Njuguna v Kipelion (Civil Appeal E011 of 2023)
[2025] KEHC 6822 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6822 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E011 OF 2023

RB NGETICH, J

MAY 22, 2025

BETWEEN

JOSEPH MUYA NJUGUNA ..... APPELLANT

AND

SELINA CHEPKEGON KIPELION ..... RESPONDENT

(Being an appeal against the Judgment/Decree of Hon. A. Towett, Principal Magistrate, delivered on 8th May, 2023 in Eldama Ravine CMCC No.114 of 2018)

JUDGMENT

1. The Respondent/plaintiff filed suit in the lower court seeking compensation from the Defendant/Appellant for the injuries she sustained while travelling in the Appellant/Defendant's motor vehicle registration number KBK 324 which occurred on the 27th of May 2018 along Kabarnet/Nakuru road. By Judgment delivered by the Honourable A. Towett on 8th May,2023, the Plaintiff was awarded a total award of Kshs.1,839,890/-, general damages being 1,700,000/- and special damages of Kshs.139,890/=. The Defendant, now Appellant was held 100% liable.

2. Being aggrieved by the said judgment, the Appellant herein instituted an appeal dated 26th May, 2023 challenging assessment of damages on the following grounds: -

    i. The Learned Magistrate erred in fact and in law by weighing the Respondent's case in isolation from the appellant' case precluded herself from assessing the magnitude of damages impartially.

    ii. The Learned Magistrate erred in fact and in law by awarding the Respondent an excessive and unjustified amount on quantum for general damages of Kshs.1,700,000/=.

    iii. The Learned Magistrate erred in fact and in law when she failed to consider the Appellant's evidence and submissions on points of law and facts on finding that the Respondent was entitled to Special Damages of Kshs 139,890/-which the same was not specifically proved.

iv. The learned magistrate erred in fat and in law and misdirected herself as to the exact nature of the Respondent's injuries and therefore erred in law in his assessment of damages which had not been proved.

v. The Learned Magistrate erred in law and in fact by disregarding the submissions of the Appellant in totality thus precluding herself from assessing the magnitude of damages impartially.

vi. The learned magistrate erred in law and in fact when she relied on erroneous principles of law in arriving at an excessive award on quantum.

vii. The Learned magistrate grossly misdirected herself by treating the evidence and submissions before her on quantum superficially and consequently arrived at a wrong decision without any basis in law or fact.

viii. The Learned Magistrate erred in fact and in law in failing to accord the Appellant's - submissions due consideration.

ix. The Learned magistrate's findings on quantum of damages are not supported by facts or law hence irregular.

3. The appellant proposed to ask the Court for the following Orders:-

a. That this Appeal be allowed.

b. That the Judgment on quantum of the Hon. A. Towett Principal Magistrate be set aside and substituted with a fresh award.

4. The court directed that the Appeal be canvassed by way of written submissions.

Appellant's Submissions

5. The Appellant submits that the Plaintiff sustained the following injuries;

a) Crush injury on the left hand.

b) Fracture of the left radius and ulna.

c) Traumatic amputation of the left thumb.

d) Traumatic amputation of the left index finger.

6. The appellant urged this court to re-evaluate assessment of damages herein as the Plaintiff suffered injuries that were properly managed and have since healed. That it is trite law that assessment of damages in a claim for general damages is a discretionary exercise however, the discretion must be exercised judicially, with wise circumspect and upon some legal principles. The said dimensions are vital such that when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. The discretion in assessing the amount of general damages payable will be disturbed if the trial court:-

i. Took into account an irrelevant factor or,

ii. Left out of account a relevant factor or, short of this

iii. The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

7. That it is also trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards and relied on the case of Kigaraari v Aya (1982-88) 1 KAR 768, as quoted by Kamau J in Godfrey Wamalwa Wamba& another v Kyalo Wambua [2018] eKLR in support of their argument.

8. The Appellant urges this Court to disturb the award of Kshs. 1,839,890/- in general damages as the same is so high as to be an erroneous estimate inconsistent with the Plaintiff's injuries; and urged this court to look into the medical evidence produced before the trial court dated 29th March,2021 at page 26 of the Record of Appeal.

