



**Lowland Diaries v Njau (Civil Appeal E034 of 2023)
[2024] KEHC 14149 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E034 OF 2023
JM NANG'EA, J
NOVEMBER 13, 2024**

BETWEEN

LOWLAND DIARIES APPELLANT

AND

JOHN NJENGA NJAU RESPONDENT

*{Being an appeal from the judgement and decree of the Chief Magistrate's court at Kiambu
(Hon. Kibet Sambu (SPM) delivered on 18/1/2023 in Kiambu CMCC NO. 518 of 2021)}*

JUDGMENT

1. By a Memorandum of Appeal filed on 8/2/2023, the appellant faults the above trial court's judgment on grounds that may be summarized into two as hereunder:
 1. That Learned Trial Magistrate erred in law and fact in making an award of general damages in the sum of Ksh. 800,000 that is manifestly excessive in the circumstances thereby occasioning a miscarriage of justice.and
 2. That the learned trial magistrate misdirected himself by ignoring applicable principles and relevant case law guiding assessment of damages and thus arrived at an erroneous figure.
2. The appellant therefore seeks the following orders:
 - a. That the appeal be allowed with costs.
 - b. That the judgement and decree of the magistrate's court be set aside and substituted with an order for judgement allowing the appellant's suits with costs (sic).



Analysis and determination

3. It would appear that only the respondent filed submissions which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate found the appellant wholly liable for the claim and awarded the respondent Kshs. 800,000 in general damages for pain, suffering and loss of amenities and other awards in special damages that are not in contention in this appeal. Based on medical evidence presented before the trial court, the respondent suffered a fracture of the left femur resulting in permanent incapacity assessed at 30% as per the medical examination report dated 11/9/2021 by Dr. G.K Mwaura. A second medical report dated 11/4/2021 by Dr Ichamwenge Ruth opines that the degree of permanent incapacity was 25%. The respondent required the left hip replacement at a cost of Kshs. 200,000 in accordance with medical opinion proffered.
4. The respondent's injuries allegedly arose in a road traffic accident in which motor vehicle registration number KBS 086 L that was said to have been in actual possession and control of the appellant knocked him down while he was a pedestrian owing to negligent driving. The appellant traversed the allegation of negligence and all other material particulars of the suit putting the respondent to strict proof, but didn't offer evidence at trial.
5. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:-
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."
6. It is not disputed that the respondent suffered the injuries as noted above . The trial court assessed general damages for pain, suffering and loss of amenities in the sum of Kshs. 800,000 in in his favour . I have perused the decisions in *Patrick Kinyanjui Njama V. Evans Juma Mukweyi* (2017) eKLR, *Denshire Muteti Wambua V. Keya Power & Lighting Co. Ltd* (2013) eKLR and *EWO (Suing as next friend of a minor - Cow) V. Chairman Board of Governors of AgoroYombe Secondary School* (2018) eKLR the respondent relied upon in the lower court in which Kshs. 1,500,000, Kshs. 1,500,000 and Kshs. 800,000 general damages respectively were granted to the claimants. The trial court noted that the appellant had not filed its submissions. The court in its judgement observed that the respondent's injuries were severe and immobilized him. The learned trial magistrate further rendered himself thus:

“ And guided by settled principles in award of damages, the comparable cited legal authorities and taking into account the monetary inflationary trends of the Kenya currency do hereby award the plaintiff the sum of Kshs. 800,000 on general damages for pain, suffering and loss of amenities”.



7. It must be noted that general damages are damages at large and no case is exactly the same as the other. The general method of approach in assessing general damages ought to be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see the often cited case of *Kemro Africa Ltd & Another V. Lubia & Another* (1982-88) KLR).
8. In this appeal the respondent first attacks the appeal as defective for failure to include the decree of the lower court in the record of appeal. The respondent also cites additional judicial determinations which also largely relate to more severe injuries relative to the instant matter owing to multiple fractures subject of those cases.
9. Regarding the alleged defectiveness of the appeal, indeed the appellant has not filed the decree appealed from. The judgement and proceedings of the trial court are, however, available to guide the court regarding the final orders of the trial court. I therefore choose to determine the appeal on merits.
10. The cited decisions are not quite comparable to the instant matter as they refer to more severe injuries involving multiple fractures unlike this case in which the respondent suffered a single fracture.
11. I have sampled the following decisions that I think are relevant. In *Nguku Joseph & Another V. Gerald Kihui Maina* (2020) eKLR the claimant sustained a fracture of the right humerus and a host of soft tissue injuries. Kshs. 500,000 general damages were assessed.
12. For a pelvic fracture and soft tissue injuries to the right thigh and chest, Kshs. 500,000 general damages were also assessed in the case of *Peter Gakere Ndiangui V. Sarah Wangari Maina* (2021) eKLR.
13. In yet another case of a pelvic fracture and soft tissue injuries, the claimant in *Joseph Njeru Luke & 3 others V. Stellah Muki Kioko* (2020) was awarded Kshs. 750,000 in general damages for pain and suffering. In *Kensilver Express Limited vs. Nzangu (Civil Appeal E039 of 2021)* (2022) KEHC 1033 (KLR) rendered in July 2022, the claimant sustained a cut wound to the right ear; two rib fractures and severe chest pain. He healed well with no permanent disability. The court assessed general damages in the sum of Kshs. 500,000. In *Deneva Heavy Trucks & Another vs. Chrispine Otieno* [2022]eKLR, the claimant sustained fractures of the left tibia and fibula and another fracture on the pelvis. He walked with a limping gait and supported himself with crutches. He was nevertheless expected to heal permanently. Kshs. 800,000 damages were assessed in his favour.
14. The above decisions are more comparable to the instant case. I must, however, take note that the respondent herein suffered a significant degree of permanent disability assessed at between 25% and 30% as per the medical reports exhibited. I do not think in the circumstances that the trial court's award of Kshs. 800,000 general damages for pain an suffering is unreasonable. The learned trial magistrate is not to be faulted the exercise of judicial discretion in the assessment of damages.
15. The appeal is therefore dismissed with costs to the respondent.
16. Judgement accordingly.

J. M NANG'EA, JUDGE

JUDGEMENT DELIVERED VIRTUALLY THIS 13TH DAY OF NOVEMBER 2024 IN THE PRESENCE OF :

The appellant's Advocate, Mr Nyakweba

The respondent's advocate, Absent

The Court Assistant, N/A

