Nairobi Women's Hospital v Mutuku (Civil Appeal 477 of 2018)
[2023] KEHC 26224 (KLR) (Civ) (15 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26224 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 477 OF 2018

JN NJAGI, J

NOVEMBER 15, 2023

BETWEEN

THE NAIROBI WOMEN'S HOSPITAL ..... APPELLANT

AND

FRANCIS MUTUKU ..... RESPONDENT

(Being an Appeal from the judgment of Hon. I. Orenge (MR,), Senior Resident Magistrate, in Milimani CMCC NO. 7464 of 2016) delivered on 25th September 2018)

JUDGMENT

1. By a plaint dated 28th September 2016, the Respondent as the Plaintiff sued the Appellant as the Defendant claiming general and special damages after the Respondent was injured and fractured his femur after a fall while under the care of the Appellant as an inpatient. The Respondent attributed the injuries to breach of duty of care by the Appellant by leaving the Respondent unattended. The Appellant denied the claim. After a full trial, the trial court found the Appellant liable for the injuries and awarded the Respondent Ksh.1,000,000/= in general damages. The Appellant was dissatisfied with the finding on liability and the award of damages and filed this appeal.

2. The grounds of appeal are that:

   (a) That the trial magistrate erred in law and fact in failing to consider the argument by the Appellant as far as the aspect of liability is concerned.

   (b) The trial magistrate erred in law and fact by failing to apportion liability yet the issue of proximal cause was raised by the Appellant.

(c) The trial magistrate erred in law and fact by holding the Appellant wholly liable in a clear case where the Respondent's injuries did not appear as an immediate and obvious consequence of the Appellant's unlawful act.

(d) The trial magistrate erred in law and fact by awarding damages that are excessively high in view of the injuries sustained.

Respondent`s case at the lower court

3. The Respondent testified as PW 2 in the case and stated that he was at the material time admitted at the appellant`s facility with a fractured right femur after being involved in a road traffic accident. That on or about the 26th of October 2014 he was recuperating in the ward after undergoing surgery on the femur when he felt an urgent need to visit the toilets. He tried to apply the emergency bell but there was no response as the bell was not working. There was nobody from the appellant`s staff to offer him assistance to reach the toilets. He went to the toilet on his own with the aid of clutches. On his way back, he slipped and fell on the floor and re-fractured the same femur. He realized that there was water on the floor. A cleaner had apparently left the floor wet and slippery after cleaning which had caused him to slip and fall. It was his testimony that the floor was dry when he went to the toilets. That when he went back, there was no sign showing that there was cleaning going on. He blamed the Appellant for the accident which caused him severe bodily injuries.

4. The Respondent called Dr. Okere, PW 1, as a witness in the case. His evidence was that he saw the Respondent on the 09/3/2016 and found him to have sustained compound fracture of the right femur which had a metal implant into it. He assessed the degree of incapacity at 45%.

Appellant`s defence

5. The Appellant's defence was that the Respondent was to blame for the accident as he did not follow the instructions given to him. The Appellant called one witness, Penina Kirea, DW1 who was a Nursing Services Manager at the Appellant's facility. Her testimony was that the Respondent had been admitted to their hospital with a fractured leg following a road traffic accident. That he underwent surgery at the hospital.

6. It was further evidence of DW1 that due to the fracture on the leg it was necessary for him to be assisted in walking by a physiotherapist and clear instructions to that effect had been given to him. That the Respondent ignored the said instructions and attempted to walk without assistance. It was also her evidence that the nurse who was responsible for the Respondent's care on the material day left their employment. She stated that there was a lady called Dinah who used to do cleaning at night. The witness however admitted that she, DW1, was not present at the time of the accident.

