**Gachege v Njuguna (Civil Appeal 170 of 2021)**
**[2023] KEHC 18890 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18890 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL APPEAL 170 OF 2021**

**JRA WANANDA, J**

**JUNE 16, 2023**

**BETWEEN**

**PETER MUHUHA GACHEGE ..... APPELLANT**

**AND**

**JOSEPH NGANGA NJUGUNA ..... RESPONDENT**

## JUDGMENT

1. This Appeal arises from a suit seeking compensation for injuries suffered by a 31 years old man which arose as a result of a road accident. In the suit, the Appellant was the Defendant and the Respondent was the Plaintiff.

2. By the Plaint filed on 19/02/2020 through Messrs Morgan Omusundi Law Firm Advocates in Eldoret Chief Magistrate Court Civil Case No. 183 of 2020, the Respondent sued the Appellant seeking general damages, special damages, costs of the suit and interest. It was alleged that the Appellant was the owner of the motor vehicle registration number KBV 663E (lorry) on 10/01/2020 the Respondent was a pillion passenger aboard motor cycle registration number KMEA 521J when the Appellant's said motor vehicle while being driven along the Eldoret-Nairobi Road when at Royalton area, the same was so recklessly, carelessly and negligently driven causing it to lose control and veer off the road and/or its lane onto the Respondent's lawful lane resulting to an accident which occasioned the Respondent injuries and for which the Respondent held the Appellant liable. These matters were basically restated in the Respondent's Witness Statement.

3. The Appellant filed its Statement of defence on 13/08/2020 through Messrs Onyinkwa Co. Advocates. In the defence, liability for the accident was denied and, in the alternative, it was averred that if the accident occurred as alleged, then the same was wholly caused by negligence on the part of the Respondent while being carried as a pillion passenger on the said motor cycle and the rider thereof.

4. The suit then proceeded to full trial wherein the Respondent called 3 witnesses. These were a doctor, the Respondent and a traffic police officer. For the defence, the driver of the Appellant's motor vehicle testified.

**Respondent's evidence before the trial Court**

5. PW1, Dr. Joseph Sokobe testified that on 13/01/2020, he examined the Respondent who was involved in a road traffic accident and sustained injuries as per the doctor's report, he also filled a P3 Form, he relied on a radiology request form, two prescription forms and a bundle of receipts. He then produced receipts, P3 Form, medical report and treatment notes as exhibits.

6. PW2, the traffic officer confirmed that he had a police abstract relating to the accident which occurred on 10/01/2020 at around 15.40 hours at Royalton area along Eldoret-Nakuru road, he confirmed that the accident involved the motor vehicle and motor cycle referred to in the Plaint, both were heading towards Nakuru direction, the motor cycle rider intended to turn right at Royalton area but the motor cycle was hit from behind, as a result, the driver lost control and knocked the Respondent on the road, the lorry (motor vehicle) was blamed, he was the investigating officer. He then produced the Abstract as an exhibit. He stated further that he was not aware whether the driver was charged since he (PW2) was transferred from Langas Police Station, the motor cycle was not insured whereas the motor vehicle was. In cross-examination, he stated that he visited the scene after 40 minutes, the motor vehicle was on the left lane, the motor cycle was on the left lane as one faces Eldoret direction from Nairobi, he got the information from the rider and the driver, he did not bring the police file, he recorded a statement from an eye-witness, the point of impact was near the yellow line on the left side of the road as one heads to Nakuru direction, he forwarded the file for further action, he concluded investigations, the motor cycle had 2 passengers. In re-examination, he stated that both the motor vehicle and the motor cycles were on their rightful lanes, the motor cycle was hit from behind/sideways, he blamed the motor vehicle.

7. PW3 was the Respondent. He adopted his witness statement as his evidence-in-chief and added that he was treated at the Moi Teaching & Referral Hospital. He produced various exhibits and added that he was heading towards Nakuru direction when he was knocked, he had 2 passengers on board, he was not charged with a traffic offence. In cross-examination, he stated that it was about 2.00-3.00 pm, they were heading in the same direction, he was hit suddenly, he was turning right, he indicated, he confirmed the road was clear, he got injured on the left leg and hand, he was seen by a doctor, he has healed.

