



REPUBLIC OF KENYA



**Mbeva v Kenya Malik Limited & another (Civil Appeal E003 of 2022)
[2023] KEHC 23269 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E003 OF 2022**

RK LIMO, J

SEPTEMBER 26, 2023

BETWEEN

MUTANU MBEVA APPELLANT

AND

KENYA MALIK LIMITED 1ST RESPONDENT

RAPHAEL MWINZI MUTHUI 2ND RESPONDENT

*(Being an Appeal that arose from the Judgement of Hon.
S. Mbungi- CM vide Kitui CMCC No. 409 of 2018)*

JUDGMENT

1. This is an appeal that arose from the Judgement of Hon. S. Mbungi vide Kitui CMCC No. 409 of 2018.
2. In that suit the 2nd respondent sued the appellant and the 1st respondent for negligence that resulted in a road traffic accident that involved motor vehicle Registration No. KCC 714 V, owned by the 1st respondent herein and driven by the appellant. The 2nd respondent claims he was walking along Kitui-Kalundu Road when he was knocked down.
3. The 2nd respondent laid blame on the appellant for negligence in driving the said motor vehicle and pleaded that the same veered off the road and knocked him down causing him injuries. The 1st respondent was sued as the registered owner of the said motor vehicle and on account of vicarious liability.
4. The record from the subordinate court shows that the parties agreed on liability with the 1st respondent and the appellant conceding to 80% liability while the 2nd respondent agreed to shoulder 20% liability.



5. The trial court was then called upon to assess quantum payable and the parties agreed to file submissions on the issue.
6. The trial court assessed the quantum and award the 2nd respondent 2.5 million in general damages and Kshs. 71,000 as special damages. The total amount was subject to 20% contribution from the 2nd respondent.
7. The appellant felt aggrieved by the award and filed this appeal raising the following grounds namely: -
 - i. The learned trial magistrate erred in law and in fact in the manner that he assessed general damages and in awarding damages that were excessive in the circumstances considering the injuries that had been sustained by the respondent and the evidence that was presented.
 - ii. The learned trial magistrate misdirected himself in law and in fact in not taking cognizance and applying the established principles in the award of general damages.
 - iii. The learned trial magistrate erred in law in failing to consider the appellant's submission on quantum and in so doing he arrived at an erroneous decision.
8. The appellant through written submissions dated 27th January, 2023 done through Counsel faults the trial court for failing to analyze the evidence on the nature of injuries sustained by the 2nd respondent.
9. He submits that the medical reports tendered by both sides indicated that the 2nd respondent had healed substantially from the injuries sustained without any permanent incapability.
10. The appellant contends that the award made by the trial court was excessive and submits that an award in the region of Kshs. 500,000 as general damages would be fair. He supports his proportion with the following authorities;
 - a. *Nyota Tissue products versus Charles Wanga & 4 others* (2020) eKLR where the Plaintiff sustained head injury with open depressed frontal fracture court substituted an award of Kshs. 1,200,000 with that of Kshs. 500,000.
 - b. *Moiz Motors Limited & Anor Versus Harun Ngethe Wanjiru* (2021) eKLR.
Where the Plaintiff sustained soft tissue injuries and moderate head injury and was hospitalized for three days. The trial court substituted an award of general damages of Kshs. 700,00 with that of Kshs. 500,000.
11. The 2nd respondent has opposed this appeal vide submissions dated April 19, 2023 and supplementary submissions dated May 12, 2023 done through Counsel.
12. The 2nd respondent submits that the trial court's assessment of general damages at Kshs. 2,500,000/- was proper and commensurate to the injuries sustained and he has placed reliance on the following decisions;
 - a. *Charles Mwaniki Muchiri vs Coastal Kenya Enterprise Limited* (2016) eKLR. In the matter, the court awarded Kshs 3,000,000/- in general damages where the Plaintiff sustained the following injuries; admission in an unconscious state; laceration and contusion over the forehead; a depressed fracture over the left (parietal) side of the skull; multiple basal and calvarial skull fractures; bilateral frontal intra-cerebral hemorrhage (bleeding) and brain oedema; and soft tissue injuries (contusions) over the right wrist and left ankle. It was also reported that the Plaintiff was admitted in hospital from 1st July 2008 to 9th August 2008. His incapacity was also assessed at about 65% in relation to the head injury and sequel.



- b. *Terry Kanyua Marangu vs Wells Fargo Limited* (2014) eKLR where the court awarded Kshs 3,500,000 /- as general damages while commenting on the injuries sustained by the Plaintiff stated as follows;

...The plaintiff herein sustained serious injuries with severe head injury. She suffered a compound commuted frontal depressed skull fracture, facial cuts, maxillary injuries with severe brain trauma. She underwent toilet and elevation of the depressed skull fracture at Kenyatta National Hospital as a life-saving procedure. The plaintiff was subsequently admitted to the Nairobi West Hospital where further post-operational care was done and currently she has a frontal skulls defect due to head trauma which according to Dr. Wekesa makes her brain susceptible to injury. That she suffers from memory lapses, visual impairment, and recurrent tearing and eye irritation. She experiences severe psychological trauma due to facial deformity, as well as recurrent headaches, and maxillary pain from fractured teeth. Dr. Wekesa's opinion is that the plaintiff needs surgery to correct the deformity as well as follow-ups at a cost of Kshs. 1,900,000/-. The report by Dr. Wekesa was not challenged way of submission of case a medico-report by the defendants. Dr. Njiru in his medical report agreed with the report by Dr. Wekesa and added that the plaintiff complaints included persistent loss of memory; feeling drowsy, persistent loss of permanent upper incisors, costs of medication and clinic attendance and inability to continue with her private practice as a Surveyor."

