



**Loyd v Mwangi (Civil Appeal E475 of 2021)
[2024] KEHC 7046 (KLR) (Civ) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7046 (KLR)

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

CIVIL

CIVIL APPEAL E475 OF 2021

CW MEOLI, J

JUNE 13, 2024

BETWEEN

KIRIMI MUTWIRI LOYD APPELLANT

AND

STEPHEN NJUHIGU MWANGI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. Orenge, K.I., (Mr.),
SRM, delivered on 26th September 2019 in Milimani CMCC No. 10500 of 2018)*

JUDGMENT

1. This appeal emanated from the judgment delivered on 26.09.2019 in Milimani CMCC No. 10500 of 2018 (the suit). Stephen Njuhigu Mwangi (hereafter the Respondent) instituted the suit against Kirimi Mutwiri Loyd (hereafter the Appellant) vide the plaint dated 28.11.2018. Seeking general and special damages in respect of injuries allegedly sustained by the Respondent on or about 13.11.2016. The Respondent pleaded that on the material date, he was a lawful passenger aboard the motor vehicle registration number KBW 853P-Toyota Matatu (the first motor vehicle) travelling along the Thika-Nairobi Highway; that the Appellant so carelessly and/or negligently controlled and/or managed the first motor vehicle that it lost control and ram into the rear of the motor vehicle registration number KBP 413P-Toyota Matatu (the second motor vehicle) ; and that consequently, the Respondent sustained serious bodily injuries. The Respondent blamed the Appellant for the said accident, setting out the particulars of negligence in the plaint.
2. The Appellant entered appearance and filed a statement of defence on 8.01.2019, denying the key averments in the plaint and liability.
3. When the matter came up before the trial court for hearing on 31.07.2019, the parties recorded a consent on liability in the ratio of 90:10 in favour of the Respondent and against the Appellant and



the production of the Respondent's documents without calling the makers thereof. Thereafter, the parties canvassed the issue of quantum of damages by way of written submissions.

4. In the end, the trial court by its judgment delivered on 26.09.2019 awarded damages in the following manner:
 - a. General damages for pain, suffering and loss of amenities Kshs. 2,500,000/- (less 10% contribution)
 - b. Loss of earning capacity NIL
 - c. Special Damages Kshs. 410,265/-
5. Dissatisfied with the outcome, the Appellant preferred this appeal (vide the memorandum of appeal dated 4.08.2021) specifically challenging the quantum of general damages under the head of pain, suffering and loss of amenities. The appeal was premised on the following grounds:
 - “ 1. The Learned magistrate erred in fact and in law in making an inordinate award of KSHS, 2,500,000 as general damages in which was excessively high.
 2. The learned magistrate erred and misdirected himself when he failed to consider the applicants submissions on both points of law and facts.
 3. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 4. That the learned trial magistrate erred in law and in fact by failing to judiciously analyze the evidence on record and the appellant's submissions and authorities thereby arriving at a finding on quantum that was manifestly high, erroneous, untenable, unfair and unjust to the appellant.
 5. The learned trial magistrate failed to consider conventional awards made in respect of cases of similar injuries thereby arriving at an excessive award.
 6. The Learned magistrate erred in fact and in law in failing to appreciate the nature of injuries sustained by the respondent and in so doing arrived at an erroneous assessment of damages.” (sic)
6. Directions were given for the appeal to be canvassed by way of written submissions. However, by the time of writing this judgment, the Appellant had not complied with the said directions. In the circumstances, the court will proceed to consider the submissions filed on behalf of the Respondent.
7. Counsel for the Respondent anchored his submissions on the decisions in *Bungoma Line Sacco Society Limited v Super Bargains Hardware (K) Limited* [2021] eKLR and *Ratilal Gova Sumaria & Another v Allied Industries Limited* [2007] eKLR on the duty of a first appellate court. Counsel then proceeded to submit that the medical evidence tendered at the trial supported the injuries pleaded in the plaint, which injuries were of a severe nature. It was counsel's argument that given the serious nature of injuries sustained here, the trial court ought to have awarded the sum of Kshs. 4,000,000/- which was sought before it by the Respondent.
8. Citing in support of the above proposal several decisions, inter alia, the case of *Nicholas Njue Njuki v Eliud Mbugua Kahuro* [2014] eKLR where the court awarded the sum of Kshs. 3,800,000/- to a plaintiff who had sustained an unstable fracture dislocation of the lumbar vertebrae leading to spinal



