



**Mathews alias Nkatha Elizabeth alias Elizabeth Nkatha alias Elizabeth Mгатia v Muchuki
(Civil Appeal E064 of 2023) [2025] KEHC 6588 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E064 OF 2023
FN MUCHEMI, J
MAY 15, 2025**

BETWEEN

**ELIZABETH NGATHA MATHEWS ALIAS NKATHA ELIZABETH ALIAS
ELIZABETH NKATHA ALIAS ELIZABETH MGATIA APPELLANT**

AND

CATHERINE WANGUI MUCHUKI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. V. Asiyo (PM)
delivered on 7th December 2023 in Thika CMCC No. 257 of 2020)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. 362 of 2020 arising from a claim of road traffic accident whereby the trial court found the respondent fully liable and awarded general damages for pain and suffering at Kshs. 200,000/- and special damages at Kshs. 8,150/- to the appellant.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds summarized as follows:-
 - a. The learned trial magistrate erred in fact and in law and reached a verdict that is wholly against the weight of the law and the evidence presented before the court;
 - b. The learned trial magistrate erred in law and in fact in awarding general damages for pain and suffering at Kshs. 200,000/- which is manifestly and inordinately low bearing in mind the injuries sustained by the appellant.
3. Parties put in written submissions.



The Appellant's Submissions

4. The appellant submits that according to the Amended Plaintiff she sustained the following injuries:-
 - a. Blunt chest injury
 - b. Blunt back injury
 - c. Blunt injury to the right arm
 - d. Blunt soft tissue injuries to the pelvis
 - e. Wedge compression fracture of the 2nd lumbar vertebrae (L2)
 - f. Blunt soft tissue injuries on the left arm and
 - g. Loss of 2 upper incisor teeth
5. The appellant further submits that the said injuries were confirmed by Dr. Wokabi and were not controverted at trial. The appellant opposes the position taken by the learned magistrate as the learned magistrate downplayed or ignored the severity of her injuries. The appellant submits that Dr. Wokabi in his medical report confirmed that she sustained a wedge compression fracture of 2nd lumbar vertebrae (L2) and loss of 2 upper incisor teeth which injuries caused her a lot of pain. The appellant further submits that she confirmed the injuries in her testimony and stated that she had not fully healed and experiences pains from the back forcing her to sleep sideways and that she still has two missing incisor teeth.
6. The appellant thus argues that an award of Kshs. 2,500,000/- is fair and reasonable compensation for pain and suffering. The appellant relies on the cases of Ahmed Abdalla Maawiy vs Southern Travel Services Ltd HCCC No. 949 of 1997 LLR No. 1341 (HCK) where the plaintiff suffered a right sided subdural haematoma, fracture of the skull and fracture of the 6th and 7th cervical vertebrae. The court awarded general damages for pain, suffering and loss of amenities at Kshs. 1,250,000/-. In David Chege Ndungu vs Robert Macharia & 2 Others [2015] eKLR the plaintiff sustained a fracture dislocation of C6, C7. The court awarded general damages for pain, suffering and loss of amenities at Kshs. 4,000,000/- on 14/05/2015.
7. The appellant submits that as a result of the accident, she sustained a permanent incapacity of 18% as assessed by Dr. Wokabi and is therefore entitled to damages for diminished earning capacity. The appellant submits that she testified that the injuries had adversely affected her ability to work thus placing her at a relative disadvantage in terms of her ability to work as she used to before the accident. To support her contentions, the appellant relies on the cases of S.J vs Francesco Di Nello & Another [2015] eKLR; Butler vs Butler [1984] KLR 225 and Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR.
8. The appellant submits that a global award of Kshs. 1,000,000/- is fair and reasonable as she relies on the case of Mumias Sugar Company Limited (supra) whereby the court awarded Kshs. 500,000/- to the respondent who had sustained 10%-15% permanent incapacity.
9. The appellant submits that she pleaded for future medical expenses for purchasing a permanent denture to replace the lost teeth at a cost of Kshs. 50,000/- as assessed by Dr. Wokabi on 12/11/2020. The appellant further relies on the case of Zakayo Chamwama Busakha vs Spice World Limited [2008] eKLR and Joseph Kahinda Maina vs Evans Kamau Mwaura & 2 Others [2014] eKLR and submits



that there was no evidence adduced to controvert the evidence of Dr. Wokabi since there is evidence that the amount is required.

