**United Millers Limited v Wanjiku (Civil Appeal E059 of 2022)**
**[2023] KEHC 26808 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26808 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL E059 OF 2022**

**RE ABURILI, J**

**DECEMBER 19, 2023**

**BETWEEN**

**UNITED MILLERS LIMITED ..... APPELLANT**

**AND**

**LUCY WAITHIRA WANJIKU ..... RESPONDENT**

***(Appeal from the judgment and decree of Hon. M.I.Shimenga, Senior Resident Magistrate in Kisumu Chief Magistrate's Court Civil Suit No. 525 of 2019 delivered on 19/5/2022)***

## JUDGMENT

1. Liability in this matter was settled by consent at 80:20 in favour of the Plaintiff/Respondent herein against the defendant/ Appellant. The trial court then proceeded to award the plaintiff/Respondent herein general damages in the sum of Kshs 2,000,000 for pain, suffering and loss of amenities, which award provoked this appeal.
2. The appellant's grounds of appeal are therefore against quantum of damages only as follows:
    1. The quantum of general damages for pain and suffering and loss of amenities is inordinately high, erroneous, oppressive and punitive and amounts to a miscarriage of justice.
    2. The Learned Trial Magistrate ignored the Appellant's submissions, paid lip service and made no references to all of the precedents on general damages cited before her, thus coming to a wrong decision on the quantum.
    3. The Learned Trial Magistrate made reference to very old authorities in arriving at her decision and which authorities had different and multiple injuries from those suffered by the Appellant.
    4. The Learned Trial magistrate erred in law and in fact in failing to correctly appreciate the Plaintiff's injuries and in misapprehending the same and thus arriving at an erroneous award of damages.

5. The learned Trial Magistrate erred in law and fact entering judgment for general damages without considering the applicable principles as established by precedent that comparable injuries ought to attract comparable damages and by so doing reached a figure of damages that is inordinately high, arbitrary and totally unsupportable by any authority or precedent.

3. The appeal was canvassed by way of written submissions.

**The Appellant's Submissions**

4. The appellant's Counsel submitted on each of the grounds of appeal as follows:

   i. On the ground that the trial court did not heed the principle that like injuries attract like awards, it was submitted that it is now trite law that similar injuries ought to attract similar awards as was restated in the case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR.

   ii. It was submitted that although the respondent proposed a sum of Kshs. 5,000,000/= general damages, relying on the case of Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR, where an award of Kshs. 4,000,000/= was made in favour of the plaintiff, in that case, the Plaintiff was awarded kshs 4,000,000.00 general damages for a fracture of the right femur; fracture of the ribs 3-6; pain in the right side of the chest and the right thigh; and persistent pain in the right knee. That the Plaintiff in the said case had to undergo several operations, still had persistent pains in the right chest and right thigh and had to be on two crutches, she needed to undergo an operation to remove the metal implants and also a complete knee replacement.

5. It was therefore submitted that the Respondent in this case did not suffer similar injuries with those of the plaintiff in the above case.

6. Further submission was that for the two fractures of the same femur and soft tissue injuries, the award of Kshs. 700,000/= was sufficient as per the ten authorities cited and all decided between 2018 and 2021 as follows:

   1. MAW (Suing as The Mother and Next Friend to) IM (Minor) v Solomon Kabiriri Mwangi [2021] eKLR Kakamega HCCA No.76 of 2019 where the Plaintiff sustained severe head injuries, a segmented fracture of the left femur, a segmented fracture of the right femur and a fracture right radius and ulna. He was unable to walk or run, and could not use his arm well due to the accident. The High Court awarded him general damages of Kshs 700,000.00 August 2021.

   2. Edward Wasamba Onyango (Suing as the next friend of a minor COW (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR Siaya HCCA No. 8 of 2017 where the High Court on appeal, upheld an award of Kshs. 800,000/= where the Plaintiff had suffered femur fractures and fractures of the tibia/fibula in 2018.

