Njenga v Kirathi (Civil Appeal E057 of 2022)
[2025] KEHC 6793 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6793 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E057 OF 2022

SM MOHOCHI, J

MAY 23, 2025

BETWEEN

JOHN NJOROGE NJENGA ..... APPELLANT

AND

SOLOMON KAHURA KIRATHI ..... RESPONDENT

(Being an Appeal against the judgment of the Honourable Magistrate E.K Usui. Chief Magistrate in Nakuru Magistrate Court Civil Suit No. 1133 of 2019 and judgment delivered on 14th April, 2022)

JUDGMENT

1. The Appellant John Njoroge Njenga being dissatisfied with judgment of the Honourable Magistrate E.K Usui. Chief Magistrate in Nakuru Magistrate Court Civil Suit No. 1133 of 2019 and judgment delivered on 14th April, 2022 appeal to this Honourable Court against the said judgment on the following principal grounds:

    i. That the Learned Trial Magistrate erred and misdirected herself by proceeding on wrong principles when assessing general damages to be awarded to the Respondent herein and failed to apply precedents and tenets of the applicable.

    ii. That the Learned Trial Magistrate erred and misdirected himself by awarding a sum in respect of general damages which was inordinately high, erroneous, oppressive and punitive and amounted to a miscarriage of justice.

    iii. That the Learned Trial Magistrate erred in law and fact in awarding loss of income for amount not specifically pleaded and proved thus occasioning a miscarriage of justice.

iv. That the Learned Magistrate erred in law and fact in ignoring the appellant's submissions and failed to consider all the precedents on general damages cited thus coming to a wrong decision on quantum.

2. The Appellant failed to prosecute the Appeal by filling written submissions upon admission and in particulars to repeated directions issued by the Court on the 30th January 2024, 11th April 2024, 27th June 2024, 25th July 2024, 22nd October 2025, 10th December 2024 and 20th march 2025.

3. On the other hand, the Respondent complied and filed written submissions dated 2nd May 2025 which this Court has equally considered in Appeal.

Respondents' Submissions.

4. That the Appeal is on the awards for General Damages for Pain and Suffering and Loss of Earning/ Income ONLY the Respondent was never served with Appellant's submissions as ordered by the Court and none have been filed in the on-line portal as at the time of filling our submissions herein and hence the Appeal herein stands unprosecuted and hence it's for dismissal.

5. However, and without prejudice to the foregoing and with regards to on the award for general damages for pain and suffering, it is submitted that, the Appellant in the memorandum of Appeal contends that the trial Court's award of Kshs.850,000/= under this head was inordinately high/excessive and was arrived at without consideration of previous decided cases and his submissions. However, and in the Respondent's view, that the foregoing is untenable for the following reasons; -

6. Firstly, the trial Court not only considered submissions by both parties and cited cases while arriving at the award herein but also delved into the nature, seriousness and resulting effects of the Respondent's injuries coupled with effect of inflation on awards in the cited authorities as captured in the lower Court's judgement at page 145146 of the record. The trial Court even went ahead to compare the injuries in the cited cases vis-a-vis injuries suffered by the Respondent herein before arriving at the award herein as expected of it. As such, the Respondent humbly submits that, the Appellant's contention to the contrary is unwarranted.

7. Secondly and in the view of the fact that the learned trial magistrate took into account the relevant factors/materials when arriving at the award herein as expected of her and it has not been demonstrated/proved that she acted on a wrong principle of law or misapprehended the facts/or any aspect of the case, then there is nothing to warrant interference of this award by this Honourable Court.

8. What the Appellant has done is to urge this Honourable Court to 'prefer' a different and lesser award than that 'awarded by the learned trial magistrate without pointing out any error committed by the trial magistrate to warrant setting aside or interfering with this award which is untenable as in our humble view, there has to be an error committed by the trial Court if the appellate Court is to interfere with an award but which the Appellant has not proved/demonstrated.

9. As such and in the circumstances, the Respondent urged this Honourable Court not to interfere with the Trial Courts award. Reliance is placed on the case of John Wambua v Mathew Makau Mwololo & another [2020] eKLR where the Court held that;

> " in an Appeal, the question is not what the appellate Court would have awarded if it was the one trying the matter at the first instance but whether the trial Court acted on wrong principles and thus where an award is supported by the authorities cited by parties, there can be no basis for interfering with the same even if the Appellate Court's award would have been different if it was the one hearing the case for the first time, See also the learned

treatise Kemp and Kemp, The Quantum of Damages Volume 1 Para 19-004:-It is not the function of an Appellate Court to substitute it's opinion for that of the trial judge... Before an Appellate Court interferes with an award of damages, it should be satisfied that the Trial Magistrate has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference of one award over the other. The scale must go down heavily against the figure attacked if the appellate Court is to interfere, whether on the ground of excess or insufficiency. As such and where there are different awards for similar injuries in decided cases and the trial Court's award is within the range/both limits set by the decided cases, the Appellate Court will not interfere with the trial Courts award. A preference of $10,000/= over $7,000/= is a matter of opinion, but not by itself evidence of error (Emphasis supplied)".