Judgment of the trial court

7. In his judgment, the learned trial magistrate found that the Appellant did not call evidence to show that there was staff on duty to attend to the Respondent at the time of the accident. That there was no evidence that the bells were functioning at the time of the accident. That the guidelines alleged to have been issued to the Respondent were not produced in court. That there was no evidence that the Appellant had put up a sign of "wet floor" at the time of the accident. The magistrate accordingly found that the Appellant was wholly liable for the accident.

8. The appeal was canvassed by way of written submissions.

Appellant`s submissions

The advocate for the Appellant submitted that the Appellant had put into place measures and taken necessary steps to mitigate any danger that would arise. That their witness testified that the bell was working. That the Respondent had also to be careful when he noticed that the floor was wet. That the fall was not reasonably foreseeable as the Appellant had assigned a nurse to the respondent, put in place a working bell to summon the nurse in case she was out of reach and had given proper guidelines to the Respondent on admission.

That the trial magistrate failed to consider that the respondent`s recklessness led to the fall as he had the option of summoning the nurse and ought to have been careful while walking on a slippery floor as alleged.

The Appellant submitted that the trial court erred in holding the Appellant100% liable without considering the fact that the Respondent had been involved in a road traffic accident prior to his admission and that his actions contributed to the injury.

The Appellant further submitted that if there was wet floor that might have caused the Respondent to slip and fall was not the proximate cause of the 45% disability suffered and injuries sustained by the respondent. That the Respondent had undergone an operation and was walking with aid. That the fall at the hospital could not have been the most significant impact in bringing about 45% disability. That the doctor did not link the disability to the fall at the hospital. That the disability was attributable to the road traffic accident and not to the fall at the hospital. The Appellant referred to Edward Nzamili Kasava v CMC Motors Group Ltd & another (2006) eKLR.

Respondent's Submissions

9. The Respondent submitted that he had discharged his legal burden before the trial court by testifying on oath and produced documents in support of his case. He cited Section 107(1) of the *Evidence Act*.

10. The Respondent submitted that it was not in dispute that he slipped and fell on the floor at the Appellant's facility. That it was not disputed that the fall re-fractured his right femur. Further that it is not disputed that the Appellant owed him a duty of care as a patient at the health facility.

11. He submitted that his evidence that nobody came to his assistance when he wanted to visit the toilets stands uncontroverted as the Appellant's witness, DW1, confirmed that she was not present at the time of the accident. That the witnesses` evidence on whether or not the Respondent pressed or did not press the bell was inadmissible as it was based on hearsay evidence.

12. He submitted that the appellant`s witness testified that there was a nurse on duty at the time of the accident but did not produce records to substantiate the claim and or confirm who was on duty.

13. That the witness said that there were instructions/guidelines given to the patient but she confirmed that she is not the one who explained them to the patient. That the witness claimed that the emergency bells were well maintained but did not produce any report to confirm their maintenance.

14. He further submitted that the Appellant's witness admitted that indeed there was a cleaner by the name of Dinah who was cleaning at night. That since the said cleaner was not called to rebut the Respondent's testimony, his testimony on the wet floor remained uncontroverted and unchallenged. In this respect, the Respondent relied on the case of Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012]eKLR where the court stated that:

> " Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same

vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

15. It was the Respondent's submission that the re-fracturing of his right femur was as a consequence of the Appellant's wrongful act and as such, the Appellant is wholly liable. He argued that the first fracture did not lead to his slip and fall in the hospital. He contended that the direct or proximate cause to the accident was actually the wet and slippery floor. He cited the definition of "proximate cause" in Black`s Law Dictionary, 7th Edition, as;

> " A cause that is legally sufficient to result in liability. A cause that directly produces an event without which the event would not have occurred."

16. He further asserted that had a warning sign been placed on the walking path to alert patients and staff, the accident could have been prevented.

17. On the issue of damages, the Respondent submitted that it was not in dispute that he suffered severe bodily injuries and that he was discharged from the hospital while walking on two crutches with further medical review appointments. He submitted that the award of Ksh.1, 000,000/= for pain and suffering by the trial magistrate was reasonable having put into consideration the pain and suffering that he underwent. The Respondent relied on authorities where general damages of Ks.1,500,000/= and Ksh.2,000.000/= were made for fractures.

