



**Mosaremo v Ashley & another (Civil Appeal E025 of 2021)  
[2024] KEHC 14090 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14090 (KLR)

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

**CIVIL  
CIVIL APPEAL E025 OF 2021**

**BK NJOROGE, J  
NOVEMBER 14, 2024**

**BETWEEN**

**WYCLIFFEE MOMANYI MOSAREMO ..... APPELLANT**

**AND**

**MEAGAN SUTTAN ASHLEY ..... 1<sup>ST</sup> RESPONDENT**

**ANN ROBERTS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. This is an Appeal arising from the decision of Honourable S.G. Gitonga (Mrs) (RM) which was delivered on 15<sup>th</sup> January, 2021. It is in respect of Nairobi CMCC No. 5867 of 2017.
2. This is a running down claim. The Appellant was the original Plaintiff while the Respondent was the Defendant before the Trial Court.

**Background facts**

3. The Appellant was a motor cyclist riding a motorcycle KMDU 559J along Loresho Ridge Road. He claimed to have been knocked by the 1<sup>st</sup> Respondent who was driving a motor vehicle KCD 908P belonging to the 2<sup>nd</sup> Respondent.
4. Upon filing a suit claiming special and general damages for personal loss and injuries, the Defendants entered an appearance and filed a Defence.



5. The parties thereafter entered into out of Court negotiations and reached a settlement on liability. This was recorded before the Trial Court as follows;

“By consent: -

- a. Judgement on liability be entered in favour of Plaintiff against the Defendant in the ratio of 70%:30%
- b. Special damages agreed at Ksh.2,550/-
- c. Medical reports by both doctors and bundle of documents be addressed without calling the makers.
- d. Parties to file written submissions for the Court to assess general damages.”

6. The Parties did file submissions and Trial Court retired to render a verdict.

7. In its Judgment, the Trial Court made the following award;

- a. Liability by consent 30%: 70%
- b. General damages Kshs. 600,000
- c. Special Damages Kshs. 2,550
- d. Future Medical Costs Kshs. 100,000  
Kshs. 702,550  
Less 30% contributory negligence Kshs. 210,765  
Kshs. 491,785

8. It is this award on quantum that has triggered this Appeal.

9. This Appeal was admitted on 29/3/2023. Directions for the disposal of the Appeal by way of written submissions were also given.

10. The Appellant’s Counsel has filed his written submissions dated 29/9/2023. The Respondent’s Counsel has filed submissions dated 27/10/2023. The Court has perused the submissions filed as well as the authorities attached.

11. This matter was flagged down for the Rapid Results Initiative (RRI) during the month of October 2024.

12. The Memorandum of Appeal filed raises four grounds as follows;

1. That the Learned Magistrate erred by making an award of damages for pain, suffering and loss of amenities of life which was;
  - a. Too low,
  - b. Did not take into account relevant factors,
  - c. Not in tandem with recent awards for comparable injuries,
  - d. Was overtly wrong or erroneous.



## Issues for Determination

13. Based on the consent on liability recorded, as well as the Grounds of Appeal, the Court frames 2 issues for determination.
  - a. Whether the Trial Court's assessment of quantum arrived at an excessively low award?
  - b. What reliefs flow from this appeal?

## Analysis

14. This is a first Appeal. The Court is therefore duty bound to re-look, re-consider and re-evaluate the evidence presented before the Trial court afresh. Then this Court has to reach its own conclusions. However, this Court has to bear in mind that it neither saw nor heard the witnesses, and should make allowances for such. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A 123.
15. When it comes to interfering with the exercise of judicial discretion, the Court turns to the case of *Mbogo & another Vs. Shah* [1960] E.A. 93. The assessment of awards of general damages is an exercise of Judicial discretion. The Appellate Court will not interfere unless the trial Court misdirected itself and has clearly been wrong in exercise of the discretion, that there has been a resultant injustice.
16. The Court therefore warns itself that the assessment of quantum is an exercise in discretion The Court should therefore be slow and cautious in interfering with the exercise of such discretion by the Trial Court. See *Butt v Khan* (Civil Appeal 40 of 1977) [1978] KECA 24 (KLR) (Civ) (1 February 1978) (Judgment)

“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 respect, and so arrived at a figure which was either inordinately high or low.”
17. The Court hears the Appellant's Counsel to submit that the Trial Court did not consider all the authorities that were cited in support. That it only relied on one decision. He had submitted for an award of Kshs.1,500,000/- in general damages for pain and suffering. That he was not served with submissions by the Counsel for Respondent who in any event submitted for an award of Kshs.400,000/-.
18. He further submitted that the following cases are the relevant comparables for the injuries sustained by the Appellant.
  - i. *Edward Kamau & another v Hannah Mukui Gichuki & another* [2018] eKLR an award of Ksh850,000/- made.
  - ii. *Meru HCCA No.21 of 2009* an award of Ksh. 850,000/- made.
  - iii. *Omar Musa Hassan & another Vs Rashid Salim & another* [2000] eKLR, an award of Kshs.700,000/- made.
  - iv. *Jackline Kamunyi Kamau V Simon Kiiru Njoki* [2018] eKLR an award of Kshs.1,200,000/- made.
  - v. *David Mwangi Kiiru vs Wilson Gathondu Muiruri (Kiambu) HCCA No. 159 of 2019*. An award of Kshs.1,000,000/- made.



