



**Muiruri & 2 others v Mbugua (Civil Appeal 297 of 2023)  
[2024] KEHC 14011 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14011 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 297 OF 2023**

**TW OUYA, J**

**NOVEMBER 11, 2024**

**BETWEEN**

**GEORGE KAMAU MUIRURI ..... 1<sup>ST</sup> APPELLANT**

**MATAARA SACCO ..... 2<sup>ND</sup> APPELLANT**

**JOHN MAINA NJOROGE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**DAVID KARIUKI MBUGUA ..... RESPONDENT**

*(Being an Appeal against the Judgment and decree of Hon. J.M. Nangea (CM) delivered on 29.09.2020 at the Chief Magistrate Court at Thika in Thika CMCC No. 791 OF 2018)*

**JUDGMENT**

**Background**

1. This appeal derives from the judgment delivered on 29.09.2020 in Thika CMCC No. 791 OF 2018 (the suit) which was commenced by way of the plaint dated 8.10.2018 and filed by David Kariuki Mbugua being the plaintiff in the lower court (hereafter the Respondent) against George Kamau Muiruri, Mataara Sacco and John Maina Njoroge, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the lower court (hereafter the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively). The claim was for general and special damages arising out of a road traffic accident which occurred on or about 27.08.2018 along Ruiru-Kiambu Road.
2. It was alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were at all material times the driver and registered owner respectively, of the motor vehicle registration No. KCC 535N (later amended orally on 4.02.2020 to read KCC 535U (hereafter the first motor vehicle), whereas the 3<sup>rd</sup> Appellant was sued in his capacity as the registered owner of the motor vehicle registration number KBN 818C (hereafter the second motor vehicle). It was further alleged that on the material date, the Respondent was lawfully travelling aboard



the second motor vehicle when the 1<sup>st</sup> Appellant so negligently and/or carelessly drove, controlled and/or managed the first motor vehicle that it collided with the second motor vehicle, causing the Respondent to sustain bodily injuries. The particulars of negligence and the injuries sustained were set out under paragraphs 5 and 7 of the plaint, respectively. The Respondent averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants ought to be held vicariously liable, for the negligent actions of the 1<sup>st</sup> Appellant.

3. Upon service of summons, the Appellants entered appearance and filed their joint statement of defence dated 17.10.2018 denying the key averments in the plaint and liability. Alternatively, the Appellants pleaded contributory negligence against the Respondent by setting out the particulars thereof in their statement of defence.
4. At the trial stage of the suit, the Respondent testified and called two (2) additional witnesses, while the Appellants closed their case without calling any evidence.
5. In the end, the trial court delivered its judgment on 29.09.2020 in favour of the Respondent and against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants jointly and severally, thus awarding him damages in the following manner:
  - a. General damages for pain, suffering and loss of amenities Kshs. 300,000/-
  - b. Special Damages Kshs. 9,000/-Total Award Kshs. 309,000/-
6. The trial court however dismissed the case against the 3<sup>rd</sup> Appellant for want of proof of liability, with costs.

### **The Substratum of the Appeal**

7. Being dissatisfied with the outcome, the Appellants collectively moved the court by way of the present appeal (vide the memorandum of appeal dated 16.10.2020) challenging the trial court's assessment on quantum of damages, premised on the following grounds:
  - I. The Learned Trial Magistrate failed to apply himself judicially and to adequately evaluate the Defendants' evidence and witness exhibits on record thereby arrived at an erroneous finding on quantum.
  - II. The Learned Trial Magistrate misdirected himself and erred both in law and in fact in failing to consider the Defendants' overwhelming evidence on record and hence arrived at an erroneous finding on quantum.
  - III. That the Learned Trial Magistrate erred in fact and law and misdirected himself by awarding general damages of Kshs. 300,000/= which amount is manifestly excessive so as to be erroneous vis a vis the actual injuries sustained by the plaintiff.
  - IV. That the Learned Trial Magistrate misdirected himself and erred in law and in fact by totally failing to consider the Defendant's submissions on record thus arrived at an erroneous finding on quantum.
  - V. The Learned Trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (to apply precedents and tenets of law applicable).
  - VI. That the Learned Trial Magistrate erred in law and fact in arriving at his said decision.