9. Further that PW3, Doctor Omuyoma testified that the plaintiff sustained a crush injury on the left hand with the ulna fracture and amputation of the thumb and index finger and further that the plaintiff had complete loss of motor function on the left hand hence 45% disability awarded. On cross-examination, he indicated that no document guided him to arrive at an award of 45%disability.

10. That DW1, the insurance doctor, testified that the plaintiff sustained a crush injury on the left hand with the ulna fracture and amputation of the thumb and index finger. They submit that the doctor indicated that there was no assessment for future treatment but awarded the plaintiff 25% disability. That he further stated that the patient was examined physically and she had generally healed at the time of examination with 25%disability and upon re-examination, the doctor stated that the plaintiff shall be able to handle small functions with remaining fingers.

11. The Appellant submit that the trial magistrate erred in law when she disregarded the testimony of the Appellant's doctor on the degree of disability whereas the second medical report show that the fractures respondent/plaintiff suffered had healed after a period close to a year after the accident.

12. Further that both doctors confirmed that the Plaintiff suffered fractures which have healed and they propose an award of Kshs. 300, 000/= for the injuries is reasonable and urged this court to be guided by the following cases: -

    a. Nashon Nyambaro Nyadega v Peter Nyakweba Omboya [2021] eKLR where the claimant sustained bruises on the face, compound fracture of the right tibia bone, cut wound, and tissue damage on the right leg and was awarded Kshs. 600,000.

    b. Daniel Otieno Owino v Elizabeth Atieno Owour [2020] eKLR where the appellant suffered a compound fracture of the tibia and fibula bones on the right leg, deep cut wound and tissue damage on the right leg, chest injury, and a head injury with a cut on the nose. The court awarded damages of Kshs. 400,000 less 20% contributory liability.

    c. Nyambura v Njuguna *& another (Civil Appeal E025 of 2022*) [2024] KEHC 4185 (KLR) where Honourable Grace L. Nzioka upheld the award of Kshs. 400, 000 for Closed left tibia fibula fracture, Deep cut wound on the left big toe leading to soft tissue injuries, Crush to the left second toe leading to disarticulation at the distal phalanx, Deep cut wound on the left heel leading to soft tissue injuries, soft tissue injuries on the right leg, soft tissue injuries of the right hand and Blunt injury to the lower back leading to soft tissue injuries.

13. That in line with the above decisions vis a vis the injuries sustained by the Plaintiff, the award herein was unjustified and should be revised substantially if not set aside wholly and propose a maximum award of Kshs. 300,000.

14. In respect to costs, the appellant submit that costs follow the event and urge this court to uphold their appeal and award them costs.

Respondents Submissions

15. The Respondent submits that it is an established principle of law that an appellate court will be slow to disturb the Learned Trial Magistrate's findings on facts unless the trial court proceeded on wrong principles of law taking into consideration factors that ought not to have been considered or omitted to consider factors it ought to have considered and relied on the case of Daniel Otieno Owino & another v Elizabeth Atieno Owuor[2020] eKLR where the court while under this head quoted the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR.

16. The Respondent/Plaintiff submit that as a result of the accident which occurred on 27th of May 2018, he sustained the sustained the following injuries;

    i. Crush injury on the left hand.

    ii. Fracture of the left radius and ulna.

    iii. Traumatic amputation of the left thumb.

    iv. Traumatic amputation of the left index finger.

17. That these injuries led to complete loss of motor function in the left hand and complete sensory loss of the left hand which was confirmed by the Appellant's doctor and the trial Magistrate noted that the Plaintiff cannot lift her left hand and two fingers are missing and this incapacitated the Plaintiff completely such that she could not use her left hand.

18. Further that the accident occurred on 28th of May 2018 and the Respondent who testified on 9th november 2021, 3 years after the accident was still suffering and still suffers to date. The appellant submit that this appellate court has not had the opportunity of seeing the Respondent and may not therefore have reason to deviate from the trial court's finding on the injuries and consequent effects

19. Further that the Respondent suffered a lot of pain and was left with a permanent disability of 45% percent as assessed by Dr Omuyoma in his medical report contained in the supplementary record of appeal and also affirmed by him in court at page 52 of the record of appeal and the said injuries were proved and have not been disputed.

