



REPUBLIC OF KENYA



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**Ndung'u & another v Mbau (Civil Appeal E002 of 2022)  
[2023] KEHC 26167 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E002 OF 2022  
CW GITHUA, J  
NOVEMBER 30, 2023**

**BETWEEN**

**FRANCIS GACHAU NDUNG'U ..... 1<sup>ST</sup> APPELLANT**

**ANNE NYAMBURA MAINA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETER IRUNGU MBAU ..... RESPONDENT**

*(Being an appeal from the judgement of Hon. E.M. Nyaga, (SPM),  
dated 7th December 2021 in Murang'a CMCC No. 12 of 2018)*

**JUDGMENT**

1. This appeal emanates from the judgement and decree of the lower court in which the respondent, Peter Irungu Mbau, was awarded general damages for pain and suffering in the sum of Kshs. 2, 000, 000; Kshs. 300,000 as damages for loss of amenities and Kshs. 500,000 as damages for diminished earning capacity. The respondent was also awarded special damages amounting to Kshs. 26, 680 as well as costs of the suit and interest.
2. The above damages were awarded in a suit instituted by the respondent against the appellants following personal injuries sustained in a road traffic accident which occurred on 15<sup>th</sup> October 2017 involving him as a pillion passenger in motor cycle Reg. No. KMCW 656 A and Motor Vehicle Reg. No. KAL 398Y (the subject vehicle) which was allegedly being negligently driven by the 1<sup>st</sup> appellant.
3. The court record shows that although the appellants initially denied liability, parties subsequently entered into a consent on liability in the ratio of 70: 30 in favour of the respondent against the appellants. Thereafter, the trial court proceeded to assess damages payable to the respondent resulting into the awards contested in this appeal.



4. In their memorandum of appeal dated 13<sup>th</sup> January 2022, the appellants complained that the award for pain and suffering which in their view was Kshs. 1,200,00 was inordinately high given the injuries sustained by the respondent and conventional awards previously made for similar injuries.
5. The appellants also faulted the trial court for awarding the respondent Kshs. 300,000 general damages for loss of amenities as the same had not been pleaded and given that the court also made a separate award for pain and suffering. Other complaints were that the court erred by awarding identical damages of Kshs. 500,000 for loss of earning capacity in civil suits 12 and 13 when both parties had different injuries and earning capabilities; failing to consider the appellant's submissions when making its decision thereby occasioning them a miscarriage of justice.
6. The respondent filed a cross appeal on 17<sup>th</sup> January 2022 in which he supported the trial court's award of general damages for pain and suffering but faulted the trial court for allegedly failing to award him damages for loss of economic capacity which was specifically pleaded and proved. He invited this court to assess and make a fair award of damages under that head.
7. The appeal was prosecuted by way of written submissions. The record shows that the respondent was the first to file his submissions on 16<sup>th</sup> of June, 2023 while those of the appellants were filed on 18<sup>th</sup> of August 2023.
8. In their submissions, the appellants re-iterated their grounds of appeal and emphasized that the learned trial magistrate erred by awarding excessive general damages in favour of the respondent without any legal or evidential justification. Relying on several authorities, the appellants contended that the award of Kshs, 2,000,000 was inordinately high as it was not comparable to previous awards made by the superior courts for similar injuries and it therefore represented an entirely erroneous estimate of the damage suffered; that in making the impugned award, the learned trial magistrate misapprehended their evidence and applied wrong legal principles thereby arriving at an erroneous decision.
9. The respondent on the other hand supported the trial courts award of Kshs. 1,200,000 as general damages for pain and suffering arguing that it was justified as the respondent had sustained serious and life-threatening injuries which caused him permanent incapacity.
10. The respondent further submitted that the court was right in awarding him damages in the sum of Kshs. 300,000 for loss of amenities considering that he had developed a permanent limp as a result of shortening of his right leg which made walking difficult; that the award of Kshs. 500,000 general damages for loss of earning capacity was in fact low, as in his opinion, the trial court should have awarded him kshs. 1, 932, 212 given extent of the permanent incapacity he had suffered and the fact that he was 35 years at the time of the accident. He urged me to exercise my discretion and enhance the award if I was persuaded that it was in fact low.
11. This being a first appeal to the High Court, it is an appeal on both facts and the law. Since the appeal only challenges the quantum of damages awarded by the trial court, it is important to set out the parameters within which an appellate court can interfere with awards made by the lower court.
12. As a general rule, an appellate court should be slow to interfere with an award of damages made by the trial court basically because such awards are at large and they depend on the trial courts discretion which needless to say must be exercised judiciously taking into account the facts of each case and the law.



