



**Shiro v Mini Bakeries (NBI) Limited (Civil Appeal E072 of 2023)
[2024] KEHC 16642 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E072 OF 2023
GL NZIOKA, J
NOVEMBER 12, 2024**

BETWEEN

SAMUEL MASAKARA SHIRO APPELLANT

AND

MINI BAKERIES (NBI) LIMITED RESPONDENT

(Being an appeal from the decision of Hon. J. Ndengeri, Principal Magistrate delivered on 25th July 2023 vide Chief Magistrate's Civil Case No. E024 of 2022)

JUDGMENT

1. The plaintiff (herein “the appellant”) sued the defendant (herein “the respondent”) vide a plaint dated 24th January 2022, seeking for the following orders: -
 - a. General damages and Special damages of Kshs 132,442
 - b. Future medical expenses of Kshs 200,000 as at 24th January 2022
 - c. Costs of the suit and interest on (a) and (b) above at court rates
 - d. Any other or further relief that this Honourable court may deem just to grant
2. The appellant’s claim arose as a result of a road accident that, occurred on 29th January 2019. He averred that he was cycling along Moi South Lake Road when he was hit by a motor vehicle registration number KCP 933M driven by the defendant’s authorized driver and/or agent.
3. That, the defendant’s agent or driver drove the subject vehicle in a negligent manner as stated in the particulars of negligence at paragraph 5 of the plaint.
4. That as a result of the accident he sustained the following injuries: -
 - a. Comminuted fracture mid shaft right femur;



- b. Fracture posterior wall and column right acetabulum;
 - c. Deep cut wound on the head leading to soft tissue injuries;
 - d. Deep cut wound on the chest leading to soft tissue injuries;
 - e. Permanent disability 30%.
5. However, the respondent denied liability and blamed the appellant for solely causing and/or substantially contributing to the occurrence of the accident.
 6. Subsequently the parties recorded a consent judgment on liability in the ratio of 85:15% in favour of the appellant as against the respondent.
 7. The case proceeded to full hearing on quantum, and thereafter the parties' filed their respective submissions. Subsequently the trial court entered judgment on quantum as follows: -
 - a. General damages-----Kshs. 600,000
 - b. Future medical expenses-----Kshs. 100,000
 - c. Special damages-----Kshs. 900,872
 - Total-----Kshs. 765,741.20
 8. However, the appellant is aggrieved by that judgment and appeals on the following grounds: -
 - a. That the learned Magistrate erred in fact by awarding, General damages that was less than what was proposed by the respondent in their submissions;
 - b. That the learned Magistrate erred in law and in fact by failing to interrogate the authorities cited by both parties prior to arriving at her decision;
 - c. That the learned Magistrate erred in law and in fact by failing to give a legal basis or otherwise as to why did not rely on the authorities contained in the submissions filed by parties;
 - d. That the learned Magistrate erred in law and in fact by awarding a lesser amount for future medical expenses despite the same having been provided for by Dr.Obed Omuyoma in his medical report;
 - e. That the learned Magistrate erred in law and fact by awarding less special damages than what was pleaded and proved;
 - f. That the learned Magistrate erred in law and in fact by failing to appreciate the gravity of the injuries sustained by the appellant.
 9. As a result of the afore said the appellant seeks for the following orders: -
 - a. The appeal be allowed.
 - b. The judgment of the lower court be set aside and the court proceed and assess the general damages, future medical expenses and special damages.
 - c. The appellant be granted costs of the appeal.
 10. The appeal was disposed of vide filing of submissions. The appellant submitted that, the trial Magistrate trivialized the injuries sustained by the appellant and in so doing awarded Kshs. 700,000 as



general damages, an amount lower than the awards proposed by both the appellant and respondent in their submissions in the trial court.