**Respondent's evidence before the trial Court**

8. DW1 was one David Kemboi Murei. He adopted his Witness Statement as his evidence-in-chief and produced copies of his Identity Card, Licence and Certificate of Examination as exhibits. He then testified that he was heading to Burnt Forest from Eldoret, he was behind the motor cycle, he blamed the motor cycle for turning to the right without indicating, the police officer lied. In cross-examination, he stated that the motor cycle and the motor vehicle were on the same lane, the motor cycle was in front, it knocked the vehicle on the cabin, it is not indicated in the report that motor vehicle had a dent, there are people who got injured, the police officer lied to the Court. In re-examination, he stated that the dent was not visible because of the impact. At this point, by consent of the parties, a 2nd medical Report, from the Appellant's doctor, was produced and admitted in evidence.

**Trial Court's Judgment**

9. After the hearing, the trial Court delivered its Judgment on 3/12/2021. The same was in favour of the Respondent and in the following terms:

a Liability 100% against the Appellant

b General damages Kshs 250,000/-

c Special damages Kshs 8,174/-

d Sub-total Kshs 258,174/-

c Costs and interest

**Appeal**

10. Aggrieved by the trial Court's said decision, the Appellant filed this Appeal on 17/12/2021. In the Memorandum of Appeal, the following 7 grounds were cited:

    i. That the learned trial Magistrate erred in law and fact in holding the Appellant 100% liable in negligence without taking into account the evidence on record.

    ii. That the learned trial Magistrate erred in law and fact in failing to take into account the evidence on record hence arriving at a wrong decision on the issue of liability.

    iii. That the Learned trial Magistrate erred in law and fact by failing to apportion liability on the part of the Respondent in view of the evidence adduced.

    iv. That the Learned trial Magistrate erred in law and fact by failing to consider the submissions by the Appellant.

    v. That the learned trial Magistrate erred in law and fact in adopting the wrong principles in the assessment of damages payable to the Respondent thereby arriving at an erroneous decision.

    vi. That the learned trial Magistrate erred in law and in fact in awarding damages which were excessive in the circumstances in view of the evidence adduced.

    vii. That the Learned trial Magistrate erred in law and fact in failing to take into account the Appellant's submissions on quantum thereby awarding excessive damages in the circumstances.

11. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellant's Submissions was filed on 14/12/2022 and the Respondent's was filed on 19/01/2023.

**Appellant's Submissions**

12. The Appellant's Counsel submitted that the trial Magistrate did not consider the Appellant's evidence on the issue of liability hence erroneously finding that the Appellant was to blame 100% for causing the accident, the trial Magistrate cited the reasons for holding the Appellant 100% liable for causing the accident as being that the Appellant's driver failed to keep a safe distance and that the Respondent was a pillion passenger who was not in control of the motor cycle at the time, the Respondent (PW3) informed the Court that on the day of the accident, he was headed towards Nakuru direction when he was knocked, he testified that he had 2 pillion passengers on board and that he was not charged with a traffic offence, in cross-examination, he admitted that both the motor cycle and the motor vehicle were headed in the same direction, the Respondent intended to turn to the right, he indicated beforehand, he made sure the road was clear, however it is to be noted the Respondent indicated in his Pleadings that he was a pillion passenger on the motor cycle, however during the trial hearing he testified and informed the Court that he was the rider of the said motor cycle, the trial Magistrate completely disregarded the testimony of the Respondent that he was indeed the rider thus erroneously exonerating him of liability

in respect to the accident, the trial Magistrate did not give any reason as to why she chose to conclude that the Respondent was a pillion passenger and not the rider, this simply shows that the Magistrate did not properly scrutinize the Pleadings vis a vis the testimony of the witness, the Respondent being the rider of the motor cycle at the time of the accident he did not produce anything in Court to show that he was qualified to be riding the motor cycle, the Respondent failed to produce a driving licence in that regard, his driving competency was therefore automatically put to question, the Respondent was not authorized to ride the motor cycle on the date of the accident, the Respondent was in contravention of Section 25A of the *Traffic Act*, 2007, it is an established principle in law that no one would benefit on an action that arose out of breach of statute. He cited the decision in Bram Kitumba vs Uganda Telecommunication Corp, Kampala HCCS No. 395 of 1991.

