



**Nyangau & 2 others v Kwamboka (Civil Appeal 63 of 2023)  
[2023] KEHC 27611 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 27611 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 63 OF 2023  
F WANGARI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**VICTOR NYANGAU ..... 1<sup>ST</sup> APPELLANT**

**MOSES OBWANGA ..... 2<sup>ND</sup> APPELLANT**

**KEVIN MAGOTSI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**SARAH KWAMBOKA ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. N.A. Akee, Principal Magistrate delivered in Mombasa CMCC No. 351 of 2020 delivered on 10th March, 2023)*

**JUDGMENT**

1. This is an appeal on quantum on damages awarded as a result of injuries sustained by the Plaintiff/ Respondent after being involved in a road traffic accident where she was a lawful passenger, in the Defendants/ Appellants motor vehicle. Parties had agreed on liability by consent at “25:75 in favour of the Plaintiff”. The Judgment on quantum was entered for Ksh. 1,500,000 by Hon. N.A Akee on 10/3/2023 in Mombasa CMCC No. 351 of 2020.
2. The Appellants filed an amended Memorandum of Appeal dated and filed on 31/5/2023 which has 5 grounds of Appeal which can be summarized on one ground, that the court awarded damages which were inordinately high, without regard to relevant principles on award of damages and as a result arrived on erroneous estimate of damages.
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



4. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
- 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.

### **Pleadings**

6. The plaintiff pleaded that the plaintiff suffered the following damages: -
- a. Segmented and displaced fractures on the mid shaft of the right femur
  - b. Fracture of the 8<sup>th</sup> and 9<sup>th</sup> posterior ribs on the right side of the chest.
  - c. Bruises of the right elbow
7. Special damages were also pleaded but the Appellant did not appeal against the award under the head. I shall therefore restrict myself to the award of general damages.
8. The 2<sup>nd</sup> Defendant/ Appellant filed the amended statement of defence denying the contents of the plaint. He blamed the 3<sup>rd</sup> defendant for the accident as he caused his motor vehicle to collide with the vehicle belonging to the 2<sup>nd</sup> Defendant and being driven by the 1<sup>st</sup> Defendant.
9. After considering the evidence and the rival submissions filed, the court awarded general damages for the injuries sustained at Ksh. 1,500,000 less 25% liability. The doctor opined that the Plaintiff was to heal with 7% permanent disability, and that due to multiple weak bone unions, they could easily fracture again following future lesser traumas.
10. The Appellants now appeals against the award of the general damages on grounds that it was erroneous, inordinately high, excessive and unsustainable. The Appellant further stated that the trial magistrate determination of general damages was erroneous by taking into account unproved particulars of injuries.



## **The general damages.**

11. The test for General damages is settled; In the case of *Butt v Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470, it was held as follows;

“Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low.”

12. Further, in *Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294, being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.

13. The court used the correct principles. Therefore, the only question is whether, in awarding for the injuries, the court was plainly wrong. The injuries suffered were as stated in paragraph 6 above.
14. According to the Discharge Summary (pg. 230) and Medical Report by Dr. S.K. Ndegwa (pg. 254) of the Record of Appeal indicates the nature of the injuries suffered by the Respondent and that she was admitted in hospital for 22 days. She underwent surgical procedures and after discharge, she continued with the physiotherapy sessions. These injuries were severe.
15. The Appellant cannot claim that the injuries were not proved. The Appellant did not cause the Respondent to undergo another medical examination for comparison purposes. I therefore rely on the medical records produced by the Respondent in the lower court as proof of injuries sustained.
16. I am aware of the task at hand and I note the words of the English Court in *Lim Poh Choo v Health Authority* (1978)1 ALL ER 332 were quoted with approval in by Potter JA in *Tayab v Kinany* (1983) KLR14, quoting Lord Morris Borth-y-Gest in *West (H) v Sheperd* (1964) AC 326, at page 345 as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavour to secure some uniformity in the method of approach. 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.”



17. In *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR, the court, Meoli J, in March 2022, consist of fracture of the mid-shaft left femur and soft tissue injuries and the court awarded Ksh. 800,000. In *Joseph Kimanthi Nzau v Johnson Macharia* [2019] eKLR, the court, G.V. Odunga J. as then he was, considered a case where the plaintiff suffered cut wound on the occipital region with lacerations on the left temporal region of the head, fracture of the skull on the occipital region, subluxation of the cervical vertebrae C1, C3 and C4, fracture of 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ribs of the left side of the chest, fracture of the left scapula and cut wound on the left hand and left arm and awarded Ksh. 800,000 on 24th June, 2019.
18. In that case the plaintiff had skull x-rays taken which were reviewed by but chest x-rays availed to the doctor confirmed the fractures of the 2nd and 3rd rib fractures. According to him, the appellant was managed as an outpatient on appropriate medications and the fractures and head injuries were managed conservatively.
19. In *Peter Robert Kinuthia & another v Jackline Atieno Otieno* [2022] eKLR the court awarded a sum of Ksh. 1,000,000 on 14/3/2022 for more less the same injuries. In this case, based on the injuries involved and the 7% permanent disability, I find the award of Ksh 1,500,000 was sufficient.
20. On the issue of costs, the same follows the event. This is what Section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. I thus exercise my discretion to direct that costs of this appeal be awarded to the Respondent.

#### **Determination**

21. Flowing from the foregoing, I proceed to make the following orders: -
  - a. That this court finds no ground to interfere with the discretion of the lower court in the award of General Damages.
  - b. That the judgment delivered on 10/3/2023 in Mombasa CMCC No. 351 of 2020 is hereby upheld.
  - c. Costs of this appeal to the Respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

M/S Mwangi Advocate h/b for Jengo Advocate for the Appellant

Okata Advocate for the Respondent

Barile, Court Assistant

