



Wamwa Trading Company Limited & another v Kanyoonji & another (Civil Appeal E071 of 2024) [2025] KEHC 18337 (KLR) (11 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E071 OF 2024
CW MEOLI, J
DECEMBER 11, 2025**

BETWEEN

WAMWA TRADING COMPANY LIMITED 1ST APPELLANT

IRENE WAMUCII 2ND APPELLANT

AND

ISAAYA KANYOONJI 1ST RESPONDENT

ANNE SAILEPO 2ND RESPONDENT

(Being an appeal from the judgment of R.A Oganyo delivered on 12th March 2024 in Kajiado CMCC No. E009 of 2023 and CMCC No. E 129 of 2023)

JUDGMENT

1. Isaaya Kanyoonji and Anne Sailepo, the plaintiffs in the lower court (hereafter 1st Respondent and the 2nd Respondent respectively/the Respondents), had instituted two separate suits in the lower court, namely, CMCC No. E009 OF 2023 and CMCC No. E129 of 2023, seeking damages in respect of injuries sustained as a result of a road traffic accident, which occurred on or about 22nd October, 2022.
2. It was averred that the 1st Respondent was on that date riding a motor cycle registration number KMFT 532T (hereafter the motor cycle) along Isara- Kajiado road while carrying the 2nd Respondent, his wife, as a pillion passenger. While the motor vehicle registration number KDJ 084U (hereafter the vehicle) owned by the 1st Defendant Wamwa Trading Company Ltd. (hereafter the 1st Appellant) was so negligently driven by Irene Wamucii the 2nd Defendant (hereafter the 2nd Appellant) that she caused it to ram into the motorcycle occasioning the injuries particularized in the complaints, to both Respondents.
3. The Appellants filed defence statements by which they denied the key averments in the complaints and liability. On 24.08.2023 an order was made to appoint CMCC No. E009 of 2023 as the test suit, and



- although no formal order to that effect appears on the record, it appears that the two matters were thereafter treated as consolidated.
4. In the judgment described as consolidated, and delivered on 12th March, 2024, the trial court found the two Appellants wholly liable for the accident and awarded Kes. 800,000/- as damages to the 1st Respondent and Kes. 350,000/- to the 2nd Respondent, special damages and costs. Aggrieved by the outcome, the Appellants lodged this appeal challenging the finding on liability and quantum.
 5. The memorandum of appeal dated 8th August, 2024 contains the following grounds:
 - i. That the learned trial magistrate erred in law and in fact in failing to appreciate the fact that the 1st Respondent veered onto the insured driver's lane.
 - ii. That the learned trial magistrate erred in law in awarding damages which were inordinately high considering the nature of the injuries.
 6. The appeal was admitted on 19.02.2025 and directions given for the appeal to be canvassed via written submissions.
 7. The Appellants' counsel, seemingly abandoning the appeal on liability, confined his submissions on the appeal to quantum. Asserting that the trial court's award of general damages was inordinately high and inconsistent with established precedent, counsel argued that the trial court disregarded comparable awards without justification. Citing in support the decision of the Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987] KLR 30*.
 8. And relying in the statement therein to the effect that "it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate," he contended that the award of Kshs. 800,000/- to the 1st Respondent, who suffered a fractured 2nd and 3rd metatarsal bone and soft tissue injuries, was excessive.
 9. In comparison, to the award in *Mash East Africa Limited v Kamau (Civil Appeal E309 of 2020) [2024] KEHC 2118 (KLR)*, where the High Court upheld an award of Kshs. 500,000/- to a plaintiff who suffered similar injuries, including a degloving injury and fracture. Further citing the case of *Jesca Kajumwa Masela vs Razick Aziz Obuba (2021) eKLR*, where on appeal, the High Court reduced an award to Kshs. 500,000/- in respect of a fracture of the first metatarsal, proximal phalanx of the big toe, and a degloving injury. Counsel therefore proposed an award of Kshs. 400,000/- for the 1st Respondent as more appropriate.
 10. Regarding the 2nd Respondent, whose injuries were soft tissue in nature, counsel contested the award of Kshs. 350,000/- in damages describing it as excessive. Relying on the case of *Maimuna Kilyungya v Motrex Transporters Ltd [2019] eKLR*, where the High Court awarded Kshs. 125,000/- for blunt injuries to the neck, shoulder, and ear, and *Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR*, where an award of Kshs. 350,000/- was set aside and substituted with Kshs. 140,000/- for similar soft tissue injuries. The Appellants' counsel hence proposed an award of Kshs. 150,000/- in this case for the 2nd Respondent, as more consistent with precedent. The court was urged to substitute the awards accordingly, in consistency with the principle that "an award must reflect the trend of previous, recent and comparable awards."
 11. In his submissions, counsel for the Respondents first pointed out that the ground of appeal on liability, which was not addressed by submissions of the Appellants, was effectively abandoned.