13. The trial Magistrate failed to take note of this while making her determination hence making an erroneous decision on liability, there was no indication that the Respondent was wearing a helmet and reflective jacket which is contrary to Section 103(b) of the *Traffic Act*, the Respondent did not produce any evidence to prove that he put on his indicator light, in fact the Respondent admitted that he did not see the motor vehicle before turning to the right and further that the accident happened abruptly, if indeed the Respondent was keeping a proper lookout on the road as alleged, he then would have been able to see the motor vehicle behind him, the fact that he did not see the motor vehicle beforehand is proof that he was not keeping a proper lookout on the road, the claim that he confirmed that the road was clear before proceeding to turn cannot hold water, if he had done so then the accident would not have happened, the claim that the Respondent indicated is mere hearsay, the trial Magistrate should not have proceeded on mere speculation, an investigation report in regard to the same would have sufficed, the Appellant's driver had the right of way as he was still on the highway, it is the Respondent that intended to turn to the right therefore he would in effect disrupt the flow of traffic, he therefore ought to have made sure that the road was clear before proceeding to turn to the right, Section 78 of the *Traffic Act* is clear in relation to when a person needs to change lanes, it provides that such a person must first make sure that he will not inconvenience traffic, the same is stated in clear mandatory terms in Section 40 of the Highway Code of Kenya, the trial Magistrate failed to consider all the above hence the reason why she made erroneous decision on liability, the Respondent was in contravention of Section 41 of the Highway Code which provides that a motor cycle riders should not carry more than one pillion passenger, carrying more than one pillion passenger can cause a rider to lose balance of the motor cycle and cause an accident, the evidence of the Respondent did not prove negligence on the part of the Appellant,

14. Counsel added that the police officer (PW2) did not have concrete proof to support his testimony, he admitted that he neither had the police file nor the sketch maps in Court, his evidence remained to be mere speculation, his conclusion that the driver was to blame for causing the accident was also mere hearsay, without the police file, the trial Magistrate had no basis for holding that the Appellant was 100% liable for causing the accident, it goes without saying that his evidence did not at all help to build the Respondent's case. He cited the decision in Kennedy Nyangoya vs Bash Hauliers [2016]eKLR in which, he stated, that the evidence of a police officer who did not have the police file or sketch maps in Court did not help to build the Respondent's case, all he did was produce the police file which is not proof of negligence, the police abstract produced as exhibit did not indicate whether the driver of the motor vehicle was charged, if indeed the investigations were completed as alleged, then why was the driver not charged? Is it not because he was not to blame for the accident, the Magistrate did not have any basis for holding the Appellant 100% liable for the accident, the law in Section 107(1) of the *Evidence Act* is clear that the onus of proving a set of facts presented before the Court for determination must first be proved that they indeed exist otherwise the claim will fail, due to the Respondent's failure

to prove his case against the Appellant, the Court should be pleased to set aside the trial Magistrate's holding on liability and instead make an order dismissing the Respondent' suit.

15. On quantum, Counsel submitted that the trial Magistrate awarded Kshs 250,000/- general damages for the injuries pleaded by the Respondent as bruises and blunt injury to the right elbow posteriorly, bruises and lacerations on the right lumbar, lacerations and blunt injury to the right knee, lacerations on the lateral right foot, the amount awarded was excessive, the Respondent only suffered soft tissue injuries from which he was recovering well, Dr. Sokobe confirmed the foregoing, the doctor did not award any permanent disability, Respondent confirmed that he had healed, the Respondent was re-examined by Dr. Z. Gaya who confirmed the foregoing, the general damages awarded was excessive as to amount to an erroneous estimate of loss and damages suffered. He cited the decision in Tayab vs Kenam eKLR and added that this Court is justified to disturb the quantum of damages awarded since the trial Court took into account irrelevant factors to award the amount which is so inordinately high and is a wholly erroneous estimate of the general damages. He cited the decision in Kemfro Africa Limited t/a Express Services of Gathongo Kanini vs A.M. Olive Lubia [1982-88] and stated that the Magistrate did not consider the fact that comparable injuries should be compensated by a similar award, in view of the foregoing, the trial Court ought to have assessed the general damages at Kshs 50,000/- to Kshs 60,000/-. He cited the decision in HB (minor suing through mother and next friend DKM) vs Jasper Nchonga Magari & Another [2021] eKLR.

**Respondents' Submissions**

16. The Respondents' Counsel submitted that the Appellant failed to rebut the Respondent's overwhelming evidence to the effect that the Appellant was fully liable for the accident, the Respondent was under a duty to prove his allegations of negligence against the Appellant as pleaded, which he did, no iota of evidence was put forth by the Appellant to challenge the Respondent's overwhelming/firm evidence, to wit documents/exhibits in form of police abstract, P3 Form and Respondent's eye-witness testimonies, of utmost importance is the indication in the police abstract that the driver of the motor vehicle is to blame for the accident, the Court should uphold the trial Magistrate's finding on liability since the Appellant has not offered/adduced any tangible/concrete evidence to warrant the overturning of the said holding.