   3. Sanganyi Tea Factory Company Limited v Patrick Onano Chungo [2019] eKLR Nyamira HCCA Appeal No. 18 of 2015 where the Respondent sustained head concussion with loss of consciousness for two weeks; bruises on the scalp, fracture of the left femur, fracture of the left tibia fibula, multiple cut wounds on the left leg and a large cut wound on the left heel. The High Court awarded him general damages Kshs. 700,000/= March 2019.

   4. Marles Vivian & another v AMW [2020] eKLR Machakos HCCA No. 62 of 2016 where the Plaintiff sustained mild head injury, deep cut wound left eyebrow, soft tissue injuries to the

chest, fracture of left femur and bilateral fractures of tibia/fibula open and deep cut wound left leg. The High Court awarded him general damages of Kshs 800,000 in February 2020.

5. Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR Kisii HCCA 74 of 2016 where the respondent sustained injuries involving: lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, and a segmental distal fracture of the right femur. He could not walk without crutches, and permanent disability was anticipated. The High Court awarded him general damages of Kshs. 450,000/- in October 2018.

6. Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR HCCA No. 177 of 2011 where the plaintiff sustained fractures of the right femur, compound fracture right tibia, compound fracture right fibula, shortening right leg and episodic pain right thigh with inability to walk without support. He was awarded Kshs. 700,000/= in 2018.

7. Thomas Owiti v Wilson Kayeli Keiza [2020] eKLR Eldoret HCCA No. 98 of 2013 where the Respondent sustained tenderness in the scalp forehead and back, pelvis and right lower limb; scars on the scalp and forehead; double fractures of the right femur; double fractures of the right tibia; and treble fractures of the right fibula. The High Court awarded him general damages Kshs. 700,000/= in April 2020.

8. John Muli Kasike & another v Samuel Gitau Waweru [2020] eKLR Kiambu HCCA No. 13 of 2018 where the respondent sustained closed fractures on the right and left femur. The High Court awarded him general damages Kshs. 800,000/- general damages January 2020.

9. Wilson Matu & another v Stanley Muriuki Wamugo [2021] eKLR Nyeri HCCA No. 55 of 2019 where the respondent sustained a fracture of the right midshaft femur and fracture of the right proximal tibia and fibula boxes. The High Court awarded him general damages of Kshs 800,000/= May 2021; and

10. Equator Bottlers & another v Joseph Omondi Ouda [2018] eKLR HCCA No. 84 of 2017 where the plaintiff suffered a head injury with cut wounds on the right scalp, blunt chest injury with damage to rib cage; dislocation of both shoulder joints; bilateral fracture of both right and left femur; and soft tissue injury on right foot. The High Court awarded him general damages of Kshs 800,000/= in July 2018.

7. Counsel for the appellant submitted that from the ten authorities in cases where the plaintiffs sustained two fractures of the femur or other leg bones, the courts gave awards of between Kshs 450,000.00 and Kshs 800,000.00. These authorities, it was submitted, showed, in the words of the Court of appeal as cited earlier in Simon Taveta v Mercy Mutitu Njeru, supra, that,

> "comparable injuries [which] should as far as possible be compensated by comparable awards."

8. It was therefore submitted that the trial magistrate in making an award of damages did not at all heed these authorities and that instead, she applied cases that no one had cited. These were the Charles Niaumenge Wacham vs Melek Ukongo [2011] eKLR which case is not accessible on the eKLR website, and thus one cannot really tell the severity of the injuries sustained by the claimant therein.

9. It was further submitted that the other case cited by the trial court, Edwin Otieno Japaso vs Easy Coach Bus Ltd [2016] eKLR, showed an appellant who sustained fracture dislocation of the right little finger, dislocation of the right hip with a fracture of the acetabulum, fracture of the pelvis involving

both superior and inferior pubic rami bilaterally ,and soft tissue injuries. He underwent a total hip replacement. The High Court awarded him Kshs 2,000,000.00 general damages. That the case in question did not show similar injuries as those of the Respondent herein

10. It was therefore submitted in reiteration that the learned Trial Magistrate erred in entering judgment for general damages without considering the applicable principles as established by precedent that comparable injuries ought to attract comparable damages and by so doing, reached a figure of damages that is inordinately high, arbitrary and totally unsupportable by any authority or precedent. That she ignored authorities, all ten of them, recent and showing similar injuries, and ended up using old authorities with no demonstrable similarity to the Respondent's injuries and thus reached an erroneous award.

