



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NO. E120 OF 2024**

**GEORGE MUIRU NDUNG’U T/A BIDII STORES.....APPELLANT**

**VERSUS**

**JAMES WAWERU.....RESPONDENT**

*(Being an Appeal against quantum from the Judgment/Decree of Hon. A. Mukenga-Principal Magistrate delivered on 29<sup>th</sup> November, 2023 in Molo CMCC Number E015 of 2023)*

**JUDGEMENT**

1. By way of Plaint dated 5<sup>th</sup> February, 2023, the Respondent sued the Appellant wherein he sought special and general damages, interest thereon and costs of the suit on account of injuries sustained from a road accident that occurred on 29<sup>th</sup> September, 2022 along the Molo Njoro Road.
2. The Respondent claimed to have been hit by motor vehicle registration number KCX 125V belonging to the Appellant while lawfully riding his motorcycle registration number KMDY 563F thereby sustaining serious bodily injuries.
3. The Appellant filed a Response to Statement of Defence dated 9<sup>th</sup> March, 2023 denied the claim and particulars of negligence and attributed the accident to the negligence of the Respondent.

4. Parties entered consent on liability in favour of the Respondent against the Appellant at a ratio of 90:10.
5. The trial Court had, assessed damages as follows:
  - a) General damages for pain and suffering Kshs. 1,200,000.00
  - b) Cost of future medical expenses Kshs. 150,000.00
  - c) Special damages Kshs. 159,810.00
  - Less 10% contributory negligence
  - d) Net award **1,358,829.00**
6. Aggrieved by the decision of the Court, the Appellant vide the Memorandum of Appeal dated 24<sup>th</sup> May, 2024 preferred this Appeal on the following grounds: -
  - i. **THAT the Learned Magistrate erred in law and in fact, in by awarding Kshs 1,200,000 as damages for pain and suffering which is manifestly excessive and way above the convectional awards under the said limb.**
  - ii. **THAT the Learned Magistrate misdirected himself failing to take into consideration the tendered judicial authorities, establishing the jurisprudence that general damages for Pain and suffering should only be compensated proportionately in juxtaposition to those awarded in comparable cases.**
  - iii. **THAT the Learned Court erred in law and in fact in disregarding the Appellants submissions and authorities in regards quantum.**

- iv. **THAT the Honourable Court erred in law and in fact by awarding using an erroneous occupation classification under the remuneration order, in disregard of the established jurisprudence that where there is no evidence in prove of earnings, then the minimum wage guidelines must apply.**
  - v. **THAT the Honourable Court misdirected itself in fact and in law by awarding Special damages of Kshs. 159,810/= while the Plaintiff had only produced valid and authentic receipts worth Kshs. 30,000/=**
7. Reasons whereof the Appellant prays that the appeal be allowed, judgment of the Honorable Court be set-aside and Cost of the Appeal together with any other relief that the court may consider just and expedient.
8. The Appeal was disposed by way of written submissions.

### **Appellant's Submissions**

9. It was submitted that, the award was excessive and not accompanied by reason reflecting non-adherence to principles applicable in the award for damages. That the Trial Court failed to consider the Appellant's medical report.
10. The Appellant relied on the case of ***Koyi v Obanga & 2 Others [2022] KEHC 9772 (KLR)*** and ***Pascal Iha Garama vs Jackson Njeru Njoka [2019] eKLR*** where the courts awarded Kshs 400,000 thousand for the injuries which the Appellant considers similar to the

Respondent's injuries. The Appellant proposed an award of Kshs. 600,000/=.

### **Respondent's Submissions**

11. Pertaining the award for pain and suffering, the Respondent submits that the award was reasonable, supported by evidence, and consistent with comparable authorities. It is contended that the Respondent sustained multiple fractures and grievous injuries and the doctor assessed permanent disability at 20% with limited movement.
12. The Respondent relied on these authorities ***Winfred Ndunge Musyoka V Martin Mugo Gatiti & Another [2020] eKLR, SBI International & Another V Maurine Ngunyi [2021] eKLR*** and ***Dennis Kaveke V Neil Kusumo [2019] eKLR*** to submit that the award for was within reasonable range.
13. With regard to the allegation that the Court failed to consider the Appellant's submissions, it is argued that neither party's opinion binds the trial Court; the Court makes its own independent finding based on the evidence and applicable principles.
14. With regard to diminished earning capacity, it submitted that the claim was based on the Respondent's occupation as a farmer, an informal but legitimate source of livelihood. That in making the award, the trial Court considered the Respondent's age (45 years), nature of injuries, and degree of permanent disability (20%) and correctly made a global

assessment rather than a mathematical computation using the minimum wage.

