



**Mutuku & another v Mangi (Civil Appeal E325 of 2023)  
[2025] KEHC 1896 (KLR) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1896 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E325 OF 2023  
JK NG'ARNG'AR, J  
FEBRUARY 4, 2025**

**BETWEEN**

**CHARLES MUTUKU ..... 1<sup>ST</sup> APPELLANT**

**JESUS CELEBRATION CENTER MOMBASA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ALICE WAGHUMBI MANGI ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. G. Sogomo (PM) delivered on 3rd November 2023 in Mombasa Chief Magistrate's Court Civil Suit No. 54 of 2018, Alice Waghumbi Mangi v Charles Mutuku Kituu & Jesus Celebration Center Mombasa)*

**JUDGMENT**

1. The background of the appeal is that vide an amended plaint dated 18<sup>th</sup> January 2018, the Plaintiff/Respondent averred that at all material times to the suit, the 2<sup>nd</sup> Defendant/Appellant was the registered owner of motor vehicle registration number KAS 791T Tata Bus while the 1<sup>st</sup> Defendant/Appellant was the driver and/or the person in actual possession, care and control of the said motor vehicle.
2. The Plaintiff/Respondent averred that on or about 22<sup>nd</sup> day of April 2016 while she was travelling in motor vehicle registration number KBK 799X Nissan Matatu along Ronald Ngala Road at JCC junction, the 1<sup>st</sup> Defendant and/or 2<sup>nd</sup> Defendant's driver, agent, servant and/or employee so negligently, carelessly and without regard to other road users drove, managed and/or controlled motor vehicle registration number KAS 791T Tata bus which suddenly drove into the front part of the said motor vehicle registration number KBK 799X Nissan Matatu causing it to ram into the bus, resulting in severe collision hence the Plaintiff was injured. The injuries suffered by Plaintiff/Respondent included dislocation of the right hip, fracture of acetabulum and a large 12 x 12 degloving wound on the right calf.



3. The Plaintiff/Respondent prayed for damages against the Respondent for general damages, special damages of Kshs. 217,663.70, costs of the suit plus interest on general damages and special damages at court rates from date of filing suit, and any other relief that this court may deem just and fit to grant.
4. This suit was heard in the trial court and judgment delivered on 3<sup>rd</sup> November 2023 where the court held that by dint of an oral consent recorded in court on 22<sup>nd</sup> June 2023, liability was agreed at 80:20 in favour of the Plaintiff as against the Defendants. For general damages, the court awarded Kshs. 1,000,000 for pain and suffering and loss of amenities less Kshs. 200,00 which was the 20% contribution. The total amount awarded to the Plaintiff was therefore Kshs. 800,000, and that costs and interest were to be assessed.
5. Being dissatisfied, the Appellant appealed against the Judgment delivered on 3<sup>rd</sup> November 2023 through the Memorandum of Appeal dated 8<sup>th</sup> November 2023 on grounds that the trial court assessment of damages was too arbitrary and did not even consider precedents, that the learned trial court magistrate erred in law and in fact in assessing and awarding quantum of Kshs. 1,000,000 as general damages for pain and suffering, and loss of amenities which was too inordinately high hence the erroneous and unreasonable estimate of damages, that the learned trial magistrate applied the wrong principles of law by taking into account some irrelevant factors and leaving out of account relevant ones hence arriving at an erroneous award for damages, and that the learned trial magistrate erred in law and in fact by only considering the Respondent's submissions and not the Defendant's.
6. The Appellant prayed for orders that the appeal be allowed, that the court be pleased to set aside the assessment of general damages for pain and suffering and loss of amenities, and reassess damages awarded to the Plaintiff downwards.
7. The appeal was canvassed by way of written submissions. The Appellants in their submissions dated 20<sup>th</sup> April 2024 argued that this being an appeal against assessment of damages, this court's jurisdiction is hinged on the principles set out in *Agnes Kamene Mulyali v Harvest Limited* (2017) eKLR. The Appellants submitted that the award for damages was inordinately high and did not take into account awards for comparable injuries hence violated necessary principles for assessment of damages.
8. The Appellants further submitted that in assessing damages, the Respondent produced a medical report by Dr. Ndegwa who is a general physician while the Appellant produced a medical report by a consultant orthopedic surgeon Dr. Udayan R. Sheth. That considering Dr. Udayan R. Sheth expertise and the fact that he saw the Respondent last after the process of healing had progressed a lot, the Appellants submitted that Dr. Udayan R. Sheth's medical report could form a better guide on the state of the Respondent. That from the said report, the Respondent had suffered fracture of the right acetabulum and dislocation of the right hip degloving injury to the right calf. That at the time the doctor saw her on 30<sup>th</sup> November 2020, she had fully recovered with no deformity. The Appellants therefore urged the court to hold as such.
9. On general damages for pain, suffering and loss of amenities, the Appellant cited the case of *Joseph Nyaboke Nyanchari v Stanley Nyabuto Mose* (2021) eKLR where the court awarded Kshs. 650,000, *Faith Mumbua Kiiro v Patel Devika* (2018) eKLR where the court awarded Kshs. 300,000 and in *Samuel Mwololo Wambua v Doris Mumo Kakundo*, Mombasa HCCA No. 171 of 2022 where the court awarded Kshs. 600,000 for similar injuries. The Appellants therefore proposed Kshs, 500,000 for pain, suffering and loss of amenities.
10. The Respondent in her submissions dated 30<sup>th</sup> October 2024 contended that she suffered severe injuries as a result of the accident and the award of Kshs. 1,000,000 would not adequately compensate her. The Respondent cited the cases of *Cecilia W. Mwangi & Another v Ruth W. Mwangi* (1997)



eKLR, *Kim Phoo Choo v Camden & Islington Area Authority* (1979) 1All ER 332 on the principles of assessment of damages. The Respondent submitted that the award of Kshs. 1,000,000 was fair and reasonable and reassessing the award downwards would be unreasonable and unjust considering the injuries sustained and the rate of inflation. The Respondent further cited the case of *Kitavi v Coastal Bottlers Limited* (1985) eKLR.