The Respondent's Submissions

10. The respondent submits that although the appellant testified that she saw the suit motor vehicle before crossing the road, she nonetheless still crossed the road. Furthermore, the appellant did not adduce any evidence that she was crossing at a designated pedestrian crossing. The respondent argues that she had already driven past the zebra crossing and thus the appellant is liable for failing to cross at a designated pedestrian crossing that was available for her use at a busy superhighway.
11. The respondent submits that the entirety of the investigation was by word of mouth as PC Linet Makuti, who produced the police abstract testified that she was not at the scene of the accident but visited the same after the accident had occurred and no independent investigation was conducted including the interrogation of independent eye witnesses. She further testified that she had not established whether the appellant was crossing at a designated pedestrian crossing and blamed the respondent for the accident as the respondent was driving against the flow of traffic which fact the respondent denied. The respondent submits that she testified that she was driving on the service lane leading to Nairobi and it would be impossible to move against traffic. Additionally, the respondent submits that she attempted to avert the accident by swerving once she spotted the appellant. The respondent thus relies on the case of Joseph Muthuri vs Nicholas Kinoti Kibera [2022] eKLR and submits that liability ought to be apportioned at 50%.
12. The respondent argues that there are various inconsistencies in the appellant's identity as her identification card indicates the names Elizabeth Ngatha Mathews born on 12th December 1964 whereas the treatment notes from Ruiru Sub County indicate her names as Elizabeth Ngatha, 40 years old and on her report by Focus x-ray Centre Ruiru her name is indicated as Elizabeth Nkitha. Further the receipts have different names whereas the police abstract has the name Elizabeth Nkatha. The respondent submits that the appellant failed to provide any official documentation substantiating her claim that she is known by those various names and aliases. Moreover, when questioned during cross examination, the appellant was unable to offer any explanation for those glaring discrepancies. Thus, the contradictions render it impossible to establish whether all or any of the documents presented in court relate to the appellant at all.
13. The respondent submits that the appellant testified that she was examined at Ruiru sub county hospital on 29th February 2020. The treatment notes from Ruiru sub county hospital indicate that she was diagnosed with soft tissue injuries and the treatment given was for pain management. The respondent further submits that a medical report dated 5th May 2020 was prepared by Dr. Cyprianus Okoth Okere wherein the only injuries noted were blunt chest injury, a blunt back injury and a blunt injury to the right arm. The medical report clearly indicated that the doctor had referenced the x-ray film and request form, the general outpatient record from Ruiru sub county hospital, the police abstract and the P3 Form in the preparation of the report. The appellant was not diagnosed with any fractures, missing teeth, blunt soft tissue injuries to the pelvis, or blunt soft tissue injuries on the left arm.
14. The respondent submits that the appellant later produced another medical report generated nine months after the purported accident dated 12th November 2020 which indicated that the appellant had two missing teeth and a wedge compression fracture of lumbar vertebra contrary to every other document availed after the accident. At cross examination, Dr. Wokabi testified that he could not remember which x ray report he relied on or whether he had considered the x ray report and the medical report prepared shortly after the accident.



15. The respondent submits that she testified that she took the appellant to Ruiru sub county hospital and to Focus X-ray Centre and thereafter to Ruiru sub-county. She testified that after the examination, the appellant was only diagnosed with soft tissue injuries and that she did not have any mouth injuries that would warrant missing teeth. Thus due to the inconsistencies, the appellant failed to prove the injuries she claimed to have sustained thus the award of Kshs. 200,000/- was manifestly excessive and ought to be substituted with an award of Kshs. 100,000/- which is sufficient for soft tissue injuries. The respondent refers to the cases of Elizabeth Wamboi Gichoni vs Bernard Ouma Owuor [2019] eKLR where the plaintiff sustained a mild head injury due to concussion, multiple cut wounds on the scalp, cut wound on the left lateral orbital region, blunt injury to the chest, multiple bruises on the left upper limb, bruises on the gluteal region and blunt injury on both knees. The court substituted an award of Kshs. 300,000/- with an award of Kshs. 175,000/-. In Paul Gatheru Mureithi vs AA Growers Limited [2019] eKLR the appellant sustained soft tissue injuries to the neck, dislocation of the right thumb and soft tissue injury to the chest. The appellate court upheld an award of Kshs. 50,000/-.
16. The appellant in his first ground of appeal raised the issue of the judgment being against the weight of evidence. However, she did not submit on the said ground and it is hereby regarded as having been abandoned and will, therefore, not form part of issues for determination herein.