13. This court has considered this appeal and the response made by the 2nd respondent. This appeal is only on quantum and the only issue is whether the trial court erred in its assessment on quantum payable.
14. The role of this court as the 1st appellate court is now well settled. Its duty is to re-evaluate and reconsider the evidence tendered with a view to drawing own conclusion.
15. The 2nd respondent pleaded that he suffered the following injuries namely: -
- a. Calvarian and facial comminuted minimally depressed fractures
 - b. Tension pneumocephalus
 - c. Cerebral oedema
 - d. Maxillary and ethmoid hemo/CSF pneumosinus
 - e. Scalp and facial soft tissues oemema and emphysema
 - f. Lacerations behind the left ear and above the right eye

He further complained of recurrent headaches and loss of memory.

16. I have perused through the medical evidence tendered in particular, the medical reports by doctors who gave a summary of their respective prognosis on the nature of injuries sustained by the 2nd respondent.
17. Dr. Calvin Achieng from Kitui District Hospital in its report dated May 6, 2018 in his prognosis and conclusion opined that;
- “the injuries (in respect to the 2nd respondent) healed with no major complication and classified the degree of injury as “grievous harm”.
18. Dr. Wambugu P.M. in its report dated March 20, 2019 made the following conclusions.
- “Mwinzi's (2nd respondent) injuries are consistent with those due to blunt trauma as may have occurred during the said accident. He sustained skeletal, neural and soft tissue



injuries from which he has since made adequate recovery. The head injury has resolved. No further surgical interventions are envisaged. I assert that no total permanent incapacitation occurred.”

19. Dr. Cyprianus Okoth Okere in his earlier report dated May 30, 2018 opined that the 2nd respondent sustained “mild head injury with multiple skull fractures” and classified the injuries as “grievous harm”.
20. It is quite apparent from the opinion of Dr. Calvin Achieng and Dr. Wambugu that the 2nd respondent responded well to treatment and had healed or recovered well from the said injuries. I have perused through the judgement of the trial court and find that it missed this crucial information about the nature of injuries suffered. The trial Court made general reference to the medical documents filed or admitted by consent of the parties but omitted making specific references and findings. To that extent, the trial court fell into error because the medical reports were crucial reference points in the assessment of damages.
21. I also find that the trial court fell into error by holding that the appellant cited authorities which were not comparable in term of the injuries sustained by the 2nd respondent.
22. The 2nd respondent as a matter of fact cited decisions that had far more serious injuries than the ones he sustained.
23. In the case of *Charles Mwaniki Muchiri versus Coastal Kenya Enterprises Ltd* (Supra) for instance, the Plaintiff was admitted in hospital unconscious after suffering severe head injuries which inter alia included compound comminuted frontal depressed skull fracture, facial cuts maxillary with severe brain trauma. The injuries resulted in visual impairment, loss of upper teeth and facial deformity that required further corrective surgeries. The degree of incapacity was assessed at 65%. In the present case the 2nd respondent suffered mild injury and the prognosis made by the doctors was that he had healed without any permanent incapacity.
24. On the other hand, the authorities cited on by the appellant were much more comparable. In *Moiz Motors Limited & another vs Harun Ngethe Wanjiru* (Supra), the respondent suffered multiple facial lacerations, a depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises both hips, swollen toes right leg and bruises of both knees whereas in the case of *Nyota Tissue Products vs Charles Wanga & 4 Others* (Supra), the plaintiff suffered head injury with open depressed frontal fracture.
24. In addition to the authorities cited by the appellant, in the case of *Joseph Kimantbi Nzau versus Johnson Macharia* [2019] eKLR the court found that the plaintiff sustained fracture of the skull, right clavicle, left 1st and 2nd ribs and multiple soft injuries and awarded general damages of Kshs 800,000/-
25. In *Telkom Orange Kenya Limited versus I S O (minor suing through his next friend and mother (J N))* [2018] eKLR, the court found that the child had sustained primarily a head injury and the doctor who testified only noted that there was a risk in the future but indicated that there was no permanent disability. The court proceeded to award general damages at Kshs 500,000/-.
26. In light of the above, it is quite evident that the award of Kshs. 2.5 million as general damages by the trial court was quite excessive. This court finds that the trial court misdirected itself when it failed to make references to specific medical reports tendered in evidence for guidance in assessing the quantum of damages payable.

In the premises, this court allows this appeal by setting aside the award of Kshs. 2.5 million as general damages in its place the 2nd respondent is hereby awarded Kshs. 500,000 as general damages. The



appellant has raised no issue with the special damages award so the same is upheld. In summary the 2nd respondent is awarded as follows: -

- a. General damages Kshs. 500,000
- b. Special damages Kshs. 71,000
Kshs. 571,000
Less: 20% Contribution Kshs. 114,200
Total Kshs. 456,800

The 2nd respondent is awarded a total of Kshs. 456,800 plus costs and interests in the Lower Court but the appellant will have costs of this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF SEPTEMBER, 2023.

HON. JUSTICE R. LIMO-JUDGE

