



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E086 OF 2023

BETWEEN

MARIETTA MUMBI BENARD.....APPELLANT

AND

HEMWIL INVESTMENTS LTD.....1ST RESPONDENT

DOUGLAS JAGUAR KIMANI.....2ND RESPONDENT

JOSHUA MUTUKU.....3RD RESPONDENT

(Being an appeal from the judgment and decree of the Makueni Chief Magistrate's Court, CMCC No. E183 of 2021, by Hon. E. Kemei (Resident Magistrate)).

JUDGMENT

1. Marietta Mumbi Benard, the appellant, was the plaintiff in Makueni Chief Magistrate's CMCC No. E183 of 2021. She had sued for a claim of general and special damages following a road traffic accident involving their motor vehicle, with registration numbers KCZ 247Q, in which she was travelling as a fare-paying passenger. As a result of the accident, she sustained injuries. The learned trial magistrate awarded her Kshs. 400,00.00 in general damages.
2. The appellant was dissatisfied with the judgment and submitted this appeal through Nyaata & Nyaata Advocates. She raised the following grounds for appeal:
 - a) The learned trial magistrate erred in law and fact by disregarding the submissions tendered by the appellant and thereby erroneously arriving at a wrong conclusion on quantum.
 - b) The learned trial magistrate erred in law and in fact in awarding the appellant Kshs. 400,000/= for blunt abdominal injury grade II liver injury with lacerations and

hemoperitoneum with ileus, which award was inordinately low and in total disregard of the severity of the injuries sustained.

- c) The learned magistrate erred in law and in fact in not making an award which was within the limits of already decided cases of a similar nature.
3. The respondent opposed the appeals through Kimondo Gachoka & Company Advocates. They argued that the award was adequate compensation.
 4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of **Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123**, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.
 5. This appeal is on the quantum of damages. The appellant argued that the learned magistrate made an error in awarding inordinately low general damages. Before an appellate court can intervene in an award of damages, it must be satisfied that a wrong principle of law was applied, irrelevant factors were considered, relevant factors were omitted, or the award is inordinately low or high. These principles were established by the Privy Council in **Nance vs British Columbia Electric Railways Co. Ltd. [1951] AC 601 on page 613**, where it stated:
The principles applicable under this head are not in doubt. Whether the assessment of damages is made by a judge or jury, the appellate court is not justified in replacing the awarded figure with another simply because it would have provided a different amount if it had initially tried the case. Even if the tribunal of first instance was a judge sitting alone, the appellate court must be satisfied that the judge, in determining the damages, applied an incorrect principle of law (such as considering irrelevant factors or omitting relevant ones); or, failing this, that the amount awarded is so inordinately low or high that it constitutes a wholly erroneous estimate of damages (Flint vs Lovell [1935] 1KB 354), as affirmed by the House of Lords in Davis vs Powell Duffryn Associated Collieries Ltd. [1941] AC 601.
 6. Dr Judith Kimuyu examined the appellant on July 27, 2021. Her findings were that she sustained the following injuries:
 - a) Blunt abdominal injury;
 - b) Grade 11liver injury with lacerations; and

c) Hemoperitoneum with ileus.

She opined as follows: Marietta suffered serious life-threatening injuries secondary to RTA. She was well managed and has recovered significantly. She is at risk of developing post-surgical intestinal obstruction due to adhesions and should be counselled for the same. No permanent incapacity occurred.

7. In the trial, the appellant had claimed Kshs. 1.5 million, whereas the respondents believed that Kshs. 150,000.00 would be sufficient compensation.
8. It would appear that the learned trial magistrate did not appreciate the seriousness of the injuries. They aptly described them as life-threatening. I agree that the award was inordinately low. The same is set aside.
9. No two cases are similar, but I will try to look for as near a case as is possible. In the case of ***Kenya Power & Lighting Co. Ltd [2016] vs Kenneth Lugalia Imbugua eKLR*** – The intra-abdominal injuries in the above case were to the liver and gall-bladder. The then doctor noted that one could live normally without a gallbladder, while the liver, a portion of which had been removed, would regenerate. The High Court upheld the lower court's award of Kshs. 700,000/=.
10. Doing the best I can, and factoring in the inflation, the trial magistrate's award is substituted with an award of Kshs. 900, 0000. The appeal is allowed with the costs.

Delivered and signed at Makueni, this 4th day of November 2025

KIARIE WAWERU KIARIE

JUDGE