



**Kipkoech v Mella (Civil Appeal E323 of 2023)
[2025] KEHC 3956 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E323 OF 2023
TW OUYA, J
MARCH 27, 2025
(FORMERLY KIAMBU HCCA NO. E363 OF 2023)**

BETWEEN

LEKONAYA KIBWALEL KIPKOECH APPELLANT

AND

LAWRENCE OLUOCH MELLA RESPONDENT

*(Being an Appeal against the Judgment and decree of Hon. Wangechi Ngumi
(SPM) delivered on 24.07.2023 in Gatundu CMCC No. E237 of 2022)*

JUDGMENT

Background

1. This appeal is in respect of the judgment delivered on 24.07.2023 in Gatundu CMCC No. E237 of 2022 (the suit). The same was commenced by way of the plaint dated 3.08.2022 and filed by Lawrence Oluoch Mella being the plaintiff in the lower court (hereafter the Respondent) against Samuel Wachira Mwangi, the defendant in the lower court (hereafter the Appellant). The reliefs sought therein were in the nature of general, future medical expenses, lost earnings/future earnings and special damages to the tune of Kshs. 165,350/- arising out of a road traffic accident which occurred on or about 13.03.2022 along the Gatundu-Juja Road near Oasis area. The Appellant was sued in his capacity as both the driver and registered owner of the motor vehicle registration No. KBZ 377V (hereafter the subject motor vehicle).
2. It was alleged that on the material date, the Respondent was lawfully riding the motorcycle registration number KMFV 724V (the motorcycle) along the above-mentioned road when the Appellant so negligently and/or carelessly drove, controlled and/or managed the subject motor vehicle that it lost control, veered off the road and hit the motorcycle, causing the Respondent to sustain bodily injuries particularized as fracture of the distal end of the left radius; fracture of the right and left femurs; and



fracture of the left tibia. The particulars of negligence were equally set out under paragraph 4 of the plaint.

3. Upon entering appearance, the Appellant filed his statement of defence dated 14.09.2022 denying the key averments in the plaint and liability. In the alternative, the Appellant pleaded contributory negligence on the part of the Respondent, by setting out the particulars thereof under paragraph 7 of the statement of defence. The Appellant similarly denied liability in respect of the injuries particularized in the plaint.
4. At the hearing of the suit, the Respondent testified and called an additional witness, while the Appellant opted to close his case without calling any witnesses.
5. Upon close of submissions, the trial court delivered its judgment in favour of the Respondent and against the Appellant, in the following manner:

Liability 100%

- a. General damages for pain, suffering and loss of amenities Kshs. 1,600,000/-
- b. Special Damages Kshs. 165,350/-
- c. Future medical expenses Kshs. 150,000/-

Total Award Kshs. 1,915,350/-

The Appeal

6. Being aggrieved by the trial court's award, the Appellant has sought to challenge it by way of the memorandum of appeal dated 13.09.2023 featuring the following grounds:
 - i. That the learned Magistrate erred in law and fact in failing to consider and find that the Appellant had shown a prima facie case with a high probability of success.
 - ii. That the learned Magistrate erred in law and fact in failing to consider and find that the Respondent allegedly sustained a fracture of the distal end of the left radius, right femur, left femur and left tibia.
 - iii. That the learned Magistrate erred in law and fact in failing to consider and find that the Respondent has since recovered from the injuries with the residual degree of incapacity being between 15% and 26%.
 - iv. That the learned Magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.
 - v. That the Learned Magistrate erred in law and fact in failing to consider and find that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered and not to mulct the tortfeasor for the injury he has caused. (sic)
7. The appeal therefore seeks to have the trial court's judgment set aside accordingly. Costs of the appeal are likewise sought.



