



**Nzomo v Mburu & another (Civil Appeal E033 of 2023)  
[2024] KEHC 16118 (KLR) (Civ) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16118 (KLR)

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

**CIVIL**

**CIVIL APPEAL E033 OF 2023**

**JM NANG'EA, J**

**DECEMBER 19, 2024**

**BETWEEN**

**BRIAN NYAMAI NZOMO ..... APPELLANT**

**AND**

**KELVIN NDUATI MBURU ..... 1<sup>ST</sup> RESPONDENT**

**MATHEW KARIMI MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement and decree of the Chief  
Magistrate's court at Nairobi Milimani Commercial Courts (Hon.  
H.Nga'ng'a - PM) delivered on 5/1/2023 in CMCC NO. 2338 of 2019)*

**JUDGMENT**

**Grounds of Appeal and reliefs sought.**

1. By a Memorandum of Appeal dated 14/1/2023, the appellant faults the trial court's judgment, on the quantum of general damages assessed only, on grounds that may be condensed into five as hereunder:
  1. That the learned trial Magistrate erred by awarding general damages that are manifestly and inordinately low relative to the appellant's injuries.
  2. That the learned trial magistrate erred in law and fact by failing to consider the appellant's submissions as well as awards made in comparable cases thereby arriving at an erroneous figure of general damages.
  3. That the learned trial erred by rendering judgement that is not based on proper evaluation of the pleadings, evidence and the applicable law in relation to the award on general damages.



4. That the trial court's judgement is otherwise unjust and against the weight of evidence adduced.
  5. That the learned trial magistrate erred in law and fact by failing to award the appellant compensation for future medical costs.
2. The appellant therefore seeks the following orders;
- a. That the appeal be allowed with costs.
  - b. That the trial court's judgement on general damages be set aside and this court does re-assess both claims of general damages and future medical costs awardable to the appellant.

### **Analysis and determination**

3. It would appear that only the learned Counsel for the Appellant filed submissions which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate granted the appellant, the plaintiff in the suit before the lower court, general damages for pain, suffering and loss of amenities in the sum of Kshs. 400,000 and Kshs. 62, 510 in special damages. The judgement followed the Appellant's suit in which he sought general damages, special damages of Kshs. 62,510, future medical costs of Kshs. 200,000, the costs of the suit and interest on account of injuries he sustained after the respondents' motor vehicle registration number KCG 398 F collided with another motor vehicle registration number KCJ 850 A in which the Appellant was travelling, owing to negligent driving of the former vehicle.
4. The Respondents do not seem to have filed their statements of defence.
5. The respondents' evidence at trial underscored the averments in the suit. Based on medical evidence presented before the trial court including Dr G. K Mwaura's medical report dated 6/12/2017, the appellant suffered a fracture of the left femur; a swollen and tender left thigh and degloving injury to the right foot. He was admitted in Hospital for 6 months and the fracture was fixed with metal implants. The appellant was also put on anti-biotics and analgesics and his wound was skin-grafted. He was still on treatment at the time of the examination. Permanent disability he suffered was assessed at 10%. The doctor further opined that the metal implants would be removed at a cost of Kshs. 200,000.
6. The respondents did not offer evidence.
7. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:”
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”