10. Thirdly, the Appellant is estopped from introducing and or relying on new authorities/materials to challenge the decision of the learned trial magistrate which were not presented/availed to the learned trial magistrate at the time of making the award herein as this being an appeal, it is only fair and just that parties do challenge the same within the context that the learned trial magistrate dealt with the matter for reasons that this Honourable Court is supposed to consider the materials presented before the trial Court when deciding whether or not the trial magistrate erred as was held in the case of Sila Tiren & Another v Simon Ombati Omiambo [2014] eKLR.

> " Those authorities have been cited by the respective parties, in their submissions before this Court. None of those 3 cases were placed before the trial Court...In effect, the learned trial magistrate was not given the benefit of the case-law which has now been placed before me, on this appeal. That means that this Court has been invited to assess the decision arrived at by the trial Court, using a yardstick that was not made available to that Court. In my understanding of the law, an appeal process is intended to correct the errors made by the trial Court. And in order for the appellate Court to be fair to the trial Court, it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial Court. The first appellate Court is enjoined by law, to re-evaluate all the evidence on record, and to draw its own conclusions. The appellate Court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of parties placing wholly new authorities before the appellate Court, and using them to either challenge or to otherwise support the decision of the trial Court, is not a proper use of the mechanism of an appeal,"

11. With regards to the issue of the award for loss of income/earnings, the Respondent contends that, the only ground upon which the Appellant challenges this award is that the Court used income that was neither pleaded nor proved to arrive at this award. However, the Respondent pleaded this claim at Paragraph 6 of the Plaint (at page 5 of the record of the record of Appeal) and at Paragraph 5 of his witness statement (at page 8 of the record of Appeal) to the effect that he used to earn Kshs.1,000/- per day from his boda - boda riding job He also confirmed this in his evidence at page 119 of the record of Appeal and further explained that he didn't keep any record of his earnings or issue his Boda Boda customers/passengers with receipts/bus tickets and therefore he could not be able any documentary proof of the same. The trial proceeded to consider and analyze his said evidence in its judgement at page 141-142 of the record of appeal and the learned trial magistrate proceeded to use minimum wage regulation to arrive at the Respondent's income since he didn't produce any documentary proof of his earnings as captured in the lower Court's judgement at page 146 and which income the Appellant now challenges.

12. The Respondent did not have documentary proof of his income, the trial Court committed no error by reverting to the minimum wage regulation to arrive at his income as provided for under Section 2 of The Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 since it is not mandatory that income be proved by way of documents as was held by The Court of Appeal in the case of Jacob Ayiga Maruja & another v Simeon Ohayo [2005] eKLR:

> " We do not subscribe to the view that the only way to prove profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed".

13. Further reference is made to the case of Githinji & Grace Mbaile, (Suing as The Administrator of The Estate of CatherineNjeri Kimani) Deceased v Mutal Hardware Stores Limited: -

> " In the absence of documentary evidence to prove income, legal authorities have stated that, a Court in pursuit of justice must appreciate the fact that there are many people in our society today who do not have documentary evidence in proof of their incomes. The lack of such documentation in such an environment should not be taken to suggest that such person did not cam a living in the absence of clear documentary proof of income, a Court ought not to merely disregard the claim as though the claimant or deceased had no livelihood at all. That would lead to injustice of great proportions. In such case the Court correctly ought to revert to the applicable Regulation of Wages Order",

14. It is submitted that the trial magistrate actually reverted to the applicable Regulation of Wages Order by adopting the income of unskilled laborer in the minimum wage when arriving at the award herein as reflected in her judgement and hence no error was committed to warrant interference with the said award by this Honourable Court.

15. The applicable principles of law when it comes to an appeal on quantum are now well settled to include Assessment of 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 have awarded a different figure if it had tried the case of first instance. It is tile law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge and hence the difficult task of awarding money compensation in a case is essentially a matter of opinion, judgment and experience. Whereas it is natural and reasonable for any member of the appellate Court to ask themselves as to what award they would have given, it's important to remember that in this sphere there are invariably differences of view and of opinion and hence they do not proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of their own assessment as it is inevitable in any system of law that there will be disparity in awards made by different Courts for similar injuries. As such, an appellate Court does not readily interfere with the estimate of damages made by the trial Court as assessment of damages is necessarily an estimate, and an estimate is necessarily a matter of degree, and unless an appellate Court concludes that the Court below mode an error, it ought not to interfere.

