



Ali v Omar (Civil Appeal E149 of 2022) [2023] KEHC 3336 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E149 OF 2022
TW CHERERE, J
APRIL 20, 2023**

BETWEEN

KULUME DAHIR ALI APPELLANT

AND

ABDI ALI OMAR RESPONDENT

*(Being an Appeal from the Judgment and Decree in Maua CMCC
E223 of 2021 by Hon. C.K. Obara (SPM) on 06th October, 2022)*

JUDGMENT

1. On July 24, 2020, Respondent was off Maua-Meru Road when he was knocked down by Appellant's KCX 012G which was allegedly being driven negligently as a result of which Respondent suffered injuries.
2. On June 30, 2022, the parties by consent entered judgment on liability at 80:20% in favour of Respondent as against the Appellant.
 1. After the hearing, the trial court by a judgment dated October 6, 2022, entered judgment in favour of the Respondent as against the Appellant for Kes 2,500,000/- together with special damages of Kes 10,550/- less 20% agreed contribution, costs and interest.

The Appeal

3. The Appellant being dissatisfied with the lower court's decision preferred this appeal mainly on the ground that the general damages were inordinately high and excessive.

Analysis and Determination

4. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless



- the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Peters v Sunday Post Limited* (1958) EA at Pg 424).
5. I have considered the appeal in the light of the grounds of appeal and submission filed by both parties and the only issue for determination is whether the general damages were inordinately high and excessive.
 6. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo V Shab* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor vs Lubia & Anor, No 2* [1987] KLR 30).
 7. Respondent's medical report prepared by Dr Githu Wachira on September 28, 2021 reveals that Respondent suffered the following injuries:
 - i. Fracture of left femur
 - ii. Fracture left tibia
 - iii. Fracture left fibula
 8. The fractures were fixed with k-nails and as at the time of examination 14 months after the accident, Respondent was unable to walk without aid and his left knee movement was reduced. The doctor assessed permanent incapacity at 46.67%.
 9. Respondent's medical report prepared by Dr Wambugu on August 19, 2022 reveals that Respondent suffered the following injuries:
 - iv. Fracture of left femur
 - v. Fracture left tibia
 - vi. Friction burns both legs
 - vii. Acute Respiratory distress syndrome
 - viii. Multiple bruises
 10. The doctor noticed that the injuries had healed with scars and pains, shortening of left leg by 2 cm and stiff left knee joint. The doctor assessed permanent incapacity at 35 %.
 11. The trial court after considering the four authorities cited for the Respondent did not relate to similar injuries and the four by the Appellant related to less serious injuries than the ones suffered by the Respondent.
 12. The court in its wisdom relied on *Densbire Muteti Wambua v Kenya Power & Lighting Co Ltd* [2013] eKLR where the court on appeal upheld an award of Kes 1.5 million for multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp.
 13. There is no doubt that this authority comprised more cases than those suffered by the Respondent but considering that Respondent suffered a permanent incapacity of an average of 40 % or thereabout, the sum of 2.5 million cannot in the circumstances of this case be said to be inordinately high and excessive.



14. From the foregoing, I find that the Appellant has failed to demonstrate that the trial court's decision in awarding general damages was wrong or that the court misdirected itself or acted on matters on which it should not have acted or failed to take into consideration matters which it should have taken into consideration thereby arriving at a wrong conclusion. The Appellants' contention that Kes 100,000/- suffices is therefore rejected.
15. Concerning loss of user, court considered that Respondent was rendered 40 % incapacitated and therefore her earning capacity diminished. The court found she was 30 years when the accident occurred and 40 years when she testified. Considering the cited cases. I find that the sum of Kes 2,000,000/- awarded under this heading was reasonable.
16. Special damages of Kes 10,550/- were proved by receipts which though faded were legible.
17. For the reasons given on the foregoing analysis, I have come to the conclusion that the appeal has no merit and it is dismissed with costs to the Respondent.

DATED AT MERU THIS 20TH DAY OF APRIL 2023

T. W. CHERERE

JUDGE

Appearances

Court - Morris Kinoti

For Appellant - Mr. Mungai for Kiruki & Kayika Advocates

For Respondent - Mr. Amule for Khan & Associates