13. The principles which guide an appellate court in exercising its mandate in appeals of this nature have been enumerated in many authorities. In *Mariga V Musila* [1984] KLR 251 for instance, the Court of Appeal expressed itself as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principle...”

14. Other principles on the subject were stated by the Court of Appeal in *Bashir Ahmed Butt V. Uwais Ahmed Khan* [1978] eKLR where the court stated that;

“... 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 was either inordinately high or low...”

See also: *Kemfro Africa ltd t/a “Meru Express Services[1976]” & Another V. Lubia & Another* [1987] KLR 30.

15. It is now a settled principle of law that in assessing damages for personal injuries, the general method of approach is that comparable injuries should be compensated by comparable awards but regard must be had to the fact that no two cases can be exactly similar. Each case therefore must be decided on its own merits.

See. *Stanley Maore V. Geoffrey Mwenda* [2004] eKLR.

16. In this case, the injuries sustained by the respondent are not disputed. According to paragraph 6 of the plaint, the respondent sustained the following injuries:

- a. Concussion to the head with loss of consciousness.
- b. Fracture of the skull –parietal bone.
- c. Blunt injury to the chest.
- d. Fracture to the lower limb –right knee joint.

The injuries were confirmed by the two medical reports prepared by Dr. Elijah Njoroge dated 4<sup>th</sup> December 2017 and Dr. Joab Bodo dated 29<sup>th</sup> May 2018 which were produced as evidence by consent of both parties without calling their makers. Both doctors were in agreement that the injuries healed but the fracture to the right femur did not unite well as it led to shortening of the respondent’s right leg making him walk with a limping gait. Dr. Njoroge assessed the degree of residual permanent incapacity as 45% while Dr. Bodo put it at 30 %.

17. Though the learned trial magistrate stated at the conclusion of his judgement that he had awarded the respondent a total of Kshs 2,000,000 as general damages for pain and suffering, the appellants in their grounds of appeal seem to have interpreted this statement by the trial court to mean that this amount included the awards of Kshs 300,000 made for loss of amenities and Kshs 500,000 damages for loss of earning capacity so that the actual award made for pain and suffering was Kshs 1,200,000. The respondent in his written submissions took the same position.



18. I am however unable to agree with the aforesaid interpretation for two main reasons. First, the learned trial magistrate specifically indicated in his judgment that the award of Kshs 2,000,000 was compensation for the respondent's pain and suffering and nothing else. The trial court in the body of its judgement made it clear that it had awarded the respondent Kshs. 300,000 for loss of amenities as a separate and distinct award.

Secondly, there is no way that an award for loss of earning capacity can be subsumed in an award of damages for pain and suffering considering that the two awards serve different purposes and different reasons and considerations apply when assessing damages under the two heads.

19. Flowing from the foregoing, it is my finding that the award made to the respondent in this case for pain and suffering was Kshs 2,000,000 and not Kshs 1,200,000 as contended by the appellants in their grounds of appeal and the respondent in his submissions.

20. The Appellants in their submissions appear to have abandoned their challenge of the general damages awarded for loss of amenities and those awarded for loss of earning capacity since no reference was made to them in their submissions. Be that as it may, it would be remiss of me not to address the validity of the said awards since they constitute some of the grievances advanced by the appellants in their appeal.

