



REPUBLIC OF KENYA



**Murungi v Nchana (Civil Appeal E215 of 2023)  
[2024] KEHC 11131 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E215 OF 2023  
JM OMIDO, J  
SEPTEMBER 12, 2024**

**BETWEEN**

**DOUGLAS MURITHI MURUNGI ..... APPELLANT**

**AND**

**JULIUS NCHANA ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. R. Ongira, Resident Magistrate delivered on 9th June, 2023 in Tigania CMCC No. E066 of 2022)*

**JUDGMENT**

1. This appeal emanates from the judgement and decree of Hon. R. Ongira delivered on 9<sup>th</sup> June, 2023 in Tigania CMCC No. E066 of 2022.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 17<sup>th</sup> November, 2023 upon which he seeks to upset the trial court's finding on court are as follows:
  - i. The learned trial Magistrate erred in law and misdirected herself when she failed to consider the Appellant's submissions on both points of law and facts.
  - ii. The learned trial Magistrate erred in fact and in finding that the Respondent was entitled to Ksh.700,000/- as general damages.
  - iii. The learned trial Magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the Appellant which are related to the injuries and the evidence adduced in trial.
  - iv. The learned trial Magistrate erred in fact and in law in finding that the Respondent was entitled to Ksh.6,000/- as special damages which were not specifically pleaded and proven.



3. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions. It is instructive from the Appellant's submissions that the appeal is preferred on the issue of quantum only.
4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the relevant evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
5. In Sielle, Sir Clement De Lestang observed that:
 

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
6. The claim before the lower court, as per the amended complaint dated 30<sup>th</sup> August, 2022 was one based on tort whereby the Respondent herein (the Plaintiff before the trial court) claimed and pleaded that he sustained injuries in a road traffic accident that occurred on 16<sup>th</sup> March, 2022, for which he held the Defendant liable.
7. The relevant evidence in so far as this appeal is pursued was that of the Respondent, who testified as PW1 and that of Dr. John Kimani Macharia, who testified as PW3.
8. The Respondent testified before the trial court and stated that following the accident, he sustained injuries on his chest, right hand, left knee, left shoulder and head.
9. The Plaintiff stated that he was later examined by Dr. Macharia, who prepared a medical report on his findings, for which the Respondent paid Ksh.6,000/-. He stated that although he ultimately recovered from the injuries, he still used painkillers as at the time he testified.
10. The Respondent produced, inter alia, the following documents in support of his case: Receipt issued by Dr. Macharia for Ksh.6,000/- for the medical report (PEXh3). General outpatient card from Muthara Subcounty Hospital (PEXh4). P3 form (PEXh5). Right shoulder x-ray report (PEXh6). Demand letter (PEXh7).
11. On cross examination, the Respondent stated that he did not have documentation that would show that he was still on medication.
12. On his part, Dr. Macharia told the trial court that he examined the Respondent on 18<sup>th</sup> April, 2022 and prepared a report, for which he charged the Respondent Ksh.6,000/-, in which he documented the injuries that the Respondent sustained as follows: Swollen occiput, scalp. Tender chest wall. Right shoulder was swollen and tender. Bruises over the knees. Fracture of the right clavicle, junction of the mid third and medial third.
13. The report indicated that the fracture, the pains and swellings were managed conservatively with an arm sling.



14. The doctor stated in his report that at the time of examination, the Respondent complained of pains over the fracture site with inability to use the right upper limb effectively and pains over the right upper limb on lying on the right side. He noted that the Respondent had a slight deformity of the right clavicle at the fracture site and movements of the right shoulder were painful on extreme of ranges.
15. In his conclusion, Dr. Macharia formed the opinion that the bone union at the fracture site would heal with a mal-alignment of the bone which would result in persistent pains requiring painkillers.
16. The doctor produced the medical report as PExh5.
17. The Appellant did not call any witnesses in the trial court.
18. In rendering her findings on quantum, the learned trial Magistrate stated as follows:

“PW3 the doctor produced the medical report for PW1 as PExh5 and stated that the Plaintiff had a swollen scalp at the back of the head, tender chest wall, right shoulder was swollen and tender, bruises over the knees and he sustained a fracture of the right clavicle bone. PW3 stated that the Plaintiff sustained a fracture of the right cervical (sic) bone and soft tissue injuries and that the fracture was undergoing healing and the Plaintiff was still experiencing pain.

The Plaintiff in her submissions opined that a sum of Ksh.1,000,000/- would suffice as general damages for pain and suffering and relied on the case of *Mwavita Jonathan v Silvia Onunga* [2017] eKLR and the case of *Maliki Boeki Company Limited & another v Michael M. Peter* [2022] eKLR. The court has had the benefit of reading the said authorities. The Defendant didn't file written submissions.

The court in *Ramadhan Kamora Dhadbo v John Kariuki & another* [2017] eKLR opined thus:

“There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the Defendant who has been held liable for the claim. Thirdly, while exercising discretion courts shall endeavor to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”

In the matter of *H. Young & Company E.A. Limited v Edward Yumatsi* [2013] eKLR, the High Court on appeal upheld an award of Ksh.500,000/- as general damages where the claimant sustained inter alia deep cut wound on the head and fracture of the right clavicle bone.

In the matter herein, taking into account the value of the Kenyan currency, I proceed to award the Plaintiff a sum of Ksh.700,000/- for the injuries sustained.”

