



**Nduku v Kahara & another (Civil Appeal E071 of 2022)  
[2024] KEHC 5575 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5575 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E071 OF 2022**

**FROO OLEL, J**

**MAY 9, 2024**

**BETWEEN**

**CHRISTINE MWENDE NDUKU ..... APPELLANT**

**AND**

**DAVID KABIRU KAHARA ..... 1<sup>ST</sup> RESPONDENT**

**MIKE MUEMA MUTINDA ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Judgement and decree of Honourable B. LUOVA (RM)  
in Machakos CMCC No E034 of 2022 delivered on 12th day of May, 2022)*

**JUDGMENT**

**A. Introduction**

1. This appeal arises from the judgment of Honourable B. A Luova (RM) dated 12<sup>th</sup> May 2022, delivered in MACHAKOS CMCC No.E034 of 2022 where She awarded the Appellant herein damages arising from a road traffic accident in the sum of Ksh.50,500/= plus costs and interest.

**B. The Pleadings**

2. By a plaint dated 24<sup>th</sup> January 2023, the Appellant filed the primary suit and sought for General and special damages arising from injuries sustained in a road traffic accident which occurred on 07.01.2022. she blamed the respondents as the legal and beneficial owners of the accident motor vehicle as the persons responsible for the said accident. The Appellant did aver that on the said date, she was a pillion passenger on motor cycle registration Number KMFK 875Q,( hereinafter referred to as the suit motor cycle) which was lawfully being driven on its lane around ABSA bank, within Machakos town, when the defendants and/or their driver, servant or agent reckless drove Motor vehicle registration Number KBY 955T Subaru station wagon,( hereinafter referred to as the suit motor vehicle) that they permitted



the same to be negligently driven, lose control and rammed into the rear of the suit motor cycle. As a result of the said accident she suffered injuries and therefore prayed to be compensated.

3. The respondents though served, did not enter appearance and on 24.02.2022, interlocutory judgement was entered as against them. The matter therefore proceeded for formal proof.

### **C. Evidence at trial**

4. PW1 the Appellant herein adopted her witness statement as her evidence in chief and further produced all the claim supporting documents as Exhibits in support of her case. In her witness statement she had stated that on 07.01.2022, she was a pillion passenger in the suit motor cycle being ridden along ABSA road, with Machakos town. The 2<sup>nd</sup> respondent negligently drove and or controlled the suit motor vehicle that he permitted the same to ram into the suit motor cycle at the rear. As a result of the accident she sustained sever injuries, which included; concussion of the brain, blunt injuries to the forehead, cut wound on the face, multiple facial injuries, blunt injuries to the right ribs, deep cut wound on the right elbow, crush bruises to the right hip and crush injury to the right knee. She was treated at Machakos level 5 hospital and later reported this incident at Machakos police station. She therefore prayed to be awarded damages.
5. The trial court did consider the evidence adduced, the submissions filed and came to the conclusion that respondent was to blame for causing this accident, but the Appellant had exaggerated the injuries suffered. The trial magistrate proceeded to award her Ksh.50,000/= as General damages and kshs.550/= as special damages plus costs and Interest. Being wholly aggrieved and dissatisfied by the judgment/decree issued, the appellant did prefer this appeal and raised four (3) grounds of Appeal namely;
  - a. That the learned trial magistrate erred in law and in fact by failing to consider the Appellants evidence.
  - b. That the learned trial magistrate erred in law and in fact by failing to appreciate the full nature of the Appellants injuries and authorities cited and thus making an award that was manifestly low.
  - c. That the learned trial magistrate erred in law and in fact by taking into account irrelevant factors in coming up with the award of quantum.
6. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect quantum awardable be set aside and the damages be reassessed afresh considering the injuries sustained. The Appellants also prayed for costs of this Appeal.

### **D. Submissions**

#### **(i). Appellant's Submissions**

7. The appellants filed their submissions on 18.12.2023, and did submit that the Appellant testify as to the circumstances of the accident and the injuries which she sustained. In particular, the Appellant had sustained the following injuries; concussion of the brain, blunt injury to the forehead, deep cut wound on the face, multiple facial injuries, blunt injury to the right ribs, deep cut wound to the right elbow, crush injury to the right hip and crush injury to the right knee. These injuries were supported by the documents produced namely the treatment notes, P3 form and Medical report, which had confirmed these injuries.
8. The Appellants evidence stood unchallenged/uncontroverted and therefore the severity of the injuries sustained had been proved as set out in the plaint. The trial Magistrate therefore erred in law to award



quantum which was low, considering the injuries sustained. Reliance was placed on *Ndundo Dennis Vs Ann Wangari & Another* (2018) eklr , *Rosemary Wanjiru Kungu Vrs Elijah Macharia Githinji & Another & Rahima Tayab & others Vrs Anna Mary Kinanu C.A. NO 29 of 1982 (1983)*klr 114;1 KAR 90.

