



**NK Brothers Limited & another v Kihaki (Commercial Appeal
E169 of 2023) [2025] KEHC 4083 (KLR) (Civ) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
COMMERCIAL APPEAL E169 OF 2023
MN MWANGI, J
MARCH 21, 2025**

BETWEEN

NK BROTHERS LIMITED 1ST APPELLANT

KIPYEGON ARAP TOWETT 2ND APPELLANT

AND

JAMES ONDOYO KIHAKI RESPONDENT

(Being an Appeal from the judgment and decree of Hon. Benson Kabanga, Resident Magistrate, delivered on 5th May 2023 in Milimani CMCC NO. 5353 of 2020)

JUDGMENT

1. The respondent (plaintiff in the lower Court) filed a suit against the appellants (defendants in the lower Court), wherein he sought for judgment against the appellants for general and special damages, future medical surgery, costs of the suit and interest on damages. The respondent's case was that he was involved in a road traffic accident on 22nd August 2020 while lawfully riding motorcycle Reg. No. KMDV xxxF along Ngong Road, Nairobi, as a result of which he sustained serious injuries causing him to suffer loss and damage. He averred that the said accident was caused by the 2nd appellant who negligently drove motor vehicle Reg. No. KBS xxxK by inter alia, driving at excessive speed, failing to give adequate warning, and recklessly turning into the respondent's path. He contended that since the 1st appellant was the registered owner of the said motor vehicle, it was vicariously liable for the 2nd appellant's actions.
2. In opposition to the suit, the appellants filed a statement of defence dated 9th October 2020, wherein they denied all the averments contained in the respondent's plaint. They averred that the alleged injuries sustained by the respondent and the consequent loss and damage suffered were wholly caused



- or substantially contributed to, by the respondent's negligence by inter alia, failing to keep a proper lookout, riding off the kerb into the road without allowing the 2nd appellant time to react, attempting to cross unsafely, stopping aimlessly on the road, and ignoring warnings from the 2nd appellant.
3. The lower Court entered judgement on 24th May 2023 against the appellants for Kshs.7,700/= in special damages, Kshs.850,000/= in general damages, Kshs.20,000/= for future medical expenses, costs of the suit and interest at Court rates from the date of judgment until payment in full.
 4. The appellants being aggrieved by the said decision, lodged an appeal against it vide a Memorandum of Appeal dated 26th July 2023 raising the following grounds of appeal -
 - i. That the learned Trial Magistrate erred in law and fact in the manner that he assessed damages for pain and suffering; and
 - ii. That the learned Trial Magistrate erred in law and fact in awarding the plaintiff damages for pain and suffering in the sum of Kshs.850,000/= which was manifestly excessive as to amount to an erroneous estimate of damages for the injuries suffered by the plaintiff.
 5. The appellants' prayer is for this Court to allow this appeal with costs, set aside the judgment delivered by the Trial Magistrate and re-assess damages to be awarded for pain and suffering.
 6. The instant appeal was canvassed by way of written submissions. The appellants' submissions were filed on 17th September 2024 by the law firm of Mwangi & Mwaura Advocates, whereas the respondent's submissions were filed by the law firm of Robert Case & Partners on 30th September 2024.
 7. Ms Mwaura, learned Counsel for the appellants submitted that the lower Court erred by relying on misleading and exaggerated claims from the respondent, failed to properly interrogate the evidence, and disregarded the appellants' submissions and legal precedents. She contended that the respondent's evidence was contradictory and unsubstantiated, casting doubt on the credibility of the claims regarding the alleged injuries. Ms Mwaura argued that the award of Kshs.850,000/= in general damages was excessively high for the injuries sustained by the respondent, which were primarily soft tissue injuries that have since healed, and that the respondent had resumed his normal duties as a mechanic. She relied on the case of *Eastern Produce (K) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi* [2013] eKLR, and urged this Court to set aside the Trial Court's award in general damages and substitute it with an award of Kshs.80,000/=.
 8. Mr. Ombuna, learned Counsel for the respondent submitted that the Trial Court's award was too low given the severity of the injuries sustained by the respondent. He urged this Court to increase the award of Kshs.850,000/= in general damages to Kshs.1,500,000/= or preferably Kshs.2,000,000/=. He argued that since the appellants failed to file submissions at the Trial Court, attempting to introduce them in the Record of Appeal is not only unprofessional but also dishonest. He urged this Court to dismiss the instant Appeal and enhance the respondent's compensation to reflect the serious impact of the injuries on his quality of life and earning capacity.

Analysis and Determination.

9. I have examined the Record of Appeal and given due consideration to the submissions filed by the parties' respective Counsel. This being a first appeal, I am under an obligation to re-evaluate and re-assess the evidence adduced and make my own conclusions. In doing so, I am reminded to keep in mind that a Trial Court unlike the Appellate Court, had the advantage of observing the demeanour



of witnesses and hearing their evidence first hand. This position was stated by the Court in *Peters v Sunday Post Limited* [1985] EA 424 as follows–

It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses... But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

10. On perusal of the pleadings and submissions filed by the parties herein, it is evident that this appeal is on quantum of damages since the appellants challenge the Trial Court's award on general damages for pain and suffering. That being the case, the issue that arises for determination is whether the Trial Court's award on general damages was so manifestly excessive and/or inordinately high in the circumstances of this case, to warrant interference by this Court.

