

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
CIVIL APPEAL NO. E004 OF 2024

ROLLINGSTONE NJUKI NJAGI.....1ST APPELLANT

NANCY KARIMI NYAGA.....2ND DEFENDANT

VERSUS

JENNIFER NCARIBA NGAI.....RESPONDENT

(Being and appeal from the judgement of the Hon. Oscar Wakina (R.M), in Chuka Chief Magistrate's Court Criminal Case No. E188 of 2022 delivered on 19th March, 2024.)

JUDGEMENT

1. This Appeal arises from the judgment and decree in Chuka CMCC No. E188 of 2022 delivered on 19th March 2024 by Hon. Oscar Wakina (R M.) By way of Plaint dated 21st September 2022 the Plaintiff had sued the Defendants seeking special and general damages arising out of a road traffic accident. The Plaintiff's case was that on or about

5th July 2022 at Magunas area along Chuka-Embu road the 1st Defendant being the driver of motor vehicle registration number KCW 559K drove the said motor vehicle so negligently and carelessly that the said motor vehicle veered off its lawful lane and hit motor cycle registration number KMEK 692C on which motor the Plaintiff was a pillion passenger as a result of which a road traffic accident occurred and the Plaintiff suffered serious bodily injuries. The Plaintiff blamed the 1st Defendant for the accident for the accident whose actions the 2nd Defendant is vicariously liable for.

2. The Defendants filed a statement of defence dated 9th December 2022 denying the averments in the Plaint in particular denying that the Plaintiff was a pillion passenger aboard motor cycle registration number KMEK 692C along the Chuka-Embu road when at Magunas area, the 1st Defendant negligently drove the motor vehicle registration

number KCW 559K that he/she caused it to lose control and knock down the motor cycle and that the Plaintiff suffered pain and sustained injuries.

3. The matter proceeded for hearing where the Plaintiff testified on assessment of damages with liability having been determined in civil suit number E189 of 2022 which was selected as the test suit. Judgment was entered in favour of the Plaintiff in the in the following terms;

- i. Liability 100%
- ii. General damages Kshs. 800,000 with interest at court rate from date of judgement
- iii. Special damages Kshs. 33,300 with interest at court rate from date of filing suit
- iv. Costs with interest at court rate from date of judgement.

4. Dissatisfied with the judgment, the Appellants lodged the Appeal vide the amended Memorandum of Appeal dated 12th April 2024 raised on the following grounds: -

- i. That the learned magistrate erred in law in awarding general damage for pain and suffering at Kshs. 800,000 which amount is manifestly excessive and high considering the injuries sustained by the Respondent.
- ii. That the learned magistrate erred in law and in fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellants' case while arriving at the award in general damages.
- iii. That the learned magistrate misdirected himself by using wrong principles and

failing to consider other conventional awards in the assessment of damages payable.

- iv. That the learned magistrate erred in law and in fact by failing to follow rules of precedence in awarding general damages.
- v. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record and against the doctrine of stare decisis.

5. The Appellant prayed that the Appeal be allowed, the judgment of the lower court be set aside and costs of the Appeal be granted to the Appellants.

6. My duty as the first appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of **Kiilu & Another-v-**

Republic (2005) 1 KLR 174 where the Court of Appeal stated: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court

has had advantage of hearing and seeing the witnesses.”

7. The Appeal was canvassed by way of written submissions as directed by the court. The Appellants filed written submissions dated 7th August 2024. The Respondent filed written submissions dated 17th October 2024.

8. Both parties raised the issue of quantum. The Appellant wished the court to find that the award of general damages of Kshs. 800,000/= by the trial court was excessive considering the injuries sustained by the Respondent.

9. On her part, the Respondent wished the court to affirm that the trial court was not in error in awarding Kshs. 800,000/= as general damages for pain and suffering.

10. Having considered the record, grounds of appeal, and respective submissions of the parties, the one broad issue which arises for my

determination is whether the award of Kshs. 800,000/= as general damages for pain and suffering was manifestly excessive in light of the injuries sustained.

11. It is trite that assessment of damages is discretionary. As a general rule, appellate courts should be slow to interfere with the exercise of such discretion unless it is shown that the trial court proceeded on a wrong principle, misapprehended the evidence, or made an award that is so inordinately high or low as to represent an erroneous estimate of the damage suffered.