12. Concerning the guiding principles, counsel cited the decision in *Mbogo and Another v Shah* [1968] EA 93, as to the circumstances when an appellate court can interfere with the exercise of discretion by an inferior court, in addition to the principles espoused in *Selle and Another v Associated Motor Boat Company and Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 with regard to the remit of the first appellate court.
13. In defending the quantum of general damages, counsel for the Respondents stated that the Appellants failed to demonstrate any legal or factual error warranting interference by this court. Asserting that the trial court properly exercised its discretion, upon considering the nature and extent of the injuries and relevant precedents, counsel relied on principles expressed in *Shabani v City Council of Nairobi* [1985] KLR 516 and *Kemfro Africa Ltd v Lubia and Another (No. 2)* [1987] KLR 30. All regarding situations when the appellate court is justified in disturbing the quantum of damages awarded by a trial court. Including the principle expressed in the latter case that the appellate court ought to satisfy itself 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.”
14. It was the counsel's position that the trial court's awards of Kes. 800,000/- and Kshs. 350,000/- for the 1st and 2nd respondent, respectively, were reasonable and supported by comparable case law. Citing *Hussein Abdi Hashi v Hassan Noor* [2004] eKLR, where a plaintiff who suffered injuries comparable to the 1st Respondent's was awarded Kes. 800,000/-. In conclusion, counsel asserting that the Appellants have not justified interference in the awards by the appellate court, urged the court to dismiss the appeal with costs.
15. The court has considered the record of appeal, (which this court found to be incomplete for failing to include the proceedings of the lower court as required), the pleadings and original record of the proceedings as well as the parties' respective submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle* (supra) in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
16. 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. As earlier noted, the appeal before this court turns on the singular issue of damages, the challenge to liability having been abandoned.



17. In considering the foregoing, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] 1 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”.

See also *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.

18. 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”.

19. Pertinent to the determination of these issues are the pleadings, which form the basis of the parties’ respective cases before the trial court and before the appellate court. See *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. The 1st Respondent by his plaint averred at paragraph 8 that:

“8. By reason of the matter aforestated, the Plaintiff sustained injuries. He thus suffered loss and damage for which he holds the Defendant liable.

Particulars of the Plaintiff’s injuries .

- a. Blunt injuries to the right knee with bruises
- b. Fractured 2nd metatarsal bone
- c. Blunt injuries to the right foot with swelling

20. Similarly, at paragraph 8 of her plaint, the 2nd Respondent averred as follows:-

“8. By reason of the matter aforestated, the Plaintiff sustained injuries. He (sic) thus suffered loss and damage for which he holds the Defendant liable.

Particulars of the Plaintiff’s injuries

According to the medical report by Dr. Titus Ndeti ... the claimant sustained the following injuries:

- a. Blunt head injuries with massive swelling on the scalp.
- b. Lacerations on the upper lip
- c. Lacerations on the lower lip
- d. Blunt injuries on the abdomen



- e. Blunt injuries on the left waist
- f. Blunt injuries to the left knee
- g. Blunt injuries on the left leg below the knee with swelling and tenderness”. Future medical expenses to be proved at the hearing hereof.”

