



REPUBLIC OF KENYA



KENYA LAW
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**Litembekho v Namasaka (Civil Appeal E156 of 2023)
[2025] KEHC 773 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E156 OF 2023
REA OUGO, J
JANUARY 30, 2025**

BETWEEN

SALOME LITEMBEKHO APPELLANT

AND

ERICK WEKESA NAMASAKA RESPONDENT

*(An appeal from the judgment of Hon. J.O Manasses, RM in
Sirisia PMCC No E048 of 2022, delivered on 16th November 2023)*

JUDGMENT

1. The appellant has lodged an appeal dated 16th December 2023 seeking that the lower court's award on general damages for pain, suffering and loss of amenities, future medical expenses and special damages be revised and or set aside and vacated and the same be substituted with reasonable and lawful awards.
2. The respondent at the lower court filed a suit by way of a plaint alleging to have sustained injuries after he was knocked by the appellant's motorcycle, reg no. KMFV 968T on the 13th January 2022, as he walked along Sirisia Chwele-Kimilili Road. The respondent claimed to have sustained a fracture of the femur, bruises on the scalp and pain in the left thigh. The appellant denied causing the accident and pleaded without prejudice that if the accident occurred then the same was an act of God, inevitable and beyond the appellant's control.
3. The trial court entered liability against the appellant in the ratio of 75:25. He awarded damages as follows:
 - a. General damages - Kshs 1,600,000
 - b. Future Medical Expenses - Kshs 150,000
 - c. Special Damages - Kshs 56,095



Total - Kshs 1,806,095

Less 25% - Kshs 451,524

Total - Kshs 1,354,571

4. The appellant dissatisfied with the finding of the court has filed this instant appeal against the award of damages on the following grounds:
 1. The learned trial magistrate erred in law and fact in making an award of general damages of Kshs 1,600,000/- to the respondent for pain, suffering and loss of amenities which award was too high, excessive, unmerited and unjustified regard being had to the injuries suffered by the respondent.
 2. The learned trial magistrate erred in law and or fact in awarding the respondent Kshs 150,000/- for future medical expenses despite the fact that the respondent had healed fully with no resultant permanent incapacitation and the said award was devoid of basis or justification.
 3. The learned trial magistrate erred in law and or fact in awarding the respondent special damages of Kshs 56,095 which sum was not strictly proved as required in law.
 4. That the learned magistrate ignored and or failed to consider the appellant's submissions and he failed to apply the correct principles in making awards leading him into error and his awards were excessive, unmerited, flawed, erroneous and indefensible and have resulted in a miscarriage of justice.
5. The appellant did not contest the injuries sustained by the appellant. He submits that for the soft tissue injuries and a fracture of the femur, an award of Kshs 500,000 would be most adequate. She relied on the cases of Migori HCCA No 7 OF 2015, *Harun Muyonga v Daniel Otieno Agulo; Daniel Otieno Owino & Another v Elizabeth Atieno Owuor* [2020] eKLR; and *Paul Kitbinji Kirimi and Another v Gatwiri Murithi* [2018] eKLR.
6. She also disputed that the respondent was not entitled to the award of Kshs 150,000 as future medical expenses as he had fully healed. She further challenged the award of special damages arguing that it was not strictly proved.
7. The respondent submitted that the trial magistrate rightly took into account the evidence on record and adopted the correct principles in awarding damages. The respondent submits that he spent Kshs 49,245/- in the hospital. He requires further treatment worth Kshs 150,000/-. On damages awarded, he submits that at the subordinate court, he had sought an award of Kshs 2,206,095 and was awarded Kshs 1,354,571/- which was reasonable.

Analysis and Determination

8. The appeal before the court is solely challenging the award of damages. The parameters under which an appellate court will interfere with an award of damages was stated by the Court of Appeal in *Bashir Ahmed Butt v. Uwais Ahmed Khan* (1982-88) KAR as follows:

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”



9. The Court of Appeal observed in *Simon Taveta v. Mercy Mutitu Njeru* [2014] eKLR that:
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
10. In this case, the injuries sustained by the respondent are not contested. According to the treatment notes from Bungoma Referral Hospital, he sustained a closed fracture of the left femur and the hospital carried out open reduction and internal fixation. The report by Dr. Sokobe confirmed the injuries. Dr Sokobe further opines that the respondent will need further treatment i.e. the removal of implants at an estimated cost of Kshs 150,000/-. Therefore, the award on future medical expenses of Kshs 150,000 was pleaded and proved.
11. On special damages, the medical expenses amount to Kshs 49,345. The cost of the medical report and copy of records were Kshs 6,000/- and Kshs 550/- respectively. The special damages pleaded and proved were Kshs 55,845/-.
12. I now turn to consider the award of general damages. It is not in dispute that the respondent sustained a closed fracture of the left femur. In this case, the magistrate awarded Kshs 1,600,000/- as general damages for the fracture of the femur. However, recent cases with comparative injuries reveal that the award was excessive. In *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR the court awarded Ksh.800,000/- for fracture of the femur mid shaft with 4% permanent incapacity. In *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR the court awarded the appellant Kshs 600,000/- where he had sustained blunt injury to the right shoulder and fracture of the femur. Considering recent awards with comparable injuries, I find that an award of Kshs 650,000/- is adequate.
13. Consequently, I set aside the award by the trial magistrate and award damages as follows:
- a. General Damages - Kshs 650,000/-
 - b. Special Damages - Kshs 55,845/-
 - c. Future Medical Expenses - Kshs 150,000/-
- Total - Kshs 855,845
14. The award is subject to the agreed-upon liability at the subordinate court. The appellant is awarded the costs of the appeal.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JANUARY 2025

R.E. OUGO

JUDGE

In the presence of:

Miss Nanjala -For the Appellant

Mr. Shiku -For the Respondent

Wikister -C/A