18. The Respondent submitted that the appellate court can only interfere with an award of damages by the trial court where the same is shown to be inordinately too high or too low as to present an entirely erroneous estimate of the compensation, wherein he cited the case of Peter Namu Njeru v Philemone Mwagoti [2016] eKLR. According to the Respondent, the Appellant has not shown that the assessment by the trial court was too high to warrant interference and that the trial magistrate applied the correct principals of law and available facts.

Analysis and Determination

19. Being a first appeal, the court takes a guide in the principles as set out by the Court of Appeal in Selle and Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123 that:

> "...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

20. Further afield is the case of Coghlan vs. Cumberland (1898) 1 Ch. 704, where the Court of Appeal (of England) stated as follows:

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and

demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

21. Hence, it is incumbent upon this court to thoroughly examine the factual details, re-examine the evidence as presented in the trial court, assess it and reach its own autonomous conclusions. However, it should bear in mind and account for the fact that the trial court had the advantage of directly hearing from the parties involved.

22. I have considered the material placed before me. The issues for determination in the appeal are:

    (1) Whether the trial court erred in holding that the Appellant was wholly to blame for the accident.

    (2) Whether the amount of damages awarded by the trial court were excessive.

Liability

23. It is trite law that whoever lays a claim before the court against another has the burden to prove it. Section 107 and 108 of the *Evidence Act* provide as follows:

    107

    "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

    108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

24. In the case of Mbuthia Macharia v Annah Mutua & Another [2017] eKLR the Court of Appeal discussed the burden of proof and stated as follows:

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the Appellant."

25. From the above, it is clear that once the plaintiff has discharged his/her legal burden, the evidential burden may shift to the defendant depending on the evidence adduced. In this appeal, it is crucial to interrogate whether the evidence tendered by the Respondent before the trial court was sufficient to attain the bar to shift the evidential burden to the Appellant.

26. The Respondent testified under oath and gave an account of how he got involved in an accident at the Appellant's hospital. According to his account, he was admitted as an inpatient at the Appellant's hospital. During his stay, he found himself unattended and, in a situation where he needed to urgently use the restroom. While returning from the restroom, he slipped and fractured his leg due to wet

floor. He stated that prior to going to the restroom, he attempted to use the emergency bells to call for assistance, but they were non-functional and he thus received no response.

27. The Respondent called one witness who testified to the nature of the injuries that he, the respondent, sustained.

28. Having looked at the evidence presented by the Respondent, I am persuaded that the Respondent successfully discharged his legal burden and therefore the evidential burden shifted to the Appellant. The Appellant in an effort to discharge the evidential burden called one witness who testified that the Respondent was to blame for the accident because he failed to follow instructions. She also testified that a nurse was assigned eight patients and she was supposed to sit in the ward even if the bell was not working. On cross-examination, she stated that the nurse who was assigned to the Respondent had since left the Appellant's employment. She also testified that she was not present when the accident occurred.

29. It was not in dispute that the Respondent was admitted at the Appellant's facility after he was involved in a road traffic accident where he fractured his right femur. It is also not in dispute that indeed an accident involving the Respondent occurred at the Appellant's facility wherein he re-fractured the right femur.

30. The witness for the Appellant, DW1, stated that there was a nurse assigned to the Respondent, but the Appellant failed to provide any evidence to verify the identity of the nurse who was supposed to be on duty during the accident. Furthermore, the Appellant did not summon the nurse to testify in the case. The only explanation offered by the Appellant was that the nurse had stopped being its employee.

31. DW1 confirmed that indeed one Dinah was cleaning on the night of the accident. However, they did not call the said Dinah to testify in the case and to confirm whether there were signs indicating that cleaning was underway.

