



REPUBLIC OF KENYA



**Kimutai & another v Swaka (Civil Appeal E026 of 2024)  
[2026] KEHC 5502 (KLR) (16 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5502 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E026 OF 2024**

**REA OUGO, J**

**APRIL 16, 2026**

**BETWEEN**

**VIOLET TEMKO KIMUTAI ..... 1<sup>ST</sup> APPELLANT**

**PAUL KINYANJUI CHEGE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**VIOLET ANALO SWAKA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. T.M. Olando  
SPM delivered on 24/01/2024 in Bungoma CMCC No. E153 of 2021)*

**JUDGMENT**

1. The respondent filed suit before the trial court and, in an amended plaint dated 9/8/2021, sought general damages, future medical expenses of Kshs. 250,000, special damages of Kshs. 26,100, and costs of the suit for injuries sustained in a road traffic accident on or about 13/4/2021.
2. The appellants entered an appearance and filed a joint amended statement of defence dated 22/2/2022, in which they denied the respondent's claim and pleaded contributory negligence on the appellants' part in causing the accident.
3. The matter proceeded to trial, and by a judgment delivered on 24/1/2024, the trial court decreed:
  - a. Liability 100% against the respondents.
  - b. General damages Kshs. 2,000,000/-  
Special damages Kshs. 26,100/-  
Future medical expenses Kshs. 200,000/-
  - c. Net award Kshs. 2,226,100/-.



- d. Costs of the suit and interest.
4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 20/02/2024 and raised five (5) grounds of appeal as follows: -
    - a. The learned trial magistrate erred in law and fact in failing to appreciate the reasonable and sufficient evidence tendered in court when assessing and awarding damages hence arriving at an award which award when viewed against the awards in comparable claims is manifestly excessive and inordinately high as to amount to a miscarriage of justice.
    - b. The said award of damages is out of keep with other Kenyan awards for comparable/similar claims.
    - c. That the learned trial magistrate erred in law and fact in considering extraneous matters leading to an erroneous and excessive award of general damages.
    - d. The learned trial magistrate erred in law and in fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the appellants.
    - e. The learned trial magistrate failed to exercise his discretion judiciously in awarding general damages and failed to consider the appellants' submissions and authorities and/or apply the settled principles of law and thus there was no good or proper basis for the said assessment of damages.
  5. The appeal was disposed of by way of written submissions. The appellants submitted that the award of general damages was inordinately high, given that the respondent's injury did not result in permanent incapacitation, thus warranting intervention by this court. They further submitted that the authority relied on by the respondent, *Kakuli v Ngase & Another* (suing as the legal representative of the estate of Stanley Alemba Chavasi – Deceased) (Civil Appeal E192 of 2021) [2022] KEHC 12132 (KLR) (Civil) (21 July 2022) (Judgment), is a fatal claim and irrelevant by comparison. In *Mbaka Nguru & Another v James George Rakwar* (1998) eKLR, the plaintiff sustained multiple fractures in both limbs, resulting in permanent incapacitation of 10%, and later succumbed to those injuries. It is submitted that an award of Kshs. 400,000/- would be sufficient for general damages. Reliance was placed on the cases of *Nyang'au v Mekenye & 2 Others* (Civil Appeal E089 of 2021) [2024] KEHC 2830 (KLR) (7 March 2020) (Judgement), where the plaintiff sustained slightly severe injuries, and the High Court upheld an award of Kshs. 700,000/- in general damages in March 2024, and that of *Gathua & Another v Muthiani* (Civil Appeal 7 of 2023) [2024] KEHC 10763 (KLR) (19 September 2024) (Judgement), where an award of Kshs. 600,000/- was made in September 2024 for multiple fractures of the forearms, including a fractured humerus.
  6. On the award for future medical expenses, it was submitted that although the respondent pleaded for Kshs. 250,000/-, the medical report relied on provided an estimate of between Kshs. 150,000/- and 250,000/-. There was no proof that the surgery was necessary, in the form of an X-ray, and the plaintiff was discharged with a malunited fracture.
  7. The respondent submitted that the trial court correctly awarded general damages of Kshs. 2,000,000/-. Reliance was placed on the cases of *Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & Another* (2014) eKLR, *Mwaura Muiruri v Suera Flowers Limited & Another* (2014) eKLR and *James Gathire Ngunji v Multiple Hauliers (EA) Limited* (2015) eKLR.
  8. On future medical expenses, the respondent submitted that the trial court was properly guided in awarding the amount as the same was pleaded and supported by medical documents and testimony of



both Pw2 & Pw3. On future medical expenses, the respondent relied on the Court of Appeal case of Kenya Bus Services Limited v Gituma (2004) EA 91.

