Chesire v Bulila (Civil Appeal E068 of 2025)
[2025] KEHC 11471 (KLR) (Civ) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11471 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E068 OF 2025

AC MRIMA, J

JULY 31, 2025

BETWEEN

REUBEN CHESIRE .... APPELLANT

AND

CLIFF BULILA .... RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. H.M Ng'ang'a (PM) in Nairobi Chief Magistrates Court Civil Suit No. E3201 of 2023, delivered on 20th December 2024)

JUDGMENT

Background:

1. Through the Plaint dated 30th May 2023, Cliff Bulila, the Appellant herein, sought damages from Rueben Chesire, the Respondent herein, for injuries he sustained as a result of a road traffic accident.

2. He pleaded that on or about 15th August 2022, while lawfully walking at South B shopping Centre, the Appellant negligently and/or carelessly drove the motor vehicle registration No. KCY 701R (hereinafter 'themotor vehicle') that it veered off the road knocking him down thereby causing him serious bodily injuries.

3. The Respondent relied on violation of *Traffic Act* and the doctrine of res -ipsa-loquitor to impute liability on the Appellant. He stated that he sustained a fracture of the right big toe and expended kshs 6,550/- in special damages. He sought to recover both general and special damages.

4. The Appellant challenged the suit through the Statement of Defence dated 10th August 2023. He denied both the claim that he was the registered owner of the motor vehicle and that of negligence. He put the Respondent to strict proof.

5. Further, the Appellant denied the applicability of the doctrine of res-ipsa-loquitor in the circumstances of the case. He pleaded that the suit was an afterthought with the ill intention to rake in damages where there was no cause of action.

6. In the alternative, and without prejudice to the foregoing, the Appellant claimed that the accident occurred as a result of the negligence of the Respondent. He pleaded that the Respondent substantially contributed to and caused the accident. He isolated the particulars of negligence by stating that the Respondent walked into the lawful path of the motor vehicle, failed to use designated pedestrian foot path, attempted to cross the road without presence of mind and failing to heed to the warning or the presence of oncoming vehicles.

7. In his judgment, the learned trial magistrate was of the finding that, on a balance of probability, the Appellant was solely liable for the accident. On quantum, it awarded Kshs. 750,000/- in general damages and Kshs. 6,550/ in special damages.

8. The Appellants were aggrieved, hence the instant Appeal.

The Appeal:

9. Through the Memorandum of Appeal dated 22nd January 2025, the Appellants expressed dissatisfaction on quantum of damages on grounds as hereunder;

    1. The learned trial magistrate acted in error when he failed, as he did, to properly evaluate evidence on record thus reaching erroneous and excessive award in the decision on the issue of quantum of damages that is to say, general damages for pain and suffering.

    2. The learned trial magistrate acted in error when he failed, as he did to properly evaluate expert evidence on record thus reaching erroneous decision on the issue of quantum of damages payable to the Respondent and thereby arriving at a manifestly excessive award.

    3. The learned trial magistrate erred in law and in fact by basing his decision on extraneous matters and failing to base his decision on the facts, evidence on record and the principle of stare decisis.

The Submissions

10. In its written submissions dated 28th April 2025, it was its case that the Respondent sustained a fracture of the right big toe which is supported by the medical report of Dr. Cynthia W. Muriithi. However, a second medical examination by Dr. Wambugu P.M. indicated that the Respondent's X-rays did not reveal any features of an old fracture.

11. The Appellant submitted that the Respondent had testified that he sustained a fracture of the right small toe and not the big toe as pleaded in the plaint.

12. In view of the assessment by doctor Dr. Wambugu P .M that .M. there was no scarring, swelling or stiffness of the toe, the Appellant argued that earned Magistrate therefore failed to consider the Appellant's evidence which indicated that the Respondent's X-ray pictures did not have any trace of a previous or old fracture.

13. On quantum, the Appellant urged the court to abandon the cases cited by the Respondent for being excessive in the circumstances since they depicted more severe injuries, not similar to the injuries of the Respondent. It submitted that the authority in Peter Benard Makau -vs- Prime Steel Limited [2018] eKLR reflected comparable quantum for comparable injury.

The Respondent's case:

14. Cliff Bulila responded to the Appeal through written submissions dated 16th June 2025.

15. In urging the court not to disturb the award of damages, the decision in the case of Gitobu Imanyara & 2 Others -vs- Aootorney General (2016) eKLR and the one in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -vs- A.M Lubia & Olive Lubia (1982-88) 1 KAR were cited where it was observed that in interference will only suffice where the trial court acted on some wrong principle or that the amount was manifestly excessive or low as to make it an entirely erroneous estimate of the damage. It was its submission that the initial treatment notes from Mbagathi Hospital confirmed the Respondent sustained the injuries pleaded in the plaint.

16. The Respondent found support in the case of Patel -vs- Kamau & Another KECH 10992 (KLR) where it was observed that expert evidence ought to be tested against known facts, as it is the primary factual evidence which is of the greatest importance. The Respondent urged the court to be persuaded by the decision in Dickson Ciuri Wanjiru -vs- Municipal Council of Nakuru & another (2020) eKLR as well as the one on Lothike Lukolunjo -vs- Kuyia Ludaam & Another 2019 eKLR where the court awarded damages of Kshs. 800,000/- and Kshs/ 600,000/- respectively.