17. On quantum, Counsel submitted that assessment of damages is an exercise of discretion by the trial Court, for an appellate Court to interfere with this finding, it must be proved that the trial Court took into account irrelevant factors or gave an inordinately high/low amount. He too cited the decision in Kemfro Africa v Lubia & Another (supra) and added that an Appellate Court is therefore not justified in substituting a figure of its own for that awarded by the Court simply because it would have awarded a different figure if it had tried the case at first instance. He relied on the decision in Kisumu vs Sophia Achieng Tete, Civil Appeal No. 284 of 2001 [2001] 2KLR 55 and submitted that the Magistrate did not misdirect her mind when she awarded general damages of Kshs 250,000/- since the same was based on the nature and severity of injuries sustained, in fact the amount awarded was on the lower side considering recently decided and/or comparable cases on quantum and high inflation. He also cited the decision in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR and added that the injuries were also supported by the P3 and initial treatment sheets tendered, it is worth noting that the Respondent proposed a figure of Kshs 450,000/- but the trial Court held that Kshs 250,000/- would be adequate compensation.

**Analysis & determination**

18. The duty of an appellate Court was set out in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. In my view, the issues that arise for determination in this appeal are the following;

    i. Whether the pleading by the Respondent that he was a pillion passenger was fatal to his case.

    ii. Whether the trial Court erred in finding the Appellant 100% liable for causing the accident.

    iii. Whether the trial Court's award of Kshs 250,000/- as general damages loss of dependency was proper.

20. I now proceed to analyse and determine the said issues.

**i. Whether the pleading by the Respondent that he was a pillion passenger was fatal to his case**

21. The Appellant's Counsel submitted that the trial Magistrate cited the reason for holding the Appellant 100% liable as being that the Appellant's driver failed to keep a safe distance and that the Respondent was a pillion passenger who was not in control of the motor cycle at the time, the Respondent (PW3) informed the Court that on the day of the accident, he was headed towards Nakuru direction when he was knocked, he testified that he had 2 pillion passengers on board, however it is to be noted that the Respondent indicated in his Pleadings that he was a pillion passenger on the motor cycle, however during the trial hearing he testified and informed the Court that he was the rider of the said motor cycle, the trial Magistrate completely disregarded the testimony of the Respondent that he was indeed the rider thus erroneously exonerating him of liability, the trial Magistrate did not give any reason as to why she chose to conclude that the Respondent was a pillion passenger and not the rider, this simply shows that the Magistrate did not properly scrutinize the Pleadings vis a vis the testimony of the witness.

22. The above submission is correct. While in the Plaint and his Witness Statement, the Respondent pleaded and/or stated that he was a pillion passenger, at the hearing, he testified that he was in fact the rider and it is him who had passengers on board. The submission that the trial Magistrate did not properly scrutinize the evidence also has merits since in the Judgment, she held that the Respondent, being a mere passenger, had no control of the motor cycle. Evidently, the factual basis for this finding was wrong.

23. In the circumstances, one may be quick to conclude that since it is trite law that a party is bound by his Pleadings, the Respondent's case should have failed on that ground alone. However, in this case, I would not hasten to make such a declaration. This is because it is apparent that at the hearing all parties proceeded on the basis that the Respondent was the rider, not pillion passenger. The cross-examination was also along the same lines. I also note that the Appellant never even raised this issue before the trial Court, not even in the final Submissions. Further, whether or not the Respondent was the rider or a mere passenger does not in any way change the versions given on how the accident occurred. The Police Abstract produced in evidence also confirms that indeed that the Respondent is the person who was injured as a result of the accident. I also take judicial notice of the fact that Pleadings are ordinarily drawn by Advocates. The client, who is a layman, may not even understand or

comprehend what drafting of Pleadings entails. I would therefore be reluctant to penalize or punish the Respondent for the mistakes of his Advocate. More important however, is the fact that I have not come across any prejudice that was visited upon the Appellant as a direct result of the erroneous pleading of the Respondent as being a pillion passenger instated of being referred to as the rider.

24. Indeed, the Court of Appeal held in Equity Bank Limited v West Link MBO Ltd Civil Application (Appeal) No. 78 of 2011 as follows:

> "Courts of law exist to administer justice and in doing so, they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from *the constitution* or statute."