21. Starting with the award of loss of amenities, in making the award, the learned trial magistrate relied on an extract from Halsburys Law of England 4<sup>th</sup> Edition Vol. 12 at page 348 and the persuasive authority of Emukule J in Mwaura Muiruri V. Suera Flowers Ltd & Another [2014] eKLR where the Hon. Judge separately awarded Kshs 300,000 for loss of amenities to compensate the plaintiff for diminished quality of life due to inability to enjoy certain aspects of life he would otherwise have continued to enjoy had it not been for injuries sustained in the accident in question.

22. On my part, I am unable to agree with the reasoning expressed by Emukule J in the aforesaid authority for the reasons stated by Manjaja J in Benuel Bosire V Lydia Kemunto Mokora [2019] eKLR which I fully agree with. In that case, the Hon. Judge stated as follows;

“.....the decision of Emukule J. in making of a separate award for loss of amenities runs against the grain of precedent and practice in this country where a single award of general damages is made to compensate the injured party for pain, suffering and loss of amenities”.

The learned judge proceeded to adopt the explanation given by Kamau J in Peninah Mboje Mwabili V Kenya Power and Lighting Co Ltd Voi HCCC No. 2 of 2015 [2016] eKLR where the Hon. Judge observed thus:

“General damages connotes a generic term for the different heads of claims, which are monetary award but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury. The inability to perform any duties must therefore be taken into account at the time of awarding general damages. A claim for loss of amenities is thus encompassed and/or is included in a claim for general damages and need not be awarded separately. Allowing an extra amount in the sum of Kshs 2,000,000/= to form a distinct and separate award for loss of amenities as had been submitted by the Plaintiff would grossly exaggerate the claim herein.”

23. In my view, making a separate award for loss of amenities where another award for pain and suffering had been made would be unjust to the party against whom the damages are awarded as it may amount to double compensation for the injured party.



I therefore agree with the appellant that the learned trial magistrate erred in making a distinct and separate award of damages for loss of amenities in addition to an award of damages for pain and suffering. Consequently, the award of Kshs 300,000 for loss of amenities is hereby set aside.

24. Regarding the attack on the award of Kshs 500,000 as damages for loss of earning capacity, the only reason given to challenge this award is that the learned trial magistrate erred in making a similar award in CMCC No 13 of 2018 yet the plaintiffs in both cases had different injuries and earning abilities.

25. I am unable to authenticate this claim by the appellant since there is no indication on the record that CMCC No. 13 of 2018 was consolidated with the respondent's suit and it is apparently a suit that was decided separately. That suit was thus not before the trial court when it was determining the respondent's suit and is not therefore part of the court record. This court, being an appellate court cannot consider any material that was not before the trial court.

26. In any event, even if the trial court had made a similar award in CMCC No. 13 of 2018, this by itself does not make the award made in this case wrong because the trial court had discretion to make similar awards in other cases provided they were based on the evidence adduced in those cases and the law.

In the circumstances, I am satisfied that nothing turns on this ground of appeal.

27. The claim by the Respondent in his submissions that the award made under this head was in fact low and should be considered for enhancement by this court lacks any legal or factual basis. The Respondent did not avail any evidence during the trial to prove that the respondents resultant permanent incapacity grossly affected his chances of securing any gainful employment or engaging in income generating activities in future. I therefore find no basis to disturb the award made by the trial court under this head and it is therefore upheld.

28. Turning to the award of Kshs. 2,000,000 for pain and suffering, the record shows that in making the award, the learned trial magistrate referred to the proposal of Kshs 2,500,000 made by the respondent and the authorities cited in support thereof but made no reference to the proposal of Kshs 600,000 made by the appellants and the authorities they had relied on. This was an error on the part of the learned trial magistrate. He ought to have objectively evaluated the proposals made by each of the parties and the authorities cited in support of each proposal before arriving at the amount payable to the respondent.

