



REPUBLIC OF KENYA



**Munyes v Hussein (Civil Appeal 119 of 2017)  
[2023] KEHC 18557 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18557 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 119 OF 2017**

**JRA WANANDA, J**

**JUNE 16, 2023**

**BETWEEN**

**JOHN KIYONGA MUNYES ..... APPELLANT**

**AND**

**OSMAN HASSAN M. HUSSEIN ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgment delivered in Kapsabet Principal Magistrates Court Civil Suit No. 177 of 2017 on 1/09/2017. The Appellant was the Defendant in the suit and the Respondent was the Plaintiff.
2. The background of the matter is that by the Plaint filed in the said suit on 6/09/2016 through Messrs R. M. Wafula & Co. Advocates, the Respondent pleaded that the Appellant was the registered owner of the motor vehicle registration number KBV 945P, on or about 12/08/2015 the Respondent was travelling in the said vehicle along Serem-Gambogi Road when the Appellant's driver or agent so negligently, carelessly and/or recklessly drove or managed the motor vehicle such that it lost control and was involved in a road traffic accident and as a result whereof the Plaintiff sustained bodily injuries. In his prayers, the Respondent sought general damages, special damages of Kshs 3,500/-, costs and interest.
3. The Appellant filed his Statement of Defence on 27/10/2016 through Messrs Mose, Mose & Millimo Advocates. In the Defence, the Respondent generally denied the matters pleaded in the Plaint.
4. After close of pleadings, on 27/06/2017 the parties recorded a consent order entering Judgment on liability at 90% against the Respondent. The issue of quantum of damages to be awarded is therefore what proceeded to trial (formal proof). The Respondent testified as PW1 while the Defence (Respondent) did not call any witness.



5. In his evidence, the Respondent testified that he was injured on the cheek, right hand and both legs and that he was treated at Avenue Hospital and also at Moi Teaching and Referral Hospital. He then produced various exhibits, inter alia, medical receipts, prescriptions, a medical report, P3 Form and police abstract. In cross-examination, he stated that he had not fully healed and that he was also treated in Kisumu.
6. After conclusion of the trial, the Learned Magistrate considered the parties' Submissions and by the Judgment delivered on 1/09/2017, assessed and awarded general damages to the Respondent at Kshs 400,000/- and special damages at Kshs 3,500/-. Subjected to the 90:10 apportionment of liability earlier recorded by consent, the aggregate net sum awarded to the Respondent therefore amounted to Kshs 363,150/-. Costs and interest were also awarded.
7. Being aggrieved with the said decision, the Appellant instituted this Appeal vide the Memorandum of Appeal filed on 29/09/2017. 6 grounds of Appeal were raised as follows:
  - i. The learned trial magistrate erred in law and in fact in failing to appreciate reasonable and sufficient evidence tendered in court when assessing damages.
    - i. The learned trial magistrate erred in law and in fact in awarding damages that were excessive in the circumstances.
    - ii. The learned trial magistrate erred in law and in fact in assessing general damages at Kshs. 400,000/- which assessment when viewed against the evidence adduced and the injuries sustained by the plaintiff was manifestly excessive and inordinately high as to amount to a miscarriage of justice.
    - iii. The learned trial magistrate erred in law and in fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the appellant.
    - iv. The said award of damages is out of keep with other Kenyan awards for comparable similar claims.
    - v. The learned trial magistrate failed to exercise his discretion judiciously in awarding damages and failed to apply the settled principles.
    - vi. There was no good or proper basis for the said assessment of damages.

### **Hearing of the appeal**

8. It was then directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 6/02/2023 while the Respondent filed his on 17/01/2023.

### **Appellants' Submissions**

9. Learned Counsel for the Appellant submitted that the award of Kshs 400,000/- for general damages was inordinately high, the Respondent suffered minor soft tissue injuries according to the medical re-examination report, the doctor confirmed that the Respondent had fully healed at the time of examination and that there were no residual effects or permanent disabilities, the award of Kshs 400,000/- was without basis, the trial magistrate has not given his reason for the award, if reliance was to be placed on the authorities cited by the Respondent, the awards would still remain so high, the authorities cited by the Respondent were for awards of Kshs 100,000/-, Kshs 150,000/- and Kshs 180,000/-, in cases of comparable nature, the award is manifestly high. an award of Kshs. 60,000/-



was sufficient. He cited several authorities which, according to him, were comparable and in which the awards made in general damages ranged at between Kshs 40,000/- and Kshs 70,000/-. Counsel submitted further that the Appellant is alive to passage of time and changes in inflation rates and for that reason he stated that an award of Kshs. 100,000/- shall suffice. He cited two further authorities which, according to him, were comparable and in which the awards made in general damages were Kshs 125,000/- and Kshs 120,000/-