16. That in order to justify reversing a Trial Court's decision on the question of the amount of damages it will generally be necessary that the Appellate Court should be convinced either that the judge at the

trial acted upon some wrong principle of law, or that the amount was so extremely high or so very small as to make it, is the judgment of the Appeal Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled. This means that if the amount given is an amount which the Appeal Court self might feel disinclined to agree with, that circumstances alone would not necessarily justify the Court of Appeal in making any amendment of the trial judge award, and the Appellate Court would normally have tobe satisfied that there really was an entirely erroneous estimate of the damage to which the Plaintiff is entitled but it should not be supposed that because an Appellate Court is hearing such a case by way of rehearing, therefore it would be ready to reassess damage according to what the Court of Appeal, if it had been trying the case, might have given as damages, and not what the judge below gave below.

17. Therefore, it is incumbent on the parties wishing to disturb the damages awarded to satisfy the Court of Appeal that the judge at the trial had acted upon an erroneous estimate-meaning there was something in which the error had so tinged the proceedings that if was a proper case for the Appellate Court to re-assess the damages. As such, it is not enough that there is a balance of opinion or preference of one award over the other. The scale must go down heavily against the figure attacked if the Appellate Court is to interfere, whether on the ground of excess or insufficiency. As such and where there are different awards for similar Injuries in decided cases and the Trial Court's award is within the range/ both limits set by the decided cases, the Appellate Court will not interfere with the Trial Courts award. A preference of one award over another is a matter of opinion and not an error and hence if it happens that a decision seems equally open either way, the decision of the Trial Court which had the advantages not enjoyed by the Appellate Court becomes of paramount importance and ought not to be disturbed

18. The Respondent reiterates and adopt their submissions in the lower Court as part of these submissions and urge the Court to consider them. Taking into consideration all the materials on record, the relevant factors including the above stated applicable principles of law the Respondent humbly submit that the learned trial magistrate did not err when arriving at her awards for pain and suffering and loss of income earnings and hence urge this honorable Court to uphold the same and consequently dismiss the Appeal with costs to the Respondent as was held in the case of Amos Njagl Emurasi & another v Alex Murlithu Niogu (2016) eKLR:-

Analysis and Determination

19. Being a first appeal this Court lays emphasis on the 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."

20. The only solo issue for this Court to consider is whether the award made in judgment was inordinately excessive to warrant the disturbance by the Court.

21. This Court is alive to the fact that this is not a retrial and the 1st hurdle on the Appellants is to demonstrate the inordinate and excessive award granted as a basis of inviting the Court to disturb the same. As this Court can only intervene if the award meted out is too large or too small as to demonstrate a wholly erroneous estimate of damages.

22. The Appellant elected not to prosecute the Appeal despite multiple opportunities and thus the Court only undertook a bare review of the Record of Appeal as well as considered the Respondents submissions.

23. I have considered the Record of Appeal and the trial proceedings noting that, the Trial Court took into considerationsimilar judicial authorities to appreciate the serious injuries occasioned, the evidence tendered as the basis of the judgment.

24. This Court notes that the Respondent has been waiting to enjoy the fruits of his judgment since September 2019, I need to recap the seriousness of the injuries occasioned as exhibited in the medical report produced in the trial Court indicated that, the Respondent suffered the following injuries;

    i. a displaced comminuted fracture of the right parietal bone,

    ii. Deep laceration on the right parietal region of the scalp,

    iii. Laceration on the forehead,

    iv. Laceration on the right side of the nose and

    v. Deep laceration on the right ear lobe.

25. The Doctor noted that the plaintiff was prone to post traumatic epilepsy and classified injuries as grievous. The Respondent submitted for an award of Kshs 950,000.00 General Damages for pain suffering and loss of amenities and quoted a decided case; Gerald Ireri Harrison & 2 others v Danson Ngari eKLR. Where the Court made awarded ksh 800,000.00 for comparable injuries.

26. The Appellant submitted for ksh 250,000.00 on the same heading and relied on the following decided cases; Francis Ochieng & another v Alice Kajimba 2015 eKLR. In this quoted case the Court made an award of ksh 350,000.00 on head and soft tissue injuries. Easy Coach Bus Limited v Mary Adhiambo Ohuro 2017 eKLR. The injuries in this quoted case are not of similar nature as present case.

27. The Trial Court considered the serious nature of the Respondents' injuries, the fact that the injuries predispose him to post traumatic epilepsy, age of quoted comparable award plus the ever-escalating cost of living in our economy and found an award of ksh850, 000.00 is adequate compensation for pain suffering and loss of amenities.

28. The Court respectfully declines the overtures by the Appellant to engage in a bargaining exercise on quantum unless of Court it is demonstrated that the awards were made in an injudicious manner.

29. I find no fault on the part of the Trial Magistrate as the basis to disturb the judgment from the Trial Court.

30. This cumulatively brings me to the conclusion that the Appeal lack merit and qualifies for dismissal with costs to the Respondent.

    It is So Ordered

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 23RD DAY OF MAY 2025.

MOHOCHI S. M.

JUDGE