



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthoiri v Njoka (Civil Appeal 77 of 2019)  
[2023] KEHC 22451 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22451 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL 77 OF 2019  
EM MURIITHI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**ROBERT MUTHOIRI ..... APPELLANT**

**AND**

**LUCY MWENDE NJOKA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Honourable Court (H. NDUNG’U (CM) in Meru CMCCC NO. 10 of 2018 delivered on 8th May 2019))*

**RULING**

1. The trial court upon formal proof following the entry of interlocutory judgment entered on 26/7/2018 gave judgment for the plaintiff in terms as follows:

“The plaintiff’s case as stated in their recorded statement is that on November 25, 2016 he was hit by motor vehicle KCF 169 Toyota Station Wagon. He alleges that the vehicle was driven in a careless, reckless and negligent manner. As a result, he sustained the following injuries as described in the report by a Dr. Nicholas Koome.

Bimalleolar fracture of right ankle joint (involving distal tibia/fibula bones).

Counsel for the plaintiff did not file any submissions. The defence also did not file any defence and therefore the suit is not contested.

Guided by *Kellen Wanjiku Kimato Vs Muranga Timbers Co. Ltd* Nrb. HCCC 4888/90 where Githinji J. (as he then was) awarded the plaintiff General damages Kshs. 100,000/= . He had suffered fracture of the heel bone and a strain left ankle joint.

I am of the view that a sum of Ksh. 100,000/= will adequately compensate the plaintiff for his injuries.



I so award. Costs and interest to the plaintiff.

Right of Appeal 28 days.

H.N. Ndungú Chief Magistrate

8/5/2019.”

2. The plaintiff was aggrieved by the award of damages which he considered inordinately low and he appeal on grounds set out in the memorandum of appeal dated July 10, 2019 as follows:

“Memorandum of Appeal

The Appellant above named, appeals to the High Court of Kenya at Meru against the Judgment of the Hon. H. Ndung’u court at Meru CMCC Number 10 of 2018 read on 8/05/2019 and here below sets forth the grounds of appeal:

”

1. The learned trial Magistrate erred in law and in fact in awarding the Kshs 100,000/= (One hundred thousand shillings only) to the appellant and award which is not commensurate or mitigating the injuries, pain and suffering and cost involved considering the fact that the suit was filed under the *fatal accidents act*.
2. The learned trial magistrate erred in law and fact without taking into an account that the accident  
was solely caused by the negligent action of the Respondent,
3. That the learned magistrate erred in law and in fact in not considering the submissions of the appellant and the weight of the evidence on record submitted by the appellant.
4. The learned trial magistrate erred in law and in fact in the issuance of his award.

Reasons wherefore the appellant prays that this appeal be allowed with costs to the appellant.”

3. The appellant filed written submissions before this court dated August 11, 2020 complaining that the trial court had not considered special damages pleaded in paragraph 6 itemized (a) – (e) and sought in relief prayer (b) despite receipt produced in court” and reiterated that citing the same authority of *Duncan Kimathi Kiragania v. Ngugi David & Others* Civil Case No. 73 of 2019 which had awarded Ksh.4,000,00/- urged that the award of 100,000/- was too low.
4. Despite service the respondent did not file submissions or otherwise participate in the appeal.

### Written Submissions

5. At the outset, the court has established that there never was filed written submissions for the plaintiff. There is no filed copy of such submissions on the file and the copy attached to the Record of Appeal is only an unstamped copy without any acknowledgement receipt stamp by the Court registry or the payment of necessary filing fees therefor. Indeed, the trial court could have expected to have considered submissions even they had been filed on the date they are purported to be signed on 8/5/2018, which is the date the Judgment was delivered!



6. Moreover, the duty of an appellate court is one of rehearing the case as stated in the decision of the Court of Appeal for Eastern Africa in *Peters v. Sunday Post Limited* (1958) EA 424 and the Court is entitled to review the evidence before the trial court:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide. *Watt v. Thomas*, (1947) 1 ALL ER 582; [1947] A.C. 484, applied.”

7. Additionally, in *Selle & Anor. v. Automobile Associated Motor Boat Company Ltd.* (1968) EA 123 the successor Court of Appeal for East Africa held (which is as well applicable to the appeals from the magistrate to the High Court) that-

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

8. There is, therefore, nothing lost in alleged failure of the trial court to consider the plaintiff submissions but this makes a finding that the court cannot be faulted for such failure as the submissions were not presented before the court!

9. The principles for appellate interference with award of damages are well settled since *Butt v. Khan* (1978) eKLR, (1981) KLR 349, 356 (per Law JA):

“An appellate court will not disturb an award of damages unless it is so 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 respects, and so arrived at a figure, which was inordinately high or low.”

10. To be sure, apart from submissions on liability, which the court found already settled by the interlocutory judgment, the only submission which the appellant makes in his unfiled written submissions dated May 8, 2019, the only argument made in the submissions as to the quantum was as follows:

“On Quantum the plaintiff pleaded and produced a medical report by Dr. Nicholas Koomewho confirmed that he sustained severe injuries classified as harm. According to Dr. Koomewho the joint is still unstable and he is at risk of developing osteoarthritis of the right ankle joint and as such we suggest that the plaintiff be awarded 2 million shillings for pain and suffering and loss of amenities.

