

KENYA / JUDGMENT

## Musembi v Kiptala & another [2025] KEHC 10126 (KLR)

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COURT

High Court

BEFORE

PN Gichohi

CASE / FILE NUMBER

Civil Appeal E092 of 2023

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Musembi v Kiptala & another (Civil Appeal E092 of 2023) [2025] KEHC 10126 (KLR) (14 July 2025)  
(Judgment)

Neutral citation:

[2025] KEHC 10126 (KLR)

Republic of Kenya

In the High Court at Nakuru

Civil Appeal E092 of 2023

PN Gichohi, J

July 14, 2025

Between

Maureen Musembi

Appellant

and

Collins Kiptala

1st Respondent

Kenjap Motors Limited

2nd Respondent

(Being an appeal from the judgement and decree of Hon. Edward Meshack Otieno Oboge(RM/ADJUDICATOR) delivered on 3rd May, 2023 in Nakuru SCCC No. E008 of 2023)

## Judgment

1. The 1st Respondent initiated a suit before the Small Claims Court vide a Statement of Claim dated 13th December, 2022, seeking the following reliefs against the Appellant and the 2nd Respondent for judgment in the sum of Kshs 73,660/= as special damages, general damages for pain and suffering, costs of future operation, costs of claim and interest in all the above.
2. His case was that on 31st July, 2022, he was lawfully riding his motor cycle registration Number KMFD 734T along Nakuru-Eldoret highway and upon reaching Mustard seed area, the Respondent who was driving motor vehicle registration number KDG 818X so negligently caused it to hit him and his motor cycle which accident left him with severe bodily injuries to wit:-

Fracture distal 1/3 of the right tibia and fibula.

Severe soft tissue injuries of the right leg and the head.

blunt injury to the anterior chest wall leading to soft tissue injuries.

Soft tissue injuries to both hands and the left leg.

3. He blamed the Appellant and the 2nd Respondent for the injuries sustained. By consent, his bundle of documents was produced as his evidence in support of his case. The Appellant filed a response to the claim but did not participate in hearing while the 1st Respondent did not participate at all in the case before the trial court.
4. By consent of parties, judgment was entered on liability in the ratio of 90:10 in favour of the 1st Respondent as against the Appellant and 2nd Respondent jointly and severally.
5. Parties also agreed on production of documents as exhibit and adoption of 1st Respondent's witness statement as evidence . The Claimant never went for second medical examination and parties filed and exchanged submissions.
6. The Adjudicator ultimately entered judgment in favour of the Claimant as follows:-
  - a.Liability- 90:10 in favour of the 1st Respondent against the Appellant and 2nd Respondent jointly and severally.
  - b.General damages for pain and suffering of Kshs 765,000/= less 10% contributory negligence.
  - c.Special damages of Kshs. 68,660/=.
  - d.Future medical expenses of Kshs. 200,000/=.
  - e.Costs of claim and interest on all the above from the date of judgment until payment in full.
7. Being dissatisfied with the said Judgement and decree, the Appellant preferred this appeal vide a Memorandum of Appeal dated 17th May, 2023, raising the following ground:-1. The trial court erred in law and fact by making an award that was excessively beyond its pecuniary jurisdiction.2. The learned trial magistrate erred in law by misapprehending the

principle applicable in the assessment of damages in personal injury claims, thus occasioning a miscarriage of justice.3. The trial court erred in awarding the Deceased's estate a sum of Kshs. 850,000/= as general damages for pain and suffering, an amount which was manifestly and inordinately excessive in the circumstances.4. The trial court erred in law and fact in failing to adhere to and consider the principle of stare decisis.5. The trial court erred in law and fact by awarding Kshs. 200,000/= for future medical expenses that was not pleaded.6. The trial court erred in failing to critically consider the appellant's submissions and legal authorities relied upon in support thereof.