15. On special damages, it is submitted that they were specifically pleaded and strictly proven. That the Trial Court properly itemized and verified the receipts tendered. That the Appellant did not object to their production or authenticity during trial.

### **Analysis and determination**

16. Having considered the record of appeal and the submissions of both parties and bearing in mind that this is a first appeal, this Court is guided by the well-settled principle that a first appellate Court is obliged to reconsider the evidence on record, evaluate it afresh and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses. This duty was articulated ***Selle v Associated Motor Boat Co. Ltd [1968] EA 123.***
17. For starters **Ground 4** of the appeal is irrelevant. The trial Court expressly declined to make any award for diminished current or future earning capacity on account of absence of such vital evidence.
18. **Ground 1** and **2** on the award for pain and suffering, the Appellant faults the trial Court on the basis that the amount of Kshs. 1,200,000 awarded was excessive.
19. As stated in ***Butt v Khan [1977] KECA 24 KLR*** and ***Kemfro Africa Ltd v A. N. Lubia & Olive Lubia [1988] IKAR 727*** an appellate court will only interfere with a trial Court's award of damages if it is shown that, the Court acted on wrong principles, misapprehended the

evidence, or arrived at a figure so inordinately high or low as to represent an erroneous estimate.

20. Damages must be commensurate with the injuries sustained and guided by comparable precedents. Proportionality and precedent are the guiding benchmarks.
21. The Respondent suffered the following injuries;
  - a) Displaced fracture of the left clavicle,
  - b) Fracture of the left femur in the distal part.
  - c) Fracture of the left 3' metacarpal.
  - d) Soft tissue injuries of the left shoulder.
  - e) Soft tissue injuries of the left wrist joint.
  - f) Soft tissue injuries of the left leg.
  - g) Soft tissue injuries of the left ear.
22. The Report by Dr. Malik dated 5<sup>th</sup> June, 2023 opine that the Respondent suffered total incapacity of a temporary nature for a period of four months followed by a partial incapacity of a temporary nature for a further period of two months with no permanent physical disability.
23. Dr. Kimba's dated 2<sup>nd</sup> October, 2023 classified the degree of injury as grievous harm, temporary disability of 6 months and permanent disability of 20%.
24. In awarding damages, the trial Court highlighted the authorities cited by the parties but correctly noted that while the injuries were

comparable, the awards relied upon by the Appellant did not reflect prevailing inflationary trends.

25. The Court therefore considered **Dennis Kaveke v Neil Kisumo [2019] eKLR**, where damages for pain and suffering were reassessed from Kshs. 1,500,000 to Kshs. 1,000,000 for multiple fractures of the humerus, radius, and ulna. The Court found this authority relevant and persuasive.
26. It is apparent from the record that the Respondent suffered immensely and was incapacitated for some time. He also had metal implants in his wrist and leg and at the time of examination by both doctors he was still in pain.
27. I concur with the trial Court that, the authorities relied on by the Appellant, though comparable, were delivered in 2013 and thus are outdated in light of inflation.
28. I have also considered the Appellant's authorities in the instant, **Koyi v Obanga & 2 Others [2022] KEHC 9772 (KLR)** and **Pascal Iha Garama v Jackson Njeru Njoka [2019] eKLR**. These do not adequately reflect the severity of the Respondent's injuries or current economic conditions although recent.
29. In the end, the Appellant has not demonstrated any misdirection in principle, misapprehension of the law, or error in the evaluation of evidence by the trial Court. The award for pain and suffering was neither arbitrary nor capricious, but a reasoned and proportionate response to the grievous injuries sustained by the Respondent.

30. As this Court has often stated, damages are not meant to enrich but to fairly compensate, and the trial Court's award falls squarely within that remit. There is therefore no basis upon which this Court may properly interfere, and the appeal on quantum must fail.
31. On the issue of failure to consider submissions under **Ground 3**, judicial decisions are to be assessed on substance rather than form. The absence of express reference to submissions does not amount to failure to consider them. The trial Court's judgment bears the imprint of careful consideration. The complaint of failure to consider submissions is thus without merit.
32. On special damages under **ground 5**, it is trite that special damages claim must be specifically pleaded and strictly proved see *Hahn v Singh [1985] KLR 716*. The Respondent availed receipts totaling Kshs. 159,810 which is the amount awarded by the trial Court, the award stands.
33. The Appeal being devoid of any merit is hereby dismissed with costs to the Respondent.
34. The Judgment/Decree of Hon. A. Mukenga - Principal Magistrate delivered on 29<sup>th</sup> November, 2023 is hereby affirmed and upheld.

**Dated, Signed and Delivered at Nakuru  
On this 18<sup>th</sup> Day of March 2026.**

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**MOHOCHI S.M  
JUDGE**