



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndumia v Mwirisha (Civil Appeal E043 of 2021)  
[2022] KEHC 16742 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16742 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E043 OF 2021  
RN NYAKUNDI, J  
DECEMBER 23, 2022**

**BETWEEN**

**MOSES NDUMIA ..... APPELLANT**

**AND**

**REBECCA ASWA MWIRISHA ..... RESPONDENT**

*(Being an Appeal from judgment of Hon. N. Wairimu Chief Magistrate  
in Eldoret CMCC NO. 858 OF 2017 delivered on the 26th day June, 2020)*

**JUDGMENT**

**Coram: Hon. Justice R. Nyakundi**

**M/S Mwinamo Lugonzo & CO. Adv for the respondent**

**Kimondo Gachoka & CO. Adv for the appellant**

1. The appeal herein arises from the judgment delivered on June 26, 2020 in Eldoret CMCC No 858 of 2017. The subject of said suit was a claim that on April 24, 2017, the plaintiff sustained injuries as a result of an alleged road traffic accident that took along Eldoret- Munyaka road. It was alleged that the plaintiff was a lawful when motor vehicle KAH 012V belonging to the defendants allegedly knocked him down.
2. After hearing the matter, considering the evidence and testimonies of all the parties, the trial court awarded the plaintiff Kshs 500,000 being general damages rendered as well as special damages of Kshs 6,000. Liability was apportioned at 100% in favour of the plaintiff.
3. The defendant being dissatisfied with the judgment of the court instituted the present appeal *vide* a memorandum of appeal dated May 5, 2021. The grounds of the appeal as set out were;



1. That the learned trial magistrate's decision was unjust, against the weight of the evidence and was barred on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
2. That the learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in the [Insurance \(Motor Vehicle Third Party Risks\) \(Amendment\) Act, 2013](#), cap 405
3. The learned magistrate erred in fact in awarding damages inconsistent with injuries pleaded and proved to have been sustained by the plaintiff.
4. The learned magistrate having misapprehended and misunderstood the extent and severity of the injuries erred in law and in fact in relying on authorities that were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.
5. The learned magistrate erred in assessing an award hereunder, which was a wholly erroneous estimate of the loss and damages suffered by the plaintiff; Liability 100% in favour of the plaintiff as against the defendants General Damages – Kshs 500,000/- Special Damages – Kshs 6,000/-

### **Appellant's Case**

4. The appellant's case is that the appeal can be summed down to one of quantum. learned counsel for the appellant contended that the award of Kshs 500,000/- was too high in the circumstances. it is trite law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. However, the law has set dimensions for an exercise of discretion; must be exercised judicially and upon some legal principles. The discretion in assessing the amount of general damages payable will be disturbed if the trial court;
  - i. Took into account an irrelevant factor or,
  - ii. Left out of account a relevant factor or, short of this
  - iii. The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.
5. It is also trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. He relied on the cases of [Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd \[2013\] eKLR](#) and [Godfrey Wamalwa Wamba & another v Kyalo Wambua \[2018\] eKLR](#) in support of this submission. The appellant urged the court to set aside the award of Kshs 500,000/- and substitute it with an award of Kshs 70,000/-. He cited the following cases in support of the proposed award of Kshs 70,000/-. HCA No 28 of 2012 (Eldoret) [George Kinyanjui t/a Climax Coaches v Equity Bank Ltd \(2016\) eKLR](#) (as quoted in [Patrick Mudava Kweyu v Pan Africa Chemical Ltd \[2016\] eKLR](#)) where the High Court reduced an award of Kshs 650,000/= for soft tissue injuries (including loss of two molars, but not related to the accident) to Kshs 120,000/= for multiple bruises, severe head injury and trauma to the neck limbo sacral spine, left shoulder and left knee. He also relied on [Eldoret Steel Mills Ltd v Charles Owino](#) (Civil Appeal No 81 of 2005 - judgment delivered in July 2012 (2012)KLR (as quoted in [Patrick Mudava Kweyu v Pan Africa Chemical Ltd \[2016\] eKLR](#)), the court awarded Kshs 80,000 as reasonable compensation as in [Kenya Tea Development Agency Limited v Josephine Kwamboka \(2012\) KLR](#) (In Kisii Civil Appeal No 307 of 2000-) Judgment in November 2012 (as quoted in [Patrick Mudava Kweyu v Pan Africa](#)



*Chemical Ltd [2016] eKLR*), where an award of Kshs 100,000 was made. In both matters, the injuries sustained were soft tissue, cuts, bruises and blunt trauma injuries.

6. The appellant cited section 27 of the *Civil Procedure Act* and contended that he is deserving of the costs of the appeal.