- VII. That the Learned Trial Magistrate’s decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
- VIII. That the Learned Trial Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature. (sic)
8. The Appellants consequently seek the following orders:
- I. That the appeal be allowed.
- II. That the Judgment of the Honourable Chief Magistrate Hon. JM. Nangea (CM) (as he then was) on quantum be set aside the same be assessed afresh.
- III. That the costs of the appeal and that of the trial court be awarded to the Appellants.
- IV. That such further orders may be made by this Honourable Court as it may deem fit to grant.

### **Submissions on the Appeal**

9. Directions were given for the appeal to be canvassed by way of written submissions. However, it is apparent that at the time of writing this judgment, the Appellants had not complied with the said directions.
10. On his part, the Respondent naturally defended the trial court’s findings in their totality. His counsel anchors his submissions on the decision rendered in *Makario Makonye Monyancha v Hellen Nyangena* (Suing as the Personal Representative of the Estate of Christopher Bosire Matoke (Deceased)) [2014] KEHC 4476 (KLR) where the High Court sitting on appeal found that the plaintiff’s case in that instance stood uncontroverted and therefore succeeded. Counsel therefore submits that the trial court’s finding on liability is proper.
11. On quantum, counsel in supporting the award made by the trial court on general damages, argues that the Appellants have not demonstrated that the trial court either took into account any irrelevant factors or overlooked any relevant factors, or applied wrong legal principles, citing inter alia, the decisions in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2001] KECA 349 (KLR) and *Mbogo v Shah* [1968] E.A 93 where the Court of Appeal reaffirmed the foregoing as being the principles for consideration by an appellate court in determining whether to interfere with the award made by a trial court. Consequently, it is asserted that the appeal lacks merit and it therefore ought to be dismissed with costs.

### **Analysis and Determination**

12. The court has considered the original record, the record of appeal and the submissions on record plus the authorities cited in support thereof. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”



13. Upon review of the memorandum of appeal and submissions on record, it is apparent that the appeal turns solely on quantum, specifically the award made under the head of general damages for pain, suffering and loss of amenities; with the main contention in the appeal being that the said award is manifestly excessive and was awarded on the basis of wrong principles and without proper consideration of the evidence on record.
14. In that respect, the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages, in the following terms:

“It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
15. The same court previously stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 that:

“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”.
16. The Respondent particularized his injuries in the plaint dated 8.10.2018 as comprising blunt injuries to the chest, right and left hand and left leg; deep cut wound to the right leg (requiring 9 stitches); and head concussion. The aforesaid injuries were confirmed by the medical evidence constituting the Respondent’s bundle of documents adduced at the trial, more so the medical report prepared by Dr. G.K. Mwaura and dated 24.09.2018 (P. Exhibit 5a). The doctor who testified as PW2 at the trial, classified the Respondent’s injuries as soft tissue in nature and further stated that the Respondent suffered brief loss of consciousness following the accident. The medical report further termed the healing of the Respondent’s injuries as fair save for pain on his chest and right leg on exertion. No permanent incapacity was assessed.
17. At the submissions stage, the Respondent proposed an award of Kshs. 800,000/- whilst placing reliance on the authority of *Easy Coach Limited v Emily Nyangasi* [2017] KEHC 5131 (KLR) where the High Court sitting on appeal, upheld an award of Kshs. 700,000/- under a similar head in respect of injuries particularized as facial injuries; injuries to chest, back and right hand with cut wound, and an injury to right leg with cut wounds. The Appellants on their part suggested an award of Kshs. 60,000/- upon relying inter alia on the case of *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] KEHC 8083 (KLR) in which the court awarded a sum of Kshs. 50,000/- to the 4<sup>th</sup> plaintiff therein, who had sustained unparticularized minor injuries, abrasions and bleeding; and the case of *Pamela Ombiyo v Kenya Bus Services, Nairobi HCC No. 1309 of 2002* where a plaintiff with blunt head injury with loss of consciousness, deep cuts on the forehead and both legs, soft tissue injury to the neck, subluxation of public symphysis and blunt trauma to the right hip and right eye and was awarded a sum of Kshs.50,000/-.