11. The principles which ought to guide a Court in determining whether to disturb an award of damages were set down by the Court of Appeal in *Butt v Khan* [1978] KECA 24 (KLR) as follows –

An appellate court will not disturb an award for damages unless it is 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.

12. Further, the Court of Appeal in *Kemfro Africa Limited t/a Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* (1982-88) I KAR 727 at page 730 held as follows on quantum of damages–

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 damages.

13. In this Appeal, the Trial Court awarded the respondent Kshs.850,000/= as general damages for pain and suffering. The appellants' Counsel submitted that the said award was excessively high compared to the injuries sustained by the respondent, which were primarily soft tissue injuries that have since healed, and that the respondent had resumed his normal duties as a mechanic. The appellants urged this Court to set aside the said award and substitute it with an award of Kshs.80,000/=.

14. It is now well settled that monetary compensation can never fully remedy the pain and suffering caused by injuries sustained as a result of a road traffic accident. Further, no specific amount can precisely match the harm endured. Damages are therefore an assessment of what is reasonable to provide relief to the injured party. I concur with the Court's finding in the case of *Kigaragari v Aya* [1982-88] 1 KAR 768 cited by the Court in *Daniel Kosgei Ngelechi v Catholic Trustee Registered Diocese of Eldoret & another* [2013] eKLR that–

Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee...



15. Similarly, in *P N Mashru Limited v Omar Mwakoro Makenge* [2018] eKLR, the Court made the following observation in respect to assessment of damages-

In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff's compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents.

16. In determining the general damages to be awarded, Courts have a responsibility to keep themselves apprised of recent authorities and take into account inflation which has taken a toll on the value of the Kenya Shilling.
17. It is not disputed that the respondent herein submitted two conflicting Medical Reports, both dated 25th November 2020, by Dr. Roger Hannington Kayo. The Trial Court noted the said contradictions, which it deemed as unacceptable and since it was unclear which Medical Report was officially produced at trial, the said Court disregarded both Reports and relied on the Doctor's oral testimony to determine the quantum of damages.
18. The Trial Court further found that the injuries sustained by the respondent as a result of the road traffic accident included severe head injuries with multiple fractures, fractures of two (2) teeth and a pelvic fracture. The Trial Court further noted that according to the Doctor who testified on behalf of the respondent, the respondent suffered a permanent disability of 20% and would require Kshs.20,000/= for teeth replacement. That being the case, the amount of Kshs.80,000/= that has been proposed by the appellants' Counsel as compensation for general damages is a far cry from the severity of injuries sustained by the respondent. This Court notes that in as much as the respondent's Counsel submitted that the award of Kshs.850,000/= in general damages should be increased to at least Kshs.1,500,000/= or Kshs.2,000,000/=, the respondent did not file a cross-appeal for this Court to consider if there is any justification to increase the award on general damages.
19. In the case of *Azhar Ali v Sheikha Mohamed* [2020] KEHC 5294 (KLR), the Court affirmed the Trial Court's award of Kshs.1,500,000/= general damages for pain and suffering and loss of amenities, where the respondent sustained a head injury, loss of upper 4 incisors, fracture of the right humerus arm bone, fracture of the pelvis (right superior and inferior pubic bones), cuts on the lips and nasal bridge, and a 10% permanent disability.
20. In the case of *George Raini Atungu v Jared Ogwoka Ondari* [2021] KEHC 1612 (KLR), the Court affirmed the Trial Court's award of Kshs.1,000,000/= general damages where the respondent sustained a head injury with cut wounds on the left parietal region of the head, chest contusion, fracture of the ribs on the right side, multiple bruises on the upper limbs bilaterally, fracture of the right tibia/fibula bones, fracture of the pelvis and multiple bruises of cut wounds on the lower limbs, and a 20% permanent disability.
21. In this appeal, the Trial Court relied on the decision in *Mwangi alias Luke Wambugu Mwangi v Irungu* [2022] KEHC 14346 (KLR). In the said authority, the Appellate Court set aside the Trial Court's award of Kshs.3,000,000/= general damages and substituted it with an award of Kshs.800,000/=, where the respondent had sustained a severe head injury with a Glasgow coma scale (GCS) of 3/15 (normal being 15/15), multiple loose teeth, a comminuted fracture of the right humeral head and neck and a compound segmented fracture of the left tibia-fibula.
22. Bearing in mind the injuries sustained by the respondent herein, and the principle of comparable awards for comparable injuries, I do not find that the award of Kshs.850,000/= general damages for



pain and suffering awarded by the Trial Court was manifestly excessive and/or inordinately high to warrant interference, in view of the serious injuries sustained by the respondent. Further, the appellants have failed to demonstrate that the Trial Court proceeded on wrong principles, or misapprehended the evidence in some material respect in arriving at its decision.

23. The upshot is that the instant appeal is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF MARCH 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Mwaura for the appellants

No appearance for the respondent

Ms. B. Wokabi – Court Assistant.