- vi. Francis Ndungu Wambui vs VK (2019) eKLR. An award of Kshs.1,000,000/- made.
19. The Appellant’s Counsel submitted that the authorities that he relied upon were more relevant. They referred to surgical operations performed to correct the fractures. He distinguished the decision of Francis Maina Kahura relied upon the Respondent’s Counsel. That it did not involve any past or future surgical operations. Hence the Trial Court ought not to have relied upon it.
20. He also urged the Court to consider the incidence of inflation as the decision had been made in 2015. Therefore, the award should have been higher.
21. The Respondents oppose the appeal. Through their Counsel they submit that the award on general damages should stand. They however urge the Court to further reduce the costs for future medical expenses from Kshs.100,000/- to Kshs.97,000/-. We note that there was no cross appeal filed and the Appellant has not challenged the award of Kshs.100,000 for future medical expenses. The Court is not persuaded that it should interfere with this award.
22. On general damages for pain and suffering, the Respondent referred this Court to the following decisions
- i. Francis Maina Kahura vs Nahashon Wanjau Muriithi (2015) eKLR. The general damage assessed at Kshs.500,000/-.
  - ii. Kenyatta University vs Isaac Karumba Nyuthe (2014) eKLR. The damages were assessed at Kshs.700,000/-.
23. The Court notes that the general principle is that similar injuries should attract similar awards. See SM [Minor suing through her mother and next friend *[KAM] v Joel Obare Ameyya (Civil Appeal 30 of 2017)* [2019] KEHC 8902 (KLR) (29 March 2019) (Judgment).
- “One of the cardinal principles in the assessment of general damages is that similar injuries should attract similar awards so as to maintain a level of consistency”
24. The Court is also alive to the fact that no two injuries are alike. Therefore, there is no straight jacket award for say a fracture of the hand.
25. Generally, the Court will be keen to look at the comparable awards. If they fit within the bracket, the Court will seldom interfere with the discretion of the Trial Court. The Court will however keep a keen eye on outlier awards, either manifestly low or excessively high awards. It is in such circumstances that the Court will interfere.
26. There are two medical reports. The Appellant’s medical report was prepared by Mr. W.M Wokabi a Consultant Surgeon dated 5/10/2016. It identifies the injuries as a fracture of the left femur. The Appellant was operated on and the femur fixed with a metallic K-Nail. Recovery was to take 12-15 months. A residual disability of 80% was expected. The K-Nail would require removal after 2 years at a cost of Kshs.120,000/-.
27. The Respondents’ Medical Report was prepared by Dr. Wambugu P.M. It is dated 10<sup>th</sup> May 2019. He identified the injuries as closed fracture of the left femur. He confirms that an open reduction procedure was done to fix the fracture. The Appellant walked with a slight left sided limping gait. There was a 0.5 cm true shortening of the left limb.
28. The Court is guided by the following comparables;



- a. *Emuria v Registered Trustees Catholic Diocese of Maralal (civil appeal E033 of 2021) [2024] KEHC 10083 (KLR)*. General damages assessed at Kshs.800,000/- for a fracture distal end of the left femur, fracture proximal end of the left tibia and fibula and severe soft tissue injuries to the leg.
  - b. *Kihara & another v Mutuku (Civil Appeal 27 of 2018) [2022] KEHC 15626 (eKLR)*. General damages, for simple fracture of the femur upheld on appeal at Kshs.700,000/-.
  - c. *Achacha vs Litunya (civil Appeal E044 of 2021) (2022) KEH 3332 (KLR)*. General damages assessed at Kshs.1,200,000/- for head injuries, blunt injury to left eye, fracture of the right humerus, fracture of the right femur, fracture of the left femur and multiple cut wounds on both limbs.
  - d. *George William Awuor vs Berly Awuor Ochieng (civil appeal 1 of 2020) (2020) KEHC 1103 (KLR)*. General damages assessed at Kshs. 1,200,000. The injuries were identified as fractures of right femur and left tibia fibula. The labia fibula fractures were compound. The femur fracture was simple. Nail fixation was done.
  - e. *Njogu vs Njoroge (Civil Appeal E027 of 2023) (2024) KEHC 1876 (KLR)*. General damages assessed at Kshs.1,000,000. The injuries were identified as fracture of the right mandible, right shoulder dislocation, fracture of the left mid shaft femur as lacerations on the right forehead region.
29. It is therefore clear to this Court that the award of Kshs.600,000 for the injuries sustained by the Appellant is manifestly low. The Appellant faults the Trial Court for failing to take note that this was not a simple fracture. It required an operation and fixation of a K- nail.
30. On the other hand, the award of Kshs.1.500,000/- sought by the Appellant is too high. The Court doing the best it can in the circumstances, taking into consideration the nature of the injuries and the inflationary trends, awards Kshs.1,000,000/- in General damages for pain and suffering. The Court therefore does interfere with the exchange of discretion by the Trial Court.

### **What reliefs flow from this Appeal**

31. The Appeal is therefore successful.
32. As to costs, they follow the event. The Appellant as the successful party is awarded the costs of this appeal.

### **Determination**

33. The Appeal succeeds to the extent that the decree of the Lower Court in Milimani Commercial Courts CMCC 5867 of 2017 is set aside and replaced with the following award;
  - a. Liability by consent 30%:70%
  - b. General damages Kshs. 1,000,000.00
  - c. Special damages Kshs. 2,550.00
  - d. Future medical costs Kshs. 100,000.00  
Kshs. 1,102,500.00  
Less 30% contrary negligence Kshs. 330,765.00



Kshs. 771,785.00

- e. The costs and interest of the suit before the lower Court are awarded to the Respondent/Plaintiff.
- 34. The costs of this appeal are awarded to the Appellant, to be agreed upon within 30 days failure to which the same to be taxed.
- 35. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**NJOROGE BENJAMIN K**

**JUDGE**

In the presence of: -

..... for the Appellant

..... for the Respondent

Court Assistant.....