21. Upon restating the evidence tendered before it and submissions of the parties, the trial court pronounced itself as follows concerning quantum; -

“On quantum, the plaintiff submitted that the Plaintiff suffered blunt tissue injuries to the right knee with bruises and fractures on 2nd and 3rd metatarsal bones with blunt injuries to the left foot with swelling for the man (1st Respondent).

The wife Anne Sailepo suffered lacerations on both upper and lower lips, blunt injuries to the abdomen, left waist, left knee and left leg below the knee with swelling and tenderness. The injuries were confirmed by Dr. Ndeti whose medical reports indicated that the Plaintiffs suffered soft tissue injuries of moderate severity while indicating that the 1st Plaintiff (1st Respondent) ...would require future medical expenses of Kshs. 10,000/- for attending anticipated orthopedic clinics with a degree of permanent incapacity assessed at five percent...and the second Plaintiff Anne Sailepo expected to completely heal of her multiple soft tissue injuries of moderate severity with residual permanent scars.

The Plaintiffs relied on the case s of Easy Coach Limited vs Emily Nyangasi Kisumu HCCA No. 20 of 2015 eKLR and Pius Gitau vs EWN (A minor suing through her mother and next friend MWK) in seeking that this court considers awarding the first Plaintiff a sum of Kshs. 1,500,000/- and to the second one a sum of Kshs. 800,000/- respectively.

I have had a comparison of the injuries suffered by the Plaintiffs in the instant case, as consolidated, with the cited caselaw and considering the extent, seriousness and severity in the cited cases as compared to these, I am of the considered view that the proposed sums are way above the modest expectations guided by case law in such circumstances.

I will therefore award Kshs. 800,000/- for the 1st Plaintiff ...as general damages for pain and suffering and Kshs. 350,000/- for the second Plaintiff ...as general damages for pain and suffering.”(sic)

22. It is worth noting here that the Appellants’ submissions in the lower court did not propose any quantum of general damages for the 2nd Respondent while citing the case of Simon Taveta Vs Mutitu Njeru (2014) eKLR on the applicable principles and proposing an award of Kes. 250,000/- to the 1st Respondent, but without citing any pertinent authorities in support.
23. On this appeal, the Appellants have attempted to cure the gaps in their submissions in the lower court by introducing authorities and submissions in regard to the appropriate award to the 2nd Respondent. They have also introduced authorities specific to the quantum of damages in respect of the 1st Respondent. All which were never placed before the lower court. This is unacceptable; an appeal is essentially a retrial based on material already placed before the trial in the lower court for consideration. An appeal is not a new trial, where parties can improve on their cases through introduction of new material not seen or considered by the lower court.



24. This court entirely agrees with the disapproval expressed towards such conduct by Ochieng J (as he then was) in his judgment in *Silas Tiren & Another v Simon Ombati Omiambo* [2014] eKLR. The learned Judge taking exception to the introduction of new authorities at the appeal stage, stating *inter alia* that:

“None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal.”

25. The court understood the Appellants’ complaint on this appeal to be that the quantum of general damages awarded by the trial court was inconsistent with awards made for comparable injuries in other cases, hence erroneous. In that regard, the court has considered the evidence of Dr. Titus Ndeti (PW1). His evidence was that he examined both Respondents and prepared the respective medical reports. He outlined injuries by the 1st Respondent as blunt injury to the right knee, fractured 2nd and 3rd metatarsal bone and blunt injury on the right foot which he documented in P.EXh. 1. As regards the 2nd Respondent, he categorized her injuries as soft tissue injuries of moderate severity as captured in the medical report (P. Exh. 3). In cross-examination he stated that the 1st Respondent’s injuries portended a 5% permanent incapacity. The 1st Respondent testifying as PW2 stated that he suffered the injuries described by PW1 which resulted in persistent pain.