### **Respondent's Case**

7. The respondent's case is that the subordinate court thus properly found the appellant 100% liable for the accident.
8. As the appeal is one against damages, the court shall consider the submissions on damages. The respondent submitted that from the medical documents the respondent sustained the following injuries:-
  - a. Blunt injury to the scalp.
  - b. Blunt injury to the neck.
  - c. Blunt injury to the chest.
  - d. Blunt injury to the right shoulder.
  - e. Blunt injury to the pelvis.
  - f. Dislocation of the right knee due to blunt trauma.
  - g. Cut wound on the right knee laterally.
9. Learned counsel submitted that the award granted as general damages was sufficient for the injuries sustained. The following cases were relied upon as authorities with comparable injuries and damages to guide the award;

Nairobi HCCC No 2425 of 1990 – *Irene Egirma Nthiga v Nairobi Bus Union Ltd* where the plaintiff sustained fracture of the right acetabulum and dislocation of the right knee and torn ligaments and General damages were assessed at Kshs 450,000, Mombasa HCCC No 228 of 1987 Amrateen D Shah v Joseph Macklo Nyangawo where the plaintiff sustained fracture dislocation of the central hip and fracture of the 12<sup>th</sup> rib of the left side and the court awarded general damages of Kshs 420,000,.
10. The respondent urged that the appeal be dismissed with costs.

### **Analysis & Determination**

11. I have considered the record of appeal, memorandum of appeal and the submissions of both parties and it emerges that the only issue for determination is the issue of quantum.
12. In *Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*, the Court of Appeal held that –

...it is firmly established that this court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie [1941] 1 All ER*



297. It was echoed with approval by this court in [Butt v Khan \[1981\] KLR 349](#) when it held as per law, JA 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.’ (Emphasis my own).

13. In the case of [Savanna Saw Mills Ltd v Gorge Mwale Mudomo \(2005\) eKLR](#) the court stated as follows:

It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”

14. In line with the principle of awarding damages based on comparable awards, I shall proceed to analyse comparable awards for the injuries sustained by the respondent to discern whether the trial court proceeded on wrong principles in its award. I wish to point out that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered, not to mulct the tortfeasor for the injury he has caused (see the case of [Lim v Camden HA {1980} AC 174](#)). There is a distinct difference between the pain and suffering experienced by a victim of an accident with serious multiple skeletal injuries in contrast with that of low-level soft tissue injuries.

15. The respondent sustained the following injuries;

- a. Blunt injury to the scalp.
- b. Blunt injury to the neck.
- c. Blunt injury to the chest.
- d. Blunt injury to the right shoulder.
- e. Blunt injury to the pelvis.
- f. Dislocation of the right knee due to blunt trauma.
- g. Cut wound on the right knee laterally.

16. The injuries are majorly soft tissue injuries. In [Elizabeth Wamboi Gichoni v Bernard Ouma Owuor \[2019\] eKLR](#) the court set aside an award of Kshs 300,000 made by the trial court and substituted the same with an award of Kshs 175,000/=. The respondent had sustained the following injuries;

- a. Mild head injury due to concussion.
- b. Multiple cut wounds on the scalp.
- c. Cut wound on the left lateral orbital region.
- d. Blunt injury to the chest.
- e. Multiple bruises on the left upper limb.
- f. Bruises on the gluteal region



- g. Blunt injury on both knees.
17. In *Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR* the respondent sustained the following injuries;
- a. Bruises on the scalp
  - b. Bruises on the neck
  - c. Bruises on the abdomen
  - d. Bruises on the lower back
  - e. Cut wound on the left thumb
  - f. Cut wound on the left palm
  - g. Subluxation of the left shoulder joint
  - h. Fractured 3rd and 9th ribs
  - i. Cut wound on the left foot near the ankle joint.
18. The appellate court set aside the award of Kshs 586,140/= and substituted it with a judgment of Kshs 364,140/=.
19. The trial court in the present appeal awarded damages of Kshs 500,000/- for soft tissue injuries which consisted of;
- a. Blunt injury to the scalp.
  - b. Blunt injury to the neck.
  - c. Blunt injury to the chest.
  - d. Blunt injury to the right shoulder.
  - e. Blunt injury to the pelvis.
  - f. Dislocation of the right knee due to blunt trauma.
  - g. Cut wound on the right knee laterally.
20. Upon considering comparable awards for similar injuries, and taking into account inflation and the time passed since the awards in the same, I find that the trial court did not proceed on wrongful principles. There is no reason to warrant the setting aside and substitution of the damages.
21. The appeal is dismissed with costs to the respondent.
22. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23<sup>TH</sup> DAY OF DECEMBER, 2022.**

**R NYAKUNDI**

**JUDGE**

