



REPUBLIC OF KENYA



**BG (A minor suing through his guardian & next friend John Muchungi Muiruri) v Waikuni t/a Chemax Investment & Contractor (Civil Appeal E002 of 2021) [2025] KEHC 11933 (KLR) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11933 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E002 OF 2021  
HI ONG'UDI, J  
AUGUST 6, 2025**

**BETWEEN**

**BG (A MINOR SUING THROUGH HIS GUARDIAN & NEXT FRIEND JOHN MUCHUNGI MUIRURI) ..... APPELLANT**

**AND**

**GEORGE WAIKUNI T/A CHEMAX INVESTMENT & CONTRACTOR ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Martin Mutua (RM) in Naivasha CMCC No. 25 of 2016 delivered on the 19th January 2021)*

**JUDGMENT**

1. The appellant who was the plaintiff in the lower court sued the respondent (defendant) seeking damages arising from injuries he suffered when he was knocked down by motor vehicle registration No. KAL 102A along the road at Kabatini area. This incident occurred on 19<sup>th</sup> May 2023.
2. The parties entered into consent on liability in the ratio of 80:20 in favour of the appellant against the respondent. In the same consent the case against the 1<sup>st</sup> defendant was withdrawn. The consent is dated 3<sup>rd</sup> July 2019 and was filed on 15<sup>th</sup> August 2019 and adopted by the court on 14<sup>th</sup> October 2019.
3. The trial court heard the case on quantum and entered judgment on 19<sup>th</sup> January 2021 in favour of the appellant in the sum of Kshs.407,500/= plus costs and interest.
4. The appellant being dissatisfied with the judgment filed this appeal dated 28<sup>th</sup> January 2021 on the following grounds:



- i. That the learned trial Magistrate erred and misdirected himself in law and in fact in his assessment of damage awardable to the appellant by awarding general damages that were inordinately low in the circumstances.
  - ii. That the learned trial magistrate failed to appreciate and/or misapplied the principle applicable in the assessment of damages under the circumstances by adopting a global sum under the limb of general damages
  - iii. That the learned trial Magistrate erred in law and in fact in awarding the appellant an inordinately low award in respect of general damages, despite the appellant having submitted on the same
  - iv. That the learned trial magistrate erred in law and in fact by failing to award the appellant future medical expenses yet the same was pleaded and proved by the Doctor's medical report and the appellant's testimony.
  - v. That the learned trial magistrate erred and misdirected himself in law and in fact by not properly analyzing the appellant's testimony and his witnesses in court, medical documents produced and his submissions on the severity of his injuries.
5. The appellant's case was that the victim was aged 9 years old at the time of accident. He suffered injuries on his left leg. His guardian (PW1) produced various documents including Dr. Kiamba's report dated 16<sup>th</sup> September 2015, receipts, birth certificate, discharge summary and P3 form. The respondent did not adduce any evidence.
6. The appeal was canvassed by way of written submissions.

#### **Appellant's submissions**

7. The same were filed by Gekonga & Company Advocates and are dated 7<sup>th</sup> December 2023. Relying on the case of Kemfro Africa Limited t/a Express Services & another Vs A. M. Lukia & another [1982-88] L KAR 727 and Butt V. Khan [1981] KLR 349 counsel invited this court to revisit the evidence, documents and submissions and ascertain whether the award by the trial court is justified.
8. Counsel highlighted the medical report by Dr. Kiamba and submitted that an award of Kshs.6,000,000/= would suffice. On this he relied on the case of Ziporrah Nangila Vs Express Limited & 2 others [2016] eKLR where similar injuries attracted an award of Kshs.2,400,000/=. He argued that in the case relied on by the trial court (Easy Coach Limited V Emily Nyangasi [2017] eKLR), the plaintiff suffered less serious injuries. He argued that in the present case the appellant suffered 50% permanent disability in both legs and further surgery would require Kshs.300,000/=.
9. Counsel further submitted that the trial court did not award the appellant future medical expenses yet it had been pleaded. He thus invited the court to revisit the awards, since the trial court awarded inordinately low damages on the limb of general damages. On this he relied on the case of Trider Construction V Charles Wekesa Kasembeli Civil Appeal No. 121 of 2002.

#### **Respondent's submissions**

10. These were filed by Ajaa Olubayi & Co. Advocates and are dated 14<sup>th</sup> February 2025. Counsel gave a brief background of the facts of the appeal. Referring to the cases of Butt V Kharo (supra) and Kemfro Africa Limited (supra) among others, counsel submitted that this was not one of those cases, where the court ought to interfere with the awards made by the trial court.



