



REPUBLIC OF KENYA



KENYA LAW
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**Mutuku v Mwangi (Civil Appeal E112 of 2021)
[2024] KEHC 16774 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E112 OF 2021
NIO ADAGI, J
NOVEMBER 21, 2024**

BETWEEN

MICHAEL MATHEKA MUTUKU APPELLANT

AND

DICKSON MWANGI RESPONDENT

*(Being an Appeal from the Judgment of Hon. B. Kasavuli (PM)
in Mavoko CMCC. No. 40 of 2020 delivered on 28/06/2021)*

JUDGMENT

1. By way of a Plaint dated 20/01/2020, the Appellant (Plaintiff) instituted a suit against the Respondent (Defendant) seeking the following prayers:
 - a. General damages for pain, suffering and loss of amenities.
 - b. Special damages of Kshs.3,550/-
 - c. Cost of the suit.
 - d. Interest
 - e. Any other relief that this Court may deem fit and just to grant.
2. The Appellant averred that on or about 10/11/2019, he was lawfully travelling as a fare paying passenger along Nairobi-Mombasa road at National Oil Petrol Station in motor vehicle reg. No. KAZ 832X Toyota Hiace owned by the Respondent when the same was negligently, recklessly and or carelessly driven by the Respondent, his driver, servant, agent or employee at a high speed and without due regard to its passengers that while overtaking it lost control and rammed into motor vehicle Reg. No. KAT 329X thereby causing a road traffic accident as a result of which the Appellant sustained serious injuries for which he claimed damages.



3. The Appellant's suit was amongst a series of suits arising out of the accident herein. CC No. 37 of 202 was selected as a test suit in which liability was determined at 100% against the Respondent. The same was adopted in the Appellant's case.
4. The suit proceeded for assessment of damages whereby the Appellant testified to have sustained several injuries as a result of the accident. According to the treatment notes, Medical Report and Dr. Ndeti's testimony, the Appellant sustained the following injuries: -Blunt object injuries to the anterior chest wallBruises on the left wristBlunt injuries to the left leg below the knee
5. Parties were directed to file submissions on quantum. The Appellant's submissions are dated 25/5/2021 and he submitted for Ksh.300,000/- and relied on Nyeri HCC No. 320 of 1998 Catherine W. Kingori & 3 others vs Gibson Theuri Gichubi. The Respondent's submissions are filed on 27/5/2021, the Respondent submitted for Ksh.40,000/= in general damages. He relied on the following cases:-HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another [2021] eKLR where the lower court had awarded Kshs.60,000/= for soft tissue injuries. The High court upheld the same and dismissed the appellant's appeal.Kipkere Limited Vs Peterson Ondieki Tai (2016) eKLR where the trial magistrate had awarded Kshs. 100,000/= for deep cut wound on the left leg, chest contusion and bruises on the left shoulder. The High Court reduced the award to Kshs.30,000/-Buds and Bloom Ltd Vs Lawrence Emusugut Obwa (2016) eKLR where the lower court had awarded Kshs. 70,000/= for a deep cut wound on the left leg and soft tissue injuries on the leg. The High court reduced the award to Kshs.50,000/=Samwel Mburu N Ng'aari, Sarah Wanjiku N Ng'aari, Grace Waithira N Ng'aari, Mary Waithira Mburu & Jeanette Wangui Mburu v Wangiki Wangare & Christopher Kimani Kuruma [2014] eKLR where the Honourable Judge awarded Kshs 50,000/=for soft tissue injuries.
6. In his brief judgment, the Learned Magistrate observed that the case of Catherine W. Kingori relied on by the Plaintiff/Appellant was distinguishable from the cases relied on by the Defendant/Respondent because it was a case which was never defended and on the other hand the cases relied on by the Defendant/Respondent present a better view of the injuries and assessment of general damages. In the end the Learned Magistrate awarded the Plaintiff/Appellant Ksh.40,000/= in general damages.
7. Being aggrieved by the said judgment, the Appellant lodged the appeal herein vide a Memorandum of Appeal dated 28/6/2021 raising 6 grounds which basically challenge the judgment on award of general damages which it considers to be too low as to be erroneous in the circumstances having regard to the nature and extent of the injuries sustained by the Appellant.
8. 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
9. 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.

