

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. E009 OF 2023

PAUL STEVEN MAGUTI.....APPELLANT

VERSUS

ELSA ATIENO JACK.....1ST
RESPONDENT

MUSONI KENYA LTD.....2ND
RESPONDENT

***(Being an appeal from the judgment and decree of Hon.
Limo B. Benjamin (PM) delivered on 28/2/2023 in Siaya
PMCC No. 8 of 2020)***

BETWEEN

**ELSA ATIENO
JACK.....PLAINTIFF**

VERSUS

MUSONI KENYA LTD.....1ST
DEFENDANT

PAUL STEVEN MAGUTI.....2ND
DEFENDANT

JUDGMENT

1. The appeal arises from the judgment and decree of Hon. Limo B. Benjamin (PM) in Siaya PMCC No. 8 of 2020 dated 28/2/2023 wherein he entered judgment in favour of the Respondent for a sum of Ksh1,800, 000/= as general damages for pain and suffering and loss of amenities arising from injuries sustained by the Respondent in an accident involving the Appellant's motor vehicle registration number KCN 142T along Ramula-Akala road on 4/12/2019 which knocked the Respondent who was then being carried as a pillion passenger on a certain motor cycle.

2. The Appellant was aggrieved by the aforesaid judgment and filed his Memorandum of Appeal dated 28/3/2023 wherein he raised the following grounds of appeal:

- 1) That the learned trial magistrate erred in law and in fact in awarding general damages of Kshs1,800,000/= which was manifestly high in the circumstances that it represented an entirely erroneous estimate vis-avis the Respondent's injuries which comprised a single open fracture distal right tibia/fibula and blunt chest trauma.
- 2) That the learned trial magistrate erred in fact and in law when he awarded general damages that is so inordinately high based on injuries that had not been proven and were non-existent at trial.
- 3) That the learned trial magistrate erred in fact and in law when he failed to take into account the evidence presented by the Appellant specifically the medical report by Dr. James Obondi Otieno showing injuries that were suffered and the present condition of the Plaintiff.
- 4) That the learned trial magistrate erred in fact and in law in disregarding the written submissions and supporting authorities which were tendered by the Appellant thereby awarding general damages which were excessive in view of the nature and degree of injuries sustained by the Respondent.
- 5) That the learned trial magistrate assessment and finding on damages was without any basis and or not supported by relevant case law at all.

The Appellant s therefore prayed that the appeal be allowed and the award of damages be set aside and

substituted with a finding commensurate to the injuries sustained by the 1st Respondent.

3. The 1st Respondent was also aggrieved by the award of the trial court and thus filed a cross appeal dated 1/12/2023 wherein she raised one ground of appeal namely that the learned trial magistrate erred in law and fact in failing to consider inflation when he relied on a 2001 case to give an award of Kshs 1,800,000/=. The 1st Respondent therefore prayed that the judgment be set aside and the same be substituted with an award of Kshs3,500,000/=.

4. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and come to its own conclusion as to whether or not to uphold the judgment of the trial court. The court must also take into account the fact that it did not have the advantage of seeing or hearing the witnesses as they testified and must therefore make due allowance for that. See **Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123.**

5. **Elsa Atieno (PW1)** adopted her statement dated 29/9/2020 as her evidence in chief. She stated that the accident took place on 14/12/2019 at 11.30 AM at Akala junction and that the vehicle which caused the accident was KCN 143T. That she was taken to Sagam Hospital as

per the discharge summary dated 14/12/2019. That a cast was placed on her neck and that her whole body ached and had to be lifted from the bed. That her legs broke and that metals were implanted. That she was later examined by Dr. Manasseh who prepared a medical report dated 24/1/2020.

On cross examination, she stated inter alia; that the vehicle hit her from behind in the middle of the road; that she was hospitalized for 14 days; that she sustained injuries on the neck, back and legs; that she was still undergoing treatment.

On re-examination, she stated that she still uses crutches and still undergoing review.

6. **Dr. Manasseh (PW2)** testified that he examined the 1st Respondent on 23/1/2020 who suffered multiple head and fractured lower limb with fracture of fibula and tibia; soft tissue damages of left lower limb with burns at the anterior aspect; deep cut wound at the right elbow region; dislocated right ankle joint; blunt head injury; dislocated lumbar sacral spine of the back; dislocated right hip joint; dislocated right and left knee joint; soft tissue injuries on both arms; dislocated cervical spine on the neck; dislocated blunt chest injuries with damage of the rib cage. That he assessed disability at 65% incapacity. That the prognosis is that the injuries would

heal within 2-3 years from the time of examination. He produced his medical report dated 23/1/2020.

