



REPUBLIC OF KENYA



**Mungai v Kironyo (Civil Appeal E598 of 2021)  
[2024] KEHC 9279 (KLR) (Civ) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9279 (KLR)

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

**CIVIL**

**CIVIL APPEAL E598 OF 2021**

**H NAMISI, J**

**JULY 15, 2024**

**BETWEEN**

**MOSES NJUGUNA MUNGAI ..... APPELLANT**

**AND**

**WAINAINA KIRONYO ..... RESPONDENT**

*(Being an Appeal from the judgement of Hon. D. M. Kivuti (Mr.) Principal Magistrate delivered on 3rd September 2021 in Nairobi CMCC No. E7652 of 2020)*

**JUDGMENT**

1. This appeal arises out of an accident that occurred on 14th February 2020 involving the Appellant, who was a pillion passenger riding on motorcycle registration number KMEX XXXW and the Respondent's motor vehicle registration number KBH XXXZ. The accident occurred along the Nderi-Thamanda Road, Nairobi. As a result of the collision, the Respondent sustained a fracture of the right femur, which was operated on and fixed with a metal implant.
2. By Plaint dated 23 October 2020, the Appellant instituted proceedings against the Respondent, seeking general damages for pain and suffering and loss of amenities, special damages of Kshs 136,250/=, costs of the suit and interest. The Plaint was amended on 3rd February 2021 to include a claim for future medical expenses of Kshs 100,000/=.
3. The Respondent filed his Statement of Defence 1st February 2021 and later amended on 9th February 2021.
4. On 22 June 2021, parties entered consent on liability in terms of 90:10 in favor of the Appellant. They further agreed to produce claim supporting documents without calling the makers. Directions were then given to file written submissions in respect of quantum of damages.



5. The trial court delivered its judgement, awarding Kshs 500,000 (less 10%) in general damages, special damages of Kshs 3,550/-, costs and interest from the date of the judgement.
6. The Appellant, being dissatisfied by the judgement of filed a Memorandum of Appeal dated 21 September 2021 on the following grounds:
  - i. That the learned Magistrate erred by making an award of Kshs 500,000/- for pain, suffering and loss of amenities, which was too low;
  - ii. That the learned Magistrate erred by declining to make an award for:
    - a. Special damages
    - b. Future medical costs
  - iii. That the trial court erred in its appreciation of the law and evidence and made erroneous findings
7. Directions were given to canvass the appeal by way of written submissions. The Appellant's submissions are dated 11th April 2024. The Respondent's submissions are dated 17 April 2024.
8. I have considered the Memorandum of Appeal, Record of Appeal as well as submissions by the parties. This appeal relates to the issue of the quantum of damages assessed by the trial court.

### **Analysis & Determination**

9. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that, "An appeal to this Court from a trial by the High 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. 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".
10. In an appeal on quantum, the court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were set out 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.