11. That the appellant prayed for an award of Kshs. 3,500,000 and relied on the case(s) of:
 - a. Eugene Reeksting vs Attorney General & Anor (2021) eKLR,
 - b. James Mbugua & Anor vs John Mbugua Mburu (2020) eKLR,
 - c. John Mutuga Kamau vs Kanini Haraka Enterprises Ltd (2019) eKLR;
 - d. Transtrac Ltd & Anor vs Nalanga Lokwait (2019) eKLR,
12. That the respondent proposed the appellant be awarded Kshs. 1,000,000 as general damages and relied on the case(s)of;
 - a. Geoffrey Maraka Kimchong vs Frechial Hugiuru (2020) eKLR,
 - b. Kimathi Muturi Donald vs Keyin Ochieng Osoro (2021) eKLR,
 - c. Cold Hire Tours Limited vs Elizabeth Wambui Matheri (2015) eKLR,
 - d. Ouma Dachi -Vs- Joseph Maina Kamau & Another (2018) eKLR
13. The appellant further submitted that, the trial court did not apply itself to the authorities cited by the parties, and instead relied on the case of; P. N Mashru Limited —Vs- Omar Mwakoro Makenge (2018) eKLR without laying a basis for the same.
14. That the injuries in the afore case(s) are distinguishable from the injuries the appellant suffered which were more severe. Further, the claimant in the afore case suffered permanent disability assessed at 5% while the permanent disability sustained by the appellant herein was assessed at 30%.
15. Further that, the trial Magistrate erred in awarding Kshs. 100,000 as future medical expenses for removal of the implants being lower than the amount of Kshs. 200,000 stated in the medical report of Dr. Obed Omuyoma. That despite the appellant being examined by Dr. Malik on behalf of the respondent no reference was made to the cost of removing the implants.
16. Furthermore, the trial Magistrate erred by descending into the arena of the medical field without requisite expertise and by stating that she took judicial notice that most doctors recommend an amount of Kshs. 100,000 as the costs of removing metal implants in most affordable hospitals.
17. However, the respondent submitted that assessment of damages was at the discretion of the court and cited the case of; Ntulele Estate Transporters Ltd & another v Patrick Omutanvi Mukolwe (2014) eKLR where the court stated that an appellate court is not justified in substituting an award of the trial court with its award on the ground that it would have awarded a different figure if it tried the case in the first instance.
18. That, the appellant's contention that the trial court did not consider the submissions and authorities by the parties and awarded inordinately low amounts to travelling outside his pleadings, which the court should not permit.
19. The respondent relied on the case of; Eurochem International Limited v Emma Kabura Kariuki (2021) eKLR where the court cited the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others (2014) eKLR and held that the court and the parties are bound by the pleadings and therefore the court can only adjudicate on matters in dispute as raised by the parties in the pleadings.



20. The respondent further submitted that, a court has a duty to consider the submissions of the parties but is not bound to take them into account as they are merely a guide for the court. That, the trial Magistrate in her judgment discussed the submissions of the parties and highlighted the authorities relied on by the parties and therefore cannot be said to have followed any wrong principle.
21. The respondent placed reliance in the case of; Benson W. Kaos & 72 others v Attorney General & 85 others [2022] eKLR where the court stated that submissions are not part of the case as they are merely the marketing language of parties meant to concretize and focus on their case and that a court is at liberty not follow them.
22. That, where multiple authorities are cited a court is at liberty to adopt one authority over another and cannot be faulted for doing so. That even where the court does not follow the authorities cited by parties, it cannot be said to have erred if the assessment was fair, reasonable and within decided cases.
23. However, the respondent argued on a without prejudice to its foregoing submissions, that if the court is persuaded that the trial court followed the wrong principles of law and therefore the damages ought to be re-assessed, the court ought to award an amount of Kshs. 1,000,000 as general damages.
24. That, the appellant was subjected to a second examination by Dr. Malik who found that the appellant sustained a fracture of the acetabulum and femur and that the femur was straight and solidly united and permanent disability was assessed at 20%.
25. Further, the authorities relied on by the appellant are for more severe damages and therefore the court ought to be guided by the respondent's authorities relied on in the trial court in particular the case of; Sylvester Onvango Lire v Isack Ouma Shikuku (2022) eKLR where the court reduced an award of general damages from Kshs. 850,000 to Kshs. 650,000 where the plaintiff suffered a fracture of the midshaft left femur and a fracture of the pelvis.
26. On the issue of special damages, the respondent submitted that, the appellant claimed for Kshs. 132,442.00 while the trial court awarded Kshs. 100,872. However, the receipts provided at pages 27 to 41 of the record of appeal amounts to Kshs. 99,772. In the circumstances, the trial court finding cannot be faulted and therefore the appeal ought to be dismissed with costs.
27. At the conclusion of hearing of the appeal and assessing general damages, I have considered following matters: -
 - a. The injuries the appellant sustained as pleaded in the plaint dated 24th January 2022;
 - b. The medical documents and/or reports produced by the parties in support of those injuries;
 - c. The submissions on quantum as tendered by the parties in the trial court;
 - d. The award on damages by the trial court.
28. In relation to injuries sustained, the appellant pleaded that he sustained the following injuries: -
 - a. Comminuted fracture mid shaft right femur
 - b. Fracture posterior wall and column right acetabulum
 - c. Deep cut wound on the head leading to soft tissue injuries
 - d. Deep cut wound on the chest leading to soft tissue injuries
 - e. Permanent disability 30%