19. On the award made on the head of special damages, the learned trial Magistrate had the following to say:

“The Plaintiff pleaded for special damages of Ksh.6,000/- and produced a receipt for the said amount as PEXh3. The Plaintiff is thus awarded a sum of Ksh.6,000/- for special damages.”
20. Having above re-analyzed, reevaluated and reconsidered the relevant evidence adduced in the Magistrate's trial court and bearing in mind that I did not see or hear the witnesses when they testified



(See above Sielle), and further having perused and considered the Memorandum of Appeal proffered herein together with the rival submissions, I deduce the issues for determination to be as follows:

- a. Whether the award of Ksh.700,000/- made on the head of general damages for pain, suffering and loss of amenities was excessive and whether this court should interfere with the same.
  - b. Whether the trial court fell afoul of the law in awarding Ksh.6,000/- on the head of special damages and whether this court should interfere with the same.
  - c. Who should bear the costs of the present appeal?
21. With regard to the first issue for determination which is whether the assessment and award of general damages for pain, suffering and loss of amenities by the trial court was manifestly and/or excessively high, it is to be noted that the nature of injuries that were sustained by the Respondent is not questioned in this appeal, rather, what is challenged is the award. The law on when an appellate court can interfere with an award of damages is firmly established.
22. General damages are awarded if the party claiming establishes in principle his legal entitlement to the same, and the trial court must make its own assessment of the of such general damages.
23. In order to justify interfering with the award of damages made by the court that assessed the same, this court must be convinced that the trial Magistrate acted upon some wrong principle of law, or that the amount awarded was manifestly or excessively high or low as to render the same an erroneous estimate of the compensation for the injuries sustained by the party. (See *Rook v Rairre* [1941] 1 ALL ER 297).
24. In *Butt v Khan* [1981] KLR 349 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”.
- (See generally *Southern Engineering Company Ltd v Mutia* [1985] eKLR; *Kenfro Africa Ltd t/a Meru Express Services v Lubia & Another* (No 2) [1985] eKLR and *Gicheru v Morton & Another* [2002] KLR 333).
25. From the trial court’s judgement, the learned Magistrate took guidance from decisions of superior courts in which comparable injuries were assessed, and in my view, proceeded to properly assess the same at Ksh.700,000/-.
26. In his submissions on the appeal, the Appellant urges the position that the learned trial Magistrate failed to consider his submissions in the lower court and disregarded the judicial authorities that he cited and relied upon which related to the injuries and the evidence.
27. On that, nothing could be further from the truth. I say so because the record of the trial court bears it that the Appellant did not file submissions or seek to rely on any authorities. I need not say more on that.
28. Notwithstanding the fact that the Appellant did not file submissions in the lower court and did not rely on any judicial decisions, he sought to rely in the present appeal on the authorities of *Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited* [2019] eKLR; *Ndung’u Dennis v Anne Wangari Ndirangu & another* [2018] eKLR; and *Eva Karemi & 5 others v Koskei Kieng & another* [2020] eKLR.



29. The Appellant argued that the Respondent sustained soft tissue injuries and that this court should be guided by the three authorities above to interfere with and reduce the award of the trial court. In the three cases, the courts made awards of between Ksh.40,000/- and Ksh.100,000/- for injuries that were soft tissue in nature.
30. I have considered the Appellant's argument and looked at the three authorities. With respect, the Respondents injuries were not merely soft tissue in nature. The injuries that he sustained included a fracture of the clavicle and multiple soft issue injuries. As such, the Appellant's argument is not tenable. The authorities are also not relevant as they were in respect of soft tissue injuries only.
31. In her judgement, the learned trial Magistrate placed reliance on the case of *H. Young & Company E.A. Limited v Edward Yumatsi* [2013] eKLR, in which the High Court on appeal upheld an award of Ksh.500,000/- in 2013.
32. I have had the opportunity of going through the said High Court decision and I agree with the trial court that it related to injuries that were similar and/or comparable to those that the Respondent sustained. The authority was therefore germane in guiding the court. The trial court further correctly considered factor of inflation and the changes in the value of the Kenyan currency and the award of Ksh.700,000/- was in the premises apt and cannot be said to be excessive.
33. The second issue for determination is whether the trial court fell afoul of the law in awarding Ksh.6,000/- on the head of special damages and whether this court should interfere with the same.
34. The rule as to special damages is that the same must be specifically pleaded and proved (See *Equity Bank Limited v Gerald Wang'ombe Thuni* [2015] eKLR). I have no doubt that the Respondent satisfied this rule. The Respondent specifically pleaded in paragraph 4 of the plaint the amount of Ksh.6,000/- under the head of special damages and proved the same by producing the receipt for the medical report for Ksh.6,000/-.
35. In conclusion, as it has not been demonstrated by the Appellant that the award made by the learned trial Magistrate was so inordinately high as to represent an entirely erroneous estimate or that she proceeded on wrong principles of law, or that she misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high, I cannot fault the trial court on the findings that it made on both awards of general damages for pain, suffering and loss of amenities and on special damages.
36. From the foregoing, the result that I reach is that the present appeal lacks merit. The fate that befalls it is that it must fail, and is consequently hereby dismissed.
37. Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya dictates that costs ought to follow the event. Thus then, the Appellant will bear the costs of the appeal.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 12<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**

For Appellant: Mr. Njuguna.

For Respondent: No appearance.

Court Assistant: Mr. Kinoti.

Mr. Njuguna: I pray for 30 days stay.

Court: As there are no impending execution proceedings, the Appellant to file a formal application.



**JOE M. OMIDO**  
**JUDGE.**