### **Respondents' Submissions**

10. On his part, Learned Counsel for the Respondent submitted that the trial Magistrate considered all the evidence adduced as well as Submissions and authorities of both parties, the Respondent pleaded and proved all the injuries that he sustained, the Respondent testified and produced documentary evidence in support of his case as regards the injuries sustained, there was no contrary evidence produced by the Appellant, the Appellant did not call any expert witness(es) nor did he produce any documents to contradict the injuries the Respondent sustained, the Appellant did make reference to a second medical report in his Submissions but the said report was not listed in the Appellant's list of documents nor was it ever produced in Court, the Respondent's evidence therefore remains uncontroverted and unchallenged as the Appellant failed to substantiate his pleadings. He cited the case of *John Wainaina Kagwe v Hussein Dairy Ltd* [2013] eKLR, cited in the case of *Mara Tea Factory Limited v Lillian Bosoibori Nyandika* [2021].
11. Counsel submitted further that the Respondent produced medical receipts, prescription forms, a medical report and a P3 Form as exhibits, the Respondent testified that he had not healed from the injuries, the trial Magistrate did take into consideration all the relevant evidence, he exercised his discretion judiciously, he applied settled principles, he made a reasonable decision supported by the evidence, an appellate Court can only interfere with an award of damages if is satisfied that the trial Court took into account irrelevant factors or failed to take into account relevant factors in assessing damages or that the amount of damages is so inordinately high or low that it must be wholly erroneous estimate of the damage. He cited the case of *Kemfro Africa Limited t/a Meru Express Service & Gathogo Kanini vs A.M. Lubia and Olive Lubia* (1982-88) 1 KAR 727 cited in the case of *John Kipkemboi & Another vs Morris Kedolo* [2019] eKLR and added that the trial Magistrate took into account previously decided cases and awards made for comparable injuries, awards in past decisions are meant to be mere guidelines as was held in the case of *Sofia Yusuf Kanyare vs Ali Abdi Sabre & Another* Nairobi HCCC No. 478of 2007, each case must be decided according to its circumstances, he urged that his Submissions at the trial Court be relied on bearing in mind the toll of inflation on the Kenyan currency, the award of Kshs 400,000/- was appropriate in the circumstances of the case. He then cited several Court decisions in which the awards made in general damages ranged at between Kshs 150,000/- and Kshs 400,000.

### **Analysis & Determination**

12. Upon considering the Memorandum of Appeal, Record and Submissions by both parties, I find that the issue that arises for determination to be "whether the trial Court erred in its assessment and award of general damages".
13. I now proceed to analyze and determine the said issue.



14. Being a first appeal, this Court is guided by the principles set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] EA 123 where the duty of an Appellate Court was stated to be as follows:

“..... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

15. In an appeal against assessment of damages an appellate Court can only interfere with the trial court’s discretion where certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR thus:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be 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 damage.

16. 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.”

17. Further, in dealing with an appeal on quantum, it was held by the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 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”

18. In the case of *Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo* (2005) eKLR, the Court gave the following guidelines:

“It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is 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 the first instance ...”

19. In this case, the Respondent has relied on a Medical Report from Nandi Hills County Hospital. Although the same is not dated, I will still consider it since there are other supporting medical documents on record from the same hospital. Further, the absence of the date was not taken up as an issue before the trial Court nor in this Appeal. The Report states that the injuries suffered by the



Respondent were bruises on the right frontal region, swollen, bruised and tender cheek, bruises on the left had (dorsum) and multiple bruises on right hand and knee. It then describes the injuries as soft tissue in nature, healing will occur but scar formation will eventually remain and there will be occasional pains but which will be relieved by analgesics.

20. On the mode of assessing damages, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR guided 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.”

21. The duty of this Court is to therefore consider and determine whether the amount awarded in general damages by the trial Court in this matter is comparable to the range of recent awards given by other Courts
22. In this instant case, the Appellant’s Counsel submitted that the award of general damages at the sum of Kshs 400,000/- was excessive and inordinately high. He suggested that a sum of Kshs 100,000/- or thereabouts 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.
23. 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/-.
24. 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.
25. 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/-.
26. 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/-.
27. 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 assessment and award of damages by the trial Court. Insofar as the injuries suffered are basically described as soft tissue with no residual permanent disability, I find that the Learned trial Magistrate misdirected himself on the appropriateness and reasonableness of the award he gave. Accordingly, for reasons stated and taking into account the effects of inflation, I set aside the award of Kshs 400,000.00/- given in general damages and substitute it with an award Kshs 200,000.00/-.

### Final Order

28. In the premises, I order as follows:
- i. The appeal succeeds in that the trial Court’s award of Kshs 400,000/- given in general damages is hereby set aside and substituted with an award of Kshs 200,000/-
  - ii. Considering that the Respondent suffered injuries arising from the accident, to avoid compounding his losses further, each party shall bear its own costs of this Appeal.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 16<sup>TH</sup> DAY OF JUNE 2023**

**WANANDA J.R. ANURO**



**JUDGE**

