

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 104 OF 2020

MATUNDA (FRUITS) BUS SERVICE LIMITED.....APPELLANT
VERSUS
HANNINGTON CHARLES OGUTU OBUTE alias
CHARLES OGUTU alias
CHARLES OGUTU OGUTU.....RESPONDENT

*(Being an appeal from judgement and decree of the Hon. E.S. Soita in Molo
CMCC case No. 15 of 2019 delivered on 11th May, 2020)*

JUDGMENT

1. The background of this Appeal is that the Respondent herein had sued the Appellant vide a plaint dated 29th August, 2018, seeking judgement;-
 - a) General damages and costs for future operation.*
 - b) Special damages of Kshs. 6,850 plus 16% VAT.*
 - c) Cost of the suit.*
 - d) interest in (a) and (b) above at court rates*
 - e) Any other relief that this honourable Court shall find fit and just to grant.*
2. The Background facts are that on or about 31st December, 2017, on the Eldoret-Nakuru road, the Respondent herein, was a fare-paying passenger on board motor vehicle registration number KCC 003A owned by the Appellant herein. It was pleaded that due to careless and negligent driving of the Appellant's authorised driver, the said driver lost control of the vehicle and collided with motor vehicle registration number KBK 907C/ZD 0066.
3. It was pleaded that as a direct result of the alleged negligence, the Respondent sustained; soft tissue injuries to the left forearm, a deep cut

wound on the right leg and a fracture of the left tibia and fibula. The Respondent held the Appellant vicariously liable for the driver's actions.

4. The Appellant entered appearance on 9th May, 2019 and filed a statement of Defence on even date, and denied the substantive claims made in the Plaint. Specifically, the Appellant denied being the registered or beneficial owner of motor vehicle KCC 003A and that the Respondent was a lawful passenger in the said vehicle on the Eldoret-Nakuru road.
5. The Appellant denied the occurrence of the accident as alleged, as well as the particulars of negligence attributed to their driver, asserting that the accident was solely caused by the negligence of the Respondent and the driver of the other vehicle, KBK 967C- ZD0066 trailer.
6. The Appellant accused the Respondent for failing to buckle the seatbelt and not taking adequate precaution. In regard to the other driver, the Appellant stated that the said driver was driving recklessly, failing to remain on its lane and drove under the influence of alcohol. Consequently, the Appellant denied the alleged injuries, loss, damage and special damages, and prayed for dismissal of the Respondent's suit with costs.
7. Upon hearing both parties, the trial Court rendered its judgment in favour of the Respondent against the Appellant as follows:-
 - a) Liability 100% .
 - b) General damages.....Kshs. 800,000.
 - c) Special damages.....Kshs. 12,100.TotalKshs. 812,100 Costs and interest until payment in full.
8. Dissatisfied with that decision, the Appellant herein lodged this Appeal vide the Memorandum of Appeal dated 15th May, 2020 and filed on 5th June, 2020 on the grounds that;-

1) The trial Magistrate erred in fact and in law in awarding excessive amount for general damages of Kshs 800,000/=.

2) The learned magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions on quantum hence arriving at a determination that represents an entirely erroneous estimate of damages.

3) The learned trial magistrate erred and misdirected himself in law and in fact in misapplying the principles applicable to assessment of damages, given the nature and extent of the injuries which were soft tissues injuries.

9. The Appellant prayed for the Appeal to be allowed with costs, and for the damages assessed by the Resident Magistrate to be set aside and this Court assesses the damages afresh.

Appellant's Submissions

10. The Appellant submitted majorly that the trial court erroneously relied on alleged fracture injury of the left tibia and fibula which was not proven in the initial contemporaneous examinations and therefore was an irrelevant factor in assessing damages.

11. It was argued that the initial treatment notes from Molo District Hospital dated 31/12/17 listed injuries on the left forearm and bilateral legs, wounds on anterior surfaces, complains of DIB and a headache but did not mention a fracture. Equally, that the emergency medical services patient report dated 31/12/17 only stated that the Appellant complained of headaches and DIB.

