



**Bashir v Namayi (Civil Appeal 646 of 2016)
[2024] KEHC 817 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 646 OF 2016

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

MBURU BASHIR APPELLANT

AND

BILLY LUBANGA NAMAYI RESPONDENT

*(Being an appeal from the judgment of Usui, SPM Delivered
on 5th October, 2016 in Milimani CMCC No. 2183 of 2014)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 5th October, 2016 in Milimani CMCC No. 2183 of 2014. The suit was commenced by a plaint filed by Billy Lubanga Namayi, the plaintiff in the lower court (hereafter the Respondent) against Mburu Bashir, the defendant in the lower court (hereafter the Appellant). The claim was for general and special damages in respect of injuries allegedly sustained by the Respondent on or about the 8th September, 2012. It was averred that the Respondent was on the material date lawfully walking as a pedestrian along Ngong Road in Nairobi when the Appellant so carelessly and/or negligently controlled and/or managed the motor vehicle registration number KAK 037V (the subject motor vehicle) that he caused it to knock down the Respondent, who as a result sustained serious bodily injuries. The Respondent attributed the accident to negligence on the part of the Appellant as particularized at paragraph 3 of the plaint.
2. Upon service of summons, the Appellant entered appearance and filed his statement of defence on 19th June, 2014 denying the key averments in the plaint and liability. Alternatively, the Appellant pleaded contributory negligence against the Respondent as particularized in the defence statement.
3. In lieu of the usual trial, the parties recorded a consent on liability in the ratio of 85%: 15% in favour of the Respondent against the Appellant and agreed to file written submissions on quantum. The trial



court in its judgment awarded general damages for pain and suffering in the sum of Kshs.900,000/ and special damages in the sum of Kshs.9,591/-, costs of the suit and interest thereon.

4. By this appeal, the Appellant has challenged the award on general damages on the following grounds of appeal contained in the memorandum of appeal dated 21st October, 2016:
 1. “The learned magistrate erred in law and in fact in the way she weighed the evidence adduced in court.
 2. The learned magistrate did not consider the submissions of the appellant.
 3. The learned magistrate erred in law and in fact by awarding a manifestly high figure as general damages.” (sic)
5. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decision in *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR concerning the duty of an appellate court on a first appeal and the guiding principles as to circumstances when an appellate court is entitled to interfere with the discretion of the trial court in assessing quantum of damages. Counsel argued that the award of general damages was inordinately high and not commensurate with the injuries sustained by the Respondent. He therefore urged the court to disturb the award made in the sum of Kshs.900,000/-. Here relying on the case of *Kenya Power & Lighting Company Limited & another v Zakayo Saitoti Naingola & another* [2019] eKLR and the case of *Bhachu Industries Ltd v Peter Kariuki Mutura* [2015] eKLR where the respective courts awarded general damages in the sum of Kshs.300,000/- for injuries comparable to those sustained by the Respondent.
6. The Respondent defended the trial court’s assessment of the general damages. His counsel relied on the decision rendered in *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another* (No. 2) [1985] eKLR regarding the principles to be observed by an appellate court in deciding whether it is justified to interfere with an award of damages. Counsel contended that the trial court considered all relevant material and evidence tendered before it and therefore arrived at a reasonable award on general damages. Citing the case of *Bethwel Mutai v China Road & Bridge Corporation* [2008] eKLR where the court awarded the sum of Kshs.800,000/- as general damages to a plaintiff who sustained fracture injuries to the left clavicle, right humerus and right femur and the case of *Charles Wanyoike Gitbuka v Joseph Mwangi Thuo & 2 others* [2008] eKLR in which the court awarded general damages in the sum of Kshs. 1,600,000/- for fracture injuries. The court was thus urged to uphold the decision of the trial court in its entirety, and to dismiss the appeal with costs.
7. The court has considered the original record, record of appeal and the submissions made by the respective parties on this appeal. The duty of this court as a first appellate 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. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“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.”
8. The contention in the present appeal has to do with the award made by the lower court on the general damages, which the Appellant views as being inordinately high. In considering the appeal, the court



will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.”

9. The same court 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”.

See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu* Civil Appeal No. 284 of 2001; (2004) eKLR.

10. In the latter case, the Court of Appeal reiterated the discretionary nature of general damage awards and exhorted that:

“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 in the first instance”.

11. In *Tayib v Kinany* (1983) KLR 14, the Court exhorted *inter alia* that:

“By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis added)

12. The Respondent particularized his injuries in the plaint as comprising compound fracture of the right femur; abrasion of the left upper arm; abrasion on the lateral left chest wall; and injury on the left clavicle. The injuries were confirmed in the Respondent’s medical report prepared by Dr. Jacqueline Kitulu and dated 2nd September, 2013, the doctor terming the injuries to the left clavicle, upper arm and chest wall as soft tissue in nature. The said doctor also indicated in her report that the injuries had healed at the time of her examination. The Respondent subsequently underwent a second medical examination before Dr. George K. Museve who then prepared the medical report dated 26th April, 2015.