cord damage; complete paralysis in the lower limbs; incontinence of stool and urine; with permanent incapacity being assessed at 100%. And the case of Sabina Nyakenya Mwanga v Patrick Kigoro & another [2015] eKLR in which a plaintiff with multiple fracture injuries, bruising and soft tissue injuries was awarded a sum of Kshs. 3,000,000/- as general damages for pain, suffering and loss of amenities. Counsel therefore urged the court to exercise its discretion by revising upwards the trial court's award under this head.

9. The Respondent's counsel further urged this court to award damages under the head of loss of earning capacity, by arguing that the trial court erred in declining to make any award under this head. Counsel therefore urged the court to consider the degree of permanent incapacity assessed at 20% in the medical report tendered at the trial, the minimum wage for a general worker and a multiplier of 20 years, to be tabulated as follows:

Kshs. 12,926/- x 20 x 12 x 20/100 = Kshs. 620,448/-

10. Counsel therefore urged the court to dismiss the appeal but to re-assess the awards made by the trial court accordingly.
11. The court has considered original record, record of appeal and the submissions on record and the authorities cited. As earlier mentioned, the Appellant did not avail his written submissions. Be that as it may, the Respondent by his submissions sought to challenge the award made under the head of pain, suffering and loss of amenities, and further urged the court to assess damages for loss of earning capacity. There is no cross appeal on the record by which the Respondent signaled a challenge on the quantum of damages awarded by the trial court. Therefore, the Respondent cannot be heard to challenge the said awards through his submissions. That said, the court will now proceed to consider the appeal.
12. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

13. The main contention in the appeal relates to the quantum of damages awarded by the lower court under the head of pain, suffering and loss of amenities, which are viewed by the Appellant as being either inordinately high or awarded on the basis of wrong principles or without consideration of his submissions.
14. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.”

15. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 that:

“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”.

See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001*; (2004) eKLR.

16. In the latter case, the Court of Appeal reiterated the discretionary nature of general damage awards and exhorted that:

“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 in the first instance”.

17. In *Tayib v Kinany* (1983) KLR 14, the Court exhorted inter alia that:

“By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis added)

18. In respect of the general damages under the head of pain, suffering and loss of amenities, the Respondent particularized his injuries in the plaint dated 28.11.2018 as comprising fracture of the left and right femur bones, fractured incisors teeth, soft tissue injuries of the left thigh and left ankle joint, and blunt soft tissue injuries of the left ankle joint. The aforesaid injuries were confirmed by the medical evidence in the Respondent’s bundle of documents adduced at the trial, more so the medical report prepared by Dr. P.K. Mwangi and dated 28.09.2018. The doctor noted that the Respondent had been admitted in hospital for a period of five (5) months and further that the Respondent complained of recurring pains on both thighs. The doctor stated that in addition to the physical injuries, the Respondent had suffered emotional and social stress resulting from the accident, and that he would be predisposed to early osteoarthritis due to the skeletal fractures. That the Respondent experienced difficulties in taking steps and walking distances. Consequently, the doctor assessed permanent incapacity arising from the injuries at 20%.

19. From the record, it is apparent that the Respondent subsequently underwent a second medical examination at the request of the Appellant’s advocate. However, the resulting medical report was not tendered in evidence before the trial court.

20. Suffice it to say that, at the submissions stage, the Respondent proposed an award of Kshs. 4,000,000/- whilst placing reliance on the authorities also cited on appeal namely *Nicholas Njue Njuki v Eliud Mbugua Kahuro* (supra) and *Sabina Nyakenya Mwangi v Patrick Kigoro & another* (supra). The Appellant on his part suggested an award of Kshs. 250,000/- upon relying on the case of *Joshua Mwaniki Nduati v Samuel Muchiri Njuguna* [2005] eKLR where a similar award was made for a fracture of the pelvis right acetabulum.