11. On the ground that the trial court dismissed authorities cited as having been made some years back while they were in fact recent and used inappropriate ones instead, it was submitted that the error is that the trial court made, in addition to not heeding the hallowed principle in the assessment of damages that similar injuries attract similar awards, is that she used the wrong approach, that she would decide the case taking into account the times we live in and inflation. She dismissed the authorities cited by the Appellant as having been made "some years back" yet the authorities cited by the Appellant were in fact decided between 2018 and 2021 and were in May 2022 when she was making her judgment, fairly recent.

12. Counsel submitted that the trial court having dismissed the authorities cited by the appellant, she denied herself of the chance of looking at suitable cases, and proceeded to make an award citing two decisions cited in 2011 and 2016. These authorities, to use her expression, were made some years back. They were, in comparison to those cited by the Appellant, quite aged.

13. That the case of Charles Niaumenge Wacham vs Melek Ukongo[2011]eKLR appears to have been decided in 2011, 11 years prior to her decision in May 2022, while that of Edwin Otieno Japaso vs Easy Coach Bus Ltd [2016]eKLR, was 6 years old.

14. That besides the first case cited not appearing on eKLR, the other case of Edwin Otieno Japaso vs Easy Coach Bus Ltd, showed an appellant who suffered severe fractures of the finger, right hip dislocation, a fracture of the acetabulum, fracture of the pelvis involving both superior and inferior pubic rami bilaterally ,and soft tissue injuries. He underwent a total hip replacement, which injuries were not similar to those of the Respondent herein.

15. On the ground that the trial court did not consider the authorities cited at all, it was submitted that the trial magistrate did not analyze the above cited authorities in her judgment. That she simply set their citations without showing her comparison of the injuries in them to those of the Respondent.

16. The appellant's counsel submitted that in the cases cited below, the Court of Appeal held that failure to consider the authorities and submissions is a misdirection warranting an intervention on an award of damages by an appellate court. In Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR Nairobi CACA Civil Appeal No.60 of 2004, where the trial judge made an award without considering authorities cited to him and without heeding the principle that similar injuries attract similar awards. On appeal, the Court of Appeal held that the trial court was wrong and stated that:

> " Further, we observe that the learned trial Judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that "comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases" (see the decision of the court in Arrow Car Limited vs Bimomo & 2 Others [2004] 2 KLR 101).

Although the award of damages was at the discretion of the trial court, that discretion required to be exercised judicially. The learned trial Judge did not consider any of the authorities cited by counsel for the parties so as to guide herself on the assessment of the damages. If she had done so, she probably would have seen that the award she made was not in consonance with decided cases. The award of damages by the learned trial Judge was, in our view, so inordinately low that it is a wholly erroneous estimate of the damage." [Emphasis added]

17. A similar result was reached in Ram Gopal Gupta v Nairobi Tea Packers Limited & 2 others [2017] eKLR Nairobi CA Civil Appeal No. 65 of 2006, where the trial judge set out the cases cited by the parties but made no analysis of them. The Court of Appeal stated that the trial judge erred and interfered with the award. The Learned judges of the Court of Appeal stated as follows:

> "A perusal of the judgment written by the trial Judge shows that although the learned Judge set out the cases referred by counsel on either side nonetheless she did not make any comment on the cases at all; nor did she say whether they were relevant to the matter before her; or even compare the injuries in the previous cases to the case before her. She did not distinguish them. All she satisfied herself with, was to state cases referred to and proceeded to make the award we have referred to without reference to any past decided case. We think that the learned Judge erred by failing to make reference to past decided cases and make an award without laying any basis for it. This was, with respect, an improper use of her discretion and this is a case where we must interfere with that wrong use of discretion and correct the error that the learned Judge made."