8. The Appellant therefore prayed that the judgement and the decree of the Court dated 3rd May, 2023 be reviewed and or set aside.
9. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 11th March, 2025, whereas the 1st Respondent's submissions are dated 25th February, 2025.

### **Appellant's submissions**

10. While emphasising that an appellate court should interfere with a trial court's award of damages if the principles on which the award was made were erroneous, or if the amount is inordinately high or low, constituting an erroneous estimate, reliance was placed on several cases that have settled that principle including *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR*.
11. Further reliance was placed on the case in the case of *Hassan v Nathan Mwangi Kamau Transporters & 5 others NBI CACA NO 123 of 1985*, where the Court held that;-"..Inordinately high awards will lead to monstrously high premiums for Insurance of all sorts and it is to be avoided for the sake of everyone in the country..."
12. Based on the above, the Appellant contended that the award herein was inordinately high and not based on proper principles, as compensation should be fair to both claimant and Respondent.
13. Further reliance was placed on *West (H) & Son Ltd. v Shepherd (1964) A.C. 326* at page 345 for the principle that courts' aim is to provide reasonable compensation and maintain uniformity, ensuring comparable injuries receive comparable awards assessed with moderation.
14. While arguing that that the 1st Respondent's injuries were largely soft tissue injuries apart from the fracture, the Appellant submitted that the following cases are comparable:-

*Koyi v Obanga & 2 others (Civil Appeal 73 of 2017) [2022] KEHC 9772 (KLR)*, where Kshs. 400,000/= was awarded for a fracture of the left femur and tibia, laceration on the left leg, and soft tissue injuries of the chest.

Kiamav Mutiso (Civil Appeal 40 of 2023) [2024] KEHC 5135 (KLR), where Kshs. 400,000/= was awarded for a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh.

Triad Coaches Ltd and Another v Mary Mutheu Kakemu [2020] eKLR, where Kshs. 250,000/= was awarded for a fracture of the distal tibia fibula and soft tissue injuries on the wrist.

15. Consequently, the Appellant urged the court to substitute the trial court's award with a sum between Kshs. 250,000/= and Kshs. 400,000/=.

#### 1st Respondent's Submissions

16. On whether the general damages were manifestly excessive, he submitted that he suffered a fracture of the distal 1/3 of the right tibia and fibula, severe soft tissue injuries of the right leg, soft tissue injuries of the head, blunt injury to the anterior chest wall, and soft tissue injuries of both hands and the left leg'
17. It was submitted that Dr. Omuyoma's medical report dated 24th November, 2022 confirmed these injuries and that the 1st Respondent was admitted to Nakuru Level 5 Hospital, where he underwent open reduction and internal fixation of the fracture and therefore, Dr. Omuyoma classified the injury as grievous harm and assessed a permanent disability of 20%.
18. Based on these injuries, the 1st Respondent submitted that the trial court's award of Kshs. 850,000/= for general damages considered the severity of the injuries and comparable authorities. He cites the case of Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR where the high court upheld an award of Kshs. 1,000,000. 00 for less severe injuries, including soft tissue injuries to the upper limbs and fracture of the distal tibia fibula shaft.
19. In addition, he cited the case of Kornelius Kweya Ebichet v C&P Shoe Industries Ltd [2008] eKLR, where the Court awarded Kshs. 1,000,000/= for pain, suffering, and loss of amenities to a plaintiff with blunt trauma to the forehead and fracture of the left tibia & fibula bones.
20. Based on these precedents, he argued that the trial court's award is reasonable, falls within the range for similar injuries, and should be upheld due to the severe nature of the injuries suffered.
21. Regarding future medical expenses, it was submitted that these costs were specifically pleaded and proved by the medical report where Dr. Omuyoma confirmed that the 1st Respondent will require implant removal from the right tibia and fibula at an estimated cost of Kshs. 200,000/=, which sum the trial court awarded.
22. Arguing that there was no contrary medical report presented before the trial court to counter Dr. Omuyoma's medical report, the 1st Respondent finally submitted that the Appeal lacks merit and should be dismissed with costs awarded to him.