12. The Appellant submitted that the first instance where the fracture of the left fibula was captured was in the Kenya Police Medical Examination Report dated 01/01/2018 and the medico-legal report by Dr. Obed Omuyoma subsequently listed the fracture.

13. It was submitted that based on a re-examination on 11/07/2019, the second medical report by Dr. Jenipher Kahuthu, noted an initial distal fibula shaft fracture but found no physical disabilities resulting from the injuries, stating

the fracture had healed and in a good position with normal movement, thus faulting Dr. Omuyoma's findings of 10% permanent disability.

14. Based on the medical findings, the Appellant reiterated that the initial treatment reports is the document that captures the actual injuries suffered by the Respondent. In support of this position, reliance was placed on the case of ***Sospeter Kimutai & another v Isaac Kipleting Boit [2021] eKLR***, which excluded a fracture from consideration in determining quantum because it was not included in the earlier contemporaneous accident examinations and lacked reliance on X-rays.
15. The Appellant submitted that initial treatment notes are paramount in a personal injury claim and pray for the exclusion of the fracture injury in determining the appeal.
16. The appellant acknowledged that the discretion in assessing general damages must be exercised judiciously, and that an appellate court can interfere if the trial court took into account an irrelevant factor or if the amount is so inordinately high that it is a wholly erroneous estimate of the damages. Further, it was submitted that awards must be within consistent limits, compensating comparable injuries with comparable awards.
17. On that basis, it was submitted that if the court excludes the fracture, treating the injuries as soft tissue in nature with no permanent incapacity, then the initial award was erroneous and grossly exaggerated.
18. The Appellant thus proposed nominal award of soft tissue injuries of Kshs. 80,000 citing the following cases in support of the proposed award;-
 - ***George Mugo & Another V AKM(Minor suing through next friend and mother of ANK) [2018] eKLR***, where Kshs. 90,000 was awarded for soft tissue injuries.
 - ***George Kinyanjui T/A Climax Coaches & Another Vs Hussein Mahad Kuyala [2016] eKLR***, where an award was reduced from Kshs.

650,000 to Kshs. 109,890 for soft tissue injuries after excluding a loss of teeth unrelated to the accident.

19. The Appellant proposed that in the event the fracture injury is considered by this Court then the award of Kshs. 800,000 be found to be inordinately high and unjustified. On the contrary, that a maximum award of Kshs. 300,000 would be sufficient as general damages. In support, the Appellant relied on cases involving fractures where the awards were significantly lower than Kshs. 800,000, including:-

- *Zachariah Mwangi Njeru v Joseph Wachira Kanoga [2014] KEHC 3995 (KLR)*, where a plaintiff sustained comminuted fracture of the tibia and fibula and was awarded Kshs.800,000, but upon Appeal, Wakiaga J (As he then was)substituted the award with Kshs . 400,000.
- In *Jitan Nagra v Abidnego Nyandusi Oigo[2018] eKLR*, D.S Majaja J set aside an award of Kshs. 1,000,000 and substituted with Kshs. 450,000 for compound fracture of the right tibia/fibula, segmental distal fracture of the right femur, and other injuries.
- In *Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR*, a plaintiff sustained a fracture of the lower tibia and fibula and other severe injuries requiring an operation and he was awarded Kshs. 300,000 which was upheld on appeal.

20. In conclusion, the Appellant urged the court to allow the appeal, set aside the judgment of the trial court, and award costs to the appellant.

Respondent's submissions

21. He defended the trial court's award of Kshs. 800,000 for general damages as just and appropriate arguing that the award was neither excessive nor based on a misapplication of principles. He emphasised the severity of the Respondent's injuries which, he stated, included a fracture on the left tibia

and fibula, a deep cut wound on the right leg leading to severe soft tissue injuries, and soft tissue injuries to the left forearm.

