



REPUBLIC OF KENYA



**Barasa v Mutisya (Suing through Father and Next Friend James Mutisya Wambua)
(Civil Appeal 185 of 2023) [2025] KEHC 10296 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 185 OF 2023**

TW OUYA, J

JULY 17, 2025

BETWEEN

JOSPHAT KABERIA BARASA APPELLANT

AND

ANN MWIKALI MUTISYA RESPONDENT

**SUING THROUGH FATHER AND NEXT FRIEND JAMES MUTISYA
WAMBUA**

*(Being an appeal from the decision of the Honourable Senior Resident Magistrate's
Court at Kithimani in Civil Case No. 140 of 2021 delivered on 13th July 2023)*

JUDGMENT

1. This is an appeal against the quantum of damages awarded by the trial court. The background of the case is that the accident occurred on the 27th January 2021 along Kanyonyo-Embu Road at Kivua area involving motor vehicle registration number KCJ 360F Toyota Succeed owned and driven by the appellant, and the Respondent (pedestrian) who suffered serious body injuries. The Respondent was a lawful pedestrian while the Appellant drove. The Respondent prayed for special damages of Ksh. 6,650.00 together with general damages and costs of the suit.
2. The Appellant denied the accident via the Statement of defence dated 7th December 2021 and instead pleaded contributory negligence by the Respondent. The Appellant denied receipt of a Demand Letter or Notice of Intention to sue prior to the institution of the suit at the lower court.
3. During the trial the parties, by consent agreed on liability at 90:10 in favour of the Respondent as against the Appellant. The Respondent had proposed general damages at Kshs. 1,500,000.00 while the Appellant had proposed the general damages at Ksh. 400,000.00



4. While delivering the judgment on quantum, the learned magistrate observed that the Respondent had sustained a very tender soft tissue oedematous formation over the left elbow, hematoma formation and multiple bruise wounds over the distal left leg, tenderness of the left ankle and fracture of the left tibia bone. The injuries were certified as grievous harm injuries. The trial court considered the nature of the injuries sustained by the Respondent as well as the authorities on similar injuries and awarded general damages of Ksh. 1,200,000.00
5. Aggrieved with the decision of the trial court on quantum, the Appellant filed the instant appeal via a Memorandum of Appeal dated 7th August 2023 on grounds that the learned trial magistrate erred in law and fact in awarding a sum in respect of general damages which was inordinately high as to be an erroneous and unjust estimate, grossly misdirected itself in treating the evidence and the appellant's submission on quantum before him superficially and consequently arriving at a wrong conclusion on the same ignored the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions filed by the Appellant thereby awarding Kshs. 1,200,000.00 as general damages. The Appellant also contended that the trial Magistrate failed to apply himself judicially and to adequately evaluate the evidence and submissions tendered on quantum and thereby arrived at a decision which does not have any legal or evidential justification.
6. The appeal was disposed through written submissions.
7. The Appellants filed incomplete submissions on the e filing portal and when the registry reached out to him to upload complete submissions, he failed, refused and or neglected to do so. Therefore, the determination of this appeal has not taken his submissions into consideration but the evidence available in the record. In this regard, I am guided by the decision of the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR where the court stated:

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
8. The Respondent opposed the Appeal via their written submissions of 18th October 2024. The Respondent contended that the appeal was defective as the Appellant had failed to extract the decree/ order being appealed from either in the Record of Appeal or a Supplementary record of appeal. Therefore, in the absence of a Certified Decree or Certified Judgment, the instant appeal is fatally defective as elucidated in the case of *Lucas Otieno Masaye v Lucia Olewe Kidi* [2022] eKLR.
9. Citing the authorities in *Paul Kipsang Koech v Titus Osule Osore* [2013] eKLR and *Kiwanjani Hardware Ltd & another v Nicholas Mule Mutinda* [2008] eKLR, the Respondent submitted that the general damages of Kshs. 1,200,000.00 awarded by the trial court was not excessive as the Respondent's injuries were commensurate with the award made by the trial court. The appellant had failed to show any concrete reason why the award was either too high or too low to warrant the disturbance by this honourable court. It is further submitted that the Respondent's evidence on the injuries sustained were not challenged with any substantive proof by the Appellant. The Respondent urged the court not to interfere with the award of the lower court.
10. The duty of the first appellate court is espoused in Section 78 of the *Civil Procedure Act* which provides that the first appellate court is to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusion.



11. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. 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. In the case of *Mbogo and Another v Shab* [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 it 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.”

12. Having looked at the pleadings herein, the record of appeal and the submissions, the issues that commend themselves for determination are whether the appeal herein is defective and whether the trial court’s assessment of general damages was excessive so as to warrant interference by this court.

13. The Respondent has submitted that the instant appeal is fatally defective for failing to attach a certified copy of the decree/order or judgment from which the appeal emanates. A look at the Record of Appeal shows that neither a certified copy of the decree nor an order of the court appealed from has been annexed.

14. Under the *Civil Procedure Act*, appeals lie from original decrees Section 79 of the *Act* provides as follows:

“The provisions of this Part relating to appeals from original decrees shall, as far as may be, apply to appeals –

- (a) from appellate decrees; and
- (b) from orders made under this Act or under any special or local law in which a different procedure is not provided.”

15. It follows that an appeal must be of necessity be from the decree issued by the sub-ordinate court. Order 42 (2) of the *Civil Procedure Rules* provides as follows:-

- “(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

16. A party is therefore required to file the decree together with the memorandum of appeal and if not, file it as soon as it may be directed by the court. Under Order 42 Rule 13 (4) *Civil Procedure Rules*, a decree is one of the documents which must be filed by the appellant.

17. In a persuasive decision in the case of *Paul Kurunyi Leshuel –v- Ephantus Kariithi Mwangi & Another* (2015) eKLR Justice Ngaah stated:-

...



“Much as this requirement is contained in the rules, it is not in my humble view a requirement that can be dismissed as a mere technicality that may be swept under the carpet, the question whether or not there is indeed an appeal which called for the appellate court to exercise its jurisdiction in that respect goes to the root of the appeal itself, for without an appeal properly so called, any attempt to invoke and exercise that jurisdiction would be in vain.”

18. The issue of an incomplete record of appeal was also addressed by the Supreme Court in the case of *Bwana Mohamed Bwana –v- Silvano Buko Bonaya & 2 Others* (2015) eKLR where the court held that

.....

“without a record of appeal a court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirement of the law. A Court cannot exercise its adjudicatory powers conferred by the law, or the *Constitution* where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

19. The Court of Appeal in *Chege v Sulciman* [1988] eKLR in addressing itself over a similar issue remarked thus:

‘...no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.’

20. Order 42 Rule 13 (4) (f) of the *Civil Procedure Rules* provides that...

- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
- (a) the memorandum of appeal;
 - (b) the pleadings;
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”



21. In *Akile & another v Mugo* (Civil Appeal E013 of 2023) [2024] KEHC 6538 (KLR), the court stated:-

‘Under Sub-rule (a) (b) & (f) in a Memorandum of Appeal pleadings, the Judgment, order or decree appealed from, and the order (if any) giving leave to appeal, are documents which must be filed in an appeal. Where they are not filed, there is no competent appeal worth consideration by the appellate court.’

22. Section 2 of the *Civil Procedure Act* defines a decree in the following terms:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- (a) any adjudication from which an appeal lies as an appeal from an order; or
- (b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;”

23. Further, in the case of *Elizanya Investments Limited v Lean Energy Solutions* [2021] KEHC 8495 (KLR) the Court stated thus: -

“30. I am of the view that the use of the conjunction “or” means that an appellant is not mandatorily obligated to attach both the Judgment and the decree. Further, a decree is an extract of the Judgment appealed from. A decree is defined under Section 2 of the *Civil Procedure Act*, Cap 21, Laws of Kenya as follows:

31. In the present appeal, the appellant filed Kilifi Senior Principal Magistrate’s Court Civil Case No. 326 of 2018. After hearing the parties, Judgment was delivered dismissing the appellant’s suit, with costs to the respondent. In this court’s view, the failure to include a certified copy of the decree in the Record of Appeal should not invalidate the present appeal for reasons of non-compliance as this court has had the benefit of reading Judgment which was rendered by the Trial Court.”

24. In view of the above, it is evident that an appeal can be rendered fatally defective in the absence of a decree. I have perused the record of appeal and I have noted that the judgment appealed from is annexed at page 45 of the record of Appeal. I am therefore satisfied that the instant appeal is properly before the court for determination.

Whether the trial court’s assessment of general damages was excessive so as to warrant interference by this court.

25. The substratum of the appellant’s appeal is the propriety of Ksh. 1,200,000.00 awarded as damages by the trial court.