## Analysis and Determination

23. This Court has considered the grounds of appeal, the submissions by both parties, and the authorities cited therein. This being an appeal from the Small Claims Court, Section 38 of the Small Claims Court Act provides that:“(1)(1) a person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.(2)An appeal from any decision or order referred to in subsection (1) shall be final.”
24. It is clear from the aforementioned provision that jurisdiction of this Court from the Small Claims Court will only be on matters of law and not factual issues. In *Kenya Breweries Ltd v Godfrey Odooyo* [2010] eKLR the Court of Appeal distinguished between matters of law and matters of fact as follows: -“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another v Associated Motor Boat Company Ltd and Others* [1968] EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”
25. What constitutes points of law was settled by the Court of Appeal in the case of *Peter Gichuki King'ara v Iebc & 2 Others*, Nyeri Civil Appeal No 31 of 2013, where Visram, Koome & Odek, JJA stated:-“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”
26. The issues of failure to exercise discretion is equally a point of law as was held by the Court of Appeal in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, thus: -“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”
27. The Appellant herein challenged the trial Court’s discretion in awarding general damages for pain and suffering and also the award for future medical expenses, arguing that the award of general damages was excessive while the award under future medical expenses were not pleaded for.

28. In regard to the award of general damages, the parties are in agreement on the injuries suffered herein which are:-

Fracture distal 1/3 of the right tibia and fibula.

Severe soft tissue injuries of the right leg and the head.

blunt injury to the anterior chest wall leading to soft tissue injuries.

Soft tissue injuries to both hands and the left leg.

29. The injuries suffered herein are fracture of the tibia and fibula and several other soft tissue injuries. In awarding the sum of Kshs. 850,000/=, the trial court relied in the case of Daneva Heavy Trucks & another v Chrispine Otieno [2022] KEHC 2885 (KLR) where the Respondent suffered two major fractures; Fracture of the pelvis and Fractures of the left tibia and fibula and was awarded Kshs. 800,000/= as damages for pain and suffering.
30. In Mohammed Younis Quereshi & Another v Chris Maina Mathu [2020] eKLR, the Respondent therein sustained Fracture of left tibia, Bruises on the head, both hands and left leg. The Doctor had opined that the injuries would heal but leave him with disability at 20%. On appeal, the award of general damages was reduced from Kshs. 800,000/= to Kshs. 400,000/=. Further, in the case of Kiamav Mutiso (Civil Appeal 40 of 2023) [2024] KEHC 5135 (KLR) D.S. Majanja J reduced an award of Kshs. 700,000/= to Kshs. 400,000/= where injuries suffered were a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh.
31. Persuaded by the above cases, and considering that the 1st Respondent suffered a fracture of the tibia and fibular bone together with several soft tissue injuries which the doctor indicated had healed, this Court finds that the award of Kshs. 850,000/= made by the trial Court was excessive as compared to the injuries suffered and comparable cases. That award is therefore set aside and substituted with an award of Kshs. 500,000/=.
32. Regarding the award of future medical expenses, a perusal of the Statement of Claim dated 13th December, 2022 reveals one of the prayers sought therein is costs of future operation. That is a future medical expense that was specifically pleaded and strictly proved. That award is therefore upheld.
33. In conclusion, the trial Court decision is set aside and substituted as follows:-1. Liability- 90:10 in favour of the 1st Respondent.2. General damages- Kshs. 500,000/= .Less 10% contributory negligence = 450,000/=3. Special damages –Kshs. 68,660/= .4. Future medical expenses –Kshs 200,000/= .5. Since the Appeal has partially succeeded, each party to bear its own costs of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF JULY, 2025. PATRICIA GICHOHIJUDGEIn the presence of:N/A for AppellantMs. Jeptanui h/b Ms Chelagat for 1st RespondentN/A for 2nd RespondentRuto, Court Assistant

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