8. The Appellant's advocates submit that the trial court wrongly exercised its discretion in assessing and awarding damages. They restate the settled principle in *Tayab vs Kinanu* (1983) KLR 114 that money cannot renew a shuttered or battered physical frame and therefore courts only make reasonable awards assessed with moderation taking into account that comparable injuries should as far as possible be compensated by comparable awards. In *Sheikh Mustaq Hassan V. Nathan Mwangi Kamau Transporters & 5 Others* (1986) KLR 457 also relied upon by the appellant, it was observed that awards may only be increased if they are inordinately low as to represent an entirely erroneous estimate, or where wrong principles are applied, or evidence was misapprehended in some material respects.
9. The appellant's advocates think that Kshs. 2,000,000 in general damages for pain and suffering would be adequate compensation for their client, although they submitted for a lesser sum of Kshs. 1,800,000 in the lower court. Judicial decisions in *Ismael Longishu Kobei vs David Kariuki Gichangi & Another* (2018) eKLR; *Charles Niaumenge Wachama vs Melek Ukongo* (2011) eKLR and *Edward Mzamili Katana vs CMC Motors Ltd* (2006) eKLR where Kshs. 2,000,000, 1,500,000 and 2,000,000 general damages respectively were awarded, are cited in support of this submission. In *Edward Mzamili Katana* case, the claimant suffered head injury leading to concussion; cut wound and bruises to the scalp; a fracture of the left scapula; compound fracture and dislocation of the left elbow; chest injury with multiple fractures of the left 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ribs and a fracture of the left femur upper 1/3 shaft. He was severely shocked necessitating resuscitation by administration of intra-venous fluids. There was plastering of the fracture sites and open reduction of the fractures. The victim remained in hospital for 32 days. 30% permanent incapacity was assessed. The victim later suffered further complications after a fall. The accident in which the claimant sustained the injuries was found to be the proximate cause of the complications resulting from the fall.
10. In *Ismael Longishu Kobei* case, the victim equally suffered severe and extensive injuries. They were fractures of the left and right femurs as well as more fractures of the left tibia plateau; left 2<sup>nd</sup> metatarsal and left navicular bone. He also endured a deep cut wound on the right temporal region and other cut wounds on the right elbow and right leg. The claimant was hospitalized and open reduction and internal fixation of the fractures were done. Removal of nail screws and plates was opined to cost Kshs. 200,000. 60% permanent disability was assessed.
11. The subject injuries in the *Charles Niaumenge Wachama* are more less similar to the other cited cases. The claimant suffered a fracture of the femur and multiple soft tissue injuries with permanent disability of 25%.
12. It should be noted that general damages are damages at large and no case is exactly the same as the other. The general method of approach in assessing general damages ought to be "that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see the often cited case of *Kemro Africa Ltd & Another Lubia & Another* (1982-88) KLR)."
13. In assessing and granting the sum of Kshs. 400,000 in general damages in favour of the appellant, the trial court was guided by the judicial determination in *Kenyatta University vs Isaac Karumba Nyuthe* (2014) eKLR in which the claimant was awarded Kshs. 350,000 general damages on 100% liability basis for a fracture of the right femur; soft tissue injuries to the head and bruises on the right knee. Internal fixation of the fracture was done and the injuries were classified as grievous harm.
14. The learned trial magistrate did not consider the judicial precedent to wit; *I.G Transporters Limited & Another vs Moses Theuri Ndumia* (2018) eKLR the appellant relied upon in his submissions before him. In that case the claimant was granted Kshs. 1,500,000 general damages for a compression fracture of the head of the right femur; a fracture of the right acetabulum; severe blunt injury of the right knee



leading to tearing of the collateral ligament; head injury associated with a 4 cm laceration above the left eye brow; a 2 cm cut wound on the dorsum of the right foot and a 3x4 cm cut wound on the right shin. The patient was expected to heal but with 45% permanent disability and would not be able perform his driving work again. A hip joint replacement prosthesis he was fitted with required replacement after every 10 years at a cost of Kshs. 500,000.

15. Clearly, these cases relate to more severe injuries not comparable the instant matter where the appellant suffered a single fracture and the injuries did not result in a high degree of permanent incapacity relative to the cases cited by the appellant. Indeed the Kenyatta University case supra reliable upon by the trial court is comparable to the instant matter.
16. I have sampled some other cases I think offer guidance to the court. In the case of Herbart Otara Marube vs Dankan Ochora [2022] eKLR this court awarded Kshs 450,000/- general damages for a claimant who sustained a fracture of right tibia, right ankle dislocation, chest contusion as well as laceration and cut wounds on the right lower limb. The case is comparable to the matter subject of this appeal in light of the single fracture. In Kensilver Express Limited vs. Nzangu ( Civil Appeal E039 of 2021) (2022) KEHC 1033 (KLR) rendered in July 2022, the claimant sustained a cut wound to the right ear; two rib fractures and severe chest pain. He healed well with no permanent disability. The court assessed general damages in the sum of Kshs. 500,000. In Nguku Joseph & Another vs Gerald Kihui Maina (2020) eKLR the claimant sustained a fracture of the right humerus and a host of soft tissue injuries. Kshs. 500,000 general damages were assessed. For a pelvic fracture and soft tissue injuries to the right thigh and chest, Kshs. 500,000 general damages were also assessed in the case of Peter Gakere Ndiangui vs Sarah Wangari Maina (2021) eKLR.
17. The trial court did not materially misdirect itself. The award of Kshs. 400,000 is within the range of previous comparable awards as shown in the cases referred to by the court. I will not disturb the award merely because I could have reached a different finding if I had heard the case in the first instance. The appeal on quantum of damages thus fails.
18. Regarding the claim for future medical costs in the sum of Kshs. 200,000, the appellant pleaded the same in the suit. In the opinion of Dr. Mwaura who examined the appellant for a medico-legal report, it will cost this amount to remove metal implants inserted in the appellant's fracture site. The learned trial magistrate wrongly failed to consider and grant this claim. The appeal on this claim is allowed.

### **Determination**

19. In the result, the appeal on quantum of damages is dismissed but the claim for Kshs. 200,000 in future medical costs is allowed. The parties will bear their own costs of the appeal.

**J.M NANG'EA , JUDGE.**

**JUDGEMENT DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024 IN THE PRESENCE OF:**

The Appellant's Advocate,

The Respondents

**J.M NANG'EA , JUDGE.**

