimal haemoperitoneum. There were two medical reports confirming the injuries but with varying degrees of permanent disability of 20% and 40% respectively just like in the present case.
27. Considering the similar decisions cited herein, I do award the respondent kshs.2,500,000/-. I find that the trial court’s award appropriate. Consequently, the appeal is dismissed. Parties shall meet their own costs in this appeal.

DELIVERED DATED AND SIGNED AT MERU THIS 25TH DAY OF JULY, 2024

L.W. GITARI

JUDGE