Submissions

8. Directions were given for the appeal to be canvassed by way of written submissions.
9. The Appellant's counsel has anchored her submissions on the case of Alphonse Odero Augo v Sinohydro Corporation Limited [2017] KEHC 6744 (KLR) where the court reasoned that an award on general damages ought to take into account comparable injuries and therefore ought to incorporate comparable awards. Counsel terms the award made by the trial court on general damages in the present matter as excessive and incommensurate to comparable awards; consequently, she proposes that the same be revised downwards to a sum of Kshs. 650,000/-, citing inter alia, the case of Mbae (Suing as the Legal Representative of the Estate Koome Mbae) v Kinya [2024] KEHC 2285 (KLR) in which the High Court sitting on appeal, revised an award of Kshs. 1,750,000/- downwards to a sum of Kshs. 600,000/- at the instance of a plaintiff who sustained an open fracture tibia-fibula, fracture femur, ulna fracture and soft tissue injury; and the case of DKM v Mwangangi [2023] KEHC 18105 (KLR) where a plaintiff with unconsciousness, a wound on the right lateral part of both legs, fracture of the right femur, fracture of the left femur and a medial fibula fracture of the left leg was awarded a sum of Kshs. 500,000/- and which award was upheld on appeal.
10. On special damages, it is the contention by the Appellant's counsel that the same ought to be specifically pleaded and strictly proved, going by the well-settled principle laid out in the case of Hahn v Singh [1985] KECA 129 (KLR). Counsel proceeds to submit that proforma invoices do not constitute evidence of monies incurred in order to support a claim for special damages, and hence the trial court erred in awarding special damages in the absence of the requisite receipts. According to counsel, the Respondent was only entitled to a sum of Kshs. 6,690/- being what was both pleaded and proved. In the end, the Appellant's counsel urges this court to allow the appeal as prayed.
11. The Respondent through his counsel, naturally defended the trial court's findings in their totality. Counsel argues that the appeal lies solely against quantum, in the absence of any grounds of appeal challenging the trial court's finding on liability. Counsel has anchored his submissions on the decision in Simon Taveta v Mercy Mutitu Njeru [2014] KECA 755 (KLR) where the Court of Appeal held that an award of damages is primarily based on the nature and extent of injuries and comparable awards previously made. Counsel supports the award made by the trial court on general damages, arguing that the same was made on the foundation of the medical evidence tendered by the Respondent. Counsel further argues that the award made by the trial court under that head is reasonable and within the range of awards made in respect of comparable injuries, and should therefore not be disturbed. In that regard, counsel cites inter alia, the case of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] KECA 528 (KLR) where the court awarded a sum of Kshs. 1,500,000/- to a plaintiff who sustained a fracture of left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula; and the case of Martin Ileri Namu & Dickson Kariuki Nyaga v Alicalinda Igoki Kiringa [2019] KEHC 1773 (KLR) where an award of Kshs. 1,500,000/- made in respect of injuries particularized as multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp, was upheld by the Court of Appeal; and the case of Devna Pandit v Kennedy Otieno Obara & another [2016] KEHC 6468 (KLR) in which a plaintiff who had sustained a fracture dislocation left hip with fracture head of femur, a fracture left tibia comminuted and a fracture right face/maxilla, was awarded a sum of Kshs. 2,000,000/- under the above head.
12. On the subject of specials, it is counsel's contention that the Respondent tendered various receipts to support the sum of Kshs. 165,350/- sought under that head and hence the trial court acted correctly in awarding the same.



13. On the premise of the foregoing grounds, it is asserted that the appeal lacks merit and that it therefore ought to be dismissed with costs.

Analysis

14. The court has considered the original record, the record of appeal and the submissions on record plus the authorities cited in support thereof. As a first appellate court, the duty of this court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 echoed the above principle in the following manner:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

15. Upon review of the memorandum of appeal and submissions on record, it is apparent that while the Appellant purported to mention in passing by way of his submissions; that the trial court erred in finding him entirely liable for the material accident; from a study of both the grounds of appeal and the Appellant’s submissions, the court did not come across any particular arguments advanced in challenging the finding of liability and hence the court sees no reason to review the same. Consequently, this court will limit itself to the issue of quantum.
16. As earlier mentioned, the present appeal is primarily challenging the awards made under the heads of general damages for pain, suffering and loss of amenities; and special damages. The court will first address the award made on general damages.
17. The main contention raised concerning the general damages in particular, is that the same is inordinately high and was awarded on the basis of wrong principles and without proper consideration of the evidence on record as well as comparable awards made.
18. In that respect, the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages, in the following terms:

“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 if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

19. The same court previously stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 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. 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”.

