



**Matunda (Fruits) Bus Service Limited v Muhando (Civil Appeal 7 of 2022) [2024] KEHC 9191 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL APPEAL 7 OF 2022  
JN KAMAU, J  
JULY 29, 2024**

**BETWEEN**

**MATUNDA (FRUITS) BUS SERVICE LIMITED ..... APPELLANT**

**AND**

**ANDREW OTEMBA MUHANDO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon R. Ndombi (SRM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No 4 of 2019 on 7th April 2022)*

**JUDGMENT**

**Introduction**

1. In her decision of April 7, 2022, the Learned Trial Magistrate, Hon R. Ndombi, Senior Resident Magistrate, found the Appellant to have been wholly liable for the injuries that the Respondent herein sustained and entered Judgment in favour of the Respondent as against the Appellant in the following terms:-  
General damages Kshs 1,500,000/=  
Special damages Kshs 52, 400/=  
Kshs 1,552,400/=  
Loss of the suit (sic)  
Interest on general damages, special damages and loss of suit (sic).
2. Being aggrieved by the said decision, on 21<sup>st</sup> April 2022, the Appellant filed a Memorandum of Appeal dated 19<sup>th</sup> April 2022. He relied on five (5) grounds of appeal.



3. Its Written Submissions were dated 12<sup>th</sup> January 2024 and filed on 15<sup>th</sup> January 2024 while those of the Respondent were dated 17<sup>th</sup> January 2024 and filed on 18<sup>th</sup> January 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

### **Legal Analysis**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the issue that had been placed before this court for determination was whether or the quantum of damages that was awarded by the Trial Court was excessive in the circumstances of the case so as to warrant interference by this court.
7. The Appellant submitted that this court was duty bound pursuant to Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-assess and re-evaluate the evidence adduced before the Trial Court and arrive at its own independent conclusion bearing in mind it neither saw nor heard the witnesses testify in the first instance as held in the case of *Kenya Ports Authority vs Kushton (K) Ltd* (2009) 2 EA, 212.
8. It drew the court's attention to the principle that in suits brought in respect of bodily injuries, the measure of damages was governed by the principle of *restitutio in integrum*, that is, an award for bodily injuries is intended to be compensatory in nature such that the plaintiff should receive in monetary terms no more and no less than his actual loss.
9. It pointed out that it was not in dispute that the Respondent sustained fracture of the lumbar vertebrae as confirmed by the comments on the Discharge Summary and on the X-ray form dated 10<sup>th</sup> August 2017 from Masaba Hospital. It contended that on recommendation in the said Discharge Summary, the Respondent was advised to come with a CT scan of the pelvis. However, no such report was filed. Thus the only injury this court could consider was the fracture of the vertebrae.
10. It was its case that the Kshs 1,500,000/= that was awarded by the Trial Court was excessive in the circumstances. It urged the court to substitute the same with an award of Kshs 500,000/=. In that regard, it relied on the case of *Gikonyo vs Geoffrey Nyamweya Omae* [2021] eKLR where the court upheld an award of Kshs 600,000/= for wedge compression fracture of lumbar vertebral back bone no L2, blunt object injuries to the lower back and blunt object injury to the scalp.
11. It further submitted that the essence of damages would be defeated if any higher award on general damages were made herein. It averred that courts have held that damages for injuries suffered must be within consistent limits as held in the case of *Osman Mohammed & Another v Saluro Bundit Mohammed* Civil Appeal No 30 of 1997 eKLR citation not given). It urged the court to allow its appeal with costs.
12. On his part, the Respondent submitted that the Appeal herein had no merit and the same ought to be dismissed with costs. He placed reliance on the case of *Butt v Khan* [1977] KAR 1 where it was held