12. The above principles were clearly enunciated by the Court of Appeal in **Butt v Khan [1982-88] 1 KAR 1**, where the court held:-

“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 trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, or took into account an irrelevant factor, or left out a relevant one.”

13. The same position was reaffirmed in **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR**, where the Court of Appeal emphasized that:

“The assessment of damages is a matter of discretion by the trial court and an appellate court will be slow to interfere unless it is shown that the trial court acted on a wrong principle of law, or the award is inordinately high or low.”

14. In this case, the nature of injuries sustained by the Plaintiff were not in dispute. From the medical report dated 15th December 2022, the Plaintiff sustained an open bi-malleolar fracture right ankle and soft tissue injuries which were corroborated by the P3 form.

15. The Appellants contend that the award of Kshs. 800,000/= was manifestly excessive in light of the injuries sustained by the Respondent. They opined that an awards of Kshs. 350,000 would be sufficient as general damages. They relied on the following authorities: -

- i. **Purity Wangui Kingóri v Paul Wandio Kariuki & Another [2020] eKLR** where the Appellant was awarded Kshs. 350,000 for fracture of the medial malleolus of the left ankle, a cut wound over the lateral side of the left ankle, bruises on the

dorsum of the left foot and friction injury to both forearms.

ii. **Gladys Lyaka Mwombe v Francis Namatasi & 2 Others [2019] eKLR**

where the court upheld an award of Kshs. 300,000 for injuries of a fracture of the left tibia fibula.

iii. **Savanna International Ltd v Muka [2022] KEHC 675 KLR**

where the Respondent had been awarded damages of Kshs. 500,000 for fracture medial malleolus of the left ankle joint and severe soft tissue injuries which amount was revised to Kshs. 400,000 on appeal.

16. On her part, the Respondent maintained that the award was not manifestly excessive taking into consideration the nature and extent of injuries as well as inflation rates. In support of her argument, she relied on the following authorities: -

- i. **Ombeti & Another v Muthuure [2024] KEHC 3377 (KLR)** the Respondent suffered a fracture of the left femur and soft tissue injuries was awarded Kshs. 800,000.
- ii. **Pestony Limited & Samuel Itonye Kagoko [2022] eKLR** where the court awarded general damages of Kshs. 800,000 for a fracture of the left femur.

17. From the medical evidence, the Respondent suffered a compound fracture of the ankle joint an injury generally considered serious due to the prolonged healing period and possible permanent weakness or stiffness. However, the injury cannot be equated to a femur fracture, which is generally more severe and attracts higher awards.

18. In assessing damages, the guiding principle is comparability, ensuring that like cases are treated alike while also taking into account the passage of

time and inflation. This was emphasized in **Stanley Maore v Geoffrey Mwenda [2004] eKLR**, where the Court of Appeal held that:

“Comparable injuries should be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

19. The cases cited by the Appellant show that injuries involving ankle fractures of comparable degree have attracted awards in the range of Kshs. 300,000/= - 450,000/= in recent years. On the other hand, the authorities cited by the Respondent involve femur fractures, which are more severe.

20. I find that the trial court did not sufficiently consider the nature of the specific injury relative to the comparable precedents. The award of Kshs. 800,000 was therefore on the higher side,

representing an erroneous estimate of damages for the injury in question.

21. In the case of **Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others [2022] eKLR**, the Appellant sustained fractures of the right tibia and fibula leg bones (lower 1/3rd bi-malleolar ankle fracture); dislocation of the right ankle and bruise on the right leg. Metal implants were inserted at the tibia and fibula. The court awarded damages at Kshs 600,000/-.

22. In view of the foregoing, and guided by precedent and prevailing range of awards, I am persuaded that an award of Kshs. 450,000/= would be a fair and reasonable compensation for the injuries sustained by the Respondent.

23. In the end, the appeal succeeds to the extent that:-

- (i) the award of Kshs. 800,000/= given by the trial court is set aside and substituted with an award of Kshs. 450,000/= as general damages for pain and suffering. The same shall attract interest at court rates from the date of judgement in the trial court.
- (ii) The award on special damages, remains undisturbed.
- (iii) The costs in the suit remain as awarded by the trial court while each party shall bear their costs in this appeal.

Orders accordingly

**Judgement delivered, dated and signed at
Chuka this 11th day of November, 2025.**

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R. LAGAT-KORIR

JUDGE

**Judgment delivered in the absence of the
parties. Muriuki (Court Assistant.)**

ORIGINAL