20. As earlier set out, the Respondent’s injuries as particularized in the amended pleadings are which injuries are confirmed by the medical evidence constituting the Respondent’s bundle of documents adduced at the trial, especially the medical report prepared by Dr. W.M. Wokabi and dated 4.07.2022 (P. Exhibit 9). Therein, the doctor stated that the left radius fracture had been reduced and fixed with K-wires, while the femur and tibia fractures had been operated on and fixed with K-nails. That both legs would take 12 to 15 months to be maximally rehabilitated. Consequently, permanent disability was assessed at 8% on the right leg and 10% on the left leg, as well as 8% on the left wrist, totaling a permanent disability of 26%. The doctor further determined that the Respondent would require removal of the implants in the future, at a cost of Kshs. 150,000/-.
21. The trial court record shows that the Respondent underwent a second medical examination at the request of the Appellant’s advocate, upon which Dr. Waithaka Mwaura prepared a medical report dated 7.12.2022 (P. Exhibit 14) essentially echoing the contents of the first medical report, save that this particular doctor assessed the degree of permanent disability at 15%.
22. At the submissions stage, the Respondent proposed an award of Kshs. 2,500,000/- under the head of general damages, citing the case of *John Kuria Mbure v Magari Hire Purchase Ltd & 2 others* [2019] KEHC 4001 (KLR) and the case of *Geoffrey Mwaniki Mwinzi v Ibero (Kenya) Limited & another* [2014] KEHC 1727 (KLR) where the respective courts awarded the sums of Kshs. 2,000,000/- under a similar head in respect of injuries particularized as compound fracture of the right tibia, compound fracture of the right medial and lateral malleolus with dislocation of the right ankle joint; and fracture of the left tibia and fibula, and a fracture of the collarbone; respectively.
23. On his part, the Respondent suggested a sum of Kshs. 650,000/- and relied inter alia, on the decision in *Third Engineering Bureau China Construction Group Limited v Edwin Kinanga Atuya* [2021] KEHC 5489 (KLR) where a plaintiff with bruises on the scalp, hands and right leg, compound left tibia fracture and compound left fibula fracture, was awarded a sum of Kshs. 500,000/-. The Respondent further placed reliance on the decision in *Peter Gakere Ndiangui v Sarah Wangari Maina* [2021] KEHC 6811 (KLR) in which the High Court sitting on appeal revised an award of Kshs. 1,200,000/- downwards to a sum of Kshs. 500,000/- at the instance of injuries particularized as pelvic fractures and soft tissue injuries.
24. In her judgment, the learned trial magistrate upon setting out the awards proposed by the Respondent and the Appellant respectively, coupled with the authorities cited in support thereof, ultimately settled for an award of Kshs. 1,600,000/- under the head of damages for pain, suffering and loss of amenities.
25. Upon considering the above-referenced authorities relied on in the suit, the court is of the reasoned view that those cited by the Respondent involve injuries of a slightly more severe nature than those suffered here, while those cited by the Appellant entailed less serious injuries in comparison.
26. That being the case, the court took into account the case of *Mwangi v Siloma & another* [2023] KEHC 26140 (KLR) in which an award in the sum of Kshs. 1,200,000/- was made to a plaintiff with a fracture on the distal end of the right tibia; fibula bimalleolar fractures on the left ankle joint; fractures on proximal end of the left humerus and ankle joints, among other injuries, with permanent incapacity being assessed at 30%. The court likewise considered the case of *Njuguna v Mwabindo* [2023] KEHC 24136 (KLR) involving a plaintiff with multiple fracture injuries to the distal radio-ulna, right tibia distal third, acetabulum and left big toe inter alia, and with the degree of disability being placed at 55%, who was awarded a sum of Kshs. 1,400,000/-.



27. Taking the above comparable authorities into account as well as the nature and extent of the injuries sustained here, the degree of permanent incapacity and the inflationary trends, the court is of the view that the learned trial magistrate's award under the above head of general damages for pain, suffering and loss of amenities, fell on the higher side. The court therefore deems it necessary to disturb the said award by substituting it with a more reasonable award in the sum of Kshs. 1,200,000/-
28. Turning to the award made under the head of special damages, the standing legal position on this is that special damages must be specifically pleaded and strictly proved. This was reaffirmed by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated thus:
- “It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:
- “... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;
- “Plaintiff must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.”
29. From a glance at the pleadings on record, it is clear that the Respondent pleaded the sum of Kshs. 165,350/- under the relevant head. Upon a re-examination of the evidence on record, it is apparent that the Respondent tendered both invoices and receipts, containing various amounts, though it is also apparent that some of the receipts contained illegible dates. It is equally apparent that some of the invoices tendered corresponded with receipts confirming payment of the invoiced amounts, whereas other invoices were not supported by way of any corresponding receipts.
30. Upon the court's tabulation of the medical receipts (found on pages 38, 42, 43, 44, 45 of the record of appeal) totaling Kshs. 84,100/- as well as the receipt issued to the Respondent as payment for preparation of the medical report (found on page 52 of the record of appeal) in the sum of Kshs. 3,000/- and in obtaining the copy of records in respect of the subject motor vehicle (found on page 54 of the record of appeal) in the sum of Kshs. 550/-, the same come to a total of Kshs. 87,650/-. The court in arriving at this figure, excluded the medical invoices issued to the Respondent.
31. In the circumstances, the court is of the view that the Respondent was only entitled to the said sum of Kshs. 87,650/- in line with the standing legal principle pertaining to special damages.
32. In the end therefore, the appeal partially succeeds. Consequently, the trial court's award of Kshs. 1,600,000/- made under the head of general damages for pain, suffering and loss of amenities is hereby set aside and is substituted with an award in the sum of Kshs. 1,200,000. Similarly the trial court's award of Kshs. 165,350/- made under the head of special damages is hereby set aside and is substituted with an award of Kshs. 87,650/-.

Final Determination

33. The final award will therefore read as follows:
- i. General damages for pain, suffering and loss of amenities.....Kshs. 1,200,000



- ii. Special damages ...Kshs. 87,650
TOTALKshs 1,287,650
- iii. Each party to bear their costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....mudeisi

For Respondent.....mwenja Hb Wanjohi

Court Assistant.....jackline

