

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CIVIL APPEAL NO. E014 OF 2024
LENA KARIMI.....

.....APPELLANT
VERSUS
FAITH

KARAMBU.....RESPONDENT

(Being an Appeal on Quantum from the judgment of Honourable Senior Resident Magistrate E. Tsimonjero (Mr.) delivered on 8th August, 2023 in ISIOLO CMCC NO. E049 of 2021)

JUDGMENT

1. The Respondent herein filed suit in the lower court , seeking damages for injuries and incidental loss suffered as a result of a road accident which occurred on 4th July 2021 along the Isiolo-Marsabit road within Isiolo town. The accident involved motor vehicle registration number KCA 659C, owned by the Appellant. The Respondent was a pedestrian along the said road, when she was knocked down by the said vehicle.
2. At the conclusion of the hearing, the trial court delivered judgment in which it awarded the respondent Kshs. 3,000,000 in general damages and Kshs. 20,000 in special damages. The parties had earlier recorded a consent on liability in the ratio of 80:20% in favor of the Respondent. The net award, was Kshs. 2,416,000

Memorandum of Appeal

3. Being aggrieved by the award on general damages, the Appellant proffered this Appeal and has set out the following grounds:

- a) *The Learned Trial Magistrate erred in law and fact by arriving at an award of Kshs. 3,000,000 based on the wrong principles of law governing the assessment of damages.*
- b) *The learned magistrate relied on Respondent's submissions despite the fundamental principle of law that submissions are not evidence on which a case is decided.*
- c) *The learned magistrate erred in law and fact by awarding the respondent ksh. 3,000,000 as general damages for loss of pregnancy that had not been pleaded in the plaint nor witness statement and neither led in evidence by the respondent.*
- d) *That the learned magistrate erred in law and fact by arriving at his decision based on the wrong principle of law governing the burden of proof of negligence and liability as well as the assessment of damages , in that he failed to consider the pertinent issues of law and fact raised by the Appellant's counsel submissions.*
- e) *The Trial Magistrate erred by failing to consider that the injuries sustained by the respondent were soft tissue injuries which had fully healed and thereby arrived an award that is inordinately excessive.*
- f) *The learned magistrate erred by failing to take into account into account the fact that the respondent's medical report did not indicate the fact that the respondent had suffered psychological trauma due*

- to the loss of pregnancy and would require post-traumatic counselling.*
- g) That the learned magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision that is unsustainable in law.*
- h) The learned magistrate erred in neglecting to consider the whole of the Appellant's submissions.*
4. The Appeal proceeded by way of written submissions.

Appellant's Submissions

5. It is the Appellant's submissions that loss of pregnancy was never pleaded; that Dr. Mwiti's report shows that the respondent only suffered multiple bruises on the face and cheeks, left hip joint neck pain, multiple bruises on both hands and bruises on the left forearm.
6. It is therefore submitted that the respondent suffered soft tissue injuries and such injuries should fairly attract ksh. 200,000, in damages. In this regard the Appellant has relied on the following past decisions:
- a). ***Kipkebe Limited v Peterson Ondieki Tai (2016) eKLR***, where an award for soft tissue injuries was reduced from 90,000 to 30,000.
 - b). ***Ndungu Dennis v Ann Wangari Ndirangu & another (2018) eKLR***, where 300,000 was substituted with 100,000.
 - c). ***Odinga J Ouma vs Moureen Achieng Odera (2016) e KLR***

Respondent's Submissions

7. In response, the Respondent has listed the injuries as per the same report and states that she suffered

a miscarriage of the foetus from the blunt abdominal trauma. She states that there was no other evidence brought forth to contradict Dr. Mwiti's findings. The respondent submits that the loss of a child indeed does cause trauma to the mother and relies on the case of **P B S & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016) eKLR**, where the court considered a claim of 5,000,000 for the loss of an unborn baby. The respondent has also relied on the decision in the case of **Fatuma Diyay Farah v Abdirahman Ali Galgalo & Another (2021) eKLR**, where 3,500,000 was awarded for injuries which included a stillbirth. It is submitted that the award of ksh. **Kshs. 3,000,000** was reasonable.