### **Analysis And Determination**

9. This being a first appeal, the Court is duty-bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See *Selle & Anor v Associated Motor Boat Co Ltd & Others* [1968] EA 123.
10. Before the trial court, the respondent testified as Pw1. She adopted her witness statement dated 6/5/2021 as her evidence in chief. She further testified that following the accident, she was injured on the head and the right hand. As a result, she could not lift her right hand or use it, whereas previously she had engaged in the grocery business. The doctor said she needed Kshs. 250,000/-. In cross-examination, she stated that she was discharged from hospital after recovering, but that she had not returned since she did not have money.
11. Pw2, Dr. Milianga Ekesa, a consultant surgeon based in Bungoma testified that he examined Pw1 on the 26/4/2021. The respondent had sustained a cut wound on the left side of the skull, had neck pain, painful, swollen and deformed upper arms and had a cut wound at the base of the 4th and 5th fingers.
12. Dr Ekesa testified that he formed the opinion that the respondent sustained a concussion, soft tissue injuries, a comminuted fracture of the right humerus and emotional trauma. That she could benefit from an operation of the fractures which would cost between Kshs. 150,000/- to 250,000/-. He produced the medical report dated 26/4/2021. In cross-examination Dr. Ekesa testified that when he examined the respondent the injuries were two weeks old. That his examination was based on the x-ray films adduced. That the fracture was being managed conservatively but that the best option would be to do a surgery to insert metals.
13. Pw3 Dr. Ombongi Haron of Bungoma Hospital produced the respondent's discharge summary and P3 form. It was his testimony that the respondent was admitted at the premises on 13/4/2021 and discharged on 21/4/2021. That the respondent sustained a mild head injury, humerus fracture and soft tissue injuries.
14. The appellants' appeal is basically on quantum, which they deem to be inordinately high. The general rule is that the assessment of damages lies within the discretion of the trial court, and an appellate court will only interfere with an award of damages where it is inordinately high or low, so as to represent an erroneous estimate (see *Butt v Khan* (1977) I KAR).
15. The injuries pleaded on record are as follows: -
  - a. Head injury –concussion
  - b. Soft tissue injuries
  - c. Comminuted fracture of the humerus
  - d. Psychological trauma
16. The medical evidence on record provided in the Discharge Summary from Bungoma Hospital & P3 form produced as PExh 11 & 7 respectively substantiated the respondent's averments. Furthermore, the medical report adduced by Pw2 further corroborated the nature of injuries sustained by the respondent.
17. The appellants did not call/produce any evidence to challenge or controvert the appellant's case. In *Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi* (Milimani) HCCC No., 834 of



2002, Lessit, J (as she was then) citing the case of Autar Singh Bahra and another v Raju Govindji, HCCC No. 548 of 1998 appreciated that: -

“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 1<sup>st</sup> 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.”

18. Therefore, the proven injuries sustained by the respondent as a result of the accident from the record are soft tissue injuries and a comminuted fracture of the humerus.
19. The Court of Appeal in Odinga Jacktone Ouma V Maureen Achieng Odera [2016] eKLR stated that “comparable injuries should attract comparable awards”. The principle on the award of damages is settled. In Charles Oriwo Odeyo v Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to;
  - a. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  - b. The award should be commensurable with the injuries sustained.
  - c. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
  - d. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  - e. The awards should not be inordinately low or high.
20. In considering comparable awards, I have examined the decisions cited by both parties and find that those relied on by the appellants to be more comparable. In Nguku Joseph & another v Gerald Kihiu Maina [2020] KEHC 7670 (KLR) (T. Matheka, J), the principal injury was a fracture of the right humerus, with multiple soft tissue injuries, and an award of Kshs. 500,000.00 was made. In Logistics Solutions Ltd v Steere Mavu Mwambela [2021] KEHC 8614 (KLR) (N. Mwangi, J), the claimant had sustained a fracture of the right humerus arm bone, with 9% disability, and an award of Kshs. 500,000.00 was made. In Beko v Kimani (Civil Appeal E230 of 2024) [2025] KEHC 14515 (KLR) (Civ) (15 October 2025) (Judgment), the respondent sustained a fracture of the right humerus with 2% permanent incapacity. The trial court (26 January 2026) found the appellant 100% liable, awarding Kshs 650,000 general damages and Kshs 17,158 special damages. The appeal was dismissed after the appellate court concluded the award was within an acceptable range, citing comparable cases.
21. Having regard to all these cases, I am of the considered opinion that an award of Kshs. 2,000,000/= was inordinately high in the circumstances. The authorities relied on by both the respondent and the trial court involved much more severe injuries. A proper award is Kshs. 500,000/=. I therefore set aside the award of Kshs. 2,000,000/= and substitute it with Kshs. 500,000/=.
22. As regards future medical expenses, it is trite that they must be pleaded and proved. The respondent pleaded for future medical expenses. Doctor Ekesa noted that the respondent would require surgery to correct the fractured bone using metal implants, at a sum between Kshs. 150,000 and 250,000.



23. The appellants failed to adduce medical evidence in rebuttal to Doctor Ekesa's position. The Court of Appeal, in the case of Tracom Limited & another v Hassan Mohamed Adan [2009] eKLR held that: -

“We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd v Gituma [2004] 1 EA 91, this court, stated: -

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.”

The plaintiff did not plead the exact sum that he would require under this heading. In addition, Doctor Momanyi did not give a basis for his estimate of Kshs. 150,000.00. This court is guided by the expenses that the plaintiff incurred at Hema Hospital and awards him the sum of Kshs. 70,000.00 for future medical expenses.”

24. The trial court awarded the respondent Kshs. 200,000/- in future medical expenses. I see no reason to interfere with this award.
25. The trial court's award on special damages was not challenged.
26. Consequently, the appeal is partially successful. I set aside the trial court's award of general damages and substitute it with an award of Kshs. 500,000/-. The award of future medical expenses and special damages remains undisturbed. Each party shall bear its own costs. It is ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF APRIL 2026.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Miss Opinde h/b Mr Kurgat/For the Appellants

Miss Wanyama /For the Respondent

Wilkister / Adan C/A