18. Further reliance was placed on Joyce Olweya v Pauline Akinyi Ojoo & another [2021] eKLR Kisumu Civil Appeal No. 108 of 2019, where F.A. Ochieng (as he then was) followed Ram Gopal Gupta v Nairobi Tea Packers Limited & 2 others, in an appeal from a decision of the lower court which had only set out the authorities cited without analyzing them. The Court stated that a plaintiff is entitled to a fair compensation; and that in determining what is fair in the circumstances, the court ought to derive guidance from comparable awards made by other courts, which handled cases where the injuries sustained were comparable to those in the case before it. That failure to do so is an error in principle. The Court stated:

> "7. The Appellant submitted that the trial court fell into error, by failing to give due consideration to the authorities cited before it.
>
> 8. On the other hand, the 1st Respondent submitted that the trial court had given due consideration to the authorities cited by all the parties.
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> 9. The Respondent submitted thus;
>
> > "..... authorities submitted to court, to support a party's position in a case are of a persuasive nature to the court. The court can either agree with the cited decision wholly or partially or otherwise find that on the facts, it is not relevant or helpful to the court and thus choose not to follow it."

10. The submission actually finds support from the following authority, which was cited by the Appellant; Ram Gopal Gupta vs Nairobi Tea Packers Ltd & 2 Others, Civil Appeal No. 65 of 2006. In that case, the Court of Appeal said:

> "A perusal of the judgement written by the trial Judge shows that although the learned Judge set out the cases referred to by counsel on either side, nonetheless, she did not make any comment on the cases at all; nor did she say whether they were relevant to the matter before her; or even compare the injuries in the previous cases to the case before her. She did not distinguish them. All she satisfied herself with, was to state cases referred to and proceeded to make the award we have referred to without reference to any past decided case. We think that the learned Judge erred by failing to make reference to past decided cases and made an award without laying any basis for it. This was, with respect, an improper use of her discretion and this is a case where we must interfere with that wrong use of discretion and correct the error that the learned Judge made."

11. In this case the learned trial magistrate summarized the authorities cited by the parties; she did so elaborately, in almost 4 pages of the Judgment.

12. Thereafter, the trial court concluded that the award which comparable was that of Ben Otieno Owaga & 2 Others vs Eliakim Owalla & Another (2017) eKLR.

13. I find that the said "analysis" was perfunctory, and failed to bring out the reasons why that particular case was the only one considered to be comparable.

14. If the other cited authorities were distinguishable, the trial court should have made it clear why they were so considered.

15. By not commenting on the authorities, the trial court failed to demonstrate in a verifiable manner, that it had properly exercised its discretion."

19. Counsel submitted that this court should find and hold that since the trial magistrate did not make any comment on the cases at all; nor say whether they were relevant to the matter before her or even compare the injuries in the cited cases to the case before her and made an award without reference to any past decided case, the learned trial magistrate erred and made an award without laying any basis for it. That this was, with respect, an improper use of her discretion and the award should thus be interfered with.

20. It was submitted that in giving an award of Kshs. 2,000,000/=, the trial Court disregarded the principle that similar injuries attract similar awards or put another way, that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. That she also failed to consider, analyze and compare the applicable authorities referred to her. That the trial court further as shown above dismissed the authorities cited by the Appellant as having been made years back while they were indeed recent. Finally, that the trial magistrate erred in applying not only aged cases, but also cases which did not match or compare with the injuries suffered by the Respondent.

21. Counsel invited this court to interfere with the said award and substitute therefore with an award that is comparable with the awards made in cases showing similar injuries as above shown and make an award of Kshs 700,000.00 general damages.

22. The appellant also prayed that the costs of this appeal be awarded to the appellant.

**The Respondent's submissions**

23. On the part of the Respondent, Counsel framed one issue for determination namely, whether the general damages awarded by the trial magistrate was extremely high.

24. The respondent's counsel cited the cases of Kemfro Africa Limited t/a Meru Express Services v M. Lubia & Another (19821988) 1 KAR 777 cited in Joseph Jumba Egala v Meshack Omurunga Sande (Suing as legal representative of the estate of Sarah Makonjio Sande) [2015 e KLR where the court set out principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages by a trial judge.