29. As regards the documents in support of the afore injuries, I note from the record of appeal and appellant's testimony in the trial court on 6th June 2023, the appellant filed a P3 Form, discharge summary and receipts from Nakuru PGH Hospital, treatment notes, outpatient discharge summary and receipts from A.I.C Kijabe Hospital, Medical legal report by Dr. Obed Omuyoma and a medical document by Dr Malik produced by consent of the parties.
30. In analysing of the subject documents, I note that, the P3 form dated; 2nd December 2021, indicates that the appellant suffered soft tissue injuries on the head and sutured O/E, that there were no visible scars at the time of filing the P3, that ha also suffered soft tissue injuries on the mediaster O/E hypertrophic with ascar 1cm long, fractured of the right hip joint, right knee joint and right mid femur, and had a proximal femur scar measuring 25cm long, mid lateral femur measuring 15cm long and a knee scar measuring 10cm long where ORIF was done. The age of injuries was 10 months old and degree of injuries is classified as grievous harm. consequently, the P3 form confirm inter alia; the fracture of the right hip joint, right knee joint and right mid femur.
31. I note that the discharge summary from Provincial General Hospital at Nakuru dated 12th February 2019 does not indicate the injuries the appellant suffered, and so are the documents from A.I.C Kijabe Hospital.
32. On the other part the medical report by Dr. Obed Omuyoma dated; 12th December 2021 reflects the injuries as pleaded. It further indicates that, the appellant was admitted for two (2) weeks at Nakuru Level 5 Hospital and put on skeleton traction, and later discharge and re-admitted to Kijabe A.I.C Hospital. That while at Kijabe, he was taken to theatre and three operation done as indicated below:-
- a. Open reduction and internal fixation of the fracture femur [ORIF]
 - b. Open reduction and internal fixation of the fracture posterior wall and column of the right acetabulum [ORIF]
 - c. Right femur pin traction insertion.
33. Dr. Obed formed the opinion that the appellant sustained the injuries stated and a permanent disability of 30%. He will require an implant in future at a cost a sum of Kenya shilling two hundred thousand (Kshs 200,000) to remove the same. He classified the degree of injuries as grievous harm.
34. The medical report by Dr Malik dated 26th day of May 2022, indicates he suffered fracture of the right femur but it had straightened and solidly united and he assessed the degree of permanent disability at 20%.
35. Having considered the evidence adduced the trial court in the final judgment dated; 25th July 2023, awarded the appellant Kshs 600,000 as general damages and relied on the case of; *P. N Mashru Limited - vs- Omar Mwakwo Makenge (2018) eKLR, No. 9 of 2017*. The trial court also cited an authority referred to as "HCCA 149 of 2012" where the court awarded Kshs 700,000 as general for similar injuries.
36. The appellant has submitted that the trial court did not take into account the submission tendered by the parties. I have indeed noted from the trial court judgment that, there is no indication that, the submissions by the parties were considered at all.
37. Be that as it were, I note that, the law is settled as held in the cases of; *Mbogo & another Vs Shah (1968) EA and Mkube -vs- Nyamuro 1983 KLR 403*, and *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003* (unreported) the court stated that, while assessing damages, the appellate court will not interfere with the trial court's decision on quantum unless in exercising that discretion the trial court



misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice.

