



REPUBLIC OF KENYA



**Ayusa v Moire (Civil Appeal E047 of 2021)  
[2023] KEHC 1432 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1432 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E047 OF 2021  
JN KAMAU, J  
FEBRUARY 20, 2023**

**BETWEEN**

**DUKE AYUSA ..... APPELLANT**

**AND**

**JOSEPH MATUNDURA MOIRE ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon M. C. Nyigei (PM) delivered at Nyamira in Principal Magistrate's Court Case No 196 of 2016 on 26th May 2021)*

**JUDGMENT**

**Introduction**

1. In her decision of May 26, 2021, the Learned Trial Magistrate, Hon M C Nyigei (PM), entered Judgment in favour of the Respondent herein against the Appellant on a hundred (100%) per cent basis as follows:-  
General damages Kshs 250,000/=  
Special damages Kshs 30,620/=  
Kshs 280,620/=  
Plus costs and interest of the suit
2. Being aggrieved by the said decision, on June 22, 2021, the Appellant filed a Memorandum of Appeal dated June 21, 2021. He relied on three (3) grounds of appeal.
3. His Written Submissions were dated June 21, 2022 and filed on June 22, 2022 while those of the Respondent were dated June 9, 2022 and filed on June 16, 2022. The Judgment herein is based on the said Written Submissions which the 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 respective parties' Written Submissions, it appeared to this court that the Appellant had only challenged the Trial Court's award on quantum. As all the Grounds of Appeal were related and intertwined, this court dealt with the same together.
7. The Appellant submitted that on assessment of damages and on whether to interfere with the same or not, courts have to bear in mind the principles that were highlighted in the case of *Power Lighting Company Limited & Another vs Zakayo Saitoti Naingola & Another [2008]eKLR* cited in the case of *Jennifer Mathenge vs Patrick Muriuki Maina [2020]eKLR* to the effect that damages should not be inordinately too high or too low, that they are meant to compensate a party for the loss suffered but not enrich him or her, that each case depends on its own facts, that past decisions are mere guides and that an element of inflation and the purchasing power of the Kenyan shilling at the time of the judgment should be taken into account.
8. He argued that an award of Kshs 100,000/= was sufficient and adequate compensation to the Appellant. In this regard, he referred this court to the case of *Edward Mutevu Maithya & Another vs Edwin Nyamweya [2022] eKLR* where the respondent therein sustained cut wounds on the scalp, bruises on the back, right upper limb and left lower limb and was awarded Kshs 100,000/=.
9. He also placed reliance on the case of *Francis Omari Ogaro vs JAO (minor suing through next friend and father GOD [2021] eKLR* where the respondent therein sustained cut wounds and bruises on the right lower limb, left iliac region, right iliac region, frontal and temporal regions, lacerations on the frontal region, bruises on both elbows and blunt trauma to the abdomen. The court (sic) reduced the lower court award of Kshs 230,000/= to Kshs 180,000/=.
10. He further relied on the case of *Lilian Anyango Otieno vs Philip Mugoya Ogila [2022] eKLR* where the respondent therein sustained head injury, chest injury, rib cage and blunt abdominal injury, tissue injuries of both upper limbs, dislocation of the cervical spine of the neck, wrist, elbow joint, pelvic frame, ankle joint and damage of the right lower limb and was awarded Kshs 150,000/=.
11. He urged this court to grant him costs of his appeal based on Section 27(1) of the *Civil Procedure Act*.
12. On his part, the Respondent submitted that the higher court should not be quick to interfere with the amount of general damages awarded in the trial courts as the same was discretionary. He pointed out that the principles to be applied in deciding whether or not to interfere with the same was set out in the case of *Texcal House Service Station Limited and Another vs Jappien and Another Nairobi CA No 134 of 1998 (eKLR citation not given)* and that this were that when the award was inordinately high or low as to represent an entirely erroneous estimate or the trial court proceeded on wrong principles or misapprehended evidence in some material respect (sic).



13. He contended that as a matter of principle, damages must be within limits set out by previous comparable decided cases and within limits that the Kenyan economy could afford. He was emphatic that there must be uniformity in awards in cases involving similar injuries.
14. It was his case that the amount awarded was not inordinately excessive as to warrant this court to overturn the award and that the Learned Trial Magistrate had correctly analysed the evidence on record before awarding the same.
15. He placed reliance on the cases of *Poa Link Services Co Ltd & Another vs Sindani Boaz Bonzemo [2021]eKLR* where the court awarded Kshs 350,000/= where the respondent therein had sustained fewer injuries and *Anthony Nyamwaya vs Jackline Moraa Nyandemao [2022]eKLR* where the respondent therein sustained similar injuries as herein and was awarded Kshs 250,000/=. He relied on other cases which he did not attach copies for perusal by the court.
16. He further argued that the Appellant had not attached a decree to the Record of Appeal as was mandated by Section 79 G of the *Civil Procedure Act* and hence the appeal did not fit the entry gate of a complete appeal. He urged the court to dismiss the appeal herein.
17. It is well settled in law that an appellate court will not disturb an award of general damages unless the same was 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 vs Victoria Wambua Kioko [2004] eKLR*.
18. 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 or 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.
19. 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.
20. Indeed, in the case of *Kigaraari vs 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.'
21. This court also had due regard to the case of *Lim vs Camden HA [1980] AC 174* where it was held that:-
 

