



REPUBLIC OF KENYA



**Wafula v Khaemba (Civil Appeal 103 of 2023)  
[2024] KEHC 11715 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11715 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 103 OF 2023  
REA OUGO, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**HENRY BARASA WAFULA ..... APPELLANT**

**AND**

**JUMA KHAEMBA ..... RESPONDENT**

*(An appeal from the judgment and decree of Honourable A.A Odawo  
SPM in dated 22nd May 2023 in Bungoma CMCC No E14 of 2021)*

**JUDGMENT**

1. On the 5<sup>th</sup> December 20219, the respondent sustained injuries following an accident along Bungoma-Musikoma road when the appellant's vehicle KBS 068Q knocked him. The respondent is alleged to have suffered a fracture (comminuted/open) of the right distal femur and amputation of the right 2<sup>nd</sup> toe due to crush injury. The trial magistrate apportioned liability at 50:50. He awarded damages as follows:

General damages Kshs 1,000,000/-  
Special damages Kshs 31,724/-  
Future Medical Expenses Kshs 300,0000/-  
Less 50% Kshs 665,862/-  
Total Kshs 665,862/-

2. The appellant dissatisfied with the judgment of the subordinate court has filed this instant appeal:
  1. The quantum of general damages for pain and suffering and loss of amenities is inordinately high, erroneous, oppressive and punitive and amounts to miscarriage of justice.



2. The learned trial magistrate ignored the appellant's submissions, paid lip service and made no reference to all the precedent on general damages cited before him, thus coming to a wrong decision on the quantum.
  3. The learned magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages namely that like cases attract similar awards, and ignoring completely the appellant's defendant's submissions.
  4. The learned magistrate erred in law and in fact in making an award of Kshs 1,000,000/- for general damages without giving any reason for such an award and thus made an award that was arbitrary, capricious and inordinately high, erroneous and which amounts to a miscarriage of justice.
  5. The Honourable Magistrate's decision is plainly wrong and is against the weight of evidence.
3. The appellant seeks that the lower court's judgment be set aside and that this court makes its findings on quantum. The appellant submits that the 2<sup>nd</sup> medical report by Dr. James Obondi reveals that the respondent sustained a blunt chest injury, trauma to the pelvis, and fracture of the right distal femur. He proposes that Kshs 500,000/- as general damages would fairly and adequately compensate the respondent. He cited the case of *Miriam Njeri Murimi v Kenya Broadcasting Corporation* (2009) eKLR where the plaintiff therein suffered a head injury, fractured ribs L16 and R1-12, fracture-dislocation of the hip joint with permanent disability assessed at 12% and was awarded Kshs 450,000/-. In *Mwavita Jonathan v Silvia Onunga* (2017) eKLR the court awarded Kshs 400,000/- to a complainant who sustained commuted intertrochantric fracture of the left hip which required surgery involving the insertion of surgical plantings and screws. In *Jitan Nagra v Abednego Nyandusi Oigo* [2018] eKLR the respondent therein suffered a compound fracture of the right tibia/fibula, segmental distal fracture of the right femur and soft tissue injuries and was awarded Kshs 450,000/-.
  4. The respondent opposed the appeal. He submits that the appellant relied on decisions that were made over 5 years ago and due to lapse of time, the award by the magistrate was reasonable. The respondent sustained severe injuries not just a fracture of the femur but the same is comminuted/open one and plating was done. In *Pestony Ltd & Another v Samuel Itonye Kagoko*, Nairobi Civil Appeal No 167 of 2020, the respondent sustained a fracture of the left femur (mid-shaft with permanent incapacity assessed at 5% and was awarded Kshs 800,000/- In *Ruth Wairimu Kihara & Another v Victoria Kalondu Mutuku*, Naivasha Civil Appeal No 27 of 2018, the respondent sustained a fracture of the right femur and disability assessed at 12% and he was awarded Kshs 700,000/-. Kshs 2,400,000/- was awarded in *Zipporah Nangila v Eldoret Express & 2 Others*, Nakuru HCA No 403 of 2012, where the plaintiff sustained bilateral leg injuries, right wrist injury, fracture-dislocation of the right ankle, comminuted compound fracture of the distal and fibular and extensive skin loss with bones exposed in the right tibia the court awarded Kshs. 2,400,000/- as general damages and loss amenities. They seek that the appeal be dismissed with cost.

### Analysis And Determination

5. 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.”

6. According to the medical report by Dr. Joseph C. Sokobe the respondent sustained severe soft and bony (fracture) tissue injuries from which he has not recovered. The doctor noted that the respondent’s knee is deformed and stiff, his lower right limb is shortened and he has lost one toe. He assessed permanent disability at 30%. According to the P3 form prepared by the Medical Superintendent at Bungoma District Hospital, the respondent sustained a fracture of the Distal Femur and lost one toe on the right side. The report by Dr. James Obondi Otieno notes that the respondent sustained blunt chest injury, trauma to the pelvis, and fracture of the right distal femur with 30% disability. I find that the injuries pleaded in the plaint were proved. Dr. Sokobe referred to the discharge summaries from Bungoma County Referral Hospital and Mediheal Hospital, unlike Dr. James Obondi Otieno. The findings in the P3 form were consistent with the findings of Dr. Sokobo.
7. On quantum, the appeal challenges the award of general damages. I have considered the cases cited by the parties to support their arguments. However, I note that the cases are dated and do not reflect the current awards by courts. The *Miriam Njeri Murimi v Kenya Broadcasting Corporation* case (*supra*) did not have similar or comparable injuries as those sustained by the respondent herein. The respondent also cited the case of *Zipporah Nangila v Eldoret Express & 2 Others case* (*supra*) however, the plaintiff therein sustained more serious injuries than those by the respondent in this case.
8. 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.”
9. In *Ndavi v Mwangangi* (Civil Appeal 764 of 2019) [2024] KEHC 8106 (KLR) (3 July 2024) (Judgment) this court held that Kshs 700,000/- was not excessive damages for a fractured femur and soft tissue injuries. In the *Kimani v Mwangi & 2 others* (Civil Appeal E071 of 2023) [2024] KEHC 6744 (KLR) (6 June 2024) (Judgment) plaintiff suffered a fracture of the femur on the right leg and a cut wound on the left leg and was awarded Kshs 550,000/-. In *Reamic Investment Limited v Joaz Amenya Samuel* [2021] eKLR the plaintiff with broken femur and soft tissue injuries was awarded Kshs 600,000/-. The awards by courts on simple fracture of the femur range between Kshs 550,000/- to Kshs 700,000/-.
10. In this case, the respondent other than the fracture (communited/open) of the right distal femur also had his right 2<sup>nd</sup> toe amputated and disability was assessed at 30% as his right limb was shortened. The injuries sustained by the respondent are far more serious than a simple fracture of the femur. Therefore, the submission by the appellant that Kshs 500,000/- is adequate compensation cannot be applied.
11. Although the trial magistrate did not give her reasoning in awarding Kshs 1,000,000/- as general damages, I find the award of Kshs 1,000,000/- was reasonable and proper. In conclusion, the appeal dated 14<sup>th</sup> September 2023 is dismissed with costs to the respondent.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2024.**



**R.E. OUGO**

**JUDGE**

In the presence of:

Miss Nyangano h/b For Mr. Omayya - For the Appellant

Mr Kweyu -For the Respondent

Wilkister -C/A