18. In his judgment, the learned trial magistrate (as he then was) upon setting out the respective awards suggested by the parties as well as the authorities cited in support thereof, settled for an award in the sum of Kshs. 300,000/- under the head of damages for pain, suffering and loss of amenities. He however did not cite any guiding authorities.
19. Upon considering the respective authorities cited by the parties before it, the court concurs with the view taken by the learned trial magistrate, that those by the Respondent featured injuries of a more severe nature than those suffered here. Similarly, the court finds that the authorities cited by the Appellants, though involving relatively comparable injuries to those sustained by the Respondent here, were decided a number of years back.
20. The court thus considered the recent case of *Ndungu v Maina* [2023] KEHC 21312 (KLR) where the High Court awarded the sum of Kshs. 150,000/- on appeal in relation to a plaintiff who sustained blunt injury on the left side of the head, head concussion, blunt injuries on the chest, back and right knee, deep cut wounds, left knee and big toe, with a prognosis that healing was fair save for pain on the chest and back and left knee upon exertion; as well as the case of *Peelah Stores Limited & another v Muia* [2023] KEHC 19868 (KLR) where an award originally made in the sum of Kshs. 300,000/- was revised downwards to a sum of Kshs. 200,000/- on appeal, at the instance of a plaintiff with multiple blunt injuries to the head, vassal bridge, right jaw, right shoulder and limbs. The court equally considered the case of *Kamau v Mukhango* [2024] KEHC 13317 (KLR) in which a plaintiff who had sustained loss of consciousness, deep cut wound on the head, blunt injuries to the neck, chest, back, waist and right hand, severe blunt injuries to the fingers of the right hand and injuries to the left eye; being soft tissue injuries; was awarded a sum of Kshs. 200,000/- on general damages, which award was upheld on appeal.
21. Taking the above comparable authorities into account as well as the inflationary trends, the court finds that the learned trial magistrate's award under the above head of general damages for pain, suffering and loss of amenities, fell on the higher side and ought to be interfered with. In the court's view, an award of Kshs.200,000/ would be reasonable in the circumstances.
22. Suffice it to say that, on the issue whether the learned trial magistrate considered the evidence tendered before it as well as the Appellants' submissions, following its study of the impugned judgment, the court has not come across anything to indicate that the said magistrate either overlooked or ignored either the evidence on record or the submissions placed before him, in arriving at his decision.

### **Disposition**

23. In the end therefore, the appeal succeeds. Consequently, the court hereby sets aside the trial court's award of Kshs. 300,000/- made on general damages for pain, suffering and loss of amenities and substitutes the same with an award in the sum of Kshs. 200,000/-.
24. Consequently, the judgment on appeal shall now read as follows:
  - a. General damages for pain, suffering and loss of amenities Kshs. 200,000/-
  - b. Special Damages Kshs. 9,000/-  
Total Award Kshs. 209,000/-
  - c) The Respondent shall have the costs of the suit and interest on the general damages at court rates from the date of judgment until payment in full, and interest on the special damages at court rates from the date of filing suit until payment in full.
  - d) In the circumstances, the Appellants shall have the costs of the appeal.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024**

ROA 14 days.

**HON. T. W. OUYA**

**JUDGE**

For Appellant.....n/a

For Respondent..... Mwangi

Court Assistant.....martin

