



**Ndaruzi v Kiru & 2 others (Civil Appeal E472 of 2022)
[2024] KEHC 11926 (KLR) (Civ) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11926 (KLR)

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

CIVIL

CIVIL APPEAL E472 OF 2022

TW OUYA, J

SEPTEMBER 25, 2024

BETWEEN

DESIRE NDARUZI APPELLANT

AND

JAMES KIRU 1ST RESPONDENT

PETER NJOROGE MUHUHUKO 2ND RESPONDENT

JUSTIN GITONGA AGUSTINOH 3RD RESPONDENT

(Being an Appeal against the Judgement and decree of Hon. C.A. Muchoki (RM) dated 25.05.2022 and delivered on 31.05.2022 at the Chief Magistrate Court at Nairobi in Nairobi CMCC No. 6076 of 2019)

JUDGMENT

Background

1. This decision is in respect of the appeal emanating from the judgment of Hon. C.A. Muchoki (RM) dated 25.05.2022 and purportedly delivered on 31.05.2022 in Milimani CMCC No. 6076 OF 2019 (the suit). At the onset, Desire Ndaruzi (hereafter the Appellant) filed the suit against James Kiru, Peter Njoroge Muhuhuko and Justin Gitonga Agustinoh (hereafter the 1st, 2nd and 3rd Respondents) vide the plaint dated 6.08.2019 seeking general and special damages in respect of injuries allegedly sustained by the Appellant on or about 7.04.2016. The 1st and 2nd Respondents were sued in their respective capacities as the legal/beneficial owners of the motor vehicle registration number KBA 602P (the second motor vehicle) while the 3rd Respondent was sued in his capacity as the driver of the second motor vehicle, on the material date.



2. The Appellant pleaded that on the material date, he was driving and controlling the motor vehicle registration number KBD 207D (the first motor vehicle) along Magadi road in Ongata Rongai area when the 3rd Respondent so carelessly and/or negligently controlled and/or managed the second motor vehicle that it lost control and collided head-on with the first motor vehicle, causing the Appellant to sustain serious bodily injuries. The Appellant therefore blamed the Respondents; jointly and severally; for the said accident, by setting out the particulars of negligence in the plaint.
3. Upon service of summons, the Respondents entered appearance and filed their joint statement of defence dated 17.06.2020 denying the key averments in the plaint and liability.
4. At the hearing of the suit, the Appellant testified and called two (2) additional witnesses, whereas the Respondents closed their case without reliance on any witness testimony. Thereafter, the parties filed written submissions.
5. In the end, the trial court rendered its judgment in favour of the Appellant and against the Respondents jointly and severally, as follows:

Liability 100%

- a. General damages for pain, suffering and loss of amenities Kshs. 180,000/-
 - b. Special Damages Kshs. 3,700/-
- Total Award Kshs. 183,700/-

The Substratum Of The Appeal

6. Being dissatisfied with the outcome above, the Appellant moved the court by way of the present appeal (vide the memorandum of appeal dated 30.06.2022) to challenge it, premised on the grounds hereunder:
 - i. That the learned magistrate erred in law by pronouncing a judgment in a matter she had not heard and taken evidence and testimony in.
 - ii. That the learned magistrate who delivered the impugned judgment is not the one who heard and took the testimony of the witnesses.
 - iii. That the evidence and testimony was recorded by Hon. P.M. Wambugu while the judgment was delivered by Hon. C.A. Muchoki.
 - iv. That the learned magistrate erred in law and in fact in disregarding the Appellant's pleadings, evidence, witnesses' testimonies and submissions and by doing so, arrived at a wrong decision.
 - v. That the learned magistrate erred in law and fact in closing her mind to the appellant's evidence and submissions in their entirety and in doing so arrived at a wrong decision.
 - vi. That the learned magistrate erred in law and fact in disregarding and closing her mind to the Appellant's authorities comparable to the injuries he suffered and in doing so arrived at a wrong decision.
 - vii. That the learned magistrate erred in law and fact by failing to consider the magnitude of the injuries sustained by the Appellant while assessing quantum.
 - viii. That the learned magistrate erred in law and fact by awarding an inordinately low amount of Kshs. 180,000/- as quantum considering the injuries sustained by the Respondent.