10. 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.
11. I have anxiously and carefully considered the grounds of appeal, the pleadings in the lower court, the evidence in the medical report and treatment notes adduced on the injuries of the Appellant before the trial court, the written submissions filed by respective counsels and the authorities cited as well as the trial court's judgment.
12. From the medical report by Dr. Titus Ndeti Nzina dated 25/11/2019, the Appellant sustained the injuries stated at paragraph 4 above. He was attended to at Bigson health services. At examination, the Appellant complained of pain on the injured sites, tenderness on the anterior chest wall and scars on the left wrist. In the Doctor's opinion, the Appellant suffered harm. He sustained soft tissue injuries of moderate severity which caused him pain and suffering. Complete healing was anticipated.
13. For an Appellant 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.
14. 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”.
15. The approach taken by courts in the assessment of damages is that, comparable injuries should as far as possible be compensated by comparable awards although the court should bear in mind that no two cases are exactly the same. The court will also consider factors such as the state of the economy and the rate of inflation in its assessment of damages. (See *Stanley Maore v Geoffrey Mwenda [2004] eKLR* and *Ugenya Bus Service v Gachoki [1982] eKLR*).
16. It is this court's finding that the Trial Court erred in its judgment when it observed that:-

...”the case of Catherine W. Kingori relied on by the Plaintiff/Appellant was distinguishable from the cases relied on by the Defendant/Respondent because it was a case which was never defended and on the other hand the cases relied on by the Defendant/Respondent present a better view of the injuries and assessment of general damages.



17. The Learned Magistrate failed to consider or take into account the injuries that were sustained in the case of Catherine W. Kingori cited by the Appellant and the award that was made therein, although, it appears the Appellant did not state the injuries sustained in that case and the award made. It was erroneous for the Learned Magistrate to disregard the case for the reason that the same was undefended and rely solely on the Respondent's old cases without referring to his independent comparable cases.
18. Upon considering the authorities cited by the parties in their submissions, I find that the authority relied upon by the Appellant did not state the injuries sustained and the award made and neither was it on the record, whereas the authorities cited by the Respondent were quite old and the trial court failed to take into account the state of the economy and the rate of inflation in relying on them. In addition, the awards made in the authorities cited by the Respondent are higher than what was awarded to the Appellant herein by the trial court.
19. Having given due consideration to the injuries sustained by the Appellant, I find the following more recent authorities to be more comparable on the aspect of general damages in this case:- *Adembesa & another v Gweno (Civil Appeal E192 of 2023)* [2024] KEHC 5379 (KLR) (17 May 2024) (Judgment), the court awarded Ksh.90,000/= for soft tissue injuries on the head, back, chest, head, shoulders, elbow joints and knees. In *Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa* [2020] eKLR, the respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was awarded Kshs.300,000/=. On appeal Nyakundi J. set aside that amount and awarded Kshs.150,000/=. In *John Wambua v Mathew Makau Mwololo & another* (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs.120,000/= and this was affirmed by the High Court.
20. On the foregoing comparison, the lower court's award of Kshs.40,000/= as general damages for pain suffering and loss of amenities can be said to be manifestly too low as to amount to a wrong assessment. In the premises, there is sufficient cause, in my view, for disturbing the award made by the lower court under the general damages head.
21. I set aside the award by the trial court and substitute it with an award of Kshs.150,000.00 in general damages.
22. The Appellant did not challenge the award of Ksh.3,550/= in special damages. This Court will not disturb the same.
23. The general and special damages are awarded with costs and interest.
24. The Appellant is awarded the costs of the appeal.
25. Orders accordingly.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 21ST NOVEMBER 2024

NOEL I. ADAGI

JUDGE

