



**Mwangi v Maina (Civil Appeal E028 of 2021)  
[2023] KEHC 20509 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20509 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E028 OF 2021  
LM NJUGUNA, J  
JULY 21, 2023**

**BETWEEN**

**RAHAB WAIHERA MWANGI ..... APPELLANT**

**AND**

**DUNCAN THINJI MAINA ..... RESPONDENT**

**JUDGMENT**

1. The appeal herein arose from the judgment of Hon. V. S Kosgey dated the 22<sup>nd</sup> day of June, 2021 in Karatina PMCC No. 105 of 2018 in which the respondent sued the appellant claiming both general and special damages following an accident that occurred on or about April 3, 2018.
2. The particulars of the cause of action were that; on or about the April 3, 2018, the respondent was travelling as a passenger in motor vehicle registration number KAR 518L along Nyeri-Karatina road, when the appellant, her driver, servant and/or agent so negligently drove, managed and/or controlled aforesaid motor vehicle number KBY 934P from the opposite direction that the same lost control, veered off its lane and collided with motor vehicle No. KAR 518L as a result of which the respondent sustained serious injuries.
3. The particulars of negligence and injuries are set out in paragraphs 4 and 5 of the plaint. The respondents thus claimed general damages, special damages, cost of the suit and interest thereon.
4. In his defence dated November 23, 2018, the appellant denied the respondent's claim and averred that she was not privy to the relationship between the plaintiff and the motor vehicle registration no. KAR 518L. The appellant further denied that the alleged accident occurred in the manner described by the respondent including all the particulars of negligence particularized thereunder as 4 (a -k) and put the respondent to strict proof of the allegations thereof.
5. Without prejudice to the averments set out in the defence, the appellant averred that if the accident ever occurred, the same was solely caused by the negligence on the part of the driver of the motor vehicle



- registration number KAR 518L as well as the respondent himself. The particulars of his negligence were set out in paragraph 5 of the defence. He urged the court to dismiss the respondent's claim with cost.
6. The matter proceeded to hearing and in her judgement delivered on June 22, 2021, the learned trial magistrate found in favour of the respondent and entered judgment on both liability (in the ratio of 80:20) and quantum against the appellant in the amount of Kes 1,605,240/=, special damages at 6,550/= plus costs of the suit and interests from the date of delivery of judgment at court rates.
  7. The appellant being dissatisfied with the said judgment moved this court vide a memorandum of appeal dated July 7, 2021 wherein she listed four (4) grounds of appeal as follows: -
    - i. That the learned magistrate erred in law and in fact in awarding the respondent general damages of Kes 2,000,000/=.
    - ii. That the learned magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the appellant.
    - iii. That the learned magistrate erred in awarding a sum in respect of damages which was inordinately high and was excessive in the circumstances occasioning a miscarriage of justice.
    - iv. That the learned magistrate erred in law and fact in failing to consider conventional awards in cases of similar nature.
  8. When the appeal came up for hearing, the court gave directions on filing of submissions and following the said directions, only the appellant complied with the same.
  9. The appellant submitted that the court arrived an erroneous conclusion considering that the respondent did not plead for costs of surgery to remove the plate implants and as such, the respondent did not require surgery to correct the shortened leg and /or remove the metal implants. Reliance was placed on the case of *PW (Minor suing through her next friend and mother PW) v Peter Muriithi Ngari Embu* HCCA No. 54 of 2013. The appellant contended that an amount of Kes 600,000/= would have sufficed as general damages for the pain and suffering borne by the respondent. Further reliance was placed on the cases of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR and Court of Appeal decision in *Paul N. Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR. That in light of the foregoing, this court was urged to set aside the finding by the trial magistrate and replace the same with its own finding.
  10. The court has considered the submissions by the appellant and the pleadings that were filed in the lower court. Further, it has also re-evaluated the evidence as it is required of this court being the first appellate court. The appeal herein turns only on the issue of quantum of damages. [See the case of *Selle & ano. v Associated Motor Boat Co Ltd* [1968] EA 123].
  11. The appellant submitted that the learned trial magistrate erred by awarding general damages of Kes 2,000,000.00 considering the fact that the trial court had dismissed the claim for future medical expenses which had been sought by the respondent on account of the 2<sup>nd</sup> medical report prepared by Dr. F. W. Muleshe. That the doctor opined that the respondent would require Kes 600, 000. 00 to undergo total knee replacement. It was submitted that the same view had been buttressed by the medical report prepared by Dr. Wambugu who also opined that the respondent would benefit from a shoe heel raise to obviate the uneven weight distribution axis to correct the residual shortening of the right leg. Further, the respondent had not pleaded for costs of surgery to remove the plate implants



