



**Murithi v Mbaya (Civil Appeal E135 of 2023)
[2025] KEHC 754 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E135 OF 2023
JM OMIDO, J
JANUARY 30, 2025**

BETWEEN

KELVIN MURITHI APPELLANT

AND

MARTIN MURITHI MBAYA RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. T.M. Mwangi, SPM delivered on 20th July, 2023 in Meru CMCC No. E266 of 2022, Kelvim Murithi v Martin Murithi Mbaya)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. T.M. Mwangi, Senior Principal Magistrate delivered on 20th July, 2023 in Meru CMCC No. E266 of 2022, Kelvim Murithi v Martin Murithi Mbaya.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 21st August, 2023, upon which he seeks to upset the judgement and decree of the lower court are as follows:
 1. The learned trial Magistrate erred in law in failing to follow precedents on comparable injuries and therefore arrived at an award that is so inordinately low that it does not represent the damage suffered by the Appellant.
 2. The learned trial Magistrate erred in law in basing his award of general damages on what he believed was doing his best under the circumstances rather than decided cases which is contrary to the well-known principles of assessment of damages.
 3. The learned trial Magistrate erred in law in ignoring the submissions by the parties.
 4. The learned trial Magistrate misapprehended the injuries sustained by the Appellant thereby arriving at an award that is inordinately low.



3. The Appellant proposed that the appeal be allowed and that this court sets aside the trial court's award of general damages and proceeds to assess and make an appropriate award in substitution thereof.
4. This court directed that the appeal proceeds by way of written submissions and gave the parties herein time lines for filing their respective submissions and both parties duly complied.
5. I have perused the record of appeal, the submissions by the two sides and the record in its entirety. From the Memorandum of Appeal, the Appellant's submissions are limited to quantum as a consent on liability was reached on 20th April, 2023, whereby the same was settled at 20% against the Appellant and 80% against the Respondent. He challenges the award of general damages as being inordinately low.
6. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
7. In the matter before the trial court, the relevant evidence is that the Appellant (the Plaintiff in the lower court) produced and relied on a medical report that was prepared by Dr. John K. Macharia dated 29th July, 2022 that indicated that he sustained a fracture of the right femur mid-shaft, which was managed surgically with open reduction and internal fixation with interlocking nail. The Appellant was nursed until he was discharged on 19th May, 2022 while using crutches and was on follow up at the time of examination by the doctor.
8. Dr. Macharia noted in his report that at the time of examination, the Appellant complained of having difficulty in walking and pain on the fracture site. The doctor observed that the Appellant walked unaided, albeit with a limp of the right lower limb. The Appellant had a 15cm surgical scar on the lateral aspect of the right thigh. X-rays confirmed the fracture and the surgical implant in place. There was good alignment of the bone and evidence of early healing of the bone.
9. Dr. Macharia estimated the cost of removal of the surgical implant to be at Ksh.150,000/-.
10. The Respondent produced a second medical opinion that was prepared by Dr. Maina Ruga who, upon examining the Appellant on 22nd March, 2023, noted that he had sustained a fracture of the right femur mid shaft. X-rays confirmed the injury. The doctor noted that the Appellant had surgery for ORIF I.M nail for the right femur and that he was ambulated on crutches.
11. At the time of the second examination, the Appellant complained of pain on the right knee when he walked for long. Although he walked with a slight limp, the Appellant was otherwise in good general condition. The doctor noted a surgical scar on the right thigh lateral aspect. There was no tenderness. Dr. Ruga described the injury that the Appellant sustained as "severe harm". Just like Dr. Macharia, Dr. Ruga estimated the cost of removal of the I.M nail at Ksh.150,000/-.
12. In his submissions, the Appellant proposed an award in compensation under the head of pain, suffering and loss of amenities of Ksh.1,200,000/- for the injuries, and relied on the authorities of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR in which the court in the year 2022 awarded a party who sustained a fracture of the femur and soft tissue injuries Ksh.800,000/-; and that of *M'Munjuri Kiautha v Irene Gakii Ntarangwi* [2022] in which in the same year a similar award was made where the party sustained fracture of the femur.
13. On his part, the Respondent opined that Ksh.200,000/- would adequately recompense the Appellant. The Respondent relied on the authority of *Samuel Mungai Njau v Wananchi Sanitary & Hardware Limited* [2004] eKLR in which the High Court in 2004 awarded general damages of Ksh.150,000/-



where the party suffered a crushed leg, compound fracture of the right tibia and fibula, fracture of the 1st to 4th metatarsals of the right foot and superficial wounds over the right arm.

