



**Amaunda v Thuo (Civil Appeal E041 of 2024)
[2024] KEHC 15695 (KLR) (9 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E041 OF 2024
RE ABURILI, J
DECEMBER 9, 2024**

BETWEEN

YUSUF WESONGA AMAUNDA APPELLANT

AND

JOHN WAITHAKA THUO RESPONDENT

*(Being an Appeal from the judgment and Decree of Hon. Gloriah
Nasimiyu Barassah (Senior Resident Magistrate) delivered on 5/2/2024
in Kisumu Chief Magistrate's Court Civil Suit No. E083 of 2023)*

JUDGMENT

Introduction

1. The appellant Yusuf Wesonga Amaunda sued the respondent John Waithaka Thuo vide a plaint dated 7th March 2023 for general and special damages following a road traffic accident that occurred on the 29th January 2023. It was the appellant's case that on the 29.1.2023 he was a lawful passenger aboard motor vehicle registration number KCT 080A Scania Bus, owned by the respondent, that was travelling along the Kakamega - Kisumu Road when at Mamboleo area, the said vehicle was driven at a very high speed that it lost control and veered off the road and rolled severally. The appellant averred that the accident was caused by the negligence of the respondent's driver.
2. The respondent filed his statement of defence dated 12th April 2023 denying the appellant's allegations and putting him to strict proof. The respondent pleaded contributory negligence on the part of the appellant.
3. In her judgement, the trial magistrate found the respondent 100% liable for the accident and proceeded to award the appellant general damages of Kshs. 200,000 and proven special damages of Kshs. 20, 940.



4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 4th March 2024 raising the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact in failing to consider the submissions by the appellant on the issue of quantum.
 2. That the learned trial magistrate erred in law and in fact in failing to appreciate the fact that the appellant suffered disability due to injuries sustained.
 3. That the learned trial magistrate erred in law and in fact in using the wrong principles in the assessment of damages thereby arriving at an erroneous decision.
 4. That the learned trial magistrate erred in law and fact by failing to take into account the evidence on record hence arriving at a wrong decision.
 5. That the learned trial magistrate erred in law and in fact by adopting wrong principles in assessment of damages.
 6. That the trial magistrate erred in law and fact by awarding the plaintiff Kshs. 200,000 in general damages which was very low thereby arriving at a wrong decision.
 7. That the learned trial magistrate erred in assessing general damages at Kshs. 200,000 and failed to apply the principles applicable in award of damages and comparable award made for similar injuries.
5. The parties agreed to dispose the suit by way of written submissions but as at the time of writing this judgment, only the appellant's submissions were on record.

The Appellant's Submissions

6. The appellant submitted that he had sustained disability ascertained at 15%, a fact which the trial magistrate failed to take into consideration when she awarded general damages. He submitted that consequently, this court ought to set aside the trial court's award and substitute it with one of Kshs. 800,000. The appellant relied on the following cases:
 - a. Peter Gakere Ndiangui v Sarah Wangui Maina where the respondent sustained injuries that resulted to permanent disability at 15% and a sum of Kshs. 1,200,000 was awarded and later reduced to Kshs. 500,000 on appeal.
 - b. *Pietro Cannobio vs Joseph Amani Hinzano Malindi HCCA No. 48 of 2013* where the respondent sustained injuries and suffered permanent disablement assessed at 18% and a sum of Kshs. 750,000 was awarded as general damages in the year 2016.
 - c. *Francis Omar Ogor vs JAO (minor suing through next friend GOD (2021) eKLR* where the respondent sustained multiple cut wounds to the right limb, bruises on the limbs, elbows and blunt trauma on the abdomen and a sum of Kshs. 230,000 was awarded as general damages.

Analysis and Determination

7. This appeal is against quantum only and being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due



allowance for that. This principle is in line with section 78 of the *Civil procedure Act*. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated as follows on the role of the first appellate court:

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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 allowances in this respect.”

(See the locus classicus case of *Sielle v Associated Motor Boat Company Ltd* [1968] EA 123)

8. In determining this appeal, I will apply myself to the principle established in the above cases.
9. Having considered the grounds of appeal, the submissions and the authorities relied on by the respective parties, I find the only issue for determination is whether the quantum for general damages awarded by the trial court was inordinately low.
10. The established principle of law on interfering with an assessment of damages by the appellate court is that an appellate court would not easily interfere with the trial courts’ discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding. This is what the Court of Appeal in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia* (1985) 1 KAR 727 stated that:

“ 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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”
11. The same Court in *Odinga Jackton Ouma v Moureen Achieng Odera* [2016] eKLR stated that-
“comparable injuries should attract comparable awards”.
12. The contest in this appeal is with regard to the injuries suffered by the appellant.
13. The pleaded injuries as per the plaint dated 1st April ,2020 were as follows: the Respondent pleaded that he sustained the following injuries: -
 - a. Cut wound to the left ear
 - b. Friction burns to the left ear
 - c. Degloving laceration wound to the right hand
14. In the appellant’s oral testimony, the parties agreed to have the appellant produce all the treatment notes, discharge summaries, invoices, P3 form, medical report dated 1st March 2023 and supplementary medical report dated 22nd June 2023 by consent.
15. In the P3 form, discharge summary from Bungoma County Referral Hospital and medical report dated 1st March 2023, the injuries sustained by the appellant were defined as set out in the appellant’s plaint.
16. Dr. Charles Andai in the medical report dated 1st March 2023 opined that the injuries that the appellant had sustained were soft tissue in nature. Dr. Andai went on to state that the appellant’s right hand



would heal within 6 months after which the appellant would have to go for physiotherapy to regain full functions of the hand. The doctor stated that he could not determine the disability at that time and deferred the same to a later date.

17. In the supplementary medical report dated 22nd June 2023, Dr. Andai noted that as a result of the injuries sustained by the appellant, which injuries were healing, the appellant had developed a keloidal scar on his shoulder and that he could not fully extend and flex the 2nd and 3rd fingers on the right hand. Dr. Andai stated that the removal of the keloid scar would cost the appellant about Kshs. 50,000 in future and further that as a result of the partial stiffness of the right index and middle fingers, the appellant had a permanent physical disablement of about 15%
18. There was no evidence presented by the respondent in support of his case and as such, the evidence of the appellant remained uncontroverted. Accordingly, it is my opinion that the appellant sustained soft tissue injuries that led to a 15% permanent disability.
19. I have considered the cases cited by the appellant and the ones that were relied on in the lower court's decision. It is my opinion that the trial magistrate failed to consider the aspect of the appellant's permanent disability.
20. In addition to the authority cited by the appellant, which I find to be more comparable in terms of injuries suffered, I have considered the following earlier case of *Pyramid Packaging Ltd v Humphrey W. Wangala* [2012] eKLR where the plaintiff sustained traumatic amputation of 3(three) fingers on the left hand and 15% permanent disability. He was awarded Kshs. 650,000/= for pain and suffering.
21. The above cited case has similar injuries and percentage of disability that the respondent herein suffered albeit the appellant did not suffer amputation. This court is therefore persuaded that it can interfere with the award of damages made by the trial court for reasons that the award was inordinately low, the trial court having failed to consider the degree of permanent incapacity as established by the Doctor.
22. I set aside the award of Kshs 200,000 general damages and substitute the same with an award of Kshs 700,000 general damages.
23. As the error of understatement of the extent of the injuries sustained by the appellant and the damages awardable was purely that of the trial magistrate, I order each party to bear their own costs of this appeal.
24. Decree to issue, the lower court record to be returned.
25. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