On cross examination, he stated inter alia; that he relied on the treatment notes from Sagam Hospital to prepare his comprehensive report; that there was fracture of tibia and fibula bones; that his prognosis was for reasonable recovery and not total recovery as it is not possible to replace damaged tissue and bone.

7. The parties thereafter entered into a consent wherein liability was agreed at 80% to 20% in favour of the 1st Respondent, a police abstract dated 9/1/2020 and medical report by Dr. James Obondi dated 9/11/2022 be produced as Defence Exhibits. The parties thereafter closed their respective cases and then filed and exchanged submissions. The trial court later came up with the impugned judgment.

8. The appeal was canvassed by way of written submissions. Both parties duly complied.

9. The Appellant's submissions are dated 27/10/2025. It was submitted that the 1st Respondent pleaded more injuries than those indicated in the treatment notes and which the trial magistrate considered while awarding exorbitant award of damages and that the injuries stated in the medical report of Dr. Manasseh were exaggerated. It was

further submitted that the trial court ought to have awarded a sum of Kshs350,000/= as general damages for the fracture of tibia and fibula bone and soft tissue injuries. It was finally submitted that the trial court failed to follow the doctrine of precedent and ensure that the quantum of damages were reasonable and guided by comparable cases with similar injuries.

10. The 1st Respondent's submissions are dated 25/11/2025.

In support of her cross appeal, she submitted that the trial court failed to consider the issue of inflation on the economy despite relying on a 2001 authority and further failing to consider comparable recent authorities for similar injuries. It was submitted that the amount should be increased to Kshs3,500,000/=. As regards the Appellants appeal, it was submitted that the trial court's award was erroneously low and ought to be increased and that the appeal should be dismissed and the cross appeal allowed.

11. I have given due consideration to the lower court record and submissions by both learned counsels. It is not in dispute that the parties entered into a consent on liability and hence the only issue in dispute is in regard to the award of general damages for pain, suffering and loss of amenities.

12. It is noted that both parties have challenged the trial court's award of damages from their respective stand

points. It is trite law that an appellate court is entitled to interfere with an award of damages made by a trial court upon certain parameters inter alia; that the trial court applied a wrong principle; that the trial court misapprehended the evidence or relied on irrelevant factors or it arrived at an award so as to amount to an erroneous estimate. See **Kemfro Africa Ltd t/a Meru Express Service & Another [1982-88] 1 KAR 727** and **Butt Vs. Khan [1977] 1 KAR.**

Again, in **Butler Vs. Butler [1984] KLR 225** it was held that the award of damages is within the discretion of the trial court and that the appellate court would only interfere if the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at a wrong decision.

It is also trite law that the assessment of damages in personal injury cases by the courts is guided by several principles inter alia; that an award of damages is not meant to enrich the victim for the injuries sustained; that the award should be commensurate with the injuries sustained; that previous awards are a mere guide but each case be treated on its own facts; that previous awards be taken into account; that the awards should not be inordinately low or high.

13. Vide the plaint dated 28/1/2020, the 1st Respondent pleaded injuries sustained namely fracture of the right tibia/fibula, dislocation of the right ankle joint, friction burns on the left leg, blunt injury to the head, blunt injury to both arms, deep cut wounds on the right elbow, sprain on the left foot, blunt injuries to the back, blunt injury to the right hip joint, blunt injury to the neck and blunt injury to both knees. She called Dr. Manasseh (PW2) who examined her on 23/11/2020 who confirmed fracture of tibia and fibula on her leg as well as several other injuries namely soft tissue injuries of left lower limb with burns at the anterior aspect, deep cut wound at the right ankle joint, blunt head injury, dislocated lumbar sacral spine, dislocated right ankle joint, dislocated right hip joint, dislocated right and left knee joint, soft tissue injuries on both arms, dislocated cervical spine on the neck, blunt chest injuries with damage of the rib cage. The said doctor assessed the degree of incapacity at 65% and that the injuries were to heal within 2-3 years from the time of examination. The said witness confirmed that he relied on the treatment notes from Sagam Hospital and that his prognosis was for reasonable recovery as it is not possible to replace a damaged tissue and bone. The Appellants on their part relied on the second medical report dated 9/11/2022 by Dr. Obondi who assessed the 1st Respondent three years after the accident and noted that the 1st Respondent had suffered open comminuted

fracture and distal right tibia fibula which had healed with a permanent disability of 10%.