Analysis: -

17. Since liability is not in contest, the only issue for determination is whether the trial Court properly directed itself in assessing quantum. As the appeal is on quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See Butler vs. Butler (1982) KLR 277).

18. The Court of Appeal in Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

19. This position was restated by the Court of Appeal in Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101 and also in Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR. It is the above legal threshold that will guide this Court in determining this appeal.

20. Dr. Cynthia Muriithi was PW1. It was her evidence that she physically examined the Respondent and prepared a report produced as PExh. 1. On cross-examination, she stated that the Respondent sustained pain and swelling of the right big toe. She admitted that she did not see the x-ray for the fracture. She only relied on medical report from Mbagathi Hospital.

21. The Respondent was PW2. It was his evidence that he fractured his right leg and toe and that a ring was placed. He stated that he had not healed. On cross-examination, it was his testimony that he was

injured on the leg after the accident and was taken to Mbagathi Hospital. He conceded that he did not present the x-ray report to court. He stated that he was injured in the small right toe and it was a mistake to indicate the large toe.

22. The Respondent called Dr. Peter Wambugu, a medical consultant and a lecturer at the University of Nairobi as his witness. He testified as DW2. He stated that the x-ray taken one year later did not show any old fracture and that if he sustained any injury, it was that of soft tissue. On cross-examination, it was testimony that the Respondent did not avail any x-ray. He only had a look at the treatment notes, P3 form and first medical report which indicated fracture on right leg and big toe. He stated that if there were a fracture, he would have been able to tell even if there was complete healing.

23. This Court has perused the medical report by PW1. It is dated 30th March 2023, about seven months after the accident. The complaints presented indicate that of the right leg and foot, pain swelling. In the treatment section, it indicated that radiograph revealed a fracture of the right big toe and a plaster of Paris applied. The Court has also intently interrogated the P3 Form. Upon examination of the lower limb of the Respondent, the medical doctor made remarks as hereunder;

    Swollen and tender – right foot.

    Toes swollen and painful – fracture of the right big toe.

24. From a totality of the evidence, it is apparent that whereas the Respondent did suffer injuries in the right leg it is not clear whether it was the right big toe or the small toe. In his oral testimony he stated that it was the small toe. The documentary evidence however indicate that it was the right big toe. What is apparent, however, is that there is no evidence corroborating the claimed fracture on the right leg. The Respondent stated that he lost the x-rays thereof in a fire. All the doctors did not see that evidence and so did the trial court. It is notable however, that when DW2 testified, he stated that he checked the x-rays taken on 9th November 2023, more than a year after the accident, but did not reveal any features of old fracture of the big toe. In his oral evidence he indicated that if indeed there had been any fracture, it would have been noticeable despite the passage of time.

25. The only injury, therefore, for purposes quantum, is that of the right toe. I have appreciated the authorities relied upon by the Respondent. As submitted by the Appellant, they concededly are a representation of more extensive and more severe injuries. The principles that guide this court on award of damages is primary dictated by how courts have awarded comparable injuries, the severity of the injury and the impact of the injuries on the victim's life among other factors.

26. In order to arrive at a fair estimate of the damages, I will first refer to compensation of soft tissue injuries and work the way up to fractures involving the toes. The authority in Maimuna Kilungwa -vs- Motrex Transporters Ltd (2019) eKLR will go first. In the case, the court awarded Kshs. 125,000/- for soft tissue injuries to the neck, left ear and left shoulder. In the case of Peter Bernard Makau -vs- Prime Steel Limited (2018) eKLR, the Respondent had sustained fracture on his toe and soft tissues injuries. An award of 100,000/= as general damages was made. In the case of Masinga Ndonga Ndonge -vs- Kualam Limited (2016) eKLR the appellant sustained a crushed and fracture big toe and soft tissue injuries. The appellate court awarded the appellant Kshs 150, 000/- as general damages for pain and suffering.

27. In the case of Peter Opiyo Ager -vs- David Otieno Owino & another (2020) eKLR where an award of Kshs 200,000/= for general damages for pain and suffering was maintained for dislocation on the neck (stiff neck), injuries on the shoulder, left arm, chest injuries and injuries on the small toe of the left leg with dislocation.

28. From the foregoing authorities, it is discernible that for injuries in the nature of a fracture to the toes, the range is between Kshs. 125,000/- to 200,000/-. The Respondent herein suffered no more than a big toe fracture. Inevitably, the award of Kshs. 750,000/- was manifestly high. Respectfully, the learned trial magistrate misapprehended the evidence as to arrive at an inordinately high figure. This Court's intervention is rightfully invoked. In the premises, having due regard to the fact that most of the foregoing decisions were decided between 5 – 10 years ago and considering the inflationary trends, the award that commends itself to this court is Kshs. 250,000/-.

29. In the end, the appeal succeeds and the following final orders hereby issue: -

    (a) The appeal be and is hereby allowed.

    (b) The award by the trial Court of Kshs. 750,000/- as general damages is hereby set aside. It is hereby replaced with the award of Kshs. 250,000/-.

    (c) In view of the drastically reduced award, each party shall bear its own costs of the appeal.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Kiptanui, Learned Counsel for the Respondent.

Mr. Ochieng, Learned Counsel for the Appellant.

Amina/Michael – Court Assistants.