13. In her judgment, the learned trial magistrate indicated that she would be disregarding the second medical report above, for having been filed by the Respondent at the submissions stage and without leave of the court, which fact was not disputed. Be that as it may, the learned trial magistrate itemised the Respondent’s injuries as pleaded and stated *inter alia*, that:

“Counsel for the plaintiff submitted for an award of ksh 1,800,000/ for pain suffering and loss of amenities and quoted three decided cases. I find the decision in *Mureithi & Others Vs. The Headmistress Mks Girls & Others HCC 169/2000* Most comparable. The 1st plaintiff



in that case was awarded ksh 420,000/- for comparable injuries. Award was made in the year 2003. Defence counsel submitted for kshs250,000/- under the same heading and quoted one decided case; *Jane Kamau Wambui & 4 Others Vs. Douglas Njue Kuria* [199] Eklr. In that that consolidated case none of the five plaintiffs suffered injuries comparable to the present case. I have taken into account the seriousness of the plaintiff's injuries, the parties' submissions, cited awards, age of the cited comparable award plus the high cost of living and find an award of ksh900,000/- would be adequate compensation for pain suffering and loss of amenities." (sic).

14. The Appellant has complained that the trial court did not take into consideration his submissions and authorities. The record of appeal filed herein contains respective submissions filed in the lower court by the parties (see pages 25-28 and 54-55 of the record of appeal, respectively). There was no specific demonstration of the complaint that that in assessing the general damages, the learned trial magistrate overlooked or ignored the submissions and authorities relied upon by the Appellant. In fact, reference was made to the Appellant's proposed award for general damages, in the trial judgment, as seen above.
15. In supporting the head of general damages for pain, suffering and loss of amenities, the Respondent on the one part suggested the sum of Kshs. 1,800,000/- while replying on the authorities hereunder:
 - a. *Anne Muriithi & 4 others v The Headmistress Mks Girls & 3 others* [2003] eKLR - the court here awarded a sum of Kshs. Kshs.420,000/- to the 1st plaintiff whose injuries were most comparable to those suffered by the Respondent herein and particularized as a fracture of the left femur and dislocated knee of the same leg, requiring surgery and fixation of metal implants.
 - b. *Charles Wanyoike Gitbuka v Joseph Mwangi Thuo & 2 others* [2008] eKLR - the court awarded general damages in the sum of Kshs. 1,600,000/- to a plaintiff with various fracture injuries.
 - c. *Raphael Muthoka Mailu v Earnest Jacob Kisaka* [2009] eKLR – the court; upon considering the injuries sustained including but not limited to a compound fracture of the left femur leading to shortening of left leg, fracture of the right femur and dislocation of the left shoulder region; awarded a sum of Kshs. 1,300,000/- on general damages for pain, suffering and loss of amenities.
16. On the other part, the Appellant suggested a sum of Kshs.250,000/- as earlier mentioned, with reference to the case of *Jane Wambui Kamau & 4 Others v Douglas Njue Kuria* [1999] eKLR where a similar award was made to a plaintiff who had backache and chest pains, a complete fracture of the right femur, abrasions on the left upper shin of the left leg and shortening of the right leg.
17. Upon considering the respective authorities cited, the court is of the view that the only comparable authority cited by the Respondent in terms of the injuries sustained is *Anne Muriithi & 4 others* (*supra*) since the remaining authorities constitute injuries of a more severe nature in comparison to his own. Most of the authorities cited by the respective parties were decided many years ago and might therefore not offer much guidance.
18. According to the medical report prepared by Dr. Jacqueline Kitulu, the Respondent was admitted in hospital following the accident and underwent two (2) separate surgical procedures to address the fracture injuries, including the insertion of metal plates and screws, and thereafter the insertion of a nail. That the surgery immobilized the Respondent for several months, thereby interfering with his studies and internship program. The doctor stated further that the Respondent reported experiencing occasional pain resulting from his injuries and might in the future require surgical removal of the nail implants.



19. Regarding the second medical report prepared by Dr. George K. Museve, the court agrees with the reasoning by the trial court in dismissing it that the same was filed late in the day and without leave of the court. Equally, this court declines to consider it on this appeal. That said, it is clear from the medical report of Dr. Kitulu that the Respondent's injuries were expected to gradually heal over time, save for occasional pains. No permanent incapacity was indicated. The Appellant's offer of Kshs. 300,000/- appears to be on the lower side, given the nature of the Respondent's injuries.
20. In the premises, the court considered the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR where it substituted an award of Kshs. 1,400,000/- with an award in the sum of Kshs. 800,000/- for general damages in respect of fracture of the mid-shaft left femur and soft tissue injuries with permanent incapacity assessed at 4%, on appeal.
21. In view of the foregoing, the court considers that the award made by the trial court falls on the higher side. Factoring in the inflation rate, the nature and extent of injuries sustained by the Respondent and the absence of any permanent incapacity, the court substitutes the award of Kshs. 900,000/- made by the trial court with one in the sum of Kshs. 700,000/- as general damages for pain, suffering and loss of amenities.
22. The appeal therefore succeeds. Consequently, the court hereby sets aside the award of general damages for pain, suffering and loss of amenities made by the lower court and substitutes judgment in the following terms:
 - a. General damages:
Pain, suffering and loss of amenities Kshs. 700,000/-
 - b. Special damages Kshs. 9,591/-
Total award Kshs. 709,591/-
Less 15% contribution
Net: Kshs. 603,152.34/- (Six Hundred and Three Thousand, One Hundred and Fifty-Two, and Thirty-Four Cents).
23. The Respondent shall have costs of the suit and interest on general damages at court rates from the date of judgment until payment in full, and interest on special damages at court rates from the date of filing suit until payment in full. Parties will bear own costs in the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

For the Appellant: Ms. Maina h/b for Mr. Mbigi

For the Respondent: Ms. Nzalani



C/A: Carol

