

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPELLATE DIVISION**  
**CIVIL APPEAL NO. E1457 OF 2023**

**WELLS FARGO LTD .....1<sup>ST</sup>**  
**APPELLANT**  
**EVANS MUNIALO.....2<sup>ND</sup>**  
**APPELLANT**  
**-VERSUS-**  
**EDWIN OPENDA ONGERI.....**  
**RESPONDENT**

**(Being an appeal from the judgment of Hon. Rawlings Liluma (SRM) delivered on 25<sup>th</sup> August, 2023 in Nairobi Milimani CMCC No. E2691 of 2022)**

**JUDGMENT**

1. This appeal emanates from the judgment delivered on 25.08.2023 in **Nairobi Milimani CMCC No. E2691 of 2022** (*hereafter the lower court suit*). The suit was instituted by way of plaint dated 06.05.2022 by **Edwin Openda Ongeri**, the plaintiff in the lower court (*hereinafter the Respondent*) as against **Wells Fargo Ltd** and **Evans Munialo**, the 1<sup>st</sup> & 2<sup>nd</sup> defendant/defendants in the lower Court (*hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Appellant/Appellants*). The claim was for general and special damages in respect of an accident that occurred on 03.07.2021.

The Respondent averred that on the latter date he was lawfully travelling as a passenger aboard motor vehicle registration number **KCP 156E** along Southern Bypass when the Appellants driver managed, controlled and or drove motor vehicle registration number **KBP 931G** so carelessly and or negligently at very high speed that he lost control causing the said motor vehicle to collide onto motor vehicle registration number **KCP 156E** thereby causing the Respondent serious bodily injuries from which he endured and continues to endure pain and has suffered loss and damages.

2. The Appellants filed a statement of defence dated 06.06.2022 denying the key averments in the plaint and liability. They further averred that the accident was wholly caused or substantially contributed to by the negligence of the driver of motor vehicle registration number **KCP 165E**.
3. At the hearing of the suit, consent judgment on liability was entered in favour of the Respondent as against the Appellants in ratio of 85:15 whereafter parties agreed to canvass the issue of quantum of damages by way of written submissions and further consenting to the admission of the Respondent's list of documents without calling the makers. In its judgment, the Court proceeded to award damages in favour of the Respondent as hereunder: -

<i>General Damages -</i>	<i>Kshs. 900,000/-</i>
<i>After Apportionment of liability (15%) -</i>	<i>Kshs.</i>
<i>765,000/-</i>	
<i>Special Damages -</i>	<i>Kshs. 3,550/-</i>

Total -

Kshs. 768,550/-

4. Aggrieved with the outcome the Appellants preferred this appeal solely on the question of quantum of damages based on the following grounds in their Memorandum of Appeal; -

***“a. That the Learned Magistrate misdirected himself by failing to consider and/or analyze the evidence adduced on the nature and the extent of injuries sustained by the Respondent.***

***b. That the Learned Magistrate erred in law and in fact in making an excessive award of general damages in view of the evidence adduced on the nature and extent of injuries sustained by the Respondent.***

***c. That the Learned Magistrate erred in law and in fact in failing to adhere to precedents on comparable injuries.***

***d. That the Honourable Learned Magistrate erred in law and in fact in failing to rationalize or give any legal justification for the damages awarded.***

***e. That the Honourable Learned Magistrate erred in law and in fact in failing to consider the submissions of the Appellant while arriving at the Judgement.”*** (sic)

5. The appeal was canvassed by way of written submissions, of which the Court has duly considered alongside the authorities relied upon and record of appeal before this Court.
6. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in **Selle -Vs- Associated**

**Motor Boat Co. [1968] EA 123.** Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 - 1988] 1 KAR 278.** That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the singular issue of whether the trial Court's award on damages was justified.

7. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See Court of Appeal decision in **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91.** This Court had earlier in its judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Thus, in order to contextualize the appeal and the key issue advanced for purposes of determination by this Court, it would be apposite to quote in *extenso* the relevant facets of the impugned judgment.
8. The trial Court after restating the evidence tendered before it addressed itself as follows on the issues of quantum -;

**“The injuries were proved by production of the P3 and the medical report.**

**In his submission dated 28<sup>th</sup> April 2023 the plaintiff submitted for an award of Kshs. 1,000,000/= he cited the case of Alphonse Muli**

