

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E130 OF 2023

DANIEL MUSEMBI.....

APPELLANT

VERSUS

**JOSEPH MULI KIMEU(Suing as the father
and next friend to EMMANUEL MUOKA).....**

....RESPONDENT

*(Being an appeal from the judgment of Hon B. Ojoo (Chief
Magistrate) delivered on 17th May 2023 in Mavoko Law Courts
Case No. 49 of 2021)*

JUDGMENT

- 1.By Plaint dated 11/12/2020 the Respondent herein successfully sued the Appellant for general damages, special damages, costs plus interest of the suit arising from an accident that is alleged to have occurred on 19/09/2020 at Mlolongo playground when the child was knocked down by Motor vehicle registration number KBW 162N belonging to the Respondent.

- 2.In its Statement of Defence dated 23/02/2021, the Appellant vehemently denied the accident claim and urged the court to dismiss the suit with costs.

3. After hearing and evaluating the evidence adduced by the parties, the Adjudicator found in favour of the Respondent and found the Appellant 100% liable for the accident. The Adjudicator then awarded Kshs 800,000 as general damages, Kshs 5,350 as special damages plus costs and interest.

4. Being aggrieved, the Appellant preferred this appeal. The appeal is premised on the following grounds:-

“a. That the Adjudicator erred in law and in fact by giving an award that was inordinately high in the circumstances.

b. That the Adjudicator erred in law and in fact by holding that the Respondent had proved his case on a balance of probability.

5. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 19/03/2025 and the Respondent's are dated 28/05/2025.

6. The Appellant submitted on two issues. First, he contended that the award was inordinately high and asked the court to interfere with the award of Kshs. 800,000 for general damages and award the Plaintiff Kshs. 200,000 on the basis the injuries suffered were not as serious as the one discussed in the cases of ***Clement Gitau v G K K [2016] KEHC 1730 (KLR)*** and ***Igoki v Kanini [2023] KEHC 20715 (KLR)***.

7. Secondly, it was submitted that there was nothing to rebut by the Appellant as the Respondent failed to discharge the legal

burden of proof and the Trial Court erred in finding it 100% liable. Further reliance in support of its submissions was placed on the cases of ***Southern Engineering Company Ltd. vs Musingi Mutia [1985] KLR 730, Mbuthia Macharia v Annah Mutua Ndwiga & another Civil Appeal No. 297 of 2015 [2017] eKLR, Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 54 (KLR) , Charterhouse Bank Limited (under statutory management) V Frank N. Kamau [2016] eKLR and Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021[2022] KEHC 7 (KLR).***

8. On its part, the Respondent urged the court not to interfere with the Trial Court findings as it discharged its burden of proof and the evidence was uncontroverted. That that the Appellant had an opportunity to object to the production of the alleged hearsay evidence at the trial court which the Appellant failed to do and therefore this allegation must be rejected. Lastly, it was contended that it had not been demonstrated how the Trial Court erred and/or applied wrong principles in award the general damages. In support of its submissions, reliance was placed on the cases of ***Linus Ngangsa Kiongo v. Town Council of Kikuyu, HCCC No. 79 of 2011, Njau v MW (Minor suing through mother and next friend HMM (Civil Appeal E032 of 2021) [20231 KEHC 1060 (KLR), e of George Warukenya Mucuku v Mugo [2023] KEHC 20021 (KLR) and Cecilia W. Mwangi & Another V Ruth W. Mwangi [1997] KECA 62 (KLR).***

Analysis and determination

9. I have considered the Trial Court record, the Memorandum of appeal and the submissions of the parties. Being the first appellate court, the court has a duty to re analyse and re-evaluate the evidence as per **Section 79 of the Civil Procedure Act**. Having done so, I find that the issue for determination is whether the award of liability and quantum should be interfered with.
10. As regards liability, the evidence of the Respondent was uncontroverted. Justice Odunga (as he then was) in **Linus Nganga Kiongo & 3 Others V Town Council Of Kikuyu [2012]Eklr** analysed this issue and stated as follows;

“What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call

evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. The case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 said: "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations ... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

11. In this case, no evidence was produced to displace that of the Respondent. I therefore see no reason of interference with the finding on liability.

12. The principles for interference with an award of damages were discussed by the Court of Appeal in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] KECA 137 (KLR** where the court rendered itself as follows;

"The principles to be observed by an appellate court in deciding whether it is justified in

disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principle.”

13. Similarly, in *Catholic Diocese of Kisumu v Tete* [2004] eKLR the same Court held that:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.”

14. Comparable injuries should attract comparable awards. See ***Jacktone Ouma v Moureen Achieng (2016) e KLR***. The Court of Appeal in ***Mohamed Mahmoud Jabane V Highstone Butty Tongoi Olenja [1986] eKLR***, Kneller, JA (as he then was) stated as follows: -

“The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

- 1. Each case depends on its own facts;***
- 2. Awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);***
- 3. Comparable injuries should attract comparable awards.***
- 4. Inflation should be taken into account; and***
- 5. Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”***

15. The injuries sustained in this case are not opposed, the Appellant did not produce any evidence to controvert the medical report by Dr. Titus Ndeti Nzina dated 12/05/2022 that was produced. In PW2’s expert opinion, the child suffered

maim; he sustained soft tissue and fractured bone which caused him pain and suffering. He further indicated as follows;

“The degree of functional permanent incapacity is assessed at ten percent (10%).”

16. Upon cross examination, he stated that the Plaintiff had fully recovered with slight deformity.

17. It is now for this court to determine whether the Trial court took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage when awarding damages. In the Trial Court, the Appellant asked the court to award Kshs 300,000 and relied on the case of **Damaris Ombati vs Moses Mogoko Levis & another [2019] eKLR** where an award of Kshs 800,000 was reduced to Kshs 300,000 for a cut wound on the forehead and cheek, dislocation on the left shoulder joint, tenderness on the anterior chest wall and a fracture of the left tibia for the 2nd Respondent. This was a judgment delivered in 2019.

18. The Respondent relied on the case of **Daniel Otieno Owino and another vs Elizabeth Atieno Owuor [2020] eKLR** where an award of Kshs 600,000 was given for a) Compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, Head injury with cut wound on the nose, Blunt chest injury and soft tissue injury on the left lower limb involving the high and ankle region.

Incapacitation was assessed at 50% which is higher than what is before this court.

19. The Appellant now suggests an award of Kshs 200,000 before this court which is an appellate court that relies on what was presented to the Trial Court including but not limited to list of authorities relied upon. That cannot be considered as the Trial Court did not have the opportunity to consider the same.

20. In the end, I find that the award was inordinately high and the same is reduced to Kshs 650,000. The award on special damages is not contested therefore I will not interfere with it. The appeal thus partly succeeds and the final award is as follows;

- a. The Appellant is found 100% liable for the accident
- b. The Respondent is awarded Kshs 650,000 plus costs of this appeal.
- c. The award on special damages of Kshs.5,300/- costs and interest is maintained.
- d. Each party to bear its own costs of the appeal the same having succeeded partially.

Orders accordingly.

Judgment signed, dated and delivered virtually on this 27th day of November, 2025.

E. N. MAINA

JUDGE

IN THE PRESENCE OF:

Mr. Odiyo for the Appellant

C/A- Geoffrey

ORIGINAL