



**Mwania v Kitheka & another (Civil Appeal E104 of 2023)
[2025] KEHC 15877 (KLR) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E104 OF 2023
KW KIARIE, J
NOVEMBER 5, 2025**

BETWEEN

FIDELIS MUOTI MWANIA APPELLANT

AND

HARRISON MULWA KITHEKA 1ST RESPONDENT

PETER MULWA MUTUA 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Makueni Chief Magistrate's Court, CMCC No. E209 of 2021, by Hon. E. Kemei (Resident Magistrate))

JUDGMENT

1. Fidelis Muoti Mwanja, the appellant, was the plaintiff in Makueni Chief Magistrate's CMCC No. E209 of 2021. He had sued for a claim of general and special damages following a road traffic accident involving their motor vehicle, with registration number KCU 661A, and a motorcycle, KMFF 911K, on which the appellant was a pillion passenger. As a result of the accident, the appellant sustained injuries. The learned trial magistrate made an award of Kshs. 350,000.00 in general damages.
2. The appellant was dissatisfied with the judgment on the quantum of damages and filed this appeal through Mutuku Wambua & Associates Advocates. He raised the following grounds for appeal:
 - a. The learned magistrate erred in awarding an amount on quantum, which was not commensurate with the injuries sustained by the plaintiff.
 - b. The learned magistrate erred in law and fact in awarding general damages to the tune of Kshs. 300,000/= which amount was inordinately low in the circumstances.
 - c. The learned magistrate erred in law and fact by failing to consider the plaintiff's submissions on quantum.



- d. The learned magistrate erred in law and fact by not considering the submissions and authorities cited by the plaintiff on quantum.
3. The respondent opposed the appeals through Kang'ethe & Mola Advocates.
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. The appellants argued that the learned magistrate erred in awarding inordinately low 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. In his pleadings, the appellant stated that as a result of the complained-of accident, he suffered the following injuries:
- a. Closed of the left midshaft femur;
 - b. Injuries to the left thigh; and
 - c. Pain in the left lower limb.
7. Dr Alex Makau examined the appellant. He confirmed the injuries that he had pleaded. He had a closed fracture of the left midshaft femur. He was admitted to a health facility, and ORIF was done with an interlocking nail.
8. In the trial court, the appellant sought general damages of Kshs. 1.2 million, but the respondent did not file any submissions.
9. While arriving at her decision, the learned magistrate relied on the decision in the case of *Philip Musyoka Mutua vs Leonard Kyalo Mutisya* [2018] eKLR. The respondent had suffered the following injuries:
- (i) Cut wound on the face near right eye
 - (ii) Blunt injury to the forehead
 - (iii) Bruises on the chest
 - (iv) Blunt injury to both the shoulders



- (v) Deep cut wound on the left hand
 - (vi) Bruises on the left hand
 - (vii) Fracture of the distal left radius
10. The appellant's injuries are not comparable to the respondent's in Philip Musyoka Mutua's decision above.
 11. While urging his case, the appellant relied on the decision in Pestony Limited & another vs Samuel Itonye Kagoko [2018] eKLR. In this case, an award of Kshs. 800,000.00 was given where the respondent sustained a fracture of the left femur shaft and a swollen, tender thigh. This compares closely to what the appellant herein suffered.
 12. It is evident that the award by the learned trial magistrate was extremely low. The same is hereby set aside and replaced with an award of Kshs 800,000.00. The appeal has succeeded with costs.

DELIVERED AND SIGNED AT MAKUENI, THIS 5TH DAY OF NOVEMBER 2025

KIARIE WAWERU KIARIE

JUDGE

