



**Kariuki v Mutunga (Civil Appeal E264 of 2023)
[2024] KEHC 16771 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E264 OF 2023
NIO ADAGI, J
NOVEMBER 11, 2024**

BETWEEN

DICKSON MAINA KARIUKI APPELLANT

AND

SAMMY MUTULILI MUTUNGA RESPONDENT

*(Being an Appeal from the Judgment of Hon. Ole Keiwua (CM)
in Kangundo CMCC. No. E75 of 2022 delivered on 28/09/2023)*

JUDGMENT

1. The Appellant in the Memorandum of appeal dated 06/10/2023 has raised 3 grounds of appeal which basically challenge the judgment of the trial court on quantum.
2. I will therefore not delve into the issue of liability which the Appellant seem not to be challenging.
3. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) EA 123, (1958) EA page 424
4. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the



appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the 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 first appellate court had discharged the duty expected of it.

5. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
6. The Appellant's case is that he was involved in a Road Traffic Accident on 23/02/2022 while travelling as a pillion passenger aboard motor cycle registration number KMDY 306Y and the Appellant's motor vehicle registration number KDE 290S Isuzu Lorry along Machakos-Kangundo road wherein the Respondent sustained serious injuries and suffered great loss and damage.
7. The Respondent sued the Appellant for damages sustained during the accident together with costs and interest. The Appellant denied the Respondent's claim and averred that any such occurrence as the Respondent may prove was caused solely or substantially contributed to by the Respondent's own negligence.
8. The case proceeded for hearing where three witnesses testified for the Respondent being PW1-Sammy Mutulili Mutunga, the Respondent, PW2-PC Chege Kimathi No.96468, the Police Officer and PW3-Dr. James Muoki.
9. The Appellant did not call any witness or evidence to support the defence thus the trial court found the Appellant 100% liable.
10. The Respondent pleaded that he sustained the following injuries which were confirmed by Dr. James Muoki : -Head injury with fracture through the maxillary sinus hemossinus Cuts and bruises on the face Swelling and tenderness on the lower eyelid Bruises, swelling and tenderness on the right hand Bruises on the right leg.
11. Upon hearing the case, the trial court directed parties to file and exchange written submissions. The Appellant's submissions were filed in court on 21/06/2023 submitting for Kshs.150,000/= as reasonable general damages that could adequately compensate the Respondent. Several authorities were cited by the Appellant. The trial court observed that the injuries sustained in the authorities relied upon by the Appellant were soft tissue injuries hence not relevant to the case at hand.
12. The Respondent's counsel submitted for Kshs.3,000,000/= which the trial court found to be too high to award the Respondent.
13. The trial court assessed general damages at Kshs.1,200,000/=, Special damages of Kshs.8,450/= which were pleaded and proved plus costs and interest.
14. The Appellant being dissatisfied with the judgment of the trial court has now appealed to this court basically challenging the awarded damages particularly the general damages for pain & suffering & loss of amenities which it considers to be too excessive as to be erroneous estimate of damages vis a vis the injuries sustained by the Respondent and for relying on extraneous evidence in arriving at the general damages.



15. I have considered the grounds of appeal, the pleadings and the evidence adduced before the trial court, the written submissions filed by counsel for both parties and the authorities cited.
16. The major issue that stands out for consideration in this appeal is whether the quantum of general damages of Kshs.1,200,000/= is excessive and an erroneous estimate of damages awarded to the Respondent.
17. For an Appellate Court to interfere with an award of damages, it must be shown that the trial court in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that the wrong principle of law was applied.
18. In the case of *Maraga V Musila (1984) 1 KLR 251*, where the Court of Appeal when addressing its mind to this issue expressed itself thus;

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles”.
19. The Respondent pleaded that he sustained the injuries stated at paragraph 10 herein and which were confirmed by Dr. James Muoki who described the degree of injury as ‘Grievous harm’.
20. I have considered that in assessing general damages in this case, the learned trial magistrate did not cite any comparable precedent he relied on in making the award for general damages although he states that he took into account the injuries sustained by the Respondent and the authorities cited by the Parties in their submissions.
21. The Respondent’s injuries were classified as grievous harm and at the time of examination by Dr. Muoki, the Respondent suffered recurrent pains for which analgesics were recommended.
22. I have also considered the defence medical report by Dr. Maina Ruga dated 29/05/2023 which indicates that the Respondent suffered i) mild head injury with facial bruises and lacerations and ii) Lacerations and bruises on both hands and right leg. The report shows that at the time of examination, the Respondent was getting pain on the right eye. The Respondent had scars on the head and face, on both hands and on the right leg which scars had healed.
23. The Appellant submits that there was no mention of fractures through the maxillary sinus hemossinus. However, I note that there was nothing in the report to show the defence Doctor requested for either an earlier or current x-ray report to confirm this position. I have seen a CT Scan report dated 23/02/2022 from German Medical Center and the same shows a right hemossinus due to undisplaced fracture through the medial and postero-lateral margins of the sinus cavity.
24. Being guided by the decision *GA (Minor suing through her father and next friend BZ) v Paul Muthuku [2020] eKLR* where the appellant sustained multiple fractures of the frontal left orbital roof (comminuted) right temporal bones (petrous), bleeding in the skull airspaces (haemossinus), cut on the head (frontal) a cut on the chin and the court substituted an award of Kshs. 300,000 with Kshs. 500,000. Further reliance was placed on the case of *Specialized Aluminium Renovators Limited & Another v Stephen Mutuku Musyoka [2021] eKLR* where the respondent suffered injuries of fracture of the frontal nasal bones, fracture of right orbit, frontal lobe haemorrhage contusion and the court



set aside an award of Kshs. 800,000 and substituted it with an award of Kshs. 500,000 which the court deemed to be fair and sufficient compensation.

25. No two cases can be completely similar but there is a well settled principle in assessment of damages that comparable injuries should as much as possible attract comparable awards.
26. In *Muindu v Kinyanjui & another (Civil Appeal E032 of 2022)* [2024] KEHC 3157 (KLR) (11 March 2024) (Judgment), The injuries sustained were pleaded as follows; a). Loss of consciousness b). Soft tissue injury on the head c).Cut on the face d). Multiple non displaced bone fractures of;-right occipital bone-right zygomatic arch-right orbital wall-right maxillary jaw-cerebral edema-right maxillary hemisinuse. Tenderness and pain of the right shoulder. The first thing is that the main injury was the head injury which was the fracture of the skull. He also sustained a degree of permanent disability. The court awarded Kshs.750,000/=in general damages.
27. Guided by the above recent cited case of Muindu (supra), I would consider an award of Ksh.500,000/ = general damages as sufficient.
28. As for special damages, the Respondent pleaded and proved an amount of Ksh. 8,450/= which the Appellants did not challenge in the appeal.
29. The final order; The appeal succeeds. Judgment of the subordinate court is set aside and substituted with the following orders:-
General damages.....Ksh.500,000/=,
Special damages.....Ksh. 8,450/=
Total Ksh.508, 450/= plus costs and interest
30. There will be no order as to costs on the appeal

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 11TH DAY OF NOVEMBER 2024

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NOEL I. ADAGI
JUDGE