25. It was submitted that based on the above authorities, courts must exercise their discretion judiciously on the basis of the law and evidence presented in the matter and decisions cited by the parties in the suit. It was submitted that the respondent sustained both soft tissue injuries as well as fractures which the trial magistrate considered in making the impugned award. Counsel reproduced the injuries sustained to be:

    i. tenderness on the chest right side;

    ii. swollen left leg thigh with cut wounds and compound fracture

    iii. cut wound on the right knee joint and tender;

    iv. compound fracture of the left femur

26. That the respondent was admitted in Kinangop Hospital for fourteen days and later referred to Nightingale Catholic Hospital for continued treatment which show the seriousness of the injuries sustained that warranted the award of kshs 2,000,000 by the trial court, which award, according to the respondent's counsel, was justified and was not inordinately high to warrant interference by this court as there is no evidence that the trial court acted on wrong principles of law, misapprehended the facts or made a wholly erroneous estimate of the damages suffered by the respondent herein.

27. The respondent's counsel contended that it was not correct for the appellant to allege that the trial magistrate did not consider the authorities cited by the appellant or that she never referred to the cited authorities and made reference to pages 5,6 and 8 of the trial court's judgment. Further, that the award made was not excessive as it was in comparison to the injuries suffered by the respondent hence this court has no reason to interfere with the same. Counsel maintained that the trial court never made any errors in arriving at her judgment as it arrived at its decision based on the evidence and the law as well as the submissions by both parties. He urged this court to dismiss the appeal herein with costs.

**Analysis and Determination**

28. I have considered the appeal herein, the grounds and submissions by both parties' Counsel. This being a first appellate court, its duty as stipulated in section 78 of the Civil Procedure Act and as interpreted in several judicial pronouncements is to reassess, reevaluate and re analyze the evidence adduced before the trial court and reach its own independent conclusion bearing in mind that unlike the trial court, it never had the opportunity to see and hear witnesses as they testified.

29. In the case of Sielle vs Associated Motor Boat Company Ltd [1968] EA 123 by Sir Clement De Lestang, it was held that:

> " This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

30. Regarding the quantum of damages, the established principle of law to be applied by the appellate court is that an appellate court ought to be reluctant in interfering with the award by the lower court unless the award is outrageously erroneous or unreasonable. This court would be guided by the finding in the case of Butt V Khan [1981] KLR 349 that (per Law JA:

> " ...an appellate court will not disturb an award of damages unless it is as inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principle, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...."

31. In Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR Nairobi CoA Civil Appeal No. 60 of 2004, the Court of Appeal confirmed the approach earlier set out in in Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v A.M.M Lubia and Another, and stated that:

> " This Court has in the past propounded on the principles to be applied while considering whether to interfere with damages awarded by the trial Court. In Kemfro Africa Limited t/ a Meru Express Service Gathogo Kanini v. A.M.M Lubia and Another [1982 – 88] 1 KAR 777 at p.730, Kneller, J. A. held: -
>
> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango v. Manyoka [1961] EA 705 709, 713; Lukenya Ranching and Farming Co-operatives Society Lt v. Kavoloto [1970] EA, 414 418, 419."

32. In the earlier case of Arrow Car Limited –vs- Bimomo & 2 Others (2004) 2 KLR 101 the Court of Appeal cited and applied the Kemfro Africa LTD case (supra) with regard to the principles to be considered before interfering with an award of damages by a trial Judge when it held that:

> " In deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must a wholly erroneous estimate of the damage."

33. In my view, the main issue for determination is whether the appeal challenging the quantum of damages awarded by the trial court has merit, applying the above laid down principles.

34. Revisiting the evidence before the trial court, the respondent was on 22.6.2019, a pillion passenger on a motorcycle, which collided with the Defendant's motor vehicle registration number KCJ 690 X, as a result of which she sustained injuries which she pleaded at paragraph 4 of the plaint. She sustained soft tissue injuries on her chest and right knee joint and two fractures on her right femur.

