



**Sereni Fries Limited & another v Kuria (Civil Appeal E1045 of 2022)
[2024] KEHC 9097 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E1045 OF 2022**

**AC BETT, J
JULY 19, 2024**

BETWEEN

SERENI FRIES LIMITED 1ST APPELLANT

FELIX OTIENO 2ND APPELLANT

AND

JOSEPH KURIA RESPONDENT

(Being an appeal from the Judgement and Decree of the Chief Magistrate Court at Milimani delivered on the 28th November 2022 by the Hon. S.A. Opande, P.M)

JUDGMENT

1. This is an appeal on quantum only. The respondent herein filed suit in the Chief Magistrate Court at Milimani seeking damages for injuries sustained from a road traffic accident which occurred on 19th December 2019 along Bondo Road near Jogoo Road Junction Nairobi, involving the 1st appellant's motor vehicle registration number KCU 519M. The parties agreed to apportion liability at the ratio of 85%:15% against the appellants. The parties produced by consent, the medical report by Dr. P.M. Wambugu.
2. Upon considering the doctor's medical report and the parties' submissions, the trial magistrate made an award of ksh.1,000,000/= to the respondent for pain and suffering.
3. Being dissatisfied with the decision of the trial magistrate, the appellants filed an appeal which is premised on the following grounds: -
 1. The learned trial magistrate erred in law and in fact when he made an award of ksh.1,000,000/= to the Respondent as general damages which award was inordinately high in the circumstances that it represented an entirely erroneous estimate *vis-a-vis* the Respondent's injury.



2. The learned trial magistrate grossly misdirected himself in ignoring the principles and tenets of law applicable and the relevant authorities cited in the Appellant's submissions thus arriving at an award that was excessive in the circumstances.
4. The respondent called Dr. Cyprian Okoth Okere as his second witness (PW2). According to him, the respondent sustained laceration on the occipital region and fragmental fracture of the left tibia on the lateral aspect. In his report dated 4th June 2021, he stated that from physical examination he found a lacerated scar on the occipital region of the scalp and the left upper leg and lower leg were normal. His opinion and prognosis were that the degree of injury could be classified as grievous harm and the degree of permanent incapacity 5%. On cross-examination, PW2 said that the finding of 5% incapacitation was his own personal assessment.
5. According to Dr. P.M. Wambugu's medical report dated 21st September 2021, the respondent suffered a fracture to the left tibia and occipital scalp laceration. The physical findings that were there was a healed alopecic occipital scalp wound scar and no neurological deficits. In respect to the left lower limb, the fracture was healed with a palpable site ridge over the mid-shin. The doctor further stated that the respondent had a normal gait and could walk unaided. There was no shortening of the limb and knee, and ankle joint movements were complete in range and pain free. The doctor's opinion and prognosis were that the respondent had made adequate recovery since the fracture to the left tibia had united and no further complications were envisaged. He referred to the injuries sustained as skeletal and soft tissue injuries. He further asserted that there was no total permanent incapacitation.
6. The respondent in his submissions to the lower court made a case for an award of ksh.3,000,000/= while the appellants proposed ksh.350,000/=. In his judgement, the trial magistrate stated that he had perused the authorities cited and went by the decision in Kimanti Muturi Donald Vs Kevin Ochieng Aseso Nairobi HCCA No. 68 OF 2020}} where the plaintiff was awarded ksh.1,200,000/= for a fracture of the tibia and multiple soft tissue injuries. He awarded the sum of ksh.1,000,000/= having taken into account the facts that the only other injury sustained by the respondent was a laceration on the back head.
7. Before I go into the issue of quantum, I wish to make a determination on the extent and nature of the injuries since such determination would impact on the damages.
8. As submitted by the respondent, this Honorable court is tasked with the responsibility to review the evidence presented before the trial court and reach an independent conclusion. Dr. Cyprian Okoth Okere testified on behalf of the Respondent and was subjected to cross-examination. He assessed the Respondent as having sustained permanent incapability of 5%. Dr. Okere's letterhead shows that he is a physician and specialist in lung health. He did not justify the basis of his findings of grievous harm and 5% permanent incapacity especially after conducting a personal examination and indicating that the left upper leg and lower leg is normal.
9. Dr. P.M. Wambugu on the other hand was not called to testify. He is a consultant surgeon. He classified the injuries as soft tissue injuries with no permanent incapacity. Dr. Wambugu's report is clearly inconsistent with the report by Dr. Okere. The respondent submits that since Dr. Wambugu was not called to court to testify and be subjected to cross-examination then his medical report cannot stand. I have perused the records. On 21st July 2022, the parties recorded a consent as follows:-

- “ 1. Judgement on liability be assessed at 85%; 15% in favor of plaintiff.
2. Medical report of Dr. Wambugu of 21/9/21 be produced.