26. The level of quantum assessed under each unit of the plaint lies at the discretion of the trial magistrate. In the case of *Bashir Ahmed Butt -vs- Uwais Ahmed Khan* (1982-88) KAR, the Court set out the parameters under which an Appellate court would interfere with the award on general damages made by the trial court as follows;
- “An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that the misapprehended the evidence in some material respect and so arrived a figure which was either inordinately high or low”
27. The factors that a court considers in determining the award to give in damages include the nature and extent of the injuries, the awards made for comparable injuries as well as inflation rates. A court must however bear in mind that no two cases are exactly the same. In the case of *Stanley Maore v. Geoffrey Mwenda Nyeri* CA No. 147 of 2002 [2004] eKLR the Court of Appeal held as follows on the assessment of general damages;
- “Having so said, 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 method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases.”
28. In the instant case, the injuries sustained by the Respondent are not disputed, the appellant’s contention is that the award of Ksh. 1,200,000.00 is quite high considering the injuries sustained by the Respondent. The Respondent had sustained very tender soft tissue oedematous formation over the left elbow, hematoma formation and multiple bruise wounds over the distal left leg, tenderness of the left ankle and fracture of the left tibia bone. The injuries were certified as grievous harm injuries.
29. In order to assist the court assess damages, the duty of the advocates is to cite appropriate cases from which the court can make a decision. In this case, the appellant’s filed incomplete submissions. On the other hand, the authorities cited by the Respondent involve injuries that are more comparable to the ones involved in this case. I am also minded of the fact that before awarding Kshs. 1,200,000/= as general damages, the learned trial magistrate in this case took into consideration the nature of the injuries sustained by the Respondent in comparison to the awards made in authorities cited by the parties.
30. In making award of damages the court should bear in mind that the injured person is entitled to a fair compensation and the defendant expects fairness in the award of damages as well. See Lord Denning in *Kim Pho Choo v Camden & Islington Area Health Authority* [1979] 1 All E.R 322 where he stated that in assessing damages, the injured person is only entitled to what in the circumstances a fair compensation for both the plaintiff and the defendant.
31. In the instant case the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards. The injuries in the case of *Paul Kipsang Koech & Another V Titus Osule Osore* [2013] KEHC 3561 (KLR) and *Kiwanjani Hardware Ltd & Another V Nicholas Mule Mutinda* [2008] KEHC 1102 (KLR), cited by the Respondents, are not similar to the injuries sustained by the Respondent. I hold that the decisions cited by the Respondent bear little relation to the injuries she sustained.
32. I am alive of the fact that the Appellant had proposed an award of Ksh. 400,000.00 while the Respondent had proposed general damages at Ksh. 1,500,000.00.



33. The question then is whether Kshs. 1,200,000.00 was excessive in the circumstances. Having noted that the decisions cited by the Respondent bear little relation to the injuries sustained. Also considering that they were made in 2013 and 2008 and that the awards made in those decisions were Ksh. 200,000.00 and Ksh. 150,000.00 respectively. I would think the award herein is on the higher side. I therefore hold that the award of Kshs. 1,200,000.00 is excessive in the circumstances.
34. In the case of *Kiama v Mutiso* (Civil Appeal 40 of 2023) [2024] KEHC 5135 (KLR), the Respondent had been injured in a motor vehicle accident and sustained injuries to wit a fracture of the upper 1/3 of the left tibia bone and related soft tissue injuries. I find that the injuries sustained by the Respondent are similar to those sustained by the Respondent in the *Kiama case* (Supra). Also, the Kiama case is quite recent as judgment was rendered on 13th May 2024, where the court set aside an award of Kshs. 700,000.00 and replaced it with an award of Ksh. 400,000.00
35. In view of the above I allow the appeal to the extent that I set aside the award of Kshs. 1,200,000.00 awarded as general damages and substitute it with an award of Kshs. 400,000.00 subject to the agreed liability.
36. Each party to bear its own costs in this appeal.
37. Final Orders
- i. This appeal partially succeeds. The trial court award of Kshs. 1,200,000.00 awarded in general damages is hereby set aside and substituted with an award of Kshs. 400,000.00 subject to the agreed liability of 90:10 per cent in favor of the Respondent
 - ii. Each party to bear their own costs

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 17TH JULY 2025.

HON. T. W. OUYA

JUDGE