35. In her sworn testimony, the Plaintiff stated that after the accident, she was first treated at Nightingale Hospital Kisumu before being referred to North Kinangop where she underwent further treatment. Her discharge summary from North Kinangop Hospital dated 8.7.2019, Hospital (Exhibit 6), shows that she had a diagnosis of severe anaemia and right distal femur compound communited intra articular fracture. In a second discharge summary, the injuries seen were closed intra-articular fracture of the femur.

36. Dr. Okombo's report, Exhibit 3, shows that the Plaintiff sustained the two fractures of the right femur and soft tissue injuries.

37. The latest report is that of Dr. Tobias Otieno, produced as D. Exhibit -1. It showed that the Respondent's injuries were right femur compound fracture and a right intra-articular femur fracture. He found that the respondent had suffered 25% disability.

38. In the impugned judgment at page 162 of the trial court record, the trial magistrate stated that she had a chance to look at the precedents cited by the Appellant, and that they were determined by the court some years back. In awarding damages in the suit, she stated that she would consider the times we live in and the inflation of our economy.

39. She then awarded Kshs 2,000,000.00 general damages relying on two cases of Edwin Otieno Japaso vs Easy Coach Bus Ltd [2016] eKLR, and Charles Niaumenge Wachama vs Melek Ukongo [2011] eKLR.

40. The appellant's counsel submitted proposing an award of kshs 700,000 general damages while the respondent's counsel proposed an award of kshs 5,000,000.

41. In the case of Simon Taveta v Mercy Mutitu Njeru [2014] eKLR, the Court of Appeal stated as follows:

> "In Denshire Muteti Wambua – v- Kenya Power & Lighting Co, Ltd. Civil Appeal No. 60 of 2004, this Court differently constituted (G.B.M. Kariuki, Kiage and Murgor JJ.A.) reiterated the principles under which this Court would interfere with the award of damages as stated and applied in the Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini – v- A.M.M. Lubia & Another, (1982-88) 1 KAR 777. In the case of Arrow Car Limited – v- Bimomo & 2 Others, (2004) 2 KLR 101, it was stated that comparable injuries should as far as possible be compensated by comparable awards. In Denshire Muteti Wambua – v- Kenya Power & Lighting Co, Ltd. Civil Appeal No. 60 of 2004, it was stated that awards have to make sense and have to have regard to the context in which they are made; they have to strike a chord of fairness. As was stated by Lord Denning in Kim Pho Choo – v – Camden & Islingtom Area Health Authority, (1979) 1 All ER 332, in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation for both the plaintiff and the defendant.
>
> In the instant case, the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

42. I have examined the ten (10) cases cited by the appellant against the two cases cited by the respondent. It is crystal clear that the cases cited by the respondent were old and the injuries sustained by the claimants in the said cases were much more serious than the respondent herein. In addition, and as correctly submitted by the appellant's counsel, the case of Charles Niamenge Wachama(supra) cannot be located from Kenyalaw.org and it is not clear whether it is unreported and if so, why did the respondent's counsel not supply the court with the decision for perusal and consideration.

43. On the other hand, I find that the ten decisions cited by the appellant's counsel were all recently decided, between 2018 and 2021 and that the injuries sustained by the claimants in those cases were similar in nature and extent to those injuries suffered by the respondent herein. Accordingly, I am inclined to agree with the complaint by the appellant that the trial court did not consider relevant factors in making the award and that as a result, she erred in principle in making an award that was manifestly excessive and not in consonance with the injuries sustained by the respondent as the cases that she relied on were not comparable in terms of the injuries sustained and the awards made.

44. In the end, I find and hold that this appeal has merit and the same is hereby allowed. I set aside the award of kshs 2,000,000 general damages awarded to the respondent/plaintiff in the lower court and substitute the same with an award of kshs 800,000 general damages which will attract interest at court rates to be calculated from the date of judgment in the lower court until payment in full.

45. As the award has been substantially reduced by this court, I order that each party to bear their own costs of the appeal herein.

46. The lower court to be returned to the lower court with a copy of this judgment.

47. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2023**

**R.E. ABURILI**

**JUDGE**