Issues for determination

17. Issues for determination are:-
- a. Whether the award on general damages is manifestly low.
 - b. Whether the trial court ought to have awarded general damages for loss of earning capacity.
 - c. Whether damages for future medical expenses ought to have been awarded.

The Law

18. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

19. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

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.

20. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-



- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the award on general damages was manifestly low.

21. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general 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 below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

22. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

23. According to the amended plaint filed on 16th January 2021, the appellant sustained the following injuries:-

- a. Blunt chest injury
- b. Blunt back injury
- c. Blunt injury to the right arm
- d. Blunt soft tissue injuries to the pelvis
- e. Wedge compression fracture of 2nd lumbar vertebrae (L2)
- f. Blunt soft tissue injuries on the left arm
- g. Loss of 2 upper incisor teeth.



24. The trial magistrate awarded a sum of Kshs. 200,000/- for general damages for pain and suffering. The appellant submits that the said award is manifestly low and is not justifiable in comparison to the injuries sustained. The respondent submits that the award is excessive and not comparable to the injuries the appellant sustained.
25. On perusal of the record, the injuries sustained by the appellant as pleaded in the amended plaint were confirmed by Dr. W. M. Wokabi in his medical report dated 12th November 2020. The said doctor examined the appellant on 10/11/2020. On further perusal of the record, the appellant was seen in Ruiru sub county hospital and taken for an x ray at Focus X ray Centre Ruiru. The treatment notes show that the appellant sustained soft tissue injuries and was referred for lumbar sacral review and further management to Ruiru Level 5 hospital where x-ray confirmed that the appellant had a wedge compression fracture of the 2nd lumbar vertebrae (L2). The P3 form dated 5/3/2020, it was clear that the appellant complained of backache and required x-ray which was not done at Ruiru Sub-County Hospital until in September the same year when Dr. Wokabi ordered for it on the basis that the appellant complained of persistent back pain. The P3 form and the treatment notes had history of back pain. The appellant therefore sustained soft tissue injuries particularly that she sustained chest pain with tenderness, severe back ache and pain and tenderness on the right upper limb. Thus from the evidence on record, the appellant proved to the required standard that she sustained soft tissue injuries as well as a wedge compression on the 2nd lumbar vertebrae. The loss of two teeth I contained in Dr. Wokabi's report but it is not supported by the original documents.
26. Due to the nature of loss of teeth injury, this would have been detected and confirmed at Ruiru Sub-County hospital. The appellant would have informed the doctor of the said loss because she was still conscious. In my considered view, appellant failed to prove that she lost two teeth during the accident that occurred on 29/02/2020.
27. The appellant has proposed that an award of Kshs. 2,500,000/- as reasonable compensation whereas the respondent has proposed an award of Kshs. 100,000/-. Looking at the authorities cited by both parties, it is noted that the injuries sustained by the plaintiff in the cases cited by the appellant are much more severe whereas those cited by the respondent are more comparable to the injuries sustained by the appellant in the current case. However, I am of the considered view that the general damages of Ksh.200,000 was inordinately low taking into account the nature and extent of the injuries sustained. It is evident that the wedge fracture was not taken into account in the award of the court below.
28. Taking into account the foregoing and in particular the P3 form, treatment notes as well as Dr. Wokabi's medical report, I hereby set aside the general damages of Ksh.200,000 awarded by the court below and substitute it with Ksh.450,000 which I hereby award.
29. The appellant further argues that she ought to have been awarded general damages for reduced/diminished capacity and future expenses. The court has found that the appellant proved that she sustained the soft tissue injuries and a wedge fracture of the lumbar vertebrae L2. The disability suffered was assessed at 18% by Dr. Wokabi. The loss of teeth was not proved and as such no award was made in that regard. Dr. Wokabi explained that the injuries of the strained back caused diminished capacity. The appellant had pleaded for damages related thereto and also future expenses. In my view, the back injury was not so severe and may ease over passage of time. However, I hereby award Ksh.300,000 for diminished capacity.

Conclusion

30. It is my considered view that this appeal is successful and it is hereby allowed with costs to the appellant.



31. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF
MAY 2025.**

F. MUCHEMI

JUDGE