9. There was no scientific computation of damages suffered but factors such as comparable injuries to comparable awards, passage of time and inflationary trends ought to have be considered when computing what would be reasonable award. See; *Rosemary Wanjiru Kungu Vrs Elijah Macharia Githinji & Another, Catherine Wanjiru Kingori & 3 others Vs Gibson Theuri Gichubi* (2005) eklr, *Joseph Njoroge Kariuki Vs Felix Ndolo Mbaluka HCCA NO 44 of 2009* where awards for similar injuries was placed at between Kshs.180,000/= to Kshs.300,000/= only.
10. The Appellant therefore urged this court to find that this Appeal is merited and proceed to vary the award to a proper estimate considering the injuries suffered

### **E. Analysis and Determination**

11. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari ( Deceased)* by L.Rs (2001) 3 SCC 179.
12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Ouseph* AIR 1969 Keral 316.
13. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties. In this Appeal , what is challenged is the award of Ksh.50,000/= which the Appellant avers is too low considering the injuries suffered.
14. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case *Khambi & Another v Mahitu &Another* (supra). Further the Court of Appeal in the case *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others* Civil Appeal Case No. 192 Of 1992 Stated:

“Those principles were well stated by Law, J.A in *Bashir Ahmed Butt vs. Uwais Ahmed Khan*, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-

‘An Appellate Court will not disturb an award of 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 he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ...”



15. This court is also guided by the decisions of the Court of Appeal on the issue of interference with damages. In the case of Johnson Evan Gicheru vs Andrew Morton & another [2005] Eklr where it was stated that: -

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.

16. The Appellants evidence was uncontroverted. she did produce all the documents relied on including treatment notes from Machakos level 5 hospital, P3 form and medical report to support her claim for damages. The trial magistrate did find the respondent liable for the accident, but was of the opinion that the injuries pleaded were exaggerated when compared to the injuries stated in the initial treatment notes and P3 form. The injuries noted in the initial treatment documents were stated as injuries to the head, right hand, right leg and right hip., while in the P3 form the same were noted as blunt injuries to the forehead, multiple facial soft tissue injuries, bruise son the forehead, blunt injuries to the right ribs, bruises on right elbow, blunt injuries on the right hip and blunt injuries on right hip.
17. On the plaint the appellant had pleaded that she did suffer concussion to the brain, blunt injuries to the forehead, deep cut wound to the face, multiple facial injuries, blunt injury to right ribs, deep cut wound on the right elbow, crush injury to right hip and crush injury to right knee.In Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR, the court of appeal held that that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.” Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision whether or not to interfere with an award by the appellate court must necessarily be restricted

18. I also take into consideration the sentiments by Madan (JA) (as he then was),in UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575, at page 579:

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.”

19. I have considered the appellant’s submission and authorities relied upon. I do agree with the trial magistrate that the injuries as listed in the plaint were exaggerated and do not reflect the true nature of injuries sustained by the appellant as captured by the treatment notes and specifically the P3 form. Be that as it may, I do also find that the trial Court did make error in arriving at its finding to award the Appellant Ksh.50,000/= when the injuries suffered would have attract slight higher awards, when similar injuries are compared to similar awards, passage of time and inflationary trends. I do



therefore set aside the award of Ksh.50,000/= awarded for General damages and enhance the same to Kshs.120,000/=.

#### **E. Disposition**

20. The judgment/decree of Hon B.A. Luova(RM) dated 12<sup>th</sup> May 2022 issued in Machakos CMCC No E034 of 2022 , with respect to General damages of Kshs 50,000/= awarded is hereby set-aside and the same is increased to Ksh.120,000/=.
21. Since the respondent did not take part in the primary trial or this Appeal, no costs are awarded to the Appellant in this Appeal.
22. It is so ordered.

**JUDGMENT WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 9<sup>TH</sup> DAY OF MAY, 2024**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 9<sup>th</sup> day of May, 2024

In the presence of:

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