22. He submitted that the medical report by Dr. Omuyoma confirmed these injuries, awarding him a permanent disability of 10%, and noted a permanent scar of about 6cm long on the right shin. Further that Dr. Omuyoma termed the degree of injury as grievous harm.
23. The Respondent highlighted that the Appellant presented no contrary evidence or medical reports to challenge this testimony or the degree of injury, leaving the Respondent's case on quantum unchallenged on record.
24. In response to the Appellant's claim that the trial magistrate misapplied assessment principles and that the injuries were merely soft tissue injuries, the Respondent relied on the established legal principle governing appellate interference with award of damages.
25. He submitted that a figure reached by a trial court should not be disturbed on appeal unless the trial court acted on an erroneous principle or the award is so high or so low as to amount to an entirely erroneous estimate. To support this rule, reliance was placed on the case of ***Robert Musyoki Kitavi V Coastal Bottlers LTD [1985] 1 KAR 891***.
26. Accordingly, he argued that the award of Kshs. 800,000 was not inordinately high, rather that it was proportional to the magnitude of the injuries suffered.
27. To buttress his position, reliance was placed on the case of:-
 - ***EWO (suing as the next friend of a minor COW) V Chairman Board Of Governors- Agoro Yombe Secondary School [2018] eKLR***, where the Court upheld the of Kshs. 800,000 awarded to the plaintiff who had suffered femur fractures and fractures of the tibia fibula.
 - ***Godfrey Wamalwa Wamba & Another V Kyalo Wambua [2018] eKLR*** where the Plaintiff sustained a compound fracture of the right

distal tibia/fibula and cut wounds on the scalp, chest, and lower lip and was awarded Kshs. 700,000.

- ***Joseph Musee Mua V Julius Mbogo Mugi & 3 Others [2013] eKLR*** where Plaintiff who suffered fractures on the left leg tibia and fibula, a head injury, two broken upper jaw teeth, and a chest injury was awarded Kshs. 1,300,000.

28. Based on these authorities, the Respondent urged this Court to find that the Appeal lacks merit and dismiss it in its entirety with costs.

Analysis and determination

29. This being a first Appeal, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand as was stated in ***Selle & another v Associated Motor Boat Co. Ltd. & others [1968] EA, 123.***

30. Having considered the Memorandum of Appeal together with the record, the rival submissions and the cited authorities, the appeal is on quantum only.

31. This being an appeal on quantum damages, I am guided by the legal principle enunciated in ***Butt –vs- Khan (1981) KLR 349***, which was applied in ***Kemfro Africa Ltd t/a Meru Express Service & Gathongo Kanini – vs- A.M Lobia and Olive Lobia (1982 – 1988) I KAR 727 at page 730***, wherein Kneller JA stated as follows –

“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 Judge were held by the former court of Appeal for East Africa to be that it must be satisfied that either the Judge in assessing 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 damage”.

32. The Appellant's argument is that the award by the trial Court is manifestly high given that the injuries sustained as per the initial medical examination did not capture any fracture. That the Injuries suffered as a result of the accident are only soft tissue injuries.
33. A perusal of the court record reveals that after the accident on 31st December, 2017, the Respondent herein was rushed to Molo District Hospital and upon being stabilised and X-ray taken, he was referred to Nakuru Provincial General Hospital (PGH) on the same day.
34. The P3 form issued by PGH Nakuru on 9th January, 2018 indicates that the Respondent herein reported to the Hospital on 1st January, 2018 complaining of headache and history of Road Traffic Accident and upon examination, it was noted that there was a wound on the anterior bilateral leg, the bilateral leg was swollen and tender and also that there was fracture of the left fibula. The Hospital administered analgesics, tetanus toxoid injection, antibiotics then cleaned and dressed the wound and applied pop cast on his leg.
35. In his medical-legal report dated 11th May, 2018, Dr Obed Omuyoma stated that upon examining the Respondent, he noted that the Respondent had suffered deep cut wounds on the right leg leading to soft tissue injuries, several soft tissue injuries of the left forearm and fracture left tibia and fibula, thus awarding 10% degree of disability.
36. In arriving at this conclusion, Dr, Omuyoma relied on the referral form from Molo District Hospital dated 31/12/2017, outpatient Card from PGH Nakuru OP No. 109041/2017 dated 31/12/2017 and the P3 form filled at the same Hospital dated 9th January, 2018.
37. On 11/7/2019 and pursuant to instructions from the Appellant, DR. Jenipher Kahuthu carried out a second medical examination on the Respondent. According to Dr. Kahuthu, the Respondent herein presented complain of back pain and upon physical examination, she noted that the MSS-Healed