14. The Respondent also sought to rely on the decision of Ibrahim Kalema Lewa v Esteele Co. Limited [2016] eKLR where the party in 2016 was awarded Ksh.300,000/- in general damages for injuries that included intertrochanteric fracture of the left femur resulting in 25% permanent disability and physical psychological pains.
15. The third precedent that the Respondent relied upon is that of Sundries Bargains (Nairobi) Limited v Richard Karinga Mwangi [2019] eKLR. In that case in a judgement rendered in the year 2019, the court made an award of Ksh.400,000/- to a party who sustained a fracture of the lower right fibula, swollen right leg, blisters right foot, soft tissue injuries and a fracture of the 2nd metatarsal.
16. From the reports of the two doctors, the same conclusion was reached that the Appellant sustained a fracture of the right femur mid shaft. One will note that the three authorities that the Respondent relied on were in respect of injuries that cannot be said to be comparable to those that the Appellant sustained. To that end, the three decisions were not a useful guide to the trial court as they were in the circumstances not relevant.
17. The authorities of Pestony Limited (supra) and M'Munjuri Kiautha (supra) that the Appellant submitted were both in respect of a fracture of the femur and were relevant as the Appellant sustained more or less similar and comparable injuries. As noted above, the awards made in the two cases in the year 2022 were for Ksh.800,000/-.
18. As to whether to interfere with the award of Ksh.500,000/- that was reached by the trial court, I take guidance from the case of Kemfro Africa Ltd & Another v A M Lubia & Another [1982-1988] KAR, where the Court of Appeal observed:

“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. 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”.
19. There is also the case of Kigaraari v Aya [1982-1988] 1KAR 768 where the court held as follows:

“Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”
20. In Charles Oriwo Odeyo v Apollo Justus Andabwa & Another [2017] eKLR the court held:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are;

 - a. that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded, or
 - b. 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 wrong decision. (See Butler vs Butler [1984] KLR 225).



The assessment of damages in personal injury cases by court is guided by the following principles:

1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
2. The award should be commensurable with the injuries sustained.
3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
5. The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau [2007] eKLR.”

(Underlined emphasis mine).

21. The jurisprudence provided by the decisions above is that although the award of damages is within the discretion of the trial court, one of the grounds on which an appellate court can interfere with the assessment of the trial court is where the award is inordinately high or low.
22. From the assessment of the trial court, it is clear to me that previous trends in awards of comparable nature was not taken into consideration. To that end, the learned trial Magistrate fell into error by not considering the decisions that offered comparable injuries and therefore applied the wrong principles in assessing damages. This in my respectful view resulted in an award that was inordinately low.
23. The authorities of Pestony Limited (supra) and M’Munjuri Kiautha (supra) provided appropriate guidance and considering the same and the time that has lapsed, I reach the opinion that the amount of Ksh.900,000/- would aptly compensate the Appellant for the injuries that he sustained.
24. To that end, I reach the result that the appeal has merit and I will proceed to allow it only to the extent that I set aside the trial court’s award of Ksh.500,000/- made under the head of damages for pain, suffering and loss of amenities and substitute the same with an award of Ksh.900,000/- under the same head.
25. Of course, the award as assessed in this appeal shall be subject to the agreed consent on apportionment of liability.
26. The Appellant shall have the costs of this appeal.

JOE M. OMIDO

JUDGE

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 30TH DAY OF JANUARY, 2025.

For Appellant: Ms. Gacheri for Mr. Kaberia.

For Respondent: Mr. Murimi.

Court Assistants: Mr. Ngoge & Mr. Juma.

Mr. Murimi: I pray for 30 days stay.

Ms. Gacheri: No objection.

Court: There shall be a stay of execution for 30 days.



JOE M. OMIDO
JUDGE

