



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 40 OF 2019

BETWEEN

WILSON NDOLO MUTWIWA..... APPELLANT

AND

NICHOLAS MUSINGA NDETI..... RESPONDENT

(Being an appeal from the judgment and decree of the Kilungu Principal Magistrate's Court, PMCC No.65 of 2017, by Hon. E. M. Muiruri (Senior Resident Magistrate)).

JUDGMENT

1. Wilson Ndolo Mutwiwa, the appellant, was the defendant in Kilungu Principal Magistrate's PMCC No.65 of 2017. He was sued for a claim of general and special damages following a road traffic accident involving their motor vehicle, with registration number KBW 193H, in which the respondent was a passenger, and a motor vehicle with registration number KCE 789N. As a result of the accident, the respondent sustained injuries. The respondent was awarded Kshs. 1,000,000.00 in general damages.
2. The appellant was dissatisfied with the judgment and submitted this appeal through Kimondo Gachoka & Company Advocates. He raised the following grounds for appeal:
 - a) The learned trial magistrate erred in law and in fact when he failed to consider the appellant's evidence and submissions on points of law and facts on finding the appellant liable for the accident which is the subject matter of his suit.
 - b) The learned trial magistrate erred in law and in fact when he failed to consider the appellant's submissions on points of law and facts on damages payable as quantum to the respondent.

- c) The trial magistrate erred in law and in fact in awarding inordinately too high and manifestly excessive general damages of Kenya shillings 1,000,000/= for the right frontal cranial fracture and soft tissue injuries allegedly suffered.
 - d) That the learned trial magistrate's decision was unjust, against the weight of the evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - e) The learned trial magistrate erred in law and in fact in failing to apportion liability judiciously.
 - f) The learned trial magistrate erred in law and in fact in unduly disregarding the appellant's evidence on exaggerated injuries, and instead relied entirely on the respondent's medical report, which particularized exaggerated injuries in the circumstances.
 - g) The learned trial magistrate erred in law and in fact in unduly disregarding the submissions and judicial authorities cited by the appellant and instead relying on the authorities cited by the respondent, which were excessive in the circumstances.
3. The respondent opposed the appeals through Waiganjo Wachira & Company Advocates. He argued that the award of the learned trial magistrate was reasonable and fair.
 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 excessive 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. Nicholas Musinga Ndeti, the respondent, pleaded that she sustained the following injuries:
 - a) Fracture of the right frontal bone;
 - b) Dislocation left acromio-clavicular joint;
 - c) Loss of consciousness;
 - d) Swollen, bruised forehead; and
 - e) Swollen, bruised left shoulder.
7. The appellant disputed the issue of dislocation of the acromio-clavicular joint. The learned trial magistrate did not factor this injury into the assessment of general damages. His finding was that the plaintiff (respondent) did not prove the same.
8. The respondent relied on the decision in the case of **Isaac Waweru Mundia vs Kiilu Kakie Ndeti T/A Wikwatyo Services [2012] eKLR**, the plaintiff suffered the following injuries:
 - a) fracture of the base of the skull;
 - b) comminuted complex mandibular fracture (right condylar neck fracture) with malocclusion and loss of the left lower incisor tooth;
 - c) Right eye vertical dystopia and diplopia on left gaze with marked ptosis of the upper eyelids;
 - d) Resultant facial asymmetry caused by the above injuries;
 - e) wounds and abrasions on the lip, chin and both lower limbs; and
 - f) loss of blood, physical and psychological pain.

He was awarded Kshs. 1 million general damages.

9. The respondent, while requesting an award of Kshs. 350,000.00, relied on the decision in **Duncan Mwenda & 2 others vs Silas Kinyua Kithela [2018] eKLR**. The respondent sustained a severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the middle finger, and soft tissue injuries on the chest wall. He was awarded Kshs. 350,000 as general damages. Upon examination, the medical doctor observed that the

respondent experienced recurrent headaches due to the head injury. He concluded that the injuries were properly treated and healed well without leading to permanent incapacity.

10. I have reviewed the authorities cited by both parties. A fracture of the skull is a severe injury, and I have no reason to vary the award by the learned trial magistrate. Based on the preceding analysis, I have concluded that the appeal lacks merit and is dismissed with costs.

Delivered and signed at Makeni, this 5th day of November 2025

KIARIE WAWERU KIARIE

JUDGE