**Nzuki versus Brian Charles Ochuodo (2014) eKLR where the court awarded Kshs. 800,000/= for comparable injuries and SBI International Holdings Kenya Limited versus William Ambuga Ongeru (2018) eKLR where the Court awarded Kshs. 800,000/= for similar injuries.**

**In their submissions dated 12<sup>th</sup> May 2023, the defendants proposed an award of Kshs. 300,000/-. They cited cases of Reamic Investments Limited versus Joaz Amenyah Samuel (2021) eKLR where the Court awarded Kshs. 350,000/= for comparable injuries and Erick Ratemo versus Joash Nyakweba Ratemo (2018) eKLR where the Court also awarded Kshs. 350,000/=.**

**The defendant did not cite cases that are comparable to this case for instance the case Reamic (supra) related to fracture of the femur and not the fibular.**

**Having considered the foregoing, the effects of inflation and passage of time, I am minded to award Kshs. 900,000/= as general damages for pain suffering and loss of amenities. Subject to apportionment of liability.....” (sic)**

- 9. With the above in reserve, regarding the trial Court’s role in assessing quantum of damages, it is useful at the outset to restate the applicable principles on assessment of damages. The exhortation by the English court in **Lim Poh Choo v Health Authority (1978)1 ALL ER 332** as echoed by **Potter, J.A** in**

**Tayab v Kinany (1983) KLR14**, quoting dicta by **Lord Morris Borth-y-Gest in West (H) v Shepherd (1964) AC 326**, at page 345 stated as follows-;

**“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”** (Emphasis added).

See also **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd. [2013] eKLR**.

10. More recently, the Court of Appeal in **SJ v Francesco D. Nello & Another [2015] eKLR** observed that -;

**“The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case, we refer to the **Ossuman Mohammed & Another vs. Saluro Bundi Mohamud, CA 30/1997 (unreported)** wherein the following passage, in the case of**

**Kigaragari vs. Aya (1982 - 1988), KAR 768 is employed;**

**“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance or increased fees. Over time, courts have held that damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimate of damage.”** (*emphasis added*)

**11.** Whereas on appeal, regarding the Appellants challenge on awarded damages it was held 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”.**

**12.** In **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30**, it was held that:-

**“The principles to be observed by this appellate court in deciding whether it is justified in**

**disturbing the quantum of damages awarded by a trial judge are 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 damages.” see also Butt v Khan (1981)KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.”**

13. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *“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 in the first instance”*.
14. That said, as earlier captured herein, apposite to the issues, are the pleadings. The Respondent particularized his injuries at paragraph 6 in the plaint to constitute ... *“(a) Fracture-left fibular middle 1/3; and (b) swollen, painful tender-right leg*, By **Dr. G. K. Mwaura’s** medical report on the Respondent dated 28.02.2022 which was adduced into evidence by consent, he particularized the injuries as pleaded in the plaint. His final opinion and prognosis on the Respondent was to the effect that *“He sustained injuries and received treatment at Linda Medical*

*Centre. Healing is fair; - (I) He experiences pain-left leg on exertion. He cannot walk or stand for long time (II) He sustained grievous harm injuries. (III) Permanent degree of incapacity is assessed at 5% - Left Lower Limb”*

**15.** The earliest documentation of the Respondent’s injuries were treatment notes from Linda Medical Centre that was prepared on the same day the Respondent sustained his injuries. It captured or confirmed the injuries as pleaded in the plaint. However, it must be noted that the Respondent was subjected to a second medical examination, at the behest of the Appellants. The medical report dated 30.11.2022 by **Dr. Wambugu P.M.** was equally tendered into evidence by consent of the parties with the same being the most recent medical report on the Respondent. It confirmed the Respondents’ injury to constitute a closed fracture left fibula involving the middle third.

**16.** Notably, the latter report was prepared some sixteen months (16) months after the accident. On his part, his final opinion, prognosis and attendant sequela on the Respondent was to the effect that *“injuries involved skeletal and soft tissue injuries and are consistent with those due to blunt trauma as may have occurred during the said accident. He has since made full recovery and no further complications are envisaged. I assert that no total permanent incapacitation occurred”*. Thus, from the foregoing, the most significant injury suffered by the Respondent was the closed fracture left fibula which as at 30.11.2022 by **Dr. Wambugu P.M** prognosis, had healed

though must have caused the Respondent significant pain, discomfort however left him with no attendant sequela.