3. Parties to file submissions on quantum.”
10. The respondent’s advocate confirmed the terms of the consent and the same was adopted as an order of the court. Although the respondent in his submissions has urged this honorable court to consider Dr. Okere’s medical appeal alone; I find that the respondent consented to the production of Dr. Wambugu’s medical report. It was therefore incumbent upon the respondent to have the said Dr. Wambugu summoned for cross-examination. Be that as it may, the court notes that both medical reports are at variance as to the degree of injury and prognosis.
11. While I agree with the respondent that the court should only consider Dr. Okere’s report as he testified in court and his evidence was subjected to cross-examination, the court is not blind to the fact that Dr. Okere is a physician who did not state on what basis he assessed the degree of injury as harm with 5% permanent incapacity even after testifying that the respondent had a soft tissue injury and that a fracture heals within six weeks. A surgeon would have been best placed to determine the nature and degree of injury.
12. In *Sentongo And Another Vs Uganda Railways Corp. Kampala* HCCS NO. 263 OF 1987, Byagumisha J, citing Sarkar on Evidence 12th Edition pp 506R held that:
- “Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion.”
13. In this case the doctor did not mention the basis upon which he concluded that the respondent, whose fracture he said healed within six weeks had suffered 5% incapacitation. There was no evidence of mal-union of the fracture nor osteomyelitis nor a prognosis of osteoarthritis in the future. I am therefore inclined to reject the assessment as unsupported.
14. The appellants submit that the award of ksh.1,000,000/= was excessive. They rely on the impugned medical report of Dr. Wambugu that the respondent suffered no permanent incapacity. They also rely on the case of *Juliet Kemunto Ondati Vs Gladys Mwende* [2021] eKLR, where an award of ksh.350,000/= was made to an appellant who had suffered segmental fracture of the right tibia and fibula, blunt trauma to the back and chest condition. The prognosis was that the appellant was likely to develop osteoarthritis of the right knee and ankle joint though at the time there was no permanent disability. The appellants further rely on *Daniel Otieno Owino And Another Vs Elizabeth Atieno Owuor* [2020] eKLR, where an award of ksh.600,000/= was reduced to ksh.400,000/= for injuries comprising compound fracture of tibia and fibula of right leg, deep cut wound with tissue damage to right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injuries on the left leg with evidence of mal-union of the fracture and of progressive chronic osteomyelitis of the fractured bone due to infections. The appellants also relied on *Mbitshi Muinde William Vs Rose Mutheu Mulatia* [2019] eKLR, *Simon Kimote Vs Agro Solutions Limited* [2021] eKLR and, *Atunga Vs Mogambi* Civil Appeal E009 OF 2021[2022] KEHC 9854(KLR) where ksh.550,000/= was given for more serious injuries involving fracture of tibia and fibula, dislocation of the right wrist, dislocation of right hip joint, bruises on the frontal part of the head, chest trauma and multiple cut wounds and bruises on the upper and lower limbs. On the basis of the aforesaid precedents, the appellants urge this court to set aside the award of ksh.1,000,000/= and substitute it with a fair and reasonable award.



