



REPUBLIC OF KENYA



**Muriithi & another v Kimani (Civil Appeal E092 of 2021)
[2023] KEHC 18400 (KLR) (Civ) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18400 (KLR)

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

CIVIL

CIVIL APPEAL E092 OF 2021

AN ONGERI, J

JUNE 2, 2023

BETWEEN

ELIJAH MURIITHI 1ST APPELLANT

JOSEPH KINYERU MUIRURI 2ND APPELLANT

AND

MARGARET WANJIKU KIMANI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. A. M.
OBURA in Milimani CMCC no. 1986 of 2017 delivered on 28/1/2021)*

JUDGMENT

- 1) The respondent who was the plaintiff in Milimani CMCC no. 1986 of 2017 sued the two appellants who are the owner and driver of motor vehicle registration no. KCC 649S respectively for injuries the respondent sustained while travelling in the said motor vehicle on 26/2/2016.
- 2) In her plaint filed in court on 8/12/2016 the plaintiff averred that on the material day she was travelling as a fare paying passenger in the said motor vehicle along Kiambu Road next to Naivas supermarket when the 2nd appellant drove the said motor vehicle recklessly carelessly and/or negligently thereby causing it to be involved in an accident where the respondent sustained severe and grievous bodily injuries.
- 3) The respondent sustained L1 wedge compression with 30% permanent incapacity.
- 4) The appellants failed to enter appearance or file a defence and the court entered interlocutory judgment against them.
- 5) The case proceeded to formal proof and the court assessed general damages at kshs.1,200,000.



- 6) The appellants have filed this appeal against the quantum of damages on the ground that the general damages of 1,200,000 are too high in the circumstances.
- 7) The parties filed written submissions as follows; the appellant submitted that the award of Kshs 1,300,000 was inordinately high and in support cited the following cases;
 - i. In *Harun Muyoma Boge v Dr. Daniel Otieno Agulo*, Migori HCCA No. 86 of 2012 [as quoted in *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR, the plaintiff sustained multiple injuries and fracture of right tibia and fibula the appellate court set aside an award of Kshs. 150,000/= and substituted it with an award of Kshs. 300,000/=.
 - ii. In *Naomi Momanyi v G4S Security Services Kenya Limited* [2018] eKLR [as quoted in *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300,000.
 - iii. In *Wakim Sodas Limited v Sammy Aritos* [2017] eKLR [as quoted in *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR, the respondent had sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400,000, which was upheld on appeal.
- 8) The respondent in the alternative submitted that the injuries that she sustained were grievous. That it was not in dispute that she sustained a L1 wedge Compression Fracture. That when the accident occurred she could not stand and was taken to hospital where she was admitted for five days. She took bed rest for three weeks, went to physiotherapy and had to use crutches because of the accident. As a result of the injuries the respondent's back is always in pain and she cannot sit for long hours or bend to do chores.
- 9) The respondent argued that the trial court while assessing damages noted that the respondent was still undergoing therapy and that she had been unable to fully resume her duties on account of her back pains. It was her submission therefore that the trial court was correct and indicated that the authorities that the appellant relied on do not relate to the injuries suffered by the respondent.
- 10) This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held;

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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.”

- 11) The sole issue for determination in this appeal is whether the quantum of damages awarded is too high in the circumstances of this case.



- 12) I find that the issue of liability is not contested. The appellants never entered appearance or filed a defence and the case proceeded *ex parte*.
- 13) I find that the appellants had the opportunity to participate in the trial and make submissions on quantum of damages payable but they failed to do so.
- 14) I find that the trial court relied on the submissions by the respondent and authorities submitted before awarding ksh.1,200,000.
- 15) The only basis for interfering with the quantum of damages assessed by the trial court is where the court relied on wrong principles or where the same is too high or too low. In the case of *Butt v Khan* [1977] 1 KAR , the court set the test as follows:-

“An Appellate court will not disturb an award for damages unless it is 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.”

- 16) I find that the appellants are attempting to adduce evidence at appeal stage.
- 17) The trial court took into consideration relevant factors such as the nature of injuries, the authority cited by the respondent and the inflationary trends and arrived at the figure awarded.
- 18) I accordingly find no basis for interfering with the award of the trial court.
- 19) I dismiss the appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND DAY OF JUNE, 2023.

.....

A. ONGERI

JUDGE

In the presence of:

.....for the 1st Appellant

.....for the 2nd Appellant

..... for the Respondent