32. Based on the foregoing, it is my finding that the Respondent sufficiently proved his case against the Appellant on a balance of probabilities. The Appellant did not provide an alternative account of the events leading up to the accident that contradicted the Respondent's narrative. The evidence of the Respondent thus remained uncontroverted. The statements of the Appellant that the Respondent is the one to blame for the accident because he failed to follow instructions remained unsubstantiated and mere assertions – see Linus Nganga Kiongo & 3 others v Town Council of Kikuyu (supra).

33. The issue, in my view, is however whether the Appellant ought to have been found wholly liable for the injuries sustained by the respondent. The Appellant submitted that the Respondent had already sustained the injuries and that the injuries that were sustained at the hospital already existed as a result of the road traffic accident. The Appellant relied on the decision in the case of Edward Katana v CMC Motors Group Limited & another (2006) eKLR where the court (Maraga J, as he then was) in a case where the plaintiff re-fractured his leg in a fall a year and three months after the initial road accident. He sued the owners of the accident vehicle claiming damages for the injuries sustained in the fall. The learned judge held as follows:

> Although the defendant's act may not be the proximate cause of the plaintiff's further injury or loss the defendant may nonetheless be held liable for aggravation if his act disabled the plaintiff rendering him susceptible to further injury. In this case though I have found that the plaintiff's fall in church on 3rd January 1996 was not caused by the Accident of 29th September 1994, I, nonetheless, find that the fall aggravated the accident injuries and that the plaintiff's resultant disability is attributable to the accident injuries. This is because the

accident fracture disabled the plaintiff rendering him unable to cope with the vissititutes of life. The defendants are therefore liable to him for the resultant disability.....

..... Though not the cause of the fall I find that the accident fracture left the plaintiff disabled and the fall only aggravated that fracture resulting in the shortening of the leg. I therefore find that the defendants are liable to the plaintiff for damages as a result of the shortening of the plaintiff's leg. In other words the defendants are liable to the plaintiff as though the fall was caused by the accident.

34. The circumstances under which an appellate court may interfere with the damages made by a lower court are well settled. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

35. The Appellant's contention was that the injuries the Respondent suffered were pre-existing due to a previous road traffic accident, and thus, the Appellant should not be held liable. The evidence indicates that on October 26, 2014, the Respondent underwent a review, during which it was discovered that he had experienced a subsequent fracture of his right femur. This led to a second surgery performed on October 28, 2014. The question then is whether the Appellant was liable for the re-fracture.

36. I would better start by considering what negligence is. In reviewing the applicable Law Salmond and Heuston on the Law of Torts 9th Edition noted:

> " Negligence is a conduct, not state of mind – conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do."

37. The Supreme Court in Kenya Wildlife Service V Rift Valley Agricultural Contractors Limited [2018] eKLR set out the key ingredients of the tort of negligence. The court expressed itself as follows:

> " Four key elements predominate in establishing a negligence claim-a duty of care, a breach of that duty, causation, and damage. A defendant must owe a 'duty of care' to the person bringing the claim, in the sense that they fell within a class of interests which the law considers should be protected... There is a breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damage alleged must be protected by the law."

38. In Hellen Kiramana V PCEA Kikuyu Hospital, [2016] eKLR, Aburili J adopted the meaning of negligence contained in Black's Law Dictionary Ninth Edition at page 113 where it is defined as:

> " Failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation: Any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregardful of other rights. The term denotes culpable carelessness" The same dictionary defines negligence perse " as conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular

surrounding circumstances, either because it is in violation of statute or valid municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes."

39. The Respondent herein was a patient at the appellant`s facility at the time that the accident occurred. Hospitals owe a duty of care to their patients not to expose them to any risk in which they may be injured. In the case of Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) Vs. Attorney General & 2 others (2015) eKLR it was held that;

> " A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient. On the other hand, a hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable.....