25. I also take cognizance of Article 159(2)(d) of *the Constitution* which requires Courts, when exercising judicial authority, to do justice without undue regard to procedural technicality. The Article provides as follows:

> "Justice shall be administered without undue regard to procedural technicalities."

26. Further, in the Court of Appeal case of Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR, Apaloo J.A. in recognizing that mistakes will always arise, the Court stated the following:

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".

27. For the said reasons, I find that the erroneous pleading in the Plaint of the Respondent as a passenger, instead of being mentioned as the actual rider of the motor cycle, did not render his case fatal.

**ii. hether the trial court erred in finding the Appellant 100% liable for causing the accident**

28. It is now settled that an appellate Court will only interfere with the conclusions and findings of a trial Court if the same were not supported by evidence or were premised on wrong principles of the law. This was the import of the holding in Onyango & Another vs Luwayi [1986] KLR 513, where the Court of Appeal held inter alia as follows:

> "the Court of Appeal would not interfere with the findings of fact of the two lower courts unless it was clear that the magistrate and the Judge had so misapprehended the evidence that their conclusions were based on incorrect bases."

29. In this instant case, the Respondent testified that he was riding his motor cycle heading towards Nakuru direction when he was knocked by the Appellant's motor vehicle (lorry) from the rear. He stated that he had 2 passengers on board the motorcycle, that both the motor cycle and the motor vehicle were heading towards the same direction, that he was turning right, before doing so, he indicated and confirmed that the road was clear.

30. The traffic officer's account more or less tallied with that of the Respondent. He stated that he was the investigating officer, he too confirmed that both the motor cycle and the motor vehicle were heading

towards Nakuru direction, the motor cycle was turning right when it was hit from behind, the lorry was blamed, he visited the scene about 40 minutes after the accident, the motor vehicle was on the left lane, the motor cycle was also on the left lane, he got the information from the rider and the driver, he recorded a statement from an eye-witness, the point of impact was near the yellow line on the left side of the road as one heads to Nakuru direction, both the motor vehicle and the motor cycle were on their rightful lanes, the motor cycle was hit from behind/sideways, he blamed the motor vehicle. In the police abstract that he produced, the Appellant's driver is also expressly blamed

31. On his part, the Appellant's driver testified that he was heading to Burnt Forest from Eldoret, he was behind the motor cycle. He blamed the motor cycle for turning to the right without indicating. He too confirmed that the motor cycle and the motor vehicle were on the same lane, the motor cycle was in front, it knocked the vehicle on the cabin.

32. The 3 witnesses are therefore in agreement that both the motor cycle and the motor vehicle were heading towards the same direction, that the motor vehicle was behind the motor cycle, that at the time of the impact, the motor vehicle had not passed or overtaken the motor cycle and was therefore still behind the motor cycle. It is therefore only logical to conclude that the motor vehicle knocked the motor cycle from the rear. If that is so, then it follows that the Appellant's driver did not maintain a safe distance between his motor vehicle and the motor cycle. Even assuming that the Respondent did not indicate his intention to turn right, had the Appellant's driver maintained a safe distance, he would have managed to slow down and allow the motor cycle sufficient time to turn and move out of the road. The fact that the Appellant's driver was unable to slow down or even swerve to avoid the accident also points to the driver having been driving at an unreasonably high speed in the circumstances. I do not therefore believe the allegation made in his witness statement that at the time of the accident, he was driving at a speed of 40 km/h.

33. The Appellant's driver agreed that the motor cycle was in front, he however claimed that it is the motor cycle that knocked the motor vehicle on the cabin. When pressed in cross-examination on proof that the motor-cycle knocked the vehicle on the cabin yet such fact is not indicated in the accident report, he claimed that the dent was not visible because of the impact. I found these explanations by the driver incomprehensible and absurd. It is not clear how a motor cycle being rode in front of a motor vehicle can turn around and be the one to knock the motor vehicle.