- ix. That the learned magistrate erred in law and fact in failing to appreciate the principles applicable therefore arriving at an erroneous finding.
 - x. That in all the circumstances of the case, the learned magistrate failed to do justice. (sic)
7. The Appellant consequently seeks the following orders:
- i. The appeal be allowed.
- su. The impugned Judgment and Decree of the Honourable Magistrate at Nairobi Magistrates Commercial Court in CMCC No. 6076 of 2019 delivered on 31st May 2022 on quantum be set aside.
- III. This Honourable Court be pleased to reassess and substitute the impugned Judgment of the learned magistrate on quantum. And/or in the alternative;
- IV. This Honourable Court be pleased to order that this matter be heard afresh before a different Magistrate other than Hon. C.A. Muchoki.
- V. The costs of the appeal be awarded to the Appellant. (sic)

Submissions On The Appeal

8. Directions were given for the appeal to be canvassed by way of written submissions. However, it is apparent from the record that at the time of writing its decision, the Respondents had not complied with the said directions. In the circumstances, this court will proceed to consider the submissions filed on behalf of the Appellant.
9. Counsel for the Appellant anchors his submissions on the decision in *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30 on the duty of a first appellate court. Counsel then proceeded to submit that in assessing general damages at the sum of Kshs. 180,000/-, the trial court not only applied wrong legal principles but also overlooked relevant factors; particularly, the medical evidence tendered by and on behalf of the Appellant, the respective witness' testimonies and the rival submissions filed.
10. Counsel further submits that the trial court arrived at an inordinately low figure on general damages in comparison to the nature and extent of injuries sustained by the Appellant, thus urging that the same ought to be disturbed as a consequence. It is therefore counsel's argument that given the serious nature of injuries sustained here, the trial court ought to have awarded the sum of Kshs. 3,000,000/- which was sought before it by the Appellant, citing inter alia, the case of *Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v N I A (minor suing through her next friend I A I S), A S D & F H W (Suing as the Legal Representative of the estate of L A S) & Benson Boru Jarso* [2018] KEHC 3272 (KLR) where the High Court sitting on appeal awarded the sum of Kshs. 2,500,000/- to a plaintiff who had sustained a comminuted fracture of the left radius-ulna with implants, a fracture of the right femur with K-nails in situ, right lower limbs deformed, a fracture of the right hip with screws in situ, squint eyes – pupils reacting to light and a cut wound on the scalp (right parietal area) with a scar; and the case of *Joseph Kahinda Maina v Evans Kamau Mwaura, Francis Ngugi Njenga & Habib Gulam* [2014] KEHC 1772 (KLR) in which a plaintiff with a head injury (cerebral concussion), fracture of 6 teeth, injury to the right chest wall causing pneumothorax (air in the chest cavity), fracture of the pelvis (displaced fracture of the right superior and inferior pubic ramii), diastasis of the sacro-iliac joint, fracture of the right acetabulum (hip joint) and injury to the right knee resulting in tear of the lateral meniscus. was awarded a sum of Kshs. 2,400,000/- on general damages for pain, suffering and loss of amenities. Counsel therefore urges this court to exercise its discretion by revising the trial court's award under this head, upwards, accordingly.



Analysis And Determination

11. This court has considered original record, record of appeal and the submissions on record plus the authorities cited. 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.”