40. The Appellant herein owed the Respondent a duty of care as a patient at their hospital. The element of duty of care was therefore proved.

41. The Respondent was obligated to prove causation of the accident. In the work of Charles worth & Peray on Negligence, 7th Edition, it is stated as follows;

> " Evidence of causation must be given on behalf of plaintiff. Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the plaintiff. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that on a balance of probabilities, the most likely cause of the damage was the negligence or breach of duty of the defendant, his servant or agent and not solely the negligence of some other person. If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail. Such a failure will result whether this happens to be expressed in terms of lack of result or for reasons of remoteness.

42. In the case of Elijah Ole Kool Vs George Ikonya Thuo[2001] eKLR, Visram J. (as he then was) addressed the requirement for causation and stated thus;

> " When will an act or omission be said to be the cause of the Plaintiff's injuries? A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff's injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions."

43. In Edward Mzamili Katana V Cmc Motors Group Ltd & Another [2006] Eklr the court cited the case of Obwogi – Vs – Aburi [1995 – 1998] EA 255 where the Court explained the term proximate cause as follows;

> " To render the Respondent liable in an action for negligence, it must be shown that the negligence found is the proximate cause of the damage. Where the proximate cause is the act of a third person against whom precautions would have been inoperative, the Respondent is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it."

44. In this case, the Appellant did not call the nurse who was on duty on the material day to testify in the case. Neither did they call the cleaner who is said to have left water on the floor which led the Respondent falling down. There was no evidence that the bells were working. In the absence of the evidence of the nurse on duty the evidence of the Respondent that he was left unattended can only be true. The evidence of the Respondent that he fell down as a result of a cleaner negligently leaving water on the floor was not challenged. The Respondent had therefore proved, on a balance of probabilities, the causation of the accident that he sustained at the appellant`s premises. The Appellant breached their duty of care that they owed to the Respondent thereby leading to the re-fracture suffered by the respondent. The Appellant was liable for the re-fracture.

45. Having found that the Appellant was liable for the re-fracture, I have to answer the question whether they were wholly liable for the fractures suffered by the respondent.

46. The Respondent had already suffered the fracture on the right femur when he was admitted at the appellant`s hospital. The medical report of Dr.Kigera indicates that the Respondent re-fractured his femur at the hospital 3 days after the initial surgery. He underwent another surgery after suffering the fall.

47. In my view, the Appellant cannot be held liable for the initial fracture sustained by the Respondent since the fracture was already existing when he was admitted to the appellant`s hospital. The Appellant can only be held liable for the re-fracture. The re-fracture took place 3 days after the first surgery. I do not think that the person responsible for occasioning the initial fracture and the one liable for the re-fracture should bear equal liability. The Appellant should have borne lesser liability as the leg was already weak after the initial fracture. In my view the trial court erred in holding the Appellant liable for even the initial fracture when he was not responsible for it. I Assess the appellant`s liability for the refracture at 50% of the amount the court would have awarded for the initial fracture.

Quantum

48. The Court of Appeal in Catholic Diocese of Kisumu vs. 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."

49. In this case, the Respondent had already fractured his leg in a road traffic accident when he was admitted at the appellant`s medical facility. The trial court did not take this into account when it made the award of Ksh.1,000,000/=. The court seems to have misapprehended the evidence and as a result arrived at a figure that was inordinately high. This court therefore has reason to interfere with the award.

50. The Respondent herein sustained a comminuted fracture of the right femur. The degree of permanent incapacity was assessed at 45%. The Appellant argued that the award of Ksh.1,000,000/= was excessive. They argued that the injury sustained in the first accident was of a more serious nature than the injuries sustained from the second accident. In view of that, they urged the court to award a sum of

Ksh.150,000/=. They cited the case of Naomi Wambua Njiraini v Prof. Ezra Kipronon Maritim (2010) eKLR in which an award of Ksh.450,000/= was made for a fracture of the femur and dislocation of the left hip joint, compound dislocation of the left knee joint, compound fracture of the left patella and left upper third of the tibia and metatarsal fracture of the left foot.