34. The Appellant's Counsel submitted that the Respondent did not produce anything in Court to show that he was qualified to ride the motor cycle, that he failed to produce a driving licence, that his driving competency was therefore automatically put to question, that he was not authorized to ride the motor cycle on the date of the accident, that he was in contravention of the *Traffic Act*, 2007, that it is an established principle in law that no one would benefit on an action that arose out of breach of statute and that there was no indication that the Respondent was wearing a helmet and reflective jacket. He also submitted that the Respondent was in contravention of Section 41 of the Highway Code which provides that a motor cycle riders should not carry more than one pillion passenger. While these general statements of law are no doubt correct, Counsel has missed the point here. Apart from the said claims being, at most, speculative and mere allegations, the same were not even issues for determination before the Court, at no time was the Respondent called upon to produce his driving/riding licence or prove his driving/riding competency, what was before the Court was determination of who was liable for causing the accident. The matters alleged by Counsel are matters for the criminal traffic Court, which is a different forum. In any event, there is no proof that even if true, failure to wear a helmet or a reflective jacket or absence of a driving licence in any way caused the accident.

35. The Appellant's Counsel also submitted that the police abstract produced did not indicate whether the driver of the motor vehicle was charged. He then posed the questions; if indeed the investigations

were completed as alleged, then why was the driver not charged? And that; is it not because he was not to blame for the accident? It is however not clear to me how the mere fact of not being charged can be interpreted to mean that the driver was blameless. In any event, this again, is mere speculation whose truth or lack of it was never established at the trial. Again, if one were to argue the same way, then the Respondent would also claim that he too having not being charged, means he too was blameless.

36. Counsel further alleged that the evidence of the police officer did not help because he did not have the police file or sketch maps in Court. While I agree that a police file and a sketch map would ordinarily go a long way in assisting the Court in reaching a conclusive finding on how an accident occurred, where, as herein, there is clear and sufficient evidence on how an accident occurred, absence of the police file and sketch map cannot affect the trial Court's findings on liability.

37. For the said reasons, I do not find any justification to interfere with the trial Magistrate's findings and determination on liability.

**iii. Whether the trial Court's award of Kshs 250,000/- as general damages loss of dependency was proper.**

38. In Kemfro Africa Limited t/a 'Meru Express Services [1976]"& Another V. Lubia & Another (No. 2) [1987] KLR, the Court of Appeal held that:

"…. The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that 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."

39. This principle was reiterated in Dilip Asal v Herma Muge & another [2001] eKLR [2001] KLR as follows:

> "…… Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

40. An appellate Court will not therefore disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. For the appellate Court to interfere, it must be shown that the trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

41. In this instant case, both Dr. Sokobe and Dr. Z. Gaya described the Respondent's injuries as bruises, lacerations and blunt injuries to the right elbow, right lumbar, right knee, and lateral right foot. Therefore, the same can be described as multiple soft tissue injuries. There was no skeletal injuries or fractures and neither of the doctors assessed any permanent disability. Both doctors also confirmed that the Respondent has recovered well.

42. On the mode of assessing damages, the Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards". Similarly, in Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal observed as follows:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

43. In this instant case, the Appellant's Counsel submitted that the award of general damages at the sum of Kshs 250,000/- was excessive and inordinately high. He suggested that a sum of between Kshs 50,000/- and Kshs 60,000/- should have been awarded. To establish comparable awards, I have perused various recent authorities in which the injuries suffered were similar or closer to those suffered herein.

44. I have found that for instance, in Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR, Nyakundi J, on appeal, reduced an award of Kshs 350,000/- to Kshs 140,000/-.

45. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR, Maina J, on appeal, reduced an award of Kshs 230,000/- to Kshs 180,000.

46. In Yvonne Cherotich v Said Ali & another [2020] eKLR, Mulwa J, sitting as the Court of first instance, awarded a sum of Kshs 170,000/-.

47. In Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, Aburili J, on appeal, reduced an award of Kshs 300,000/- to Kshs 175,000/-.

48. Using the above decisions as comparable awards, and applying the principles earlier enunciated, I am persuaded and concur with the Appellant's Counsel that this is one of those cases which calls for interference with the trial Court's assessment and award of damages. Insofar as the injuries suffered are basically described as soft tissue with no residual permanent disability, I find that the Learned trial Magistrate misdirected herself on the appropriateness and reasonableness of the award she gave. Accordingly, for reasons stated and taking into account the effects of inflation, I set aside the award of Kshs 250,000.00/= given in general damages and substitute it with an award Kshs 180,000.00/=.

**Final Order**

49. In the premises, I order as follows:

    i. The appeal on liability is found to lack merits and is dismissed.

    ii. The appeal on quantum succeeds in that the trial Court's award of Kshs 250,000/- given in general damages is hereby set aside and substituted with an award of Kshs 180,000/-.

    iii. Each party shall bear its own costs of the Appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023**

**.....**

**WANANDA J.R. ANURO**

**JUDGE**