17. With the above in reserve, as important as consistency in awards for similar injuries might be, this Court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the Court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. The kernel of the Appellants complaint before this Court is that the trial Court's award on damages was excessive, not conventional in comparison to cases with similar injuries; did not pay due regard to the medical evidence and submissions. Therefore, the award ought to be substituted.

18. Before the trial Court, in urging the Magistrate to award Kshs. 300,000/- the Appellants relied on the decision in -; **Reamic Investment Limited v Joaz Amenity Samuel [2021] KEHC 7483 (KLR)** wherein the claimant sustained a *fracture of the femur and soft tissue injuries*. On appeal this Court substituted the trial Court's award with an award of Kshs. 350,000/- in general damage for pain and suffering; the decision in **Erick Ratemo v Joash Nyakweba Ratemo [2018] KEHC 4138 (KLR)** wherein the claimant sustained *fracture of the femur and soft tissue injuries*. On appeal this Court substituted the trial Court's award with an award of Kshs. 350,000/- in general damage for pain and suffering; and the decision in **Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] KEHC 4895 (KLR)** wherein the claimant sustained *compound fracture of the Right leg, tibia and fibula*. On appeal this Court substituted the trial Court's

award with an award of Kshs. 400,000/- in general damage for pain and suffering.

**19.** On his part, the Respondent urged this Court to maintain the trial Court's award of Kshs. 900,000/- having earlier proposed the same before the lower Court. In support of their submissions before the trial Court, counsel relied on the decisions in **Alphonse Muli Nzuki v Brian Charles Ochuodho [2014] KEHC 1408 (KLR)** wherein the claimant sustained *compound comminuted fracture right tibia and fibula & degloving injury medial aspect of right leg and foot*. On appeal this Court sustained the trial Court's award of Kshs. 800,000/- in general damage for pain and suffering and the decision **SBI International Holdings (AG) Kenya v William Ambuga Ongeri [2018] KEHC 8193 (KLR)** wherein the claimant sustained *a chronic dislocation of the left hip, fracture of the femoral head, and bruises on the right thigh with a degree of permanent incapacitation between 40-45%*. On appeal this Court sustained the trial Court's award of Kshs. 800,000/- in general damage for pain and suffering.

**20.** The learned Magistrate in his decision did not address himself in depth on the medical evidence tendered before him however duly considered the respective parties' submissions meanwhile did not cite any specific decision(s) that informed his determination. That said, from the medical evidence presented before the trial Court, the Respondent's injuries seemed moderately severe with no residual incapacitation being occasioned. Thus, having reviewed the authorities cited before the lower Court, it must be appreciated that the same were not

on all fours similar to the injuries sustained by the Respondent in this matter. The Appellants authorities appeared to have some close semblance to the injuries sustained by Respondent whereas Respondent's authorities leaned towards more severe injuries.

21. That said, it can equally be gathered from the material presented before the trial Court, particularly the medical report by **Dr. G. K. Mwaura** that the Respondent sustained incapacitation of 5% whereas upon re-examination going by **Dr. Wambugu P.M**, the injuries had resolved with no attendant sequela. And by the latter the predominant injury sustained by the Respondent was the closed fracture left fibula involving the middle third. Ultimately, it appears from my own review of the material presented before the trial Court and comparisons with authorities cited, that the Appellants complaint with regards to the award on damages is slightly merited and the Court does feel justified to interfere given the nature of injuries disclosed in the medical evidence available.

22. Although the Respondent must have endured much pain in the period of morbidity, the Respondent appears to have sufficiently recovered from his injuries with little or no attendant sequela. Comparing these injuries with those in the above cases, adjusting for severity and inflationary trends, the Court is persuaded to disturb the award by the trial Court and by decreasing it to the sum of Kshs. 750,000/- being the award on general damages for pain and suffering. Subjecting the award to apportionment of liability of 15%, the same comes to Kshs. 637,500/-. The upshot is that the Appellants appeal succeeds by

way of the trial Court's final award on general damages to the tune of Kshs. 765,000/- (*after liability*) is set aside and substituted with an award of Kshs. 637,500/-. Specials to remain the same. The Court directs that each party bears its own costs.  
**23. Orders Accordingly.**

**Delivered, dated and signed at NAIROBI this 17<sup>th</sup> day of SEPTEMBER 2025**

**L. P. KASSAN  
JUDGE**

**In the presence of:**

Mugiro for Appellant

Kiptanui for Respondents

**Court Assistant** - Caro.

We pray for 30 days stay.

**Kiptanui** No objection.

**Court**

Stay granted for 30 days.