12. One of the issues arising for determination on appeal; though not addressed in the Appellant’s submissions but featured in the grounds of appeal; is the issue whether the learned magistrate erred in law by pronouncing a judgment in a matter she had not heard and taken evidence and testimony in.
13. From my perusal of the lower court record, it is apparent that the hearing of the suit proceeded before Hon. P.M. Wambugu (PM) on 9.11.2021 and subsequently on 16.11.2021. From my further perusal of the record, it is also apparent that upon close of submissions, the abovementioned magistrate slated the suit for judgment on 10.02.2022. However, when the Appellant’s advocate (Mr. Ondigi) attended court on the said date, he was informed by the sitting magistrate; Hon. H.M. Nyaga (CM); that Hon. P.M. Wambugu (PM) was not sitting and therefore, the matter was scheduled for mention on a different date. Subsequently, Hon. H.M. Nyaga (CM) on 17.02.2022 directed that the court proceedings be typed urgently. It is apparent from the record that the above events culminated in delivery of the impugned judgment by Hon. C.A. Muchoki (RM).
14. Suffice it to say that, it is common practice for a judicial officer to take over a matter from another; in special circumstances; which appears to be what transpired here. Whereas the record does not disclose the circumstances surrounding re-assignment of the file relating to the suit between the abovementioned magistrates, there is nothing in the law that necessarily precludes a judicial officer from taking over a matter from another, even in its final stages. In any event, it is apparent from the record that the relevant proceedings were typed and made available to the magistrate who eventually delivered the judgment. Consequently, I find no particular reason to fault Hon. C.A. Muchoki (RM) from delivering the impugned judgment notwithstanding the fact that the suit proceeded for hearing before Hon. P.M. Wambugu (PM).
15. Having found so, I now turn to the second issue which constitutes the main contention in the appeal, concerning the quantum of damages awarded by the lower court under the head of pain, suffering and loss of amenities, which the Appellant views as being inordinately low and awarded on the basis of wrong principles, and further awarded in the absence of any consideration of the evidence and submissions on record.
16. In considering this ambit of the appeal, I will therefore 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.”

17. 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.

18. 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.”

19. 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)

20. Turning to a re-examination of the record, the Appellant particularized his injuries in the plaint dated 6.08.2019 as comprising multiple rib fractures-second rib on the right side and the first and fourth ribs on the left side; comminuted fracture of the right hip joint; displaced and comminuted fracture of the right femoral condyle; and deep cut on the right knee with profuse bleeding. The aforesaid injuries were confirmed by the medical evidence constituting the Appellant’s bundle of documents adduced at the trial, more so the medical reports prepared by Dr. Samuel Deya and dated 27.06.2019 (P. Exhibit 8) and the medical report subsequently prepared by Dr. J.L. Amugada and dated 31.01.2017 (P. Exhibit 9). In the first medical report, the former doctor noted that though the Appellant showed signs of healed surgical wounds, complained of experiencing moderate to severe pains particularly during cold weather. The doctor also noted that the Appellant would require a further surgery in the future to remove the implants from his pelvis and right knee, at an estimated cost of Kshs. 1,100,000/-.

21. Turning to the second report, the latter doctor by and large echoed the prognosis by his colleague, adding that the affected bones would suffer early osteoarthritis. No permanent incapacity was assessed by either of the medical doctors.

22. At the submissions stage, the Appellant proposed an award of Kshs. 3,000,000/- whilst placing reliance on the authorities also cited on appeal namely *Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v N I A* (minor suing through her next friend I A I S), *A S D & F H W* (Suing as the Legal Representative of the estate of L A S) & *Benson Boru Jarso and Joseph Kahinda Maina v Evans Kamau Mwaura, Francis Ngugi Njenga & Habib Gulam* (supra). The Respondents on their part suggested an award of not more than Kshs. 350,000/- upon relying on the case of *Haron Kipchumba*