29. From the record, it is not clear how the learned trial magistrate arrived at the award of Kshs 2,000,000 since he did not indicate the authority or authorities he relied on nor did he state any reasons for settling on that amount.

30. On my independent appraisal of the authorities cited by the parties, I find that the authorities cited by the appellants involved claimants who had injuries not quite similar or comparable to those sustained by the respondent. For instance, in *Nguku Joseph & Another V Gerald Kihu Maina* [2020] eKLR, the plaintiff had sustained lacerations on the head, fracture on the right humerus, lacerations on the orbital region on the head.

Permanent incapacity was assessed at 40%. On appeal, the trial court's award of Kshs 2,500,000 was reduced to Kshs 500,000.

31. Again, in *Peter Wainaina Kinyua V Peter Githendi Njeri* [2018] eKLR also cited by the appellants, the plaintiff sustained a comminuted fracture of the right femur; a comminuted fracture of the right ulnar bone and a dislocation; bruises on the arms and lower limbs. The degree of permanent incapacity was assessed at 20%. The trial courts award of Kshs 600,000 was upheld on appeal.



32. In *Benard Ondieki V Boniface Ndege Orayo* [2020] eKLR cited by the Respondent, the plaintiff had sustained, inter alia, a depressed fracture of the skull, soft tissue injuries and a fracture of the tibia and fibula which resulted in shortening of his left leg. These injuries were to some extent comparable with some of the injuries sustained by the respondent.

In this case, the trial courts award of general damages in the sum of Kshs 2,500,000 was reduced to Kshs 1,750,000 on appeal.

The injuries sustained by claimants in the other cases cited by the respondent were not comparable to those sustained by the respondent in this case

33. I also find the authority of *Margaret Wothaya Kirweya & another V James Muchai Muchiri* [2020] eKLR relevant in which the plaintiff sustained a fracture of the right femur and right fibula. As a result of the injuries, her right leg was shortened by three centimetres. Degree of permanent incapacity was assessed at between 30-45%. The trial courts award of Kshs 1,800,000 was upheld on appeal.

34. Guided by the above authorities and considering that the respondent was admitted in hospital for three weeks during which time skeletal traction was applied and considering also inflationary trends given that the cases were decided about a year before the impugned award was made, I find that even if the learned trial magistrate did not give reasons to justify the award of Kshs 2,000,000, the award was not inordinately high as to warrant this court's intervention.

I will therefore uphold the award but order that the award will be compensation for the respondent's pain, suffering and loss of amenities.

35. In the end, the appellants appeal partially succeeds to the extent that the award of Kshs 300,000 being damages for loss of amenities is set aside. Given that the award of special damages was not contested, the damages now payable to the respondent will be as follows:-

- i. General damages for pain, suffering and loss of amenities

Kshs 2,000,000

- ii. General damages for diminished earning capacity

Kshs 500,000

- iii. Special damages

Kshs 26,680

Total Kshs 2,526,680

Less 30% respondent's consented contribution to liability.

The award of general damages will attract interest at court rates from date of judgement of the trial court until payment in full while the award of special damages will earn interest from date of filing of suit.

36. Turning to the cross appeal, as stated earlier, the singular complaint therein was that the learned trial magistrate erred in failing to make an award for loss of earning capacity though the same was pleaded and proved. This complaint is clearly misplaced considering that the record clearly shows that the learned trial magistrate in fact awarded the respondent Kshs 500,000 under that head. The cross-appeal therefore lacks merit and it is hereby dismissed.



37. Costs follow the event and are at the discretion of the court. Since the appellants appeal has partially succeeded and the respondent's cross appeal has been dismissed, each party shall bear its own costs of the appeal but the appellants will bear the respondent's costs in the lower court.

38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**C. W GITHUA**

**JUDGE**

**In the presence of:**

Mr. Outa for the Appellants

Mr. Kirubi for the Respondent

Mr. Quinteen Court Assistant