51. The Respondenton the other cited the following authorities in support of the award of Ksh.1,000,000/=:Kirinjit Singh Magon v Bonanza Rice Millers, Civil case No.373 of 2008 where the plaintiff received two gun-shots in a robbery with one bullet lodged in the body and the other shuttered the lower end of the left femur and destroyed the knee ligaments. The plaintiff underwent several surgeries both locally and in India that included a total knee replacement surgery. His permanent functional disability was accessed at 35% of the total person. He was awarded Ksh.2,000,000= in general damages.Charles Mathenge Wahome v Mark Mboya Likanga& others (2011), Civil Case No.87 of 2005 where Ksh.1,500,000= was awarded for fracture of the right femur.Dorcas Wangithi Mwaura v Samuel Kiburu Mwaura & another, Civil Appeal No.58 of 2013, where Ksh.2000,000/= was awarded for multiple soft tissue injuries, blunt injury to the head, failure fracture to the radius/ulna (left), compound fracture to the right tibia/fibula and compound fracture to the left tibia/fibula and where the Appellant was admitted at Kenyatta National Hospital for about 1½ months.

52. I have considered the authorities cited by both sides. I find the cases cited by the Respondent to refer to injuries far more serious than those suffered by the Respondent herein, while the case cited by the Appellant makes reference to injuries that are not comparable to those suffered by the Respondent herein as there was no disability in that case.

53. I have on my own considered the awards made in the following cases:Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR, where the Respondent sustained compound fracture of the left femur which was uniting with malunion and extreme scaring which was disfiguring on both limbs. The Respondent was in hospital for a period of 42 days. The limb was unlikely to achieve the original state and permanent disability was assessed at 40%. Majanja J. reduced the award from Ksh.2,000,000/= to Ksh.700,000/= in general damages.In Peter Karoka aka Ngige vs Mbaluka Malonza aka Eric & 2 others [2018] eKLR where an award of Ksh.900,000/= was on appeal reduced to KSh. 800,000/= for a fracture on one leg (fracture of the left femur).In Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR (C Meoli J) reviewed an award of general damages from Ksh 1,400,000 to Ksh 800,000 for a single fracture to the femur.Kiautha v Ntarangwi (Civil Appeal E050 of 2021) [2022] KEHC 10595 (KLR) (30 June 2022) (Judgment) the Respondent sustained bruises on the right upper arm and right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and a mid-shaft femur fracture. Muriithi J. reduced the award of general damages from Ks.2,000,000/= to Ksh.800,000/=.In the case of David Mutembei v Maurice Ochieng Odoyo (2019) eKLR, where the Respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia. The Respondent was hospitalized for two months. One leg was shortened with the resultant difficulty in walking long distances. Musyoka J. reduced the trial court`s award of Ksh.1,400,00/= to Ksh.800,000/=.

54. The Respondent herein suffered serious injuries that left him with 45% disability. I would have awarded him Ksh.800,000/= in general damages for the initial fracture but considering that this was a re-fracture of the same fracture that had been occasioned in a road traffic accident for which the Appellant was not responsible, an award of Ksh.400,000/= in general damages will be sufficient for the re-fracture.

55. The upshot is therefore that the liability on the part of the Appellant is reduced to 50% and the award of Ksh.1,000,000/= in general damages is set aside and substituted with an award of Ksh.400,000/=. The result of the appeal is therefore as follows:

(1) The Appellant is held 50% liable in damages for the re-fracture.

(2) I award Ksh.400,000/= in general damages for the re-fracture

56. The Appellant to have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ngira for Appellant

Mr. Ongara holding brief for Mr. Musili for Respondent

Court Assistant -Amina

30 days Right of Appeal.