



REPUBLIC OF KENYA



KENYA LAW
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**Musau & another v Ngugi (Civil Appeal E310 of 2021)
[2025] KEHC 5044 (KLR) (Civ) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E310 OF 2021

AB MWAMUYE, J

APRIL 8, 2025

BETWEEN

JOHN NJUGUNA MUSAU 1ST APPELLANT

DANIEL NJAU WAWERU 2ND APPELLANT

AND

JUDY WANJIKU NGUGI RESPONDENT

(Being an appeal from the judgment of Hon. E. Wanjala (Ms) Principal Magistrate at Chief Magistrate's Court at Nairobi in CMCC No. 8295 of 2018 delivered on 21st May, 2021)

JUDGMENT

Introduction And Background

1. This is an Appeal arising out of the judgment delivered on 21st May 2021 by Hon. E. Wanjala (Ms) Principal Magistrate, in Nairobi CMCC No. 8295 of 2018. The Respondent sustained injuries in a road traffic accident which occurred on 30th August 2017 along Ronald Ngala Street, Nairobi. She sued the Appellants, alleging that the 1st Appellant was negligent in reversing his vehicle and knocking her into another vehicle, thereby causing her injuries. The 2nd Appellant was sued under vicarious liability as the registered owner of the suit vehicle.
2. The Trial Court found the Appellants 100% liable for the accident and awarded the Respondent Kshs.220,000/= in general damages for pain, suffering, and loss of amenities, together with Kshs.2,550/= in special damages, plus costs and interest. Dissatisfied only with the quantum of damages, the Appellants lodged this appeal.



3. The Appellants filed their Record of Appeal dated 22nd May, 2023. In their Amended Memorandum of Appeal dated 3rd June, 2021, the Appellants raised the following grounds, which I quote verbatim: -
- “i. That the Learned Magistrate erred in law and in fact in not making an award which was within limits of already decided cases of similar nature.
 - ii. That the Learned Magistrate erred in fact in finding that the Respondents were entitled to general damages of Kshs.220,000/- which is too high in the circumstances.
 - iii. It is proposed to ask the Court for the following Orders that: -
 - a. This Appeal be allowed with costs
 - b. The Judgment delivered on 21st May 2021 by Hon. E. Wanjala (Ms) Principal Magistrate be set aside.
 - c. This Honorable Court be pleased to substitute the award under general damages with an appropriate amount.
 - d. Such further orders may be made by this Honourable Court may deem fit to grant. “
4. The Appeal was canvassed by way written submissions.
5. Notably, the Appellants only filed the Record of Appeal but did not file any written submissions in this Court. Conversely, the Respondent filed her written submissions opposing the appeal and urging this Court to dismiss it with costs.

Respondent’s Submissions

6. The Respondent filed her written submissions dated 25th March, 2024 in support of the Trial Court’s award of Kshs.220,000/=. The Respondent avers that the appeal is against the assessment of damages only. The Respondent cites the well-known principle that an appellate court will not interfere with an award of damages unless it is inordinately high or low, or where there is a discernible error of principle that led to an erroneous award.
7. The Respondent relied on the cases of Simon Muchemi Atako & Another vs. Gordon Osore [2013] eKLR and Sosines Orindo vs. E.M.K. Builders Ltd [2019] eKLR to underscore the principle that damages are meant to be assessed with due regard to comparable awards for similar injuries and taking into account inflationary trends. In those authorities, the Court of Appeal reiterated that merely because one tribunal might have awarded a different figure does not constitute a ground to interfere with the trial court’s exercise of discretion.
8. The Respondent averred that she adduced her oral testimony regarding her injuries being soft tissue injuries to the back and pelvis. She testified that she continued to experience back pain long after the accident, relying on painkillers. The medical evidence by Dr. Wokabi, produced in the trial court, corroborated these injuries and confirmed that soft tissue injuries may sometimes take longer to heal, depending on the individual.
9. The Respondent contends that oral testimony she adduced at the trial is sufficient to prove the fact of continuous pain in addition to the medical reports, and that any insistence on written prescriptions or medical documentation was not mandatory given the direct oral account of her continued pain.



10. The Respondent further averred that the Trial Court carefully considered all the relevant factors, the comparable authorities cited, and also took into account inflation. On that basis, the Magistrate's award of Kshs.220,000/= was neither exorbitant nor so low as to warrant interference by an appellate court.
11. The Respondent urges that there is no discernible error of principle or misdirection by the trial court in making the award and that the evidence on record supports the conclusion reached. The Respondent prays that this Court should uphold the trial court's judgment and dismiss this appeal with costs.

