

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. E1490 OF 2024

DAVID KIVINDU

MUTISO.....APPELLANT

VERSUS

BAKERS

CORNER.....RESPONDENT

(Being an appeal against the Judgment of Hon. G. Omodho, Principal Magistrate, delivered on 28th November 2024 in Milimani CMCC No. E13160 of 2021)

JUDGMENT

1. The Appellant sued the Respondent before the trial court for damages arising from the injuries that he sustained in a road traffic accident.
2. Judgment was entered in favour of the Appellant and damages awarded as follows:
 - a) ***Liability - 100%***
 - b) ***Pain and suffering - Kshs 700,000***
 - c) ***Special damages - Kshs 3,550***

Total decretal sum inclusive of costs and interest was Kshs 832,350.

3. The decretal amount was paid by the Respondent's insurer on 2nd January 2025.
4. The Appellant filed the present appeal on the grounds that the trial court: -
 - a) **Failed to appreciate the gravity of injuries sustained.**
 - b) **Made an award that was inordinately low.**
 - c) **Failed to consider inflation.**
5. The Appellant seeks enhancement of general damages to Kshs 2,000,000.
6. According to the medical report by Dr. Wokabi, the Appellant sustained the following injuries
 - i) **Fracture of right radius**
 - ii) **Fracture of right ulna**
 - iii) **Fracture of right tibia**
 - iv) **Fracture of right fibula**
 - v) **Permanent disability assessed at 18%**
7. The appeal was canvassed by way of written submissions which I have considered.

Submissions

8. The Respondent submitted that the appeal is incompetent because the decretal sum was fully settled and accepted.
9. On the competence of the appeal the Respondent argued that acceptance of payment amounted to acquiescence and waiver of the right of appeal.

10. The Respondent submitted that the Appellant having already enjoyed the fruits of the said judgment cannot at the same time seek to reverse it.

11. The Respondent further stated that the matter was closed the moment the Appellant accepted the awarded amount unconditionally.

12. On estoppel and waiver, the Respondent relied on ***John Mburu vs. Consolidated Bank of Kenya Civil Appeal No. 162 of 2015***, where the Court stated:

“The Court in that case considered estoppel by conduct and estoppel by election or waiver. The latter is an intentional relinquishment or abandonment of a known right or privilege.”

13. The Court adopted the statement in ***Sita Steel Rolling Mills Ltd vs. Jubilee Insurance Company Ltd [2007] eKLR***, where it was held:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

14. Reliance was also placed on ***D & C Builders vs. Sidney Rees*** [1966] 2 QB 617, where Lord Denning stated:

“It is the first principle which all courts of equity proceed, that if parties... enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced... the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable.”

15. The Respondent also relied on ***Air Services Ltd vs. Theuri Munyi*** Civil Appeal No. 310 of 2014, where the Court stated:

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same right having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

16. The Court further cited ***Seascapes Limited vs. Development Finance Company of Kenya Limited*** [2009] eKLR, where the Court stated:

“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment... and is either express or implied from conduct.”

17. This being a first appeal, this Court is guided by the principles set out in ***Butt vs. Khan [1977] 1 KAR***, where the Court held:

“An Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect.”

18. On quantum, the Appellant submitted that the award of **Kshs 700,000** was too low considering the seriousness of injuries. It was the Appellant’s case that comparable cases justify higher awards. The Appellant relied on ***Shreeji Enterprises Ltd vs. John Mungai Chai (2020) eKLR*** where the court awarded General Damages for pain, loss of amenities at Ksh 2,000,00 for similar injuries which amount was confirmed on appeal.

19. Reference was also made to the case of ***John Kuria Mbure vs. Magari Hire Purchase Ltd (2019) eKLR*** where, for similar injuries, loss of amenities was assessed

at Ksh 500,000 by the Lower court which amount was enhanced to Kshs 2,000,000 on appeal.

20. The Appellant submitted that the trial court made its decision on the 28th November 2024 three years after the the cited cases and that by awarding the Appellant Kshs 700,000/= it is clear that she did not factor in the aspect of inflation.

21. The Respondent, on the other hand, submitted that the award was reasonable and should not be disturbed. Reliance was placed on ***Kemfro Africa Limited vs. Lubia [1985] eKLR***, where the Court held:

“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 different figure.”

