



REPUBLIC OF KENYA



KENYA LAW
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**Songok & another v Baraka (Civil Appeal E497 of 2023)
[2025] KEHC 5672 (KLR) (Civ) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5672 (KLR)

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

CIVIL

CIVIL APPEAL E497 OF 2023

AC MRIMA, J

MAY 8, 2025

BETWEEN

DAVID SONGOK 1ST APPELLANT

ROBERT OKUTA 2ND APPELLANT

AND

TOBIAS NGAIRA BARAKA RESPONDENT

*(Being an appeal from the judgement of Hon. M.W Murage (Ms.)
Principal Magistrate delivered on 19th May 2023 in Nairobi [Milimani]
Commercial Chief Magistrate's Civil Case No. E11929 of 2021)*

JUDGMENT

1. The appeal subject of this judgment is only on quantum of damages. Through a Complaint dated 15th June 2021, Tobias Ngaira Baraka, the Respondent herein, sued David Songok and Robert Okuta, the Appellants herein, for inter alia general damages for pain and suffering and loss of amenities and special damages after having been involved in a road traffic accident on or about the 12th October 2020. That was vide Nairobi [Milimani] Commercial Chief Magistrate's Civil Case No. E11929 of 2021 [hereinafter referred to as 'the suit'].
2. In the suit, a consent was entered into on the apportionment of liability in the ratio 80%: 20% in favour of the Respondent herein. The Court then received written submissions and rendered itself on the quantum as follows: -
 - a. General Damages.....Kshs. 2,000,000/=
 - b. Special Damages..... Kshs. 3,550/=



Kshs. 2,003,550/=

c. Less 20% contribution ...Kshs. 400,710/=

Total Kshs. 1,602,840/=

3. The Respondent was also awarded costs and interests.
4. Aggrieved by the said judgment, the Appellants, through a Memorandum of Appeal dated 14th June, 2023 challenged the award on general damages on the following grounds: -
 - i. The learned trial magistrate's award of General Damages for pain and suffering and loss of Amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the Respondent.
 - ii. The learned trial magistrate erred in fact and in law by ignoring the Defendant's written submissions and authorities cited therein in assessing general damages for pain, suffering and loss of amenities.
5. The Appellants then prayed that the award be set aside and be substituted with a fair and reasonable assessment commensurate with the injuries sustained. In buttressing the appeal, the Appellants filed written submissions dated 13th March 2025 where they cited several decisions in a bid to demonstrate that the trial Court's award was erroneous and manifestly excessive.
6. The appeal was opposed. In doing so, the Respondent filed written submissions dated 5th March 2025 and also relied on several decisions. In the end, the Respondent prayed for dismissal of the appeal with costs.
7. Having carefully read the record and parties' submissions and the decisions referred to, this Court is now called upon to determine whether the Appellants' concerns are valid. As the appeal is on quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277.)
8. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988) 1 KAR 7X7 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.
9. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.
10. It is the above legal threshold that will guide this Court in determining this appeal. The trial Court in arriving at the impugned quantum stated as follows: -



.... I am aware that a Court is not bound to decide a matter in accordance with the submissions cited before it by the parties for it is obliged to carry out its research and study in the area under litigation and ought not to swallow the material placed before it in line hook and sinker as it were. In this case, taking into account the injuries sustained by the plaintiff, decided cases and also inflation, doing the best that it can, this court assess the general damages to be paid to the plaintiff for pain, suffering and loss of amenities at Kshs. 2,000,000/= less 20% contributory negligence.

12. There is no doubt that the approach taken by the Learned trial Magistrate was erroneous. Whereas a Court is not supposed, as a matter of course, to agree with the decisions tendered by parties in arriving at a decision, it is legally called upon to interrogate the decisions and express itself on the same. While a Court may or may not agree with a position taken by a party in a matter, it must, however, express itself on the decisions referred to by the parties and in doing so it may distinguish the decisions. It cannot be right for a Court to simply rubbish away the decisions referred to by the parties.
13. Further, the trial Court stated as follows ‘...In this case, taking into account the injuries sustained by the plaintiff, decided cases and also inflation, doing the best that it can, this court assess the general damages to be paid to the plaintiff for pain, suffering and loss of amenities... The Court, therefore, made a mental referral to decided cases and also inflation and that was all. No single decision was referred to by the Court even after disregarding those tendered by the parties and as such, one wonders how the aspect of inflation arose.
14. The Court in Charles Oriwo Odeyo vs. Apollo Justus Andabwa & Another [2017] eKLR set out the guiding principles in assessment of damages in personal injury cases to include: -
 - a. Award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 - b. The award should be commensurable with the injuries sustained.
 - c. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - d. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - e. The awards should not be inordinately low or high.
15. In adding its voice to the matter, the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 (1985) eKLR appreciated the position that it was inevitable that there would be a disparity in awards made by different Courts for similar injuries bearing in mind that no two cases are precisely the similar. The appellate Court then called upon Courts to establish existence of similar fact case scenarios and the peculiarity of the cases before arriving at a reasonable award.
16. In this appeal, the Appellant relied on three decisions in proposing the sum of Kshs. 400,000/= as a fair and reasonable award. The decisions were Jitan Ngaira vs. Abednego Nyandusi Oigo [2018] eKLR, Daniel Otieno Owino & Anor vs. Elizabeth Atieno Owuor [2020] eKLR and Benard Nyambane & Another vs. Benard Ogoti Ombasa [2022] KEHC 14432 KLR. The Respondent in supporting the judgment relied on the decisions in Nyambati Nyaswabu Erick vs. Toyota Kenya Limited & 2 Others [2019] eKLR, Lucy Waruguru Gatundu vs. Francis Kinyanjui Njuku [2017] eKLR and Geoffrey Mwaniki Mwinzi vs. Ibero [K] Limited & Another [2014] eKLR.



17. According to the Medical Report by Dr. G. K. Mwaura, a Consultant Surgeon, the Respondent sustained a fracture of the right femur and a compound open fracture of the right tibia/fibula. He was admitted in hospital for a month where he underwent external fixation of the fractures and skin grafting. He suffered a permanent disability assessed at 5% on the right lower limb.
18. This Court has carefully considered the above decisions in which several other decisions were discussed. The Court has further considered the decisions in *Kiama v Mutiso* Civil Appeal No. 40 of 2023 [2024] eKLR, *Ndwiga & another v Mukimba* [Civil Appeal E006 of 2022] and *Kimani vs. Mwangi & 2 Others* [2024] eKLR. From the decisions, it comes out that, depending on the peculiar circumstances of a case, the awards in respect to the injuries akin to those sustained by the Respondent herein may range between Kshs. 300,000/= and Kshs. 2,500,000/=.
19. In consideration of the totality of the injuries in this case, this Court finds and hold that the award of Kshs. 2,000,000/= on general damages was inordinately high and is hereby set aside and is substituted with the sum of Kshs. 1,000,000/= on account of the permanent disability and the fact that the Respondent will no longer be able to run.
20. It is on the basis of the foregoing that this Court finds the appeal successful. Consequently, the following final orders hereby issue:
 - (a) The appeal be and is hereby allowed.
 - (b) The award of Kshs. 2,000,000/= on general damages is hereby substituted with the sum of Kshs. 1,000,000/= [Kenya Shillings One Million Only].
 - (c) Costs of the appeal to be borne by the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MAY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mege, Learned Counsel for the Appellant.

Mr. Kiptanui, Learned Counsel for the Respondent.

Michael/Amina –Court Assistants.

