



**Kiprop & another v Akoth (Civil Appeal E1131 of 2023)  
[2024] KEHC 16702 (KLR) (Civ) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16702 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1131 OF 2023**

**BM MUSYOKI, J**

**NOVEMBER 8, 2024**

**BETWEEN**

**ALEX KIPROP ..... 1<sup>ST</sup> APPELLANT**

**MARGARET MUNALITSI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ESTHER AKOTH ..... RESPONDENT**

*(Being an appeal from judgment and decree of Honourable Lucy Njora (SPM) in Chief Magistrate's Court at Milimani Commercial Courts civil case number E9210 of 2021 dated 29-09-2023)*

**JUDGMENT**

1. This appeal emanates from a judgment and decree of the subordinate court at Milimani commercial courts civil case number E9210 of 2021. The respondent had sued the appellants for compensation in form of general damages for pain and suffering and loss of amenities and special damages as a result of an accident that occurred on 8-03-2020 in which the appellants' motor vehicle registration number KAQ 856F hit the respondent. The lower court found the appellants 90% and the respondent 10% liable for the accident and awarded general damages for pain and suffering and loss of amenities of Kshs 700,000.00 and special damages of Kshs 3,000.00.
2. Being dissatisfied with the award on general damages, the appellants preferred this appeal. In a replying affidavit sworn on 10-11-2023, the respondent's next friend exhibited a document titled as cross appeal as annexure 'CO1' and in paragraph 8 averred that 'I am further advised by my advocates on record to file a cross appeal on the issue of liability which should have been 100% as against the defendants.' I have checked the Case Tracking System and it is clear to me that the cross appeal was never filed. It is interesting that the respondent has in his submissions dated 1-10-2024 made reference to the cross



appeal and asked me to set aside the judgement on liability and hold the appellant 100%. I will not consider any submission in that regard as there is no cross appeal properly before me.

3. In his memorandum of appeal, the appellants have raised the following grounds which I quote verbatim;
  1. The said sum of Kshs 700,000.00 general damages for pain and suffering, loss of amenities is excessive in all the circumstances and ought to be reduced.
  2. The sum of Kshs 700,000.00 is not consisted with the level of damages awarded to the other plaintiff in similar circumstances.
  3. That the learned magistrate erred in law and in fact when he considered the respondent unsubstantiated medical documents.
  4. The learned magistrate erred in law and fact when she failed to consider the appellant submission and dismissed the same without giving any reason at all.
4. This appeal proceeded by way of written submissions. The appellant's submissions are dated 25-09-2024 while the respondent's submissions are dated 3-10-2024. I have read the said submissions and the entire record of appeal and the proceedings of the lower court. It is clear to me that the only issue for determination in this appeal is whether the award of Kshs 700,000.00 as general damages should be disturbed. The appellant has not appealed against the magistrate's finding on liability.
5. This is a first appeal. It is trite law that a first appeal should be conducted as a hearing where the appellate court should reconsider, re-evaluate, re-analyze and re-examine the evidence produced in the lower court and come to its own independent conclusion always bearing in mind that it did not take the evidence of the parties and did not have a chance to observe the demeanour of the witnesses and as such give due allowance for that.
6. The respondent's witness one Emily Musimsbi Wale testified in the lower court and produced documents contained in her list of documents dated 21-06-2021. The said documents were produced without any objection from the appellants. Among the said documents were, P3 form dated 17-03-2020, treatment notes dated 30-06-2020 and medical report by Dr. Roger Hannington Kayo dated 30-06-2020. All these documents showed that the respondent sustained a comminuted fracture of distal third right tibia and soft tissue injuries. The 1<sup>st</sup> appellant produced a medical report by Dr. Waithaka Mwaura dated 28-09-2022 which showed that the respondent had sustained fracture mid-shaft tibia where a cast was applied for eight weeks. This medical report indicated that at the time the doctor examined the respondent which was over two years after the accident, she still experienced occasional pains at the fracture site.
7. The appellants have urged me to interfere with the award for general damages claiming that the same are too high. It is trite law that an appellate court will not interfere with an award unless the same is manifestly too high or too low as to amount to an erroneous estimate considering the nature of injuries and other comparable cases or where it is shown that the trial court failed to consider a relevant factor or considered an irrelevant factor or applied the wrong principles of law. It is also trite that an appellate court should not disturb an award of damages simply because it would have awarded different amount if it were the trial court.
8. The appellants have submitted that the injuries sustained by the respondent did not deserve the amount the lower court awarded. They support this position by reminding the court that even the respondent had in the lower court submitted for Kshs 600,000.00. They have cited case of Ndwiga & Another vs Mukimba (2022) KEHV 11793 (KLR) where the court awarded a sum of Kshs 500,000.00



to the respondent who had suffered tenderness and swelling of the left leg and fracture of the tibia and fibula of the left leg. The appellants have also referred me to the case of Herbart Otara Marube vs Dankan Ochora (2022) eKLR where an award of Kshs 450,000.00 was awarded to the plaintiff who had sustained fracture of the right tibia, right ankle dislocation, chest contusion, lacerations and cut wounds on the right lower limb among other authorities. The appellants are of the opinion that a sum of Kshs 400,000.00 would have been sufficient to compensate the respondent.

9. The respondent has not cited any authorities in respect of the injuries in her submissions in this appeal but I have noted those she cited in the lower court being Joseph Mutua Nthia vs Fredrick Moses Katuve (2019) eKLR and Francis Ochieng & Another vs Alice Kajimba (2015) eKLR. In the former, the victim had sustained injuries to the face, loose three teeth, loss of two teeth, blunt chest injury and blunt back injury and the court upheld the award of Kshs 400,000.00. In the latter authority, the respondent was on appeal awarded Kshs 350,000.00 for head injuries, subconjunctival haemorrhage and periorbital ecchymosis on both eyes.
10. The authorities cited by the respondent did not involve any fractures. The authorities cited by the appellant are in my opinion more comparable with the instant case although they seem to have involved more serious injuries. I have also sought guidance in Kiama vs Mutiso (2024) KEHC 5135 (KLR) in which the Honourable Justice D.S. Majanja on 13-05-2024 reduced award of general damages to Kshs 400,000.00 for the respondent who had sustained a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh.
11. The above authority is a recent one and even considering the incidence of inflation, it is my opinion that the award by the trial court was not in tandem with general trend of awards in similar cases. The respondent in this matter did not suffer any post-treatment complications. There is no evidence that she was admitted to hospital. There was no evidence of follow up treatment meaning that she had healed save for the pains mentioned in the medical report dated 28-09-2022. I am therefore minded to reduce the general damages awarded by the magistrate from Kshs 700,000.00 to Kshs 450,000.00.
12. In conclusion, this appeal is allowed in the following terms;
  - a. The judgement in Milimani Commercial Courts Chief Magistrate's court civil suit number E9210 of 2021 dated 29-09-2023 is hereby set aside to the extent that the general damages for pain and suffering and loss of amenities are reduced to Kshs 450,000.00.
  - b. The rest of the said judgment of the trial court are sustained.
  - c. The appellant shall have half costs of this appeal.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of:

Miss Mugambi holding brief for Mr. Ombati for the appellants; and

Mr. Kiptoo for the respondent.

