



**Mwadundu v Ndwiga (Civil Appeal E010 of 2024)  
[2025] KEHC 6425 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6425 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E010 OF 2024  
RM MWONGO, J  
MAY 21, 2025**

**BETWEEN**

**BENJAMIN JULO MWADUNDU ..... APPELLANT**

**AND**

**ANTONY MUNENE NDWIGA ..... RESPONDENT**

*(Appeal arising from the decision of Hon. T.K. Kwambai CM in  
Embu CMCC No. E075 of 2020 delivered on 17th August 2022)*

**JUDGMENT**

**The Appeal**

1. The appeal herein challenges the judgment of the trial Court in a road traffic accident in which the trial Court awarded as follows:
  - a. 100% liability against the defendant (appellant);
  - b. General damages of Kshs.500,000/-;
  - c. Special damages of Kshs.11,100/-;
  - d. Costs of the suit and interest.
2. The appellant's Memorandum of Appeal dated 07<sup>th</sup> February 2024 seeks orders that:
  - a. This appeal be allowed;
  - b. The judgment of the trial court be set aside with costs to the appellant;
  - c. The honourable court be pleased to apportion liability based on the facts of the case; and



- d. The honourable court be pleased to award the appellant general damages commensurate to his injuries.
3. The appeal is premised on the grounds that the learned magistrate erred in fact and law:
  1. In assessing liability at 100% against the appellant;
  2. In finding that the appellant was entitled to general damages that were too high in view of the injuries suffered by the appellant;
  3. In failing to consider the respondent's submission of quantum; and
  4. In failing to consider conventional awards for general damages in cases of similar injuries.

## **Background**

4. The respondent filed a plaint dated 02<sup>nd</sup> July 2020 seeking judgment against the appellant for special and general damages together with costs and interests. He claimed that on 17<sup>th</sup> November 2019, he was a pillion passenger on motor cycle registration number KMEA 689E ridden by Njeru Ndwiga. They were travelling along Embu-Kiritiri Road when, near Rupingazi area, the appellant, his agent, servant, employee, assignee or driver so negligently drove, managed and/or controlled his motor vehicle that he caused or permitted the same to get out of control and knock the said motor cycle, causing the respondent to sustain injuries. The respondent held the appellant vicariously liable for the tortious acts.
5. According to the plaint, the injuries sustained by the respondent were: depressed skull fracture with associated brain injury leading to the loss of consciousness. He was treated at various medical facilities over a period of time. It was indicated that the injuries might lead to traumatic epilepsy in the future. Therefore, he claimed general damages for loss of earning capacity and any other damages that the court would deem fit to grant.
6. In his defense, the appellant denied the averments made in the plaint and attributed negligence to the rider of the motor cycle and the respondent. At the hearing, PW1 testified as the respondent. He rehashed the statements made in the plaint and added that he suffered memory loss as a result of the injury. He produced documentary evidence in support of his claim.
7. On cross-examination, he stated that he rider of the motorcycle is his neighbor whom he knew well. The accident occurred at 6am and it was drizzling. PW2 was Dr. Godfrey Njuki Njiru who produced a medical report he wrote after examining the respondent following the accident. He noted that it was possible that the injury sustained might result in traumatic epilepsy due to brain injury.
8. The appellant did not offer any testimony. The trial court in favour found that the appellant was 100% liable for the accident, and awarded general damages of Kshs.500,000/= and special damages of Kshs.11,100/=.

## **Written Submissions**

9. The appeal was canvassed by way of written submissions.
10. It was the appellant's submission that the police abstract produced as evidence did not indicate that the appellant was to blame for the accident even though the motor vehicle hit the motor cycle from behind. He urged the court to apportion liability at the ratio of 60:40 in favour of the respondent. On the issue of quantum, he urged the court to consider the cases of Simon Muchemi Atako & another v Gordon Osore [2013] KECA 128 (KLR) and Francis Ochieng & another v Alice Kajimba [2015]



KEHC 4703 (KLR) where the injuries were more severe than the ones suffered by the respondent but the court awarded Kshs.250,000/=. He proposed that general damages be reduced to Kshs.250,000/=.

11. The respondent submitted that the liability finding was reached through a related case Embu MCCC 74 of 2020 and it was adopted in this case. No appeal arose from the judgment of that case on liability, thus the issue cannot arise through this appeal. On quantum, he stated that the court relied on the uncontroverted evidence adduced hence the assessment of damages was fair. He stated that the appellant whilst at the trial court, relied on the case of Nyota Tissue Products v Charles Wanga Wanga & 4 Others [2020] KEHC 6207 (KLR) which supported the award of Kshs.500,000/= However, he abandoned this authority on appeal and relied on the case of Socfinaf Company Limited v James Gatiku Ndolo [2006] eKLR. He urged the court to uphold the trial court's assessment of damages.

### **Issues for Determination**

12. The issues for determination are:
  1. Whether the trial court's assessment of liability should be revised; and
  2. Whether the award of general damages is excessive, considering the nature of the injuries and similar decided cases.
13. As a first appellate court, this court is required to revisit and re-evaluate the evidence presented at the trial court and make a finding of its own. This was the position held in the case of Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123 where the court held:

“ This Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are settled. Briefly, they are that this Court must reconsider the evidence, evaluate 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”
14. According to the trial court proceedings on 15<sup>th</sup> September 2021, the trial magistrate upon the consent of both parties to the proceedings ordered that the finding on liability in MCCC 74/2020 would apply in this case. After this order, the hearing began. In MCCC 74/2020, the court found the appellant 100% liable for the accident. Liability is a matter of fact that is determined through considering evidence which is subjected to the required standard (see the case of Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612 (KLR)).
15. Through the present appeal, it is not possible for the court to re-examine the evidence adduced in the earlier case where liability was by consent, agreed and determined. The record in MCCC75/2020 is not part of the record of appeal herein nor can there be an appeal on a consent agreement. Therefore, there is no legal basis for reviewing the finding of the court on the issue of liability.
16. On quantum, the trial court awarded general damages of Kshs.500,000/= to the respondent. The court was guided by the case of Nyota Tissue Products v Charles Wanga Wanga & 4 Others (supra) in reaching its decision. In that case, the injured party suffered injuries similar to the ones suffered by the respondent herein. The doctor opined that the patient would suffer post traumatic epilepsy as a result of the accident. That court reduced an award of Kshs.1,200,000/= to Kshs.500,000/= while relying on other decided cases. It noted that no damages should be based on injuries that may occur in the future.