Analysis And Determination

12. The duty of the court in a first appeal such as this one was stated in *Selle & Anor –Vs- Associated Motor Boat Co. Ltd.& others* (1968) EA 123 in the following terms:-

“I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif -Vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”

13. This same position had been taken by the Court of Appeal for East Africa in *Peters -Vs- Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

14. It is trite that an application that is not opposed need not automatically succeed. The applicant has a duty to prove his case and the court will determine the same on merit. (See: *Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & Sunkuli & 2 others* (2018) eKLR.)
15. Having carefully examined the Record of Appeal, and in particular the Amended Memorandum of Appeal, the proceedings, and the impugned Judgment; and also the Respondent's submissions, the key issue for determination in this appeal is whether the Trial Court's award of Kshs.220,000/= in general damages warrants interference by this Court.
16. It is trite law that the assessment of damages is predominantly at the discretion of the trial court, and an appellate court will only interfere if:
 - I. The trial court took into account an irrelevant factor or failed to consider a relevant one;
 - II. The amount awarded is so inordinately high or low as to represent an entirely erroneous estimate; or



III The award is based on a demonstrable error in principle.

This principle was reiterated in *Butt vs. Khan* [1981] KLR 349 and *Kemfro Africa Ltd t/a Meru Express Service vs. A.M. Lubia* C.A 21 of 1984 [1982–1988] 1 KAR 727.

17. In order to determine whether the general damages awarded by the trial court can either be upheld or interfered with, it is important to consider what the prognosis was by the doctor who examined the Respondent.
18. In the present case, the Respondent pleaded and proved soft tissue injuries to her lower back and pelvis. Although the medical report by Dr. Wokabi envisaged recovery within six months, the Respondent testified that she still experienced lingering pain and occasionally relied on pain medication. Such testimony was within her personal knowledge.
19. The Trial Court considered comparable authorities cited by both parties, recognized that not all soft tissue injuries heal entirely without complications, and took into account inflation. The award of Kshs.220,000/= was thus premised on evidence and relevant legal principles. Furthermore, the differences in soft tissue injuries are often subtle and subjective. Courts have repeatedly held that a range of figures may be appropriate for such injuries, and it is not for the appellate court to substitute its own figure simply because it might have come to a different conclusion.
20. I am persuaded by what the court in the case *Charles Oriwo Odeyo Vs. Appollo Justus Andabwa & Another* (2017) eKLR stated the guide to courts in assessing damages, as follows: -

“The assessment of damages in personal injury case by court is guided by the following principles: -

 - 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high (See: *Boniface Waiti & Another Vs Michael Kariuki Kamau* (2007) eKLR.”
21. The Appellants, in their Grounds of Appeal, argued that the award was too high and not within limits of already decided cases of similar nature. However, they have not shown on record any convincing comparative authority that would suggest that Kshs.220,000/= is inordinately high nor have they demonstrated that the trial court acted on any wrong principle or overlooked any material factor. Additionally, the Court examined the precedent cited and relied on in the judgment of the Trial Court and they were sound and applicable to the injuries in the matter before the Trial Court. In that respect, the failure by the Appellants to file and serve written submissions was not prejudicial, as this court sitting in first appeal nevertheless was duty bound to gauge whether the grounds of appeal were supported by the case law; in which they were not in the present case.
22. On issues of quantum damages, it is important to note that general damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries.



In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR* thus: -

“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”.

23. I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this court's interference with the discretion as exercised. As regards costs, it is trite that costs follow the event and having filed an unmerited appeal, it is fit and just for the Respondent's costs to be borne by the Appellants.
 24. In the result, and for the reasons outlined, the Court finds that the Appellants have not established any ground warranting interference with the trial court's award of Kshs.220,000/= in general damages. I find no basis to interfere with the lower court's decision as the Trial Magistrate properly identified and applied the relevant law to the facts and the evidence; and arrived at a reasonable award that was in line with precedent.
 25. Consequently, the appeal herein is dismissed with costs to the Respondent which shall be borne by the Appellants, and the costs are assessed at Kenya Shillings Twenty-Seven Thousand (Kshs. 27,000.00)
- It is so ordered. File closed accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS EIGHTH DAY OF APRIL, 2025.

BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Appellants– Ms. Ndisya

Counsel for the Respondent– Ms. Kanana

Court Assistant – Mr. Jared Agara