11. It was the Appellant’s case that he sustained injuries as a result of the accident. His right leg was surgically fixed with metal implants, which would cost Kshs 100,000/- to be removed. He paid a total of Kshs 132,700/- for the medical costs at Sunbeam Medical Centre.
12. In support of his case, the Appellant produced the Police Abstract, Copy of motor vehicle records and receipt, Medical Report and receipt, Receipt from St. Peter’s Orthopedical and Surgical Specialty centre as well as documents from Sunbeam Medical Centre.
13. The Discharge Summary from Sunbeam Medical Centre indicates that the Appellant was admitted on 17 February 2020 and discharged on 8 March 2020. The Medical Report dated 10th July 2020 prepared by Mr. W. Wokabi, Consultant Surgeon, indicates that at the time of the examination, the Appellant was walking with the aid of crutches. The X-rays reviewed showed completed plated fracture of the lower third of the right femur. The Doctor’s opinion, therefore, was that it would take the Appellant about 12 to 15 months for the leg to achieve maximum rehabilitation. Permanent disability upon full recovery was assessed at 8%. The doctor opined that the cost of removal of the metal implant would be Kshs 100,000/- at a medium cost hospital.
14. The Appellant submitted that the appropriate award for general damages is Kshs 1,500,000. He relied on several authorities including *David Mwangi Kiiru v Wilson Gathongu Muiruri*; *Jackline Kamunyi Kamau v Simon Kiiru Njoki* [2018] eKLR and *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR to demonstrate that where surgery is involved, the appropriate award is a seven-figure amount.
15. On their part, the Respondent submitted that an award of Kshs 500,000 for general damages is reasonable and fair. They relied on the cases of *Reamic Investment Ltd v Joaz Amenya Samuel* [2021] eKLR, *Joseph Karisa Baya v Cefis Giorgio & another* [2020] eKLR and *Mwavita Jonathan v Silvia Onunga* [2017] eKLR.
16. On the issue of whether the general damages awarded by the trial court were too low, I am guided by the principle in the assessment of damages 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, 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.”
17. I have looked at various cases for comparable awards. In the case of *Jacaranda Bodaboda Operators & another v Nyasero* [2023] KEHC 23806 (KLR), the Court was faced with facts very similar to the ones in this case. The plaintiff suffered fracture of the shaft of the right femur. He was operated on and the fracture fixed with metal implant. At the time of the medical examination, it was noted that the plaintiff was walking with aid of crutches and complained of difficulties in getting around and was not able to work. The doctor opined that the injuries would take 12 -15 months to heal and that at optimum rehabilitation, the doctor assessed permanent disability at 10%. The Court awarded Kshs 750,000/= in general damages.
18. In *Reamic Investment Ltd v Joaz Amenya Samuel* [2021] eKLR, the plaintiff suffered open left femur fracture, abrasion on the left knees, face, neck, right upper imp and left upper lip as well as a contusion on the anterior chest. The Doctor noted that there would be need to remove the implants in future. The Court substituted an award of Kshs 600,000 for general damages with an award of Kshs 350,000.



19. In *Mutwiti v Peter & 3 others* (Civil Appeal 41 of 2018) [2022] KEHC 10084 (KLR), the plaintiff sustained a segmental fracture of the right femur and deep scalp laceration. A metal plate was inserted on the right leg. The Court held that the award of Kshs 400,000/- by the trial court was clearly so inordinately low and substituted the same with an award of Kshs 600,000/- for general damages.
20. Based on the foregoing, I am persuaded that the suitable compensation for pain and suffering and loss of amenities in this instance is Kshs 700,000/-, bearing in mind the age of the authorities cited above.
21. The issue of future medical expenses was raised by the Appellant's doctor. This evidence was not controverted by the Respondent. I find that the need for future medical expenses was supported by the Report of Mr. Wokabi and proved accordingly. I am guided by the Court of Appeal case of *Tracom Ltd v Hassan Mohamed Adan* [2009] eKLR, where it was held as follows:
- “...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, this Court, stated:
- “And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded.” We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”
22. On the issue of special damages, the Appellant produced the following receipts:
- i. Paid Invoice from National Transport and Safety Authority dated 29 July 2020 for Kshs 550/-;
  - ii. Receipt dated 21 July 2020 from Mr. W. Wokabi, Consultant Surgeon for Kshs 3,000/- in respect of a Medical Report for the Appellant;
  - iii. Faint receipts from St Peters Orthopaedic and Surgical Speciality Centre for Kshs 3,100/=;
  - iv. receipts from Sunbeam Medical Centre dated 8th March 2020 and 24 June 2020 for Kshs 120,100/- and Kshs 9,500/-;
23. The total amount in the receipts produced is Kshs 136,500/=. I find that this claim has been sufficiently proved.
24. In view of the foregoing, the appeal succeeds. I, therefore, set aside the judgement of the trial court and substitute it with the following award:
- i. Kshs 700,000/= for general damages



- ii. Kshs 100,000/= for future medical expenses
- iii. Kshs 136,500/- for special damages
- iv. Costs of the suit
- v. Interest at court rates until payment in full

25. Each party shall bear its costs of this appeal.

**DATED AND DELIVERED AT NAIROBI THIS 15 DAY OF JULY 2024.**

**HELENE R. NAMISI**

**JUDGE**

Delivered on virtual platform in the presence of:

....Mr. Kaburu..... for the Appellant

.....Ms. Wainaina ..... for the Respondent