11. He relied on the following cases to support his argument.
  - i. Tinus Mburu Chege & another V JKN (minor suing through the next friend & mother D.W.N & another [2018] eKLR where Ong’udi J. reduced an award of Kshs.800,000/= to Kshs.500,000/= for fractures of tibia and fibula on both legs, blunt injury on forehead, broken upper right second front tooth among others.
  - ii. Rayan Investments Limited V Jeremiah Mwakulegwa Kashes [2017] eKLR where an award of Kshs.300,000/= was made for similar injuries.
  - iii. Gladys Lyaka Mwombe V Francis Namatsi & 2 others [2019] eKLR where the court awarded Kshs.300,000/= for similar injuries.
  - iv. Naomi Momanyi V G4S security Services Kenya Limited & another [2018] eKLR where the court awarded Kshs.300,000/= for similar injuries which had led to 30% incapacity.
12. On further medical expenses counsel submitted that the same were not justified. He argued that the doctor besides throwing the blanket figure never explained anything about it. He argued that the appellant was not fitted with any internal fixations that would require removal later. This he got from the treatment notes and the medical report. He thus argued that the claim for future medical expenses was an afterthought hence unsustainable. On this argument he relied on the cases of: (i) Mbaka Nguru & another V James George Rakwar, Civil Appeal No. 133 of 1998; (ii) Mohammed Hassan Musa & another V Peter Mailanyi & another [2000] KECA 31 and (iii) Boniface Waiti & another V Michael Kariuki Kamau [2007] eKLR among others.

He thus urged the court to allow the appeal and adjust the award of Kshs.500,000/=.

### **Analysis and Determination**

13. This being a first appeal it is this court’s duty under Section 78 of the *Civil Procedure Act* to re-evaluate and access the evidence tendered before the trial court and come to its own independent conclusion, while taking into account the fact that it did not have the advantage of seeing and hearing the witnesses testify. This was the principle laid down in the case of: *Selle V Associated Motor Boat Company Limited* [1968] E.A 123; *Kiruga V Kiruga & another* [1988] KLR 384.
14. In view of the above authorities and upon careful consideration of the record of appeal, grounds of appeal, submissions by both parties, cited authorities and the law, I find the main issue following for determination to be as follows:

“Whether the award on general damages by the trial court is excessively low requiring this court’s interference.”
15. The issue of liability was agreed upon by the parties and the case against the 1<sup>st</sup> respondent Kirika Elvis was withdrawn. It is therefore an error to have his name listed in the lower court judgment and in the Memorandum of Appeal herein as a 1<sup>st</sup> respondent. That error is hereby expunged from the lower court judgment and the Memorandum and record of Appeal.
16. It therefore follows that the appeal herein is only against the quantum of damages. It is an established principle of law that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence. See: *Kemfro Africa Limited t/a Meru Express & another (supra)*; *Peter M. Kariuki V Attorney General C. A Civil Appeal No. 79 of 2012* [2014] eKLR among others.



17. In his judgment of 19<sup>th</sup> January 2021, the trial Magistrate made the following awards:

- i. General damages – Kshs.500,000/=
- Less 20% contribution Kshs.100,000/=
- Total Kshs.400,000/=
- ii. Special damages Kshs.7,500/=
- Total 407,500/=
- iii. Costs and interest thereon.

This is what is being challenged by the appellant.

18. Under paragraph 6 of the plaint the appellant pleaded the particulars of the injuries to be

- i. Compound fracture of the left tibia/plateau mid-shaft and fracture of the left fibula in the proximal part.
- ii. Degloving injuries of both legs with compartment syndrome.

At paragraph 7 he pleaded this:

“The plaintiff sustained very severe injuries and he requires future treatment and operations at a cost of Kshs.300,000/= which the plaintiff claims herein.”

19. The victim at the time of accident 19<sup>th</sup> May 2013 was nine (9) years old. He was born on 4<sup>th</sup> April 2004 (birth certificate at page 16 of the record of appeal). When the matter was heard on 22<sup>nd</sup> September 2020 the boy was 16 years plus 5 months plus 3 weeks, old but he did not testify. It would have been important for him to appear for the court to see his physical appearance seven (7) years after the accident.

His guardian and friend testified and produced several documents. Among the documents was the medical report by Dr. Kiamba who did not testify. His report shows that the victim was admitted at Kenyatta National Hospital twice i.e. (i) 19<sup>th</sup> May 2013 – 30<sup>th</sup> May 2013, (ii) 30<sup>th</sup> June – 19<sup>th</sup> November 2013.

20. The medical report was done on 16<sup>th</sup> September 2015 after an examination. Of significance were:

- i. Right lower leg which was deformed – its function was reduced.
- ii. On the left limb – was prominent deformity on his upper part of the leg below the knee. Its function was also reduced.

The report therefore shows that the boy’s both lower limbs were injured/fractured. He would require future medical treatment. The doctor assessed the level of permanent disability to be at 50%.