14. The Appellant contends that the award of Kshs1,800,000/= was excessive in the circumstances and which should be reduced to Kshs350,000/= as proposed before the trial court and this court. The Appellant had relied on two cases, **namely Daniel Otieno Owino & Another Vs. Elizabeth Atieno Owuor [2020] eKLR** and **Juliet Kemunto Ondari vs. Gladys Mwende Mwende [2021] eKLR** where the High Courts awarded Kshs350,000 for fracture of tibia/fibula bones as well as soft tissue injuries.

Learned counsel for the 1st Respondent has also presented several authorities which awarded between Kshs2000,000/= - Kshs3,000,000/= such as **George Kinyanjui t/a Climax Coaches vs. Hassan Musa Hassan [2016] eKLR** where the High Court upheld an award of Kshs3,000,000/= where a victim sustained grievous harm with a degree of permanent incapacity being assessed at 65%. Similarly, in **James Musyoka Nzoka vs. Kenya Power & Lighting Co. Ltd [2019] eKLR** where the high court upheld an award of Kshs2,500,000/= where the victim sustained grievous harm with a degree of permanent incapacity assessed at 65%.

Learned counsel for the Respondent in the cross appeal seeks for enhancement of the award on the ground that the trial court award was made in 2001 and that the amount should be increased due to the effects of inflation. On the other hand, counsel for the Appellant maintains that the sums should be whittled down to Ksh350,000/=. It is trite that damages must be within the limits set out by decided cases and also whittling the limits the economy can afford since large awards are likely to be passed on to members of the public a majority of whom cannot afford the burden in the form of increased insurance premium and increased fees.

It is noted that the accident took place on 14/12/2019 and that the 1st Respondent was examined by Dr. Manasseh (PW2) on 23/1/2020 and again examined by the Appellant's doctor, Dr. Obondi on 9/11/2022. It is thus clear that at the time the 1st Respondent was examined by Dr. Manasseh, her injuries were barely a month and hence his prognosis as compared to that of Dr. Obondi who examined her on 9/11/2022 about three years later must be accepted. Hence, the disparity in the percentage of disability should be seen through that prism. Even though the Appellant has challenged the injuries noted by Dr. Manasseh, I find that the said doctor was under obligation to conduct a thorough and comprehensive examination and was not bound to stick only to what was on the treatment notes and P3 forms. It is common knowledge that the initial response given to accident victims are

superficial in nature and that a comprehensive examination is conducted even after discharge from hospital. I find that Dr. Manasseh's comprehensive examination was apt and which revealed the extent of injuries suffered by the 1st Respondent. It is instructive that the 1st Respondent pleaded the injuries suffered in her plaint. The Appellant opted not to call the said Dr. Obondi to shed light on the issue of injuries and percentage of disability. The nature of the injuries sustained as per the prognosis by Dr. Manasseh justifies the 65% disability assessment.

15. As regards the reasonable award of damages to be granted, I find that the authorities cited by the 1st Respondent's counsel which touch on fracture of tibia and fibula in this appeal range between Kshs2,000,000/= - Kshs3,000,000/=. I find that Kshs1,800,000/= by the learned trial magistrate was quite reasonable. I find that the trial magistrate did not take into account irrelevant factors or left out relevant ones or took into account wrong principle and that the award was not excessive as it was commensurate with the injuries sustained. The finding on quantum by the learned trial magistrate was sound and must be upheld. Hence, it is my considered view that finding by the trial court was quite sound and must be upheld.

16. In view of the foregoing observations, it is my finding that the Appellant’s appeal lacks merit. The same is dismissed. Likewise, the 1st Respondent’s cross appeal lacks merit and is dismissed. Each party to bear their own costs.

Dated and delivered at Siaya this 19th day of January 2026.

**D. KEMEI
JUDGE**

In the presence of:

Lovis for M/s Achieng.....for Appellant.

Osala.....for 1st Respondent.

Maureen/Kimaiyo.....for 2nd Respondent.

.....Court Assistant.

SIAYA HCCA NO. E009 OF 2023 - JUDGMENT