20. The Respondent further submit that the trial court took in to consideration the nature of the injuries sustained by the Respondent, all the facts and the material placed before her and accordingly rendered the decision having rightly applied the relevant principles in assessment of damages and relied on the case of Charles Oriwo Odeyo v. Appollo Justus Andabwa & Another [2017] eKLR on the issue of principles in assessment of damages and submit that the Learned trial magistrate accurately assessed the nature of the injuries sustained by the Respondent and awarded him Kshs.1, 700, 000/= which was commensurate to the injuries sustained and conventional awards made for almost similar injuries.

21. The Respondent further submit that in the case of Easy Coach Limited v Emily Nyangasi [2017] eKLR an award of Kshs.700, 000/= was upheld where the Claimant had sustained facial injuries, injury to chest, injury to back, injury to right hand with cut wound and injury to right leg with cut wound which injuries were less compared to injuries sustained by the Respondent herein.

22. That as elaborated by the Plaintiff in written submissions before the trial, the award on quantum was based on conventional awards made on comparable injuries. The injuries in the authorities quoted in the Plaintiff's submissions were less compared to the injuries sustained by the Respondent/Plaintiff herein and listed the authorities relied on by the Respondent in the trial court as hereunder:-

a. Barchia Leornard Mbaabu & Anor versus Angeline Ngesa Rambimw, kaimbu civil appeal no 145 of 2017 where an award of Kshs, 1,500,0001= was upheld on an appeal for Deep friction burn to the right upper limb, deep degloving injury on muscles of flexes of right elbow, degloving injury to the right ante cubical area, lose of 4 extensors, media right hand exposed carpal bone with hip fractures on right wrist and soft tissue injuries on left ankle which injuries were less compared to those sustained by the Plaintiff/Respondent herein.

b. Felix Kilonzo Kieti & another v Kelvin Mutuku Katuku Ano. HCCA no 42 OF 2019, the Plaintiff an award of Kshs.l,000,000/= was upheld on appeal where the Plaintiff had sustained less injuries compared to those suffered by the Respondent herein.

c. Rovin investments Ltd v Edward Mumo Kyaka Naivasha HCCA no 46 OF 2017 where the court on appeal awarded Kshs.900, 0001= for crush injury to the left hand leading to amputation of the middle ring and small finger, multiple cut wounds on the hand, blunt injury to the chest leading to severe soft tissue injuries multiple bruises on the left leg and Blunt injuries to the knee leading to severe soft tissue injuries. The said injuries were less compared to those sustained by the Respondent who suffered two fingers amputation including the thumb nail thereby loosing grip and a fracture.

23. That guided by the above decisions, the Respondent submit that the learned trial magistrate took into account the law and evidence in arriving at his findings on liability and quantum by making award under General damages of Kshs.1, 700, 000/= and the amount was not inordinately high. That from the authorities above, at the trial court, the Respondent relied on judicial authorities where injuries were less compared to injuries sustained by the Respondent herein and the decisions were made between the years 2017 to 2019 and are therefore subject to inflation.

24. In view of the above, the Respondent submit that the general damages awarded was not inordinately high and award under special damages was based on pleadings and evidence adduced before the court as seen at page 34 of the record of appeal; that the Plaintiff testified and confirmed that she paid Kshs.128,890/= at the hospital and produced a receipt for the same.

25. That the Plaintiff confirmed having been re-examined at a fee of Kshs.10, 000/= which receipt was Marked for identification and later produced by PW3. That the Respondent also prayed for Ksh.1000/= for search of motor vehicle registration; that special damages of Kshs.139, 890/= was based on evidence adduced before the trial court and the same ought not to be disturbed. Respondent prayed that this appeal be dismissed with cost to the Respondent.

Analysis And Determination

26. This being the first appeal, I am obligated to re-evaluate the evidence of the trial court and come up with my own conclusion. I am however minded of the fact that unlike the trial court, I did not have the chance to hear witnesses and observe their demeanor and for this, I give due allowance. This position was held in the case of Selle & Another v Associated Motor Board Company Ltd. [1968] EA 123, where the court held as follows: -

> " ...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 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..."

27. Further, in the case of Mbogo and Another v. Shah [1968] EA 93 the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

28. I have perused and considered proceedings before the trial court together with submissions filed herein and find that what is in issue is whether sufficient reasons have been advanced to warrant interreference with the assessment of general damages by the trial court.