scars on both legs, with pain on the knee but with normal range of movement of the knee and left ankle joint. She observed an X-ray carried out on 31/12/2017 which showed that there was initial distal fibula shaft fracture and upon checking a second X-ray by PGH Nakuru dated 11/7/2019, she noted that the distal fibula shaft had healed and in good position and thus there was no physical disability.

38. From the medical report noted above, it is clear that the main injuries suffered by the Respondent as confirmed by the referral hospital (PGH Nakuru), that treated the Respondent herein, and affirmed by both Dr. Obed Omuyoma and Dr. Jenipher Kahuthu, are fracture of the left fibula and several soft tissue injuries.
39. In the circumstances, the allegation by the Appellant that the Respondent suffered soft tissues injuries only is not factual.
40. In view of the injuries sustained, the issue then is whether the award of general damages was excessive as alleged. Regarding assessment of damages, the Court of Appeal in the case of Stanley Maore vs Geoffrey Mwenda (2004) eKLR had this to say: -

“...Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

41. Further, it is settled that an award of damages is within the discretion of the trial court and indeed, the Court of Appeal in Catholic Diocese of Kisumu v Tete [2004] eKLR, had this to say:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and 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 difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”[Emphasis added]

42. Before the trial court, the appellant had relied on the case of **Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018]EKLR** in support of his proposal for an award of Kshs. 700,000 as general damages. However, the injuries therein were more serious hence not comparable to the injuries herein.
43. In the case of **Rayan Investments Limited v Jeremiah Mwakulegwa Kasha [2017] KEHC 966 (KLR)**, the Plaintiff therein sustained a fracture of the upper third of the right fibula, severe blunt trauma on the right wrist, bruises on the posterior aspect of the right elbow and a blunt trauma on the right wrist. On appeal, High Court (Njoki Mwangi J), set aside the award of Kshs. 500,000/- and substituted it with an award of Kshs 300,000/-.
44. In **Musili v Mwendu alias Daniel Mutisya Mwendu (Civil Appeal E022 of 2022) [2024] KEHC 8444 (KLR)**, the respondent in the matter has suffered a fracture of the fibula with severe soft tissue injuries which had healed. The trial court awarded Kshs 800,000 but on appeal, it was reduced to Kshs. 500,000.
45. Further in **Kiama v Mutiso (Civil Appeal 40 of 2023) [2024] KEHC 5135 KLR)**, D.S Majanja J reduced an award of Kshs 700,000 to Kshs. 400,000 for a party that had suffered a fracture of the left tibia bone (upper 1/3) and a blunt injury to the left leg and thigh.

46. Based on the above case law, this Court finds that the trial court's award of Kshs 800,000 was manifestly high considering the injuries sustained herein. On that basis, an award Kshs 550,000 is more appropriate.
47. There was no challenge on special damage pleaded and awarded and therefore, the same is not disturbed.
48. In conclusion, the trial court's judgement delivered on 11th May, 2020 is hereby set aside and substituted with judgment in favour of the Respondent as against the Appellant in the following terms;

- 1) *Liability100%*
- 2) *Special damages of Kshs.12,100.*
- 3) *General damages of Kshs 550,000.*
- 4) *Having partially succeeded, each party to bear their own costs of this Appeal.*

Dated, signed and delivered at Nakuru this 1st Day of December, 2025.

PATRICIA GICHOHI

JUDGE

Mr. Kabita for Appellant

Ms Atieno for Respondent

Kamau, Court Assistant