- and as such, the same boiled down to the fact that the respondent did not require the surgery to correct the shortened leg.
12. Further that the authorities relied upon by the court and specifically the case of *PW (Minor suing through the next friend and mother of PW) v Muriithi Ngari* Embu HCCA No. 54 of 2013, the injuries do not resemble the once by the respondent herein and therefore, the same ended up making the trial court reach an unfounded determination. It was therefore submitted that Kes 600,000.00 was sufficient as general damages for pain and suffering borne by the respondent and reliance to support the same was placed on the cases of *Pestony Limited & Another v Samuel Itonye Kagoko* [2022] eKLR and *Paul N. Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR.
  13. This court was therefore urged to find that the trial magistrate erred in awarding general damages in the amount of Kes 2,000,000.00 as the same was not reflective of the injuries sustained by the respondent as demonstrated in the judicial decisions cited.
  14. It is clear that the respondents' cause of action was based on the tort of negligence. Under section 108 of the *Evidence Act*, the burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side. Under section 107, whoever desires the court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist.
  15. In the case herein, the respondent suffered the following injuries:
    - i. A swollen, tender and deformed right thigh.
    - ii. A tender left wrist.
    - iii. A comminuted fracture of the mid shaft of the right femur.
    - iv. Dislocation of the left wrist styloid process.
    - v. Intra –articular (ACL) injury on the right knee.
    - vi. Anterior cruciate ligament injury.
    - vii. Shortening of the right leg with 2 inches.
  16. In the case of Charles Mathenge Wahome (*supra*) the Plaintiff sustained a fracture of the right femur, followed by a complication of pulmonary embolism sending him to the Intensive Care Unit (ICU) for several days. The rest were minor injuries on the back and head. The fracture united and healed well. This resulted in the shortening of the right leg by 2.5 centimeters. He was awarded Kshs.1, 500,000/=.
  17. In the case of *Joseph Mwangi Thuita Joyce Mwole* [2018] eKLR Justice C. Kariuki increased an award of Kshs. 100,000/= to Kshs. 700,000/= as General Damages where the appellant had sustained injuries in the nature of fractures to the right femur, Compound fracture (r) tibia, Compound fracture right fibula, shortening right leg and Episodic pain (r) thigh with inability to walk without support.
  18. In the case of *Godfrey Wamalwa Wamba & another v Kyalo Wambua* [2018] eKLR, the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest and a cut on the lower lip, he was in hospital for three weeks, he underwent surgery for repair of the fibula. The doctor testified that his leg had shortened and needed corrective surgery. The trial court awarded him general damages at Kshs. 700, 000.00, which the appellate court upheld
  19. Taking into consideration the more recent decisions on similar injuries cited above, it is my view that the award by the trial court was on the higher side. I find that an award of Kshs. 1500, 000/= would suffice as general damages having in mind the current inflation rate. The court enters judgment as follows:



- i. General Damages – Kes 1500,000.00.
  - ii. Special Damages – Kes 6,550.00.
  - iii. Liability 80:20
  - iv. Total Kes 1,205,240.00.
20. In the end, the appeal partly succeeds as shown above.
21. Each party shall bear its own costs of the appeal.
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