' Even in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered, not to punish the tortfeasor for the injury he has caused.'
22. Going further, an award of damages was also not meant to enrich the victim but to compensate such victim for the injuries he or she had sustained. Similar injuries should attract comparable awards. However, in the quest for consistency, courts must also recognise that no case is exactly the same as the other and therefore each case must be decided with its own peculiar circumstances but keeping in mind that any monies awarded must be sustainable.



23. Notably, it is not mandatory that a trial court must analyse each and every case that has been submitted by a party. It will suffice if the trial court considers what is most comparable to the injuries a plaintiff has suffered with a view to coming up with an appropriate assessment to compensate such a plaintiff for the injuries he or she would have sustained. It must be noted that cases cannot contain exact injuries and they are merely for comparison purposes.
24. According to the Plaintiff dated October 17, 2016, the Respondent was said to have sustained head injury, cut wound on the inner part of both lips, contusion on the neck, multiple bruises on the chest and septic cut wound on the right ankle which injuries were also confirmed by the P3 Form dated July 13, 2016 and the undated Medical Report of Dr Ezekiel Ogando Zoga and classified as 'harm'.
25. The Respondent was treated at Kisii Teaching & Referral Hospital where he was admitted on June 22, 2016 and discharged on June 29, 2016. When he was re-examined by Dr Ezekiel Ogando Zoga, he had not fully recovered and was still complaining of pain on the right ankle. He had scars on both lips and on the right ankle. The doctor observed that he sustained severe soft tissue injuries.
26. Remaining faithful to the doctrine of stare decisis, this court had due regard to the cases with comparable awards to come to a fair and reasonable assessment of the general damages that ought to be awarded herein:-
  1. In the case of *Fred Barasa Matayo vs Channan Agricultural Contractors [2013] eKLR*, the court reviewed an award of Kshs 250,000/= downwards to Kshs 150,000/= where the respondent therein had sustained moderate soft tissue injuries that were expected to heal in eight months' time.
  2. *Dickson Ndungu vs Theresia Otieno & 4 Others [2014] eKLR*, the court reviewed the award of Kshs 250,000/= to downwards to Kshs 127,500/= for soft tissue injuries which produced no complains.
  3. *Purity Wambui Muriithi vs Highlands Mineral Water Company Ltd [2015] eKLR* where the award of Kshs 700,000/= that had been given for injuries to the left elbow, pubic region, lower back and right ankle was reduced to Kshs 150,000/=.
27. Applying these cases and the illuminating principles in the aforesaid cases and the inflationary trends, this court was not persuaded that the Learned Trial Magistrate misdirected herself on the appropriateness and reasonableness of the award for the severe soft tissue injuries that the Respondent sustained. Notably, the Respondent was admitted in hospital for the management of his injuries for seven (7) days. His injuries could not be equated to minor soft tissue injuries that could be attended to in an outpatient facility.
28. It is important to point out that an appellate court ought not to interfere with the discretion of a trial court merely because it could have awarded a lower or higher sum than that which was awarded by the trial court. An appellate court can only interfere where the award of general damages is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended as was held in the case of *Margaret T Nyaga vs Victoria Wambua Kioko (Supra)*.
29. Be that as it may, this court found and held that Grounds of Appeal Nos (1), (2) and (3) were merited and the same be and are hereby dismissed.
30. The Respondent's arguments that the Appeal herein ought to be dismissed because the Appellant had not annexed a Decree as was mandated by Section 79G of the *Civil Procedure Act* was misplaced as the Decree was on page 54 of the Record of Appeal.



**Disposition**

31. For the foregoing reasons, the upshot of this court's decision was that Appellant's appeal lodged on June 22, 2021 was not merited. The same be and is hereby dismissed with costs to the Respondent herein.
32. It is so ordered.

**DATED AND DELIVERED AT NYAMIRA THIS 20<sup>TH</sup> DAY OF FEBRUARY 2023.**

**J. KAMAU**

**JUDGE**