- that an appellate court could only interfere with an award where an aggrieved party satisfied it that the trial court took into account irrelevant factors or left out relevant factors when assessing damages or the amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.
13. He also relied on the case of *Selle vs Associated Motor Boat Co (Supra)* where the court pronounced itself on the duty of an appellate court in hearing appeal cases. He contended that the Trial Court took into account the relevant factors being pleadings, evidence on record and the submissions by the parties and awarded damages that were commensurate with the injuries sustained and as pleaded and proved on a balance of probabilities during trial.
  14. In that regard, he cited the cases of *Kanyungu Njogu v Daniel Kimani Maingi [200] eKLR* and *Kirugi & Another vs Kabiya & 3 Others [1987] eKLR* where the common thread was that the burden was always on a balance of probability.
  15. He asserted that the Trial Court applied the general principles on award of general damages that comparable injuries should as far as possible be compensated by comparable awards as held in the case of *Simon Taveta vs Mercy Mutitu Njeru [2014] eKLR*.
  16. It was his case that the evidence that was adduced during trial showed that he sustained fracture of the sacrum and lower lumbar vertebrae with lower pelvic deformity as shown in the CT-Scan that he produced. He was emphatic that during trial, the Appellant did not contest the said injuries or adduce a contrary medical report challenging the injuries that he sustained and consequently, his evidence remained unrebutted.
  17. He placed reliance on the cases of *William Kitoto Andere v Easy Coach Limited HCCC No 3 of 2018*, *Azhar Ali v Sheikab Mohammed HCCC No 35 of 2016*, *Wendy Martin v Ngwesi Company Ltd & 2 Others* and *Peace Kemuma Nyang'era v Michael Thuo & Another (eKLR citations not given)*, in which the courts awarded damages in the range of Kshs 1,500,000/= to Kshs 2,500,000/= for pain and suffering and loss of amenities for injuries that were comparable to the ones that he suffered.
  18. He submitted that the award of Kshs 1,500,000/= general damages for pain and suffering that was awarded by the Trial Court was therefore reasonable in the circumstances considering the injuries that he sustained, the age of the cited authorities and the effect of inflation of the value of the Kenya shilling.
  19. He emphasised that the said award could not therefore be said to have been excessive in the circumstances and/or inordinately high as to represent an entirely erroneous estimate based on some wrong principles. It urged the court to dismiss the Appellant's appeal with costs.
  20. In the Complaint dated 11<sup>th</sup> January 2019 and filed on 24<sup>th</sup> January 2019, the Respondent herein was said to have sustained fracture of the sacrum and lower lumbar vertebrae, pelvic deformity with pain and swelling, severe back pain, severe pain on the pelvic region and deep cut on the left buttocks.
  21. He did not tender in evidence a Medical Examination Report or x-ray. He only produced X-ray requests and treatment documents and bills from Masaba Hospital Ltd where he was admitted and treated. The Discharge Summary dated 17<sup>th</sup> August 2017 confirmed that he had sustained a fracture of the sacrum and lower lumbar vertebrae and obvious pelvic deformity was detected. He was admitted to the said hospital on 7<sup>th</sup> August 2017 and was discharged on 17<sup>th</sup> August 2017.
  22. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of *Margaret T. Nyaga v Victoria Wambua Kioko [2004] eKLR*.



23. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.
24. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.
25. Indeed, in the case of *Kigaraari v Aya*[1982-88] 1 KAR 768, it was stated as follows:-
- “Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”
26. Notably, the main injury that the Respondent herein sustained was the fracture of the sacrum and lower lumbar vertebrae. Such a fracture was not a minor injury. However, the alleged pelvic deformity was not proven as no medical examination was done and/or adduced to show whether the Respondent had completely healed or not and/or whether there was deformity or any kind of incapacitation due to the accident.
27. Bearing in mind the injuries that the Respondent sustained, comparable general damages that have been awarded in similar cases and the inflationary trends, the sum of Kshs 500,000/= that the Appellant had proposed would be a bit low to compensate the Respondent for the injuries that he sustained.
28. On the other hand, this court thus came to the firm conclusion that the sum of Kshs 1,500,000/= that was awarded by the Trial Court was inordinately high to warrant the interference by this court. An award of Kshs 1,000,000/= would be sufficient in the circumstances of this case.
29. In arriving at the said figure, this court was guided by the following authorities:-
1. *Abdi Haji Gulleid v Auto Selection (K) Ltd & Another* [2015] eKLR  
The plaintiff therein sustained grievous injury to the spine, injuries to the upper limb and fracture at the back of L1 spine. He suffered permanent incapacitation assessed at 25%. He was awarded Kshs 925, 757/= in place of Kshs 300,000/= awarded by the trial court.
  2. *Subati Flowers Ltd vs Walter Wanyonyi Wekesa* [2019] eKLR  
The appellate court upheld an award of Kshs 1,600,000/= where the plaintiff sustained fracture of the right and left tibia and fibula and fracture of L2 of the lumbar spine.
  3. *William Kitoto Andere v Easy Coach Limited* [2019] eKLR  
The court awarded the plaintiff Kshs 2,000,000/= for having sustained a fracture of the lumbar L1 vertebrae among other serious injuries.
  4. *Joho vs Thoya (Civil Appeal E014 of 2022)* [2023] KEHC 23452 (KLR)  
The appellate court therein upheld the trial court’s award of Kshs 750,000/= for pain and suffering where the plaintiff had sustained fracture of the lumbar 3 spine with loss of curvature and blunt trauma.



## **Disposition**

30. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 19<sup>th</sup> April 2022 and lodged on 21<sup>st</sup> April 2022 was merited. The effect of this decision is that the Judgment of Kshs 1,552,400/= that was entered by the Trial Court in Vihiga in PMCC No 4 of 2019 on 7<sup>th</sup> April 2022 be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment that be and is hereby entered in favour of the Respondent herein against the Appellant on a hundred (100%) per cent basis for the sum of Kshs 1,052,400/= made up as follows:-
- General damages Kshs 1,000,000/=
- Special damages Kshs 52,400/=
- Kshs 1,052,400/=
- Plus costs and interest at court rates.
31. For the avoidance of doubt, interest on special damages will accrue at court rates from the date of filing suit until payment in full while interest on general damages will accrue at court rates from the date of judgment of the Trial Court until payment in full.
32. Although the Appellant was partially successful in its Appeal, this court deviated from the general principal that costs follow the event due to the disparity of the financial might between the Appellant and the Respondent herein. It is therefore hereby directed that each party will bear its own costs of this Appeal.
33. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JULY 2024**

**J. KAMAU**

**JUDGE**

