



REPUBLIC OF KENYA



**Mitheu v Musau (Criminal Appeal 52 of 2021)
[2023] KEHC 24080 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 52 OF 2021**

**FR OLEL, J
OCTOBER 25, 2023**

BETWEEN

MICHAEL NTOUTHU MITHEU APPELLANT

AND

ABRAHAM KIVONDO MUSAU RESPONDENT

*(Being an appeal from the judgement delivered by Honourable G.O Shikwe
Principal Magistrate in Kithimani PMCC No.36 of 2019 on 14th April 2019)*

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Hon. G.O Shikwe (Mr) PM delivered in Kithimani PMCC No.36 of 2019 and dated 14th April 2021 where he found the appellant 100% liable for the accident and proceeded to awarded the Respondent general damages of Ksh.200,000/= and special damages of Ksh.6,650/= plus cost and interest of the suit.
2. Being wholly dissatisfied as against the said Ruling the appellant did file this appeal principally as against the quantum awarded and raised the following grounds of appeal;
 - a. The learned magistrate erred in fact and in law in finding that the Respondent was entitled to general damages of Ksh.200,000/-.
 - b. The learned trial magistrate erred in fact and in law in finding that the Respondent was entitled to general damages that were too high in view of the evidence tendered. The same was too high and the same no justified.
 - c. The learned trial magistrate erred in fact and law in failing to consider the appellants evidence on quantum.



- d. The learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature. The appellant did pray that this appeal be allowed and the judgement of Honourable G.O Shikwe (PM) be set aside and it be re-assessed.

B. Brief Facts

3. The plaintiff did plead that he was a lawful passenger in motor vehicle registration no. KCQ xxxC Toyota matatu (hereinafter referred to as the suit motor vehicle) along Matuu-Thika road at National Youth Service area in Yatta when the defendant authorized driver agent employee and/or servant negligently drove the suit motor vehicle at high speed and caused it to lose control, veer off the road and overturned thereby occasioning the Respondent serious injuries as enumerated in the plaint filed.
4. The Respondent did testify and adopted his witness statement. His supporting documents were produced into evidence and exhibit P 1- 11. He stated that he was injured on the left side of the face, chest and had cut wounds on the left leg. He had not healed and had headaches which occasionally would reoccur. In cross examination the Respondent did blame the suit motor vehicle driver as he was driving at high speed and failed to effectively manage the suit motor vehicle.
5. The Respondent did not call any other witness and closed his case. Similarly the appellant did close his case without calling any witness and parties proceeded to file submissions.

C. Submissions

Appellant submissions

6. The appellant submitted that the Respondent did suffer soft tissue injury with tender lacerations over the lateral left scalp skin, pain and severe tenderness over left interior chest well and tender oedematous soft tissue injury over the left leg anterior aspect. The trial court awarded excessive quantum not in line with the legal principles therefore allowing this court to intervene as the award was too high in the circumstance. The appellant placed reliance on [*Denshire Mutati Wambua versus Kenya Power and Lighting Co. Ltd*](#) (2013) eKLR, [*Godfrey Wamalwa Wambua and another versus Kyalo Wambua*](#) (2018) eKLR, [*George Mugo and another versus Akan \(minor suing through next friend and mother of A.N.K 92018\)*](#) and [*George Kinyanjui T/A climax coaches and another versus Hussein Mahad Kunyala*](#) (2016)eKLR.
7. The appellant stated that award should be within limits set out by decided cases and prayed that the award be reduced to Ksh.80,000/=. They also prayed for costs of this appeal.

Respondent's submissions

8. The Respondent did submit that the accident was self-involving and as a result the Respondent did obtain serious injuries. The trial court did consider all the evidence adduced and correctly awarded the Respondent Ksh.200,000/= plus costs and interest. There were no valid ground of appeal raised to enable the court interfere with the judicial discretion of the trial magistrate especially where the appellant did not call any witnesses to rebut the respondent evidence. Reliance was placed on [*Hellen Wangari Wangechi versus Carumera Muthini Gathu*](#) (2005) eKLR.
9. The Respondent further justified the award as appropriate and in line with other similar injury/similar award citations. The award was also reasonable when considered with current inflationary trends. Reliance was placed on [*Cecilia Mwangi and anor. versus Ruth Mwangi*](#) CA 251 of 1996, [*Telkom*](#)



Orange Kenya Ltd versus S.O (minor suing through his next friend and mother (2018)eKLR and Ugenya bus service versus Gachoki NKU CA civil appeal no. 61 of 1981 (1982) KLR 661.

10. The Respondent did pray that this appeal be dismissed with costs to the Respondent.

D. Analysis & Determination

11. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.
12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the civil procedure Act a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316
13. The only issue for determination in this appeal is whether quantum as awarded was inordinately high and therefore was an erroneous estimate of the damages.
14. The Respondent did plead that he had the following injuries; tender lacerations over the lateral left scalp skin, pain and severe tenderness over the left anterior chest wall and tender oedematous soft tissue injury over the left leg anterior aspect. The medical Report of Dr Muli Simeon Kioko, P3 form and treatment notes from Matuu level Four Hospital all confirmed that indeed the respondent obtained the said injuries.
15. 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 as either inordinately high or low. This was stated in the case of Butt v Khan (1977) KAR 1.
16. The same finding was also made by the court of appeal in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 where it was held that that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”



17. Thus, I can only interfere with an award of damages if the aggrieved party satisfies one of two conditions:
- a. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or
 - b. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.
18. The Appellant contends that the award of Kshs200,000/= was excessive and was an erroneous estimate of damages when compared to similar injuries. Indeed, the appellant is right, as the award is high and not reflective of similar injury awards even after taking into consideration inflationary rates and nature of the injuries suffered. The decision's in *Ndungu Dennis Vs Ann Wangari Ndirangu & Another* {2018} eKLR, *Godfrey Wamalwa Wambua and another versus Kyalo Wambua* (2018) eKLR, *George Mugo and another versus Akan (minor suing through next friend and mother of A.N.K 92018)* are more reflective of the correct quantum awarded for similar injuries.

E. Disposition

19. This appeal thus has merit. The award of the trial magistrate Hon G.O Shikwe Principal Magistrate dated 14th April 2019 with respect of General damages of Ksh.200,000/= is set aside and the same is reduced to Ksh.100,000/=.
20. Judgment is therefore entered in favour of the appellant against the respondents jointly and severally in the following terms;
- i. Liability: 100% in favour of the Respondent
 - ii. General damages Ksh.100,000/=
 - iii. Special damages Ksh.6,650/=
 - iv. Costs of the suit and interest.
21. The appellant is awarded Half costs of this appeal which is assessed at Kshs 60,000/= all inclusive.
22. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF OCTOBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual Platform, Teams this 25th day of October, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