15. The respondent has cited several authorities reiterating that although he had proposed ksh.3,000,000/= he was awarded ksh.1,000,000/=. He relied on the following cases:
- (a) *Mary Wanjah Gachombab Vs Josinta Adbiambo Ogana* [2021] eKLR. An award of ksh 2,000,000/= was made for multiple fractures to the humerus, right tibia and right fibula with deep cut wounds.
 - (b) *James Gathirwa Ngungi Vs Multiple Hauliers (ea) Limited And Another* [2015] eKLR where the plaintiff suffered multiple fractures to the hands with head and facial injuries and was awarded ksh.1,500,000/=.
 - (c) *Patrick Kinyanjui Njama Vs Evans Juma Mukweyi* [2017] eKLR where the plaintiff sustained multiple injuries with need for further surgery.
 - (d) *Margaret Wothaya Kirweya And Another Vs James Muchai Muchiri* [2020] eKLR. Here the plaintiff sustained multiple fractures and his leg was shortened by 3 centimetres. Degree of permanent incapacity was assessed at between 30% to 45%.
16. The respondent has also relied on *Kornelius Kweya Ebiche Vs C And P Shoe Industries Limited* [2008] eKLR where the plaintiff was awarded ksh.1,000,000/= for pain and suffering. The plaintiff therein suffered fractures of the left tibia and fibula, had the fractures fixed with metal implants and needed to undergo another operation for plating and bone-grafting and to clear osteomyelitis.
17. Also, in *Joseph Muse Mua Vs Julius Mbogo Mugi And Two Others* [2013] eKLR the court awarded ksh.1,300,000/= to a plaintiff who had suffered a fracture to the left tibia and fibula which necessitated external fixators. He had suffered permanent incapacity with foot deformity. He had to undergo surgery and could not lift his leg due to nerve injury and had to use a device to support his leg and use crutches.
18. I have read and carefully analyzed the aforesaid cases and I have established that the said cases are largely irrelevant to this appeal because in each of the said cases, the plaintiffs suffered multiple injuries comprising several fractures, deep cut wounds and contusions. None of the plaintiff's injuries in the cases cited by the respondent can be said to be comparable to the injuries sustained by the respondent in the present appeal.
19. In *Butt Vs Khan* [1981] KLR 349 at page 356, Law JA stated: -
- “...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
20. In *Loice Wanjiku Kagunda Vs Julius Gachau Mwangi* CA 142 Of 2003, the Court of Appeal held: -
- “We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of damages suffered. The question is not what the appellate court would



award but whether the lower court acted on the wrong principles.” (See *Mariga Vs Musila* [1984] KLR 257)

21. The same principles were set out in *Gitobu Imanyara And 2 Others Vs Attorney General* [2016] eKLR and *Gicheru Vs Morton And Another* [2005] 2 KLR 333.

22. In the instant case, it is evident that the respondent seeks to rely on authorities where the injuries were much more severe than those suffered by the respondent herein.

In *Simon Taveta Vs Mercy Mutitu Njeru* [2014] eKLR the Court of Appeal held:-

“The extent in which the compensation for the respondent must be evaluated is determined by the nature and extent of the injuries and comparable awards made in the past.”

23. In *Charles Oriwo Odeyo Vs Apollo Justus Andabwa And Another* [2017] eKLR the court stated that in assessing damages in a personal injury claim the court is guided by the following principles:

- “1. An award of damages is not meant to enrich the victim but to compensate such victims for the injuries sustained.
2. The award should be commensurate with the injuries sustained.
3. Previous awards for similar injuries sustained are a mere guide but each case must be treated of its own facts.
4. Previous awards are to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
5. The award should not be inordinately low or high.” (See *Boniface And Another Vs Michael Kariuki* [2007] eKLR)

24. I have earlier noted that the respondent cited cases where the injuries were much more serious than those sustained by the respondent herein. I am not persuaded that any of the said cases are suitable in this case. Comparatively, the appellants cited cases where the awards ranging from ksh.350,000/= to ksh.600,000/= were made for injuries more serious than those of the respondent. Taking into account the fact that no two cases are the same, I now turn to the authority that the trial court relied upon and which the respondent did not cite in his submissions in the lower court nor in the appeal. That is the case of *Kimathi Muturu Donald Vs Kevin Ochieng Aceso* [2021] eKLR. The appellant in the said appeal challenged an award of ksh.1,500,000/=. The respondent had suffered the following injuries: fracture of the upper right tibia which was operated and fixed with a metal implant and fracture of the floor of the socket of the hip (acetabulum). The fractures limited the respondent to the use of crutches, and he could not sit down for long. From the doctor’s report, the said respondent sustained major injuries with 20% permanent capacity. The respondent would require hip replacement and surgical removal of the implants and risked developing arthritis.

25. In relying on the foregoing authority, I find that the trial magistrate misdirected himself and ignored the principles of the law applicable in making awards for such injuries and therefore made an inordinately high award in view of the injuries sustained by the respondent. The award therefore calls for interference by this court. Considering the authorities cited by the appellants which I find to be appropriate guidance to this court, and taking into account the length of



time that has lapsed since the said awards were made, it is my considered opinion that the sum of ksh.500,000/= is adequate to compensate the respondent.

26. I therefore find that the appeal must succeed and make the following orders: -
- (a) I hereby set aside the award of ksh.1,000,000/= being general damages and substitute it with an award of ksh.500,000/=. When subjected to 15% contribution the same shall come to ksh.425,000/=.
 - (b) The special damages of ksh.9,500/= and costs of the lower shall remain with the Respondent.
 - (c) The Appellant shall have half costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 19TH DAY OF JULY 2024.

A. C. BETT

JUDGE

In the presence of:

Ms Njeri holding brief for Kingu for the appellants

Mr. Munyoki for the respondent