Analysis and Determination

22. I have carefully considered the Record of Appeal, the written submissions and the cited cases, I find that two broad issues arise for determination, namely;

- a) Whether the appeal is barred by waiver or estoppel***
- b) Whether the award should be interfered with.***

Waiver or Estoppel

23. The Respondent raised a preliminary objection to the competence of the appeal on the ground that the Appellant accepted payment of the decretal sum and thereby waived his right of appeal. The Respondent contended that by accepting the decretal amount the Appellant acquiesced in the judgment and is estopped from challenging it.
24. The Respondent relied on several authorities on the principles governing waiver and estoppel. From those authorities, it is clear that waiver must be intentional and unequivocal, and may be express or inferred from conduct inconsistent with the preservation of the right alleged to have been waived.
25. The Respondent further argued that the Appellant, having accepted the decretal sum, cannot both enjoy the fruits of the judgment and challenge it on appeal. This argument invokes the equitable principle that a party should not approbate and reprobate at the same time.
26. While the cited authorities correctly set out the doctrine of waiver and estoppel, I am of the view that the mere acceptance of payment of a decretal sum does not, by itself, constitute waiver of the right of appeal. The decisive consideration is whether the payment was accepted in full and final settlement or in circumstances demonstrating a clear intention to abandon the right of appeal.

27. The right of appeal is a statutory right which cannot lightly be taken away. A successful litigant is entitled to enforce a judgment unless execution has been stayed, and enforcement of a decree is not necessarily inconsistent with an intention to challenge the quantum of damages on appeal.

28. In the present case, there is no evidence to show that the decretal sum was accepted in full and final settlement of the claim. No material was placed before this Court to demonstrate that the Appellant expressly or impliedly agreed to forego his right of appeal.

29. The payment made on 2nd January 2025, after the filing of this appeal, appears to have been satisfaction of the decree issued by the trial court rather than a negotiated settlement.

30. In the circumstances, this Court finds that acceptance of the decretal sum did not amount to waiver of the Appellant's right of appeal and does not operate as an estoppel against the present proceedings.

31. Accordingly, the Respondent's objection to the competence of the appeal on the ground of waiver and estoppel fails. The appeal is therefore properly before this Court.

Quantum

32. This being a first appeal, this Court is guided by the principles set out in ***Butt vs. Khan [1977] 1 KAR***, that 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 or unless the trial court acted on wrong principles or misapprehended the evidence.

33. As I have already stated elsewhere in this judgment, the Appellant sustained the following injuries:

- i) Fracture of the right radius**
- ii) Fracture of the right ulna**
- iii) Fracture of the right tibia**
- iv) Fracture of the right fibula**

Permanent disability was assessed at 18%.

34. These injuries were serious and involved multiple fractures affecting both the upper and lower limbs. The degree of permanent disability is a relevant factor in assessing damages for pain, suffering and loss of amenities.

35. The Appellant submitted that the award of **Kshs 700,000** was inordinately low considering the seriousness of the injuries and the prevailing range of comparable awards.

36. Comparable authorities demonstrate that awards for multiple fractures with residual disability generally fall within a range higher than that awarded by the trial court.
37. In ***Shreeji Enterprises Ltd vs. John Mungai Chai [2020] eKLR***, the claimant sustained multiple fractures and the Court awarded Kshs 2,000,000 as general damages, which award was upheld on appeal.
38. Similarly, in ***John Kuria Mbure vs. Magari Hire Purchase Ltd [2019] eKLR***, the High Court enhanced general damages from Kshs 500,000 to Kshs 2,000,000 where the claimant had sustained multiple fractures with residual disability.
39. In ***West Kenya Sugar Co. Ltd vs. Philip Wekesa Simiyu [2019] eKLR***, the Court upheld an award in the range of Kshs 900,000 to Kshs 1,000,000 for fractures involving the tibia and fibula with permanent incapacity.
40. I note that the injuries sustained by the Appellant are comparable to those in the above authorities, though not as severe as those attracting awards in excess of Kshs 2,000,000.
41. Taking into account the nature of the injuries, the permanent disability assessed at 18%, and the range established by comparable authorities, this Court finds that the award of Kshs 700,000 was inordinately low.
42. I find that an award of Kshs 1,200,000 will reasonably compensate the Appellant for pain, suffering and loss of amenities while remaining within the range established by comparable authorities.

Disposition

43. Accordingly, I make the following orders:

- a) The appeal is hereby allowed in part.***
- b) The award of general damages is hereby set aside.***
- c) The award of Kshs 700,000 is substituted with an award of Kshs 1,200,000 as general damages for pain, suffering and loss of amenities.***
- d) The award of special damages in the sum of Kshs 3,550 is upheld.***
- e) The Appellant shall have the costs of the appeal.***

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH, 2026.

HON. W. A. OKWANY

JUDGE

5/03/2026

FOR APPELLANT Ms Amboko

FOR THE RESPONDENT Mr. Njuguna

COURT ASSISTANT Ubah

ORIGINAL