29. The particulars of injuries suffered by the Respondent as set out in the plaint are as hereunder: -

    a) Crush injury on the left hand.

    b) Fracture of the left radius and ulna.

    c) Traumatic amputation of the left thumb.

    d) Traumatic amputation of the left index finger.

30. The Respondent/plaintiff testified that the injuries led to complete loss of motor function in the left hand and complete sensory loss of the left hand which was confirmed by the Appellant's doctor. The Respondent sustained the above injuries which included traumatic amputation of two of her fingers and a fracture, which injuries were severe and caused the Respondent a lot of pain and left her with a permanent disability of 45% percent as assessed by Dr Omuyoma in his medical report. He testified on 9th november 2021 and the accident occurred on 28th May 2018, a period of about 3 years and the Plaintiff/Respondent had not recovered. From record, the above injuries were proved and have not been disputed.

31. Medical report produced by the appellant's doctor who testified as Dw1 confirmed that the Respondent sustained a crush injury on the left hand with the ulna fracture and amputation of the thumb and index finger. The doctor assessed degree of disability at 25% disability and said he had generally healed but upon reexamination, he said the plaintiff shall be able to handle small functions with remaining fingers.

32. Upon considering the injuries above, the learned magistrate made an award of Kshs. 1,700,000/= in general damages and Kshs 139,890/= in special damages. There is no doubt that the learned magistrate took into account the written submissions filed by the parties and the authorities relied on.

33. Further, it is trite law that assessment of damages is a matter of discretion by the trial court and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. This position was held in the case of H. West & Son Ltd v. Shephard [1964] AC 326, where the court stated as follows:-

> " ...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present, it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have

made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

34. Further, in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal reiterated the position that:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages." (Also see Butt v Khan [1981] KLR 349)

35. Additionally, in Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

> " ...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

36. The principles to be considered while awarding damages were stated in the case of Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR, as set out hereunder: -

    a. each case depends on its own facts;

    b. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politic);

    c. comparable injuries should attract comparable awards;

    d. inflation should be taken into account; and

    e. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

37. In the light of the foregoing, I have taken into consideration the following authorities that were relied on by the parties before the trial court being Barchia Leornard Mbaabu & Anor versus Angeline Ngesa Rambimw, kaimbu civil appeal no 145 of 2017 where an award of Kshs, 1,500,000/= was upheld on an appeal for Deep friction burn to the right upper limb, deep degloving injury on muscles of flexes of right elbow, degloving injury to the right ante cubical area, lose of 4 extensors, media right hand exposed carpal bone with hip fractures on right wrist and soft tissue injuries on left ankle which injuries were less compared to those sustained by the Plaintiff/Respondent herein.

38. And Felix Kilonzo Kieti & another v.Kelvin Mutuku Katuku Ano. HCCA no 42 OF 2019, the Plaintiff an award of Kshs.l,000,000/= was upheld on appeal where the Plaintiff had sustained less injuries compared to those suffered by the Respondent herein.

39. Further the case of Rovin investments Ltd v Edward Mumo Kyaka Naivasha HCCA no 46 OF 2017 where the court on appeal awarded Kshs.900, 000/= for crush injury to the left hand leading to

amputation of the middle ring and small finger, multiple cut wounds on the hand, blunt injury to the chest leading to severe soft tissue injuries multiple bruises on the left leg and Blunt injuries to the knee leading to severe soft tissue injuries. The said injuries were less compared to those sustained by the Respondent who suffered two fingers amputation including the thumb nail thereby loosing grip and a fracture.

40. Having compared the injuries in the above authorities with injuries suffered by the Respondent herein, injuries suffered by Respondents injuries were more serious and upon considering all relevant factors set above including the inflationary trends now obtaining, it is my considered view that the award of Kshs. 1,700,000/= by the trial court was reasonable in the circumstances and not excessively high as alleged by the appellant. From the foregoing, no sufficient reason has been advanced to warrant this court to interfere with assessment of damages by the trial court.

41. Final Orders: -

    1. This appeal is hereby dismissed.

    2. Costs to the Respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 22ND DAY OF MAY 2025.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Ms. Cherotich for Appellant.

Ms. Kirui holding brief for Mr. Mbogo for Respondent.

Karanja/Christopher – Court A assistants.