17. In reviewing the award, the court in that case relied on the following similar cases:

- “ 1. Julius Chelule & Another v Nathan Kinyanjui [2013] eKLR (A. Mshila, J.) of January 2013 affirming an award of Ksh.60,000/- for “a linear fracture to the skull and bruised left knee with a small cut wound.”
2. Ali Issa Ali v East African Portland Cement Company [2016] eKLR (B. Thurairaja Jaden, J.) of October 2016 citing Julius Chelule & another v Nathan Kinyanjui [2013] eKLR, and awarding Ksh.600,000/- where the appellant “had sustained a subdural haematoma ... was admitted in hospital for ten (10) days [and] Treatment included “craniotomy, elevation and evacuation of the haematoma” [and] Appellant healed but he was left with a “crescentic craniotomy scar on the right frontotemporal scalp” [and] the Appellant was left with a “frontal parietal bony depression” [with] scars and the depression are permanent in nature [and] Appellant was also pre-disposed to post traumatic epilepsy due to the severe head injuries.”
3. Sukari Industries Limited v. Maxwel Omondi Otieno [2017] eKLR of January 2017 (H. Omondi, J.) affirming an award of ksh.700,000/- for injuries “a deep cut wound on the left part, swollen limbs, a depressed skull fracture of left tibia [and] blunt chest injury, dislocation of the left ankle joint and [where] examination also revealed the residual effect i.e. Respondent had a scar on the left ankle joint which also had limited movement and he walked with a limping gait.”
4. Kyoga Hauliers (K) & another v. Philip Mahiu Nyingi [2017] eKLR (Mulwa, J.) of January 2017 affirming Ksh.1,000,000/- for “Cut wound on the scalp with depressed fracture of the skull and Pain and swelling of the right ankle joint”, without any permanent physical disability.
5. Telkom Orange Kenya Limited v. I S O (minor) suing through his next friend and mother J N [2018] eKLR (Majanja, J.) of December 2018 where an award of Ksh.950,000/- was reduced to Ksh.500,000/- for “head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg” for which the doctor had “concluded that the child sustained serious head injuries which put him at risk of developing seizures as a long term complication together with disfigurement resulting from the scalp and leg scars.””

18. In the present case, the doctor who testified as PW2 indicated that the respondent is likely to suffer traumatic epilepsy due to brain injury. In his testimony, he noted that the epilepsy was anticipated to occur, probably in the future. On cross-examination, he stated that the epilepsy may or may not occur. It was a possibility, not in the foreseeable near future. PW2, in his report, did not prescribe any medication for the anticipated complication because it was likely or not likely to occur. He stated under the heading ‘Anticipated Complication’:

“ Post traumatic epilepsy due to the head injury and the long-term use of anti-epileptics if it develops.”



19. In *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* (supra), the court faced with a similar statement by the doctor where the injuries might escalate, stated:

“26. The discharge summary indicating the condition of the patient and treatment is inconsistent with any serious injury to justify the doctor’s conclusion of a propensity to “lead to post traumatic epilepsy ... a lifelong condition which needs permanent anti-convulsant medication for the rest of his life”. There was no evidence that the lifelong condition of post traumatic epilepsy would certainly result or the probability thereof was so high as to warrant an award therefor. This aspect of the report which is without evidential basis must be deemed to be speculation inserted only for purposes of supporting an award based on anticipated future medical costs. The trial court appears to have been influenced by the assertion by the doctor that the injury could deteriorate, for which no basis in evidence before the court and was only speculation probably in textbook cases, for which this court does not agree to award compensation. Award of damages must be based on foreseeable loss.”

20. It is my view, that it is hard to assess damages for a potential occurrence that lies in the future, whose chances of happening are entirely unknown. Thus, the court should only consider the facts not speculation brought before it and nothing else. The trial court was guided by the *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* (supra) case which is a good authority in this appeal as well.

21. Further, in the case of *John Kipkemboi & Another v Morris Kedolo* (2019) eKLR the court stated:

“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 a 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; and
- 5) The awards should not be inordinately low or high (See *Boniface Waiti & another Vs Michael Kariuki Kamau* (2007) eKLR.”

22. The award of damages by the trial court was based on its discretion considering similar decided cases. The award should not be overturned on appeal simply because the appellate court would have viewed the matter differently. See the case of *Butt v. Khan* (1981) KLR 349.

### **Conclusions and Disposition**

23. As already stated, the issue of liability is not open to challenge herein as the parties consented to adopting the liability found in MCCC 74/2020, in the trial Court.

24. As for the findings on damages awarded, the learned trial Magistrate made findings as discussed herein, which were reasonable, and I find there is no merit in interfering with the said award.



25. Accordingly, the appeal lacks merit and is hereby dismissed with costs to the respondent.

26. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 21<sup>ST</sup> DAY OF MAY, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Githinji holding brief for Kabiru for Appellant.
2. Ms. Maroko holding brief for Ogwenyo for Respondent.
3. Francis Munyao - Court Assistant.