21. In his judgment the trial Magistrate stated this at page 14 (supplementary record of appeal)

“I have looked at the injuries suffered by the plaintiff and the case referred to above and all issues raised in all the submissions. The plaintiff has recovered from the injuries without any complications... In my assessment of damages in this case, regard being made to the nature and the extent of the injuries by plaintiff, as shown in the doctors’s medical report an award of Kshs.500,000/= strikes a cord of fairness and would be sufficient.” (Emphasis mine)



22. When PW1 testified on 22<sup>nd</sup> September 2020 this is what he told the court:
- “Boniface was 9 years old. He is 16 years old now. Plaintiff is yet to heal fully. I pray that we be compensated. (Ephasis mine) I have further clearly shown what the doctor’s report indicates.
23. With all due respect to the learned trial Magistrate I have not seen anywhere in the proceedings where it is indicated that the boy (victim) had recovered from the injuries without any complications.
24. The boy was admitted at Kenyatta National Hospital for a total of six (6) months for the severe injuries to be managed. Dr. Kiamba’s report is very clear on the boy’s condition on two limbs when he examined him on 16<sup>th</sup> September 2015.
- Nothing was produced before the trial court to show the boy’s condition as at 22<sup>nd</sup> September 2020 when the matter came for hearing. I therefore fault the trial Magistrate on his finding that the boy (victim) had fully recovered without any complications.
25. In assessing the quantum I am considering the main injuries as per Dr. Kiamba’s report, treatment notes from Kenyatta National Hospital, P3 form (page 17, 18, 19,22 of the record of appeal) which are:
- i. Compound fracture of the left tibia/plateau mid-shaft.
  - ii. Fracture of the left tibia.
  - iii. Report shows that function of both limbs were markedly reduced.
  - iv. The right leg was markedly deformed on the antero medical aspect from the knee to the ankle.
26. The question is whether the award of Kshs.500,000/= was too low for the above injuries. Counsel for the appellant relied on the case of Zipporah Nangila (supra) and made a proposal of Kshs.6,000,000/= . The Zipporah case was decided in 2016 and an award of Kshs.2,400,00/= was made. Perusal of the said judgment reveals more serious injuries compared to what is in this case.
- Apparently the respondent did not file any submissions before the trial court. From his submissions before this court he is satisfied with the lower court judgment.
27. Besides the authorities cited by both counsel I have had an opportunity to consider other cases where decisions were made on similar injuries namely:
- i. Damaris Wamucii Kagechu V Joseph Kirui & another [2019] eKLR where the court awarded Kshs.1,600,000/= for the plaintiff who suffered bilateral compound fractures of the tibia and fibula to both right and left legs. Later the fracture showed malunion and the plaintiff could not walk. Permanent disability was assessed at 80%.
  - ii. In Harun Muyoma Boge V Daniel Otieno [2015] eKLR the plaintiff sustained multiple injuries and fractures of the right tibia and fibula, the appellate court set aside an award of Kshs.1,500,000/= and substituted it with an award of Kshs.300,000/=.
  - iii. In Daniel Otieno Owino & another V Elizabeth Atieno Owino Owuor [2020] eKLR, the court reduced an award of Kshs.600,000/= to Kshs.400,000/= for compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with a cut wound on the nose and blunt chest.



28. From the above decisions it can be noted that awards can never be the same just as cases are never the same. We however have to ensure that awards are moderately assessed. The proposal of Kshs.6,000,000/= is thus beyond a reasonable assessment.
29. Having taken into account the current awards, the rate of inflation and the injuries sustained by the respondent herein as well as the fact that disability was assessed at 50%, I find the award of Kshs.500,000/= to have been low, and I hereby double it.
30. Lastly on future medical expenses, this was pleaded at paragraph 7 of the plaint and was supported by the medical report. Dr. Kiamba floated a figure of Kshs.300,000/=. Flowing from the treatment notes and medical report it is clear the victim (plaintiff) would require more treatment as at the time of the report. One would be expected to go to a public hospital or mission hospital whose charges would be much less than the Kshs.300,000/=.
31. Consequently, the appeal succeeds and I set aside the judgment of the lower court and substitute it with a judgment of this court in favour of the appellant on the following terms.
- i. Liability 80:20 upheld.
  - ii. General damages – (Kshs.1,000,000/=) less 20% contribution = Kshs.200,000/=.  
TOTAL = Kshs.800,000/=
  - iii. Future medical expenses – Kshs.150,000/=  
Total = Kshs.950,000/=
  - iv. Costs and interest from the date of judgment in the lower court.
  - v. Costs of the appeal to the appellant.
32. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6<sup>TH</sup> DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONGUDI**

**JUDGE**