38. In evaluating the authorities cited by the appellant in the trial court, I note that generally the victims therein suffered more serious injuries than the appellant as demonstrated here below.
- a. Eugene Reeksting vs Attorney General & Anor (2021) eKLR the plaintiff sustained fracture of the distal end of the left radius, fracture of the head of the left femur with posterior dislocation of the left hip joint, fracture of posterior wall of the left acetabulum, multiple fractures of the ribs of the left side of the chest, lung contusion with permanent disability assessed at 30%.
 - b. James Mbugua & Anor vs John Mbugua Mburu (2020) eKLR, the claimant sustained more serious injuries of four (4) fractures. He sustained loss of 2 upper incisors teeth with fracture of the teeth, deep cut wound on the lower lip and chin, comminuted fracture of the left femur, comminuted fracture of the right acetabulum and dislocation of the right hip joint, and fracture of the right inferior ramus of pelvis. The doctor classified the degree of injury as grievous harm and assessed permanent disability at 50%.
 - c. John Mutuga Kamau vs Kanini Haraka Enterprises Ltd (2019) eKLR the appellant sustained fracture of the pelvis, fracture of the right acetabulum, fracture right femur, fracture right wrist joint and soft tissue injuries to the head, the right shoulder and the right groin, Dr. Omuyoma assessed permanent disability at 40% while Dr Malik assessed disability at 30%. Therefore the injuries were more severe injuries consisting four (4) fractures and soft tissue injuries.
 - d. Transtrac Ltd & Anor vs Nalanga Lokwait (2019) eKLR the plaintiff suffered fractures to the left inferior and superior rami of the pelvis, fracture of the mid-shaft of the left femur, comminuted fracture of the right femur at the distal 1/3 and deep cut wound on the forehead. Permanent disability was assessed at 60%.
39. On its part the respondent cited authorities where the victims suffered relatively less severe injuries than the appellant as here below indicated: -
- a. Geoffrey Maraka Kimchong vs Frechial Hugiuru (2020) eKLR where the claimant suffered soft tissue injuries and one (1) fracture.
 - b. Kimathi Muturi Donald vs Keyin Ochieng Osoro (2021) eKLR on 21st October 2021 Chitembwe J (as he then was) awarded general damages of Kshs. 1,200,000 where the plaintiff suffered two (2) fractures.
 - c. Cold Hire Tours Limited vs Elizabeth Wambui Matheri (2015) eKLR the claimant sustained a fracture and dislocation of the hip joint requiring hip replacement and permanent incapacity assessed at 50%.
 - d. Ouma Dachi -Vs- Joseph Maina Kamau & Another (2018) eKLR the claimant had less serious injuries with no permanent disability.
40. The court on its part relied on the case(s) of P. N Mashru Limited —Vs- Omar Mwakoro Makenge (2018) eKLR where the respondent suffered loss of consciousness after the accident, fracture of the femur distal third, fracture of the temporal bone with heamatoma, head injury to the right frontal parietal bone with brain oedema, left subdural heamotama. The injuries he sustained were classified as grievous harm leaving him with memory loss and five (5%) per cent, incapacity on the limbs and need for further examination by a neurosurgeon and the court awarded Kshs 1,200,000 general damages for pain and suffering and loss of amenities.



41. In analysing the aforesaid, I find that at no time did the trial court indicate in its decision that it considered the submissions and authorities tendered by the parties. It is not enough for the trial court to just state that they were considered without analyzing them
42. Indeed, it is important for the parties and appellant court to appreciate how the trial court arrived at the award made. I hold the view that, it can only be evident where the authorities cited are distinguished as to whether they are comparable or not to the matter at hand and giving the reasons for the decision.
43. Furthermore, the respondent submitted that the appellant be awarded at least Kshs 1,000,000. However, the trial court in its judgment awarded general damages of Kshs. 700,000, without explanation as to why it was awarding a lesser sum than the one conceded.
44. The trial court makes reference to two authorities. However, one authority has incomplete proper citation citation.
45. Be that as it were, as indicated herein I have compared the authorities by the parties and the pleadings and it is very clear that the authorities which the appellant relied on were of very severe injuries and therefore the award proposed of Kshs. 3,500,000 is untenable. On the contrary, the authorities relied on by the respondent were lesser severe the injuries and Kshs 1, 000, 000 is too low.
46. It can be noted from the medical reports herein that the degree of disability varies with Dr. Obed indicating permanent disability at 30% while Dr. Malik assessed it at 20%. To reconcile the two a fair assessment of permanent disability will be pegged at 25%
47. As regard the issue of future medical expenses, I note that the trial court stated that, it had taken judicial notice of the amount usually awarded for the procedure in question an awarded Kshs. 100,000 as future medical costs.
48. However, Dr. Obed an expert medical doctor proposed an amount of Kshs. 200,000 as such the trial court could not ignore that opinion. It is only where the doctors present varying amounts that the court can either ask for an independent report to reconcile or in the alternative, the court assess the amount. In the circumstances, the cost of future medical expense should have been Kshs. 200,000 and therefore I enhanced it to Kshs. 200,000.
49. To revert back to general damages, I hold the view that when the same is assessed the court must take into account special damages and any other sum awarded including future medical expense and that no amount of money can replace the frame of damaged body and finally inflation.
50. The upshot of the afore is that, I make an award:
 - a. General damages----- Kshs 1,300,000.
 - b. Future medical expense---- Kshs. 200,000.
 - c. Total Kshs. ----- Kshs 1,500,000
 - d. Interest and costs and to the appellant.
 - e. Each party to meet its own costs of the appeal.
51. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 12TH DAY OF NOVEMBER 2024.

GRACE L NZIOKA



JUDGE

In the presence of: -

Ms. Amboko for the appellant

Mr. Karanja for the respondent

Mr. Komen: court assistant