In case of *Duncan Kimathi Karagania versus Ngugi David and Others* civil Case No. 75 of 2012, the court awarded the plaintiff 4,000,000/- for general damages for pain and suffering and loss of amenities. We urge the honourable court to be guided by the above authority and award the plaintiff.

Dated at Meru this 8<sup>th</sup> day of May 2019.”



## General damages

11. The single injury in this particular case were set out in the Medical Examination P3 form and the examining doctor's report dated as follows:

“Bimaleollar fracture of right ankle joint (involving distal tibia/fibula bones).”

12. Conversely, in the decision urged by Counsel for the appellant, *Duncan Kimathi Karagania v Ngugi David & 3 others* [2016] eKLR, (Aburilli J.) the nature of the injuries were multiple and more severe as shown in paragraph 29 thereof as follows:

“29. On quantum, the plaintiff pleaded and produced a medical report by Doctor Gikenye who filled the P3 form on November 17, 2010 using the treatment notes which confirmed that he sustained severe injuries classified as grievous harm. The said injuries involved:

1. Blunt head injury with loss of consciousness for over two hours.
2. Lacerations over the face on both sides.
3. Comminuted fractures of the maxilla bilaterally at the Le Fort 11 level.
4. Compound fracture of the mandible.
5. Comminuted fracture of the right humerus.
6. Articular region of the elbow surface of radio carpal.
7. Multiple laceration of the hands and forearms.”

13. Indeed, as a pointer to the seriousness of the injuries in the case, the special damages on the medical expenses/treatment of the plaintiff and related costs in that case were a whopping 1,077,228. The same court (Aburilli, J) in another decision *Parodi Giorgio v John Kuria Macharia* [2014] eKLR of 8/12/2014 enlarged the awards made by Githinji J. in *Kellen* relied on by the trial court to factor passage of time and inflation as follows:

“I find the award excessive and I set aside the judgment and decree of the learned trial magistrate on quantum of Sh. 350,000/- in favour of the respondent. In its place, thereof, I substitute with an award of Ksh. 200,000/-, general damages for pain, suffering and loss of amenities, taking into account the injuries sustained by the respondent as pleaded and proved, the time lapse from the time the case of *Kellen Wanjiku* had been decided and inflation.”

14. There is nothing on the evidence to support the alleged risk of development of osteoarthritis at his injured ankle to support the plaintiff's doctor's surmise. There is no justification for increased award of damages on account uncertain future medical expenses even though these were to be factored under general damages.
15. However, it is today another close to ten years since the decision in *Parodi Giorgio* case and the Kenya shilling has in recent past greatly lost its value so that the Ksh.200,000/- awarded in *Parodi Giorgio* (2014) and the Ksh.100,000/- in *Kellen* (1994) are nowhere comparable to the Ksh.100,000/- today. Having considered the nature of injury in this case, a single case of Bimaleollar fracture of right ankle



joint (involving distal tibia/fibula bones), the court considers that an award of Ksh.300,000/- being an enhancement of the trial court's award to make provision for the 20year time difference and the depreciation of the Kenya shilling, of which the court takes judicial notice.

### **Special damages.**

16. In this case, the plaintiff pleaded in paragraph 6 of its Pleint of January 24, 2018 as follows:

“6. The Plaintiff suffered both general and special damages liability of which he wholly attributes to the defendant.

### **Particulars of Special Damages**

- a. Police abstract 200/-
- b. Medical report 5000/-
- c. Demand Letter 5000/-
- d. Hospital charges 1800/-
- e. Doctor attendance fees 5000/-

Total 17,080/-”

17. The Record shows that at the hearing of evidence was presented by way of exhibits in the list of documents as follows:

“PW1 Robert Muthumi duly sworn states in Kiswahili:

I resided at Ruiru. I am a businessman. I did record] a statement with my Advocate dated January 24, 2018. I wish it adopted as evidence in chief. Also I have a list of documents Exh 1-5 respectively. I pray for general and special damages. That is all.”

18. The trial court did not even make reference to the prayer for special damages in its judgment yet the same were pleaded and exhibits of receipts and reports produced at the hearing in strict proof thereof. The court did not consider the issue properly pleaded and placed before it by evidence and in this the court, with respect, fell into error and its judgment must be set aside on the principle of failure to take into account a material factor.

### **Order**

19. Accordingly, for the reasons set out above, the court makes the following orders:

1. The award of Ksh.100,000 for pain and suffering is set aside and substituted with an award of Ksh.300,000/-.
  2. The court makes an award of special damages in the sum 17,080/= of from the date of filing of the suit on 26/1/2018.
  3. The damages awarded under orders No. 1 and 2 above Kshs 317,080/= shall attract interest at court rates until payment in full.
  4. Costs in the trial court to the plaintiff/appellant.
4. There shall be no order as to costs of the appeal, as the defendant had no part in the decision of the trial court herein set aside.



20. Order accordingly.

**DATED AND DELIVERED ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Kiogora Mugmbi for the Appellant.

Respondent in Person.

