



REPUBLIC OF KENYA



**Adungo & another v Malesi (Civil Appeal E1278 of 2023)
[2024] KEHC 13162 (KLR) (Civ) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13162 (KLR)

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

CIVIL

CIVIL APPEAL E1278 OF 2023

AM MUTETI, J

OCTOBER 8, 2024

BETWEEN

PHILIP OKISEGERE ADUNGO 1ST APPELLANT

STEPHEN EMOI 2ND APPELLANT

AND

PETRONILA MALESI RESPONDENT

*(Being an appeal against the whole of the judgement of the learned Hon. R. MUSIEGA
PM delivered on 27th October 2023 in Milimani Civil case NO. E2311 of 2022)*

JUDGMENT

Introduction

1. The appellants have moved to this Court challenging the decision of the learned Honourable Magistrate on quantum.
2. The appellants contend that the award is unconscionably high and disproportionate considering the evidence adduced in the matter.
3. The appellants are also aggrieved by the Learned Honourable Magistrate's failure to consider their submissions on quantum.

Duty Of The First Appellate Court

4. As a first appellate Court, the duty of the Court is to review the evidence re-evaluate it and draw independent conclusions on the same, while appreciating this Court did not have the opportunity to hear the witnesses – See Ratalal Gova Sumaria & Another Vs. Allied Industries Ltd [2007] eKLR.



5. The appeal being mainly on quantum, the Court must remain alive to the fact that the assessment of the damages is a matter of judicial discretion thus for this Court to interfere, the appellants must satisfy the Court that the trial Court improperly exercised its discretion.
6. It should be established by the appellants that the learned Honourable magistrate misdirected himself on some important matter of evidence or misapplied certain principles of law in arriving at the decision.
7. This Court is guided by the decision in Kenya Breweries Ltd Vs. Saro [1991] eKLR in which it was held :-

“... It is now well established that this Court can only interfere with a trial judge’s assessment of damages/ where it is shown that the judge has applied wrong principles or where the damages awarded are so inordinately high or low that an application of wrong principles must be inferred...”

Analysis And Determination

8. The task of persuading this Court to intervene and disturb the findings of the learned Honourable magistrate on assessment of damages lies with the appellant.
9. The appellant must present cogent evidence of misdirection by the Court otherwise the Court would hesitate to intervene.
10. The appellants have by the way of their submissions aptly captured this duty of the Court.
11. The thrust of their argument is that the damages awarded were manifestly excessive considering the nature of injuries suffered by the Respondent.
12. The learned Honourable magistrate ordered the sum of Kshs. 850,000 in general damages, Kshs. 5550 special damages less 20% contribution of Kshs. 171,110.
13. According to the medical report prepared by Dr. Cyprianus Okoth Okere the Respondent suffered the following injuries:-
 - i. Blunt injury to the left ankle with a swelling and tenderness
 - ii. Abrasions on the left lateral malleolus.
 - iii. Fracture of the left tibia.
14. The main injury was identified as the fracture of the fibula which was classified as grievous harm.
15. The appellants have suggested to this Court what they consider to be a fair award to be Kshs. 130,000.
16. The argument by the appellants is that the fracture has since healed thus this Court should treat the injury as a soft tissue injury. It cannot be so since the injury once suffered the damage is done. The court cannot purport to down grade an injury since the opinion of the doctor is a key consideration.
17. The appellants have no problem with the award for special damages being maintained as was granted in the Lower Court.
18. In my view, the appellants did not do justice to their case by failing to provide a comparable figure for similar injuries.
19. It is not clear to me why the appellants would urge this Court to treat the injury suffered by the Respondent as a soft tissue injury where as there is medical evidence that it was grievous harm.



20. I would have expected the appellants to demonstrate that the award by the trial Court was way above conventional awards for a fracture of the nature suffered by the Respondent.
21. To attempt to degrade the injuries without support of medical evidence is an attempt to challenge the evidence by an expert without a contrary opinion of another expert.
22. The case cited by the appellants is distinguishable in that it dealt with cut wounds and no fractures. It cannot therefore serve as a useful guide to this Court on the issue of quantum.
23. The appellants have not discharged their burden of demonstrating misdirection on the part of the magistrate or the consideration of irrelevant factors or the failure to consider relevant factors in arriving at the decision.
24. I have also not been persuaded in what manner the award is excessively high for there is no comparison of the award with others.
25. The respondent cited the cases of *SAVCO Stores Ltd VS. David Mwangi Kimotho HCCA NO. 12 of 2005* and *Hussein Abdi Hashi Vs. Hassan Noor HCCA 550 of 2000*. In both cases the Courts awarded Kshs. 800,000 respectively in general damages.
26. I find that the injuries in the two cases were comparable to the present case for they involved fractures.

Conclusion

27. I am not inclined in the circumstances to interfere with the decision of the learned Honourable Magistrate on the assessment of damages. The same is hereby upheld.
28. In the end I dismiss the Appeal with costs.
29. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 8TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Ms Murigi for the Appellants

Ms Mumbi holding brief Wakanjo for Respondent