Analysis & Determination

8. The Appeal to the high court from the Magistrate's court is by way of a pre-trial and it is the duty of this court therefore to review the evidence , re- evaluate it and arrive at its own conclusions (see **Gitobu Imanyara & 2 others vs AG (2016) e KLR**).
9. This Appeal challenges the award on general damages only.
10. It is the Appellant's case that there was no **plea** or **evidence** of the loss of a foetus by the respondent. To the Appellant, the injuries sustained by the respondent were as they appear on page 5 of this judgment, and which injuries did not include loss of pregnancy. It is also argued that they were not pleaded in the plaint. The respondent on the other hand, , while relying on the same report listed injuries as : Blunt abdominal trauma resulting in tenderness and loss of foetal movements Multiple

bruises on the face, cheeks, and mandibular area. Left hip joint pain and neck pain, Multiple bruises on both hands and the left forearm, and miscarriage of the foetus .

11. I have studied both the plaint and the medical report by Dr. Mwiti as well as the respondent's written statement. Contrary to the Appellant's submissions the loss of the foetus was pleaded under **sub- paragraph 4 of paragraph 4 of the plaint** , where one of the injuries listed therein is "**miscarriage of the foetus from blunt abdominal trauma**". Further In his report dated 7-08-2021 Dr. Mwiti listed the respondent's injuries as follows:

- Blunt abdominal trauma resulting in tenderness and loss of foetal movements
- Multiple bruises on the face, cheeks, and mandibular area.
- Left hip joint pain
- Neck pain,
- Multiple bruises on both hands and dorsal side
- Bruises on the left forearm
- Miscarriage of the foetus from the blunt Abdominal trauma

12. Dr. Mwiti's report was listed as one of the plaintiff's documents and those documents were produced by consent of the parties in court on 29-05-2023.

13. The Appellant's submission therefore that the loss of the foetus was neither pleaded nor proved is factually incorrect. The injuries, listed by the Appellant in her submission have no basis as I did

not find any primary document containing the said injuries.

14. I further disagree that loss of a 32-week foetus can, by any stretch of interpretation be classified as soft tissue injury. Indeed it is medically proven that a 7-week foetus, whether delivered naturally or through medically assisted delivery, has high chance of survival outside the womb (see: **USA, National Institute of Health** found on <https://pmc.ncbi.nlm.nih.gov/>)
15. Nevertheless, was the award of ksh. 3,000,000 excessive?
16. It is trite law that assessment of damages is an act of discretion by the trial court and an Appellate court can only interfere if the award is too excessive, too low or is based on wrong principles. (see: **Catholic Diocese of Kisumu vs Tete(2004) e KLR**) . Further in assessing damages, comparable injuries should attract comparable awards, while taking into consideration inflationary trends.
17. I have noted the authorities relied on by the parties. The Appellant has relied on cases that involved soft tissue injuries and therefore are not helpful to this court. On the other hand, the respondent has relied on the case of **Fatuma Diyay Farah v Abdirahman Ali Galgalo & Another** (supra), where the court awarded 3,500,000. The claimant then had suffered a stillbirth but had also sustained fractures and remained with a permanent disability of 35%.
18. In the present case, the Respondent did not suffer fractures and had no permanent disability,

However, the loss of the foetus at an advanced stage of 32 weeks aggravated the respondent's loss in the present case.

19. Taking into account the decision in ***Fatuma's case***(supra), and inflation factors, am satisfied that the award of ksh. 3000,000 was fair assessment of the loss suffered by the respondent. It cannot be said to have been inordinately high to warrant the intervention of this court.

20. I find no merit in the Appeal . It is hereby dismissed, with costs to the Respondent.

Dated signed and delivered at Isiolo this 22nd day of January 2026

S. Chirchir
Judge.

In the presence of:

Roba Katelo- court Assistant.

Mr. Mugun for the Appellant

Ms Asuma for Mr. Mutembei for the Respondent.