26. The Appellants closed their case without calling any witnesses and on this appeal, they did not appear to dispute that the injuries pleaded were proved at the trial. Rather, their grouse is that the trial court failed to consider relevant precedents in arriving at its award of general damages. That said, upon considering the Respondent’s evidence adduced at the trial in proof of the injuries, this court is satisfied that it established on a balance of probabilities, the respective injuries pleaded by each Respondent, thus discharging their burden of proof. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*.

27. The Court of Appeal in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.” The above provision provides for the legal burden of proof.



However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under Section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, Section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

28. Hence, the duty of proving the averments contained in the plaint lay squarely on the Respondents. In *Karugi & Another v Kabiya & 3 Others (1987) KLR 347* the Court of Appeal stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant..... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

29. In considering the complaint that the award of general damages to both Respondents was erroneous or excessive, the court is guided by settled principles, some of which have already been outlined elsewhere in this judgment. The assessment of damages involves the exercise of discretion by the court, and in *Kemfro (supra)* the Court of Appeal stated that :

“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 of Eastern Africa to be that it must be satisfied that either that 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 damage.”

30. The most significant injury suffered by the 1st Respondent was the fractures to the 1st and 2nd metatarsal bone, accompanied by soft tissue injuries, all which must have caused him some degree of pain and discomfort. Not to mention the prognosis of a 5 percent residual permanent incapacity. The 2nd Respondent’s injuries were primarily soft tissue injuries from which the said Respondent would recover fully according to P.Exh. 3.



31. With the exception of skeletal injuries suffered by the 1st Respondent, the injuries of the Respondents herein compare well with the injuries of the plaintiff in *Easy Coach limited vs Emily Nyangasi* (2015) eKLR, as the trial court found. The injuries therein included facial, chest, back, right hand injuries with cut wound and right leg injury with cut wounds. The award of Kes. 700,000/- in general damages was upheld in that appeal.
32. Considering here that the 1st Respondent in addition to soft tissue injuries had sustained two fractures and residual disability albeit slight, and the inflationary factors since 2017 when the decision in *Easy Coach* was rendered, the court is not persuaded that the award of Kes. 800,000/- in general damages was excessive or erroneous. Besides, the Appellants furnished no authorities with comparable injuries at the trial to guide the court in assessing the appropriate award of damages.
33. In the court's further view, in light of the age of the initial awards and injuries involved in the authorities submitted by the Appellants on this appeal, the impugned awards to the Respondents herein in 2024 appear within reasonable range. As observed by the English Court in *Lim Poh Choo v Health Authority* (1978) 1 ALL ER 332 and echoed by Potter JA in *Tayab v Kinany* (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Shepard* (1964) AC 326, at page 345:

“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.”

See also *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR , *Kigaraari v Aya* (1982-88) 1 KAR 768 and *Simon Taveta vs Mercy Mutitu Njeru* (2014) eKLR.

34. A necessary caveat here is that as important as consistency in awards for similar injuries might be, the 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 trial court, while seemingly alive to relevant principles, analyzed the evidence and submissions placed before it and arrived at awards that were patently justified.
35. Applying the principles enunciated in *Kemfro* (supra) to the facts of this case, the court is of the considered view that the Appellants have failed to demonstrate that the trial court “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.”
36. On this appeal, the Respondents have correctly the dicta in *Mbogo & Another vs Shah* (supra). In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR) the Court of Appeal had this to say concerning orders made in exercise of discretion, as obtains in the assessment of damages :

“In *Edward Sargent -v- Chhotabhai Jhaverbhat Patel* [1949] 16 EACA 63, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially. (See also *Spry VP in Haman Singh & Others -v- Mistri* [1971]



EA 122, 125). The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of Mbogo & Another -v- Shah [1968] EA 93, where it was held at page 96 that:

“ An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion....”

37. In the absence of a demonstration that the trial court’s exercise of its discretion in assessment of general damages was erroneous, the court does not feel justified to disturb the trial court’s awards. The appeal therefore fails in its entirety and is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 11TH DAY OF DECEMBER 2025.

C. MEOLI

JUDGE

In the presence of:

For the Appellants: Mr. Odiyo

For the Respondents: N/A