11. In instances where similar injuries were sustained, the Respondent relied on the holding in *Kimathi Muturi Donald v Kevin Ochieng' Aseso* (2021) eKLR where the court awarded Kshs. 1,849,247, *Peris Wanjiru Kahiga v Moses Kabata Mwangi* (2020) eKLR where the court awarded Kshs. 1,434,200 and *Nguku v Kiria-ini Farm (Civil Appeal 267 of 2020)* (2022) KEHC 342 (KLR) (Civ) (5<sup>th</sup> May 2022) (Judgment) where the court awarded Kshs. 1,800,000. The Respondent prayed that the appeal be dismissed with costs.
12. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
13. I have considered the Record of Appeal dated 27<sup>th</sup> March 2024 and submissions by the parties. The issues for determination are: -
  - a. Whether the amount of Kshs. 1,000,000 awarded for general damages for pain and suffering, and loss of amenities was fair in the circumstances.
  - b. Who should bear costs.
14. The Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR 5 set out circumstances under which an award for damages can be disturbed as follows: -

“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.”
15. The injuries pleaded by the Plaintiff in the amended complaint included fracture of the right acetabulum, dislocation of the right hip and a large 12 x 12 cm degloving wound on the right calf.
16. This court has perused the evidence on record and established that according to the medical report dated 4<sup>th</sup> April 2019 prepared by Dr. S.K. Ndegwa, the Plaintiff suffered the injuries as pleaded where she was admitted for 52 days at the Coast General Hospital. According to the report, she underwent radiological imaging which confirmed the injuries and she was operated on the right hip where screws were inserted to fix acetabular fracture. The hip dislocation was reduced and she underwent surgical toilet and skin grafting of the wound on the right calf. Dr. S.K. Ndegwa formed the opinion that the Plaintiff sustained severe injuries, was treated and healing was expected with 8% permanent disability due to the expected post trauma arthritis of the hip, weak bone union, that could fracture again, chronic pains and extensive scars. He stated that future medical costs for removal of the surgical metal implants would be Kshs. 70,000 at the Coast General Hospital.
17. Dr. Udayan R. Sheth prepared a medical report dated 30<sup>th</sup> November 2020 where the Plaintiff complained of pain on the calf and right hip. On examination, the doctor formed the opinion that



there was a 20 cm x 10 cm scar over the right calf, 25 cm healed scar mark over the right buttock to thigh. The doctor stated that movement of the right hip, knee and ankle were full, he found skin grafting donor site over the right thigh and that there was no limp. The doctor formed the opinion that the Plaintiff was fully recovered and there was no deformity and permanent disability.

18. The Appellants proposed an award of Kshs. 500,000 by citing the cases of Joseph Nyaboke Nyanchari v Stanley Nyabuto Mose (2021) eKLR, Faith Mumbua Kiio v Patel Devika (2018) eKLR and Samuel Mwololo Wambua v Doris Mumo Kakundo, Mombasa HCCA No. 171 of 2022 where the court awarded Kshs. 650,000, Kshs. 300,000 and Kshs. 600,000 respectively.
19. The Respondent opposed interference with the award and suggested that if at all there was any, the same ought to be revised the same ought to be revised upwards. She relied on the cases of Kimathi Muturi Donald v Kevin Ochieng' Aseso (2021) eKLR, Peris Wanjiru Kahiga v Moses Kabata Mwangi (2020) eKLR and Nguku v Kiria-ini Farm (Civil Appeal 267 of 2020) (2022) KEHC 342 (KLR) (Civ) (5<sup>th</sup> May 2022) (Judgment) where the court awarded Kshs. 1,849,247, Kshs. 1,434,200 and Kshs. 1,800,000 respectively.
20. This court relies on the case of Gitonga v Kalunge (Civil Appeal E034 of 2021) [2022] KEHC 3070 (KLR) (30 June 2022) (Judgment) where the injuries sustained included brain contusion with loss of consciousness for 2 hours and disorientation for 4 days, soft tissue injuries anterior chest, soft tissue injuries left shoulder, and left acetabulum fracture with posterior hip dislocation. The court awarded Kshs. 1,700,000.
21. Further, in the case of Geoffrey Maraka Kimchong v Frechiah Hugiru (2020) eKLR, the injuries suffered were cut wound on the cheek which was tender, blunt trauma to the pelvis which was tender and fracture of the right acetabulum. The court in this case awarded Kshs. 1,000,000.
22. It is therefore the considered view of this court that the award of Kshs. 1,000,000 by the trial court was fair in the circumstance.
23. Accordingly, the appeal herein lacks merit and is dismissed. Judgment of the trial court is upheld. The Appellants to bear costs.

**DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

..... Advocate for the Appellants

..... Advocate for the Respondent

Court Assistant – Shitemi