21. In his judgment, the learned trial magistrate upon setting out the summary of the pleadings, evidence tendered, and awards suggested by the parties, relied inter alia on the decision of *Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another* [2012] eKLR in which the court awarded a sum of Kshs. 2,040,000/- to a plaintiff who suffered concussion for 3 days, fractures of right superior and inferior rami of pubis, fracture of ischia, fracture left acetabulum, fracture lateral condyl of femur, dislocation left knee with torn collateral ligament; skin grafting surgery on left leg, and left leg shortened by 4 cm. The learned trial magistrate similarly relied on the decision of *Edward Mzamili Katana v CMC Motors Group Ltd & Another* [2006] eKLR where the court awarded a sum of Kshs.2,000,000/- to a plaintiff who had sustained head injury leading to concussion, cut wound and bruises of the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injury with multiple fractures of left 5th, 6th and 7th ribs and fracture of the left femur upper 1/3 shaft.
22. The learned trial magistrate upon citing the above authorities, proceeded to award a sum of Kshs. 2,500,000/- under the relevant head of damages.
23. The Appellant firstly complained that trial court did not take into consideration his submissions and authorities filed before the trial court. This complaint is not justified by a perusal of the record as well as the impugned judgment. As a matter of fact, the impugned judgment referred to the awards proposed by the Appellant on general damages, and the relevant authority(ies) relied upon.
24. Upon considering the respective authorities cited, the court is of the view that those cited by the Respondent constituted relatively comparable injuries albeit older. Similarly, the court finds that the authorities cited by the Appellant constituted less severe injuries than those suffered here and could not therefore have offered guidance.
25. Upon considering the authorities relied upon by the learned trial magistrate in making his award, the court is of the view that they related to injuries of a more severe nature in comparison to those suffered by the Respondent.
26. In the circumstances, the court has considered the case of *Azhar Ali v Sheikha Mohamed* [2020] eKLR where an award of Kshs. 1,500,000/- was upheld on appeal, for general damages in respect of fracture of the right humerus bone, fracture superior and inferior bone of the right pelvic bone, multiple soft tissue injuries, facial bruises, cut wound over nose lips. The court also took into account the case of *Mbugua v Mwaniki (Civil Appeal 94 of 2020)* [2022] KEHC 16576 (KLR) (15 December 2022) (Judgment) in which an award of Kshs. 1,300,000/- was made in general damages, to a plaintiff who had suffered fractured neck of the right femur, fracture distal end of the right tibia and fibula, movements at the right joint were restricted because of pain and 3 upper incisors removed and 3 lower incisors were loose, multiple permanent scars on the scalp and face, with 30% permanent disability.
27. Upon taking the just cited authorities into account, the nature and extent of the injuries sustained by the Respondent herein, coupled with the resultant degree of permanent incapacity assessed, the court is of the view that the award of Kshs. 2,500,000/- made by the learned trial magistrate fell on the higher side. The court therefore deems it necessary to disturb the said award by substituting it with a more reasonable award, but adjusted for inflation, in the sum of Kshs. 1,700,000/-.
28. In the end therefore, the appeal succeeds and is hereby allowed. Consequently, the court hereby sets aside the trial court award made on general damages for pain, suffering and loss of amenities.
29. Consequently, the judgment on appeal shall now read as follows:
 - a. General damages for pain, suffering and loss of amenities - Kshs. 1,700,000/-



- b. Loss of earning capacity - NIL
 - c. Special damages - Kshs. 410,265/-
Total award - Kshs. 2,110,265/-
Less 10% contribution
Net: Kshs. 1,899,238.50- (One Million, Eight Hundred and Ninety -nine Thousand, Two Hundred and Thirty-Eight, and Fifty Cents)
30. The Respondent shall have costs of the suit and interest on general damages at court rates from the date of judgment until payment in full, and interest on special damages at court rates from the date of filing suit until payment in full. In the circumstances of this case where the Appellant failed to submit on his appeal, the court will order that the parties shall bear their own costs in the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Kalaine

For the Respondent: Mr. Kirubi

C/A: Erick