- Cheron v Eastern Produce (K) Limited [2014] KEHC 1511 (KLR) where a similar award was upheld on appeal, in respect of a fracture on the right radius distal third; double fractures of the right ulna; and, a fracture of the right olecranon of the right ulna at the elbow joint; in addition to soft tissue injuries; and the case of George Kinyanjui t/a Climax Coaches & Equity Bank Limited v Hassan Musa Agoi [2016] KEHC 7255 (KLR) in which a plaintiff who had suffered various injuries including two loose teeth; fracture of the left clavicle; and, fractures of the 4th and 5th left ribs, was awarded the sum of Kshs. 450,000/- on appeal.
23. In his judgment, the learned trial magistrate upon setting out the summary of the pleadings, evidence tendered and submissions by the parties, proceeded to award a sum of Kshs. 180,00/- under the relevant head of damages.
 24. The Appellant firstly complained that trial court did not take into consideration his submissions and authorities filed before the trial court. From a perusal of the record as well as the impugned judgment, I beg to differ. There is nothing on the record to indicate that in assessing the damages, the learned trial magistrate necessarily overlooked or ignored the submissions and authorities relied upon by the Appellant. Be that as it may, I observed that the learned trial magistrate misdirected himself as to the award proposed by the Respondents. Going by their submissions, it is clear that while the Respondents suggested a sum not exceeding Kshs. 350,000/- under the above head, the learned trial magistrate erroneously mentioned in his decision that they had proposed a sum of Kshs. 80,000/-. Consequently, it is apparent that the award of Kshs. 180,000/- eventually awarded by the said magistrate was much lower than the sum proposed even by the Respondents. In addition, it is apparent from a reading of the impugned judgment, that the said magistrate did not cite any guiding authorities to support his award.
 25. Upon considering the respective authorities cited before the trial court therefore, I am of the view that those by the Appellant constituted slightly more severe injuries in comparison to those suffered here. Similarly, the court finds that the authorities cited by the Respondents constitute injuries of a less severe than those suffered here.
 26. I therefore considered the authority of Nelson v Ochieng [2023] KEHC 2780 (KLR) in which the High Court sitting on appeal, upheld an award in the sum of Kshs.2,000,000/- in respect of injuries particularized as Multiple fractures of the right lower limb, comminuted fractures of the right leg femur bone, fragmented/comminuted fractures of the tibia/fibula bones on the right leg with malunion, among other fracture and deep cut wounds, as well as chest pain. However, it is noteworthy that in the above-cited case, permanent incapacity was assessed at 80%, unlike in the present case where no permanent incapacity was assessed. I similarly considered the case of Nguku v Kiria-ini Farm [2022] KEHC 342 (KLR) involving a plaintiff with fracture of the 5th, 6th and 7th ribs, fracture of the pelvis right pubic sysisysis (sic) and acetabulum, multiple bruises of the arms; where the court awarded a sum of Kshs. 1,800,000/- on appeal in the absence of any assessment of degree of incapacity.
 27. Taking the above comparable authorities into account as well as the nature and extent of the injuries sustained, the degree of permanent incapacity and the inflationary trends, I find that the learned trial magistrate's award under the above head of general damages for pain, suffering and loss of amenities, fell on the lower side. I therefore deem it necessary to disturb the said award by substituting it with a more reasonable award in the sum of Kshs. 1,800,000/-.

Disposition

28. In the end therefore, the appeal succeeds. Consequently, I hereby set aside the trial court award of Kshs. 180,000/- made under the head of general damages for pain, suffering and loss of amenities and substitute it with an award in the sum of Kshs. 1,800,000/-.



29. Consequently, the judgment on appeal shall now read as follows:

- a. General damages for pain, suffering and loss of amenities Kshs. 1,800,000/-
Special Damages Kshs. 3,700/-
- b. The Appellant shall have costs of the suit and interest on general damages at court rates from the date of judgment until payment in full, and
- c. The Appellant shall have interest on special damages at court rates from the date of filing suit until payment in full.
- d. The Appellant shall likewise have the costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant Ondigi

Respondent N/A

Court Assistant Martin Korir

