

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. E097 OF 2025

**MOSES KIARIE
NDUNGU.....APPELLANT**

VERSUS

**KELVIN WANJALA WAFULA.....
.....RESPONDENT**

(Being an Appeal from the Judgment and Decree of Hon. Sylvia A. Wayodi (RM/Adjudicator) delivered on 20th March 2025 in Thika Small Claims Court SCCC No. E833 of 2024)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E833 of 2024 which claim arose from a road traffic accident. The parties recorded a consent on liability at the ratio of 80:20 in favour of the respondent. The court awarded the respondent general damages for pain suffering and loss of amenities at Kshs. 400,000/- and special damages at Kshs. 5,550/-.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 3 grounds summarized as follows:-

a) The learned adjudicator erred in law and in fact in awarding Kshs. 400,000/- in general damages which is inordinately high

and excessive in the circumstances occasioning a miscarriage of justice.

3. Directions were issued that parties put in written submissions and the record shows that the appellant complied by filing his submissions on 11th August 2025 while the respondent failed to comply.

The Appellant's Submissions

4. The appellant submits that the respondent sustained injuries of wound-occipital region, pain and tenderness (blunt injury) lower back, pain and tenderness (blunt injury) abdomen, hematoma, right kidney and bruises right 2nd and 3rd hand fingers. The appellant further submits that the lower court in awarding general damages of Kshs. 400,000/- relied on the cases of **Equity Bank of Kenya Ltd & 2 Others vs David Githuu Kuria [2020] eKLR** where the respondent sustained blunt injury (tender) anterior chest wall, cut wounds left knee and swollen tender left knee and the appellate court reduced the award of Kshs. 400,000/- to Kshs. 250,000/- and in **Michael Okello vs Priscilla Atieno [2021] eKLR** where the respondent sustained a blunt injury to the head, blunt injury to the forehead, blunt injury to the neck, blunt injury to the chest with fracture of the 1st anterior rib, bruises

and blunt injury to the left shoulder, bruises to the left shoulder, bruises and blunt injury of the left upper limb and blunt injury to the right upper limb and the appellate court reduced the award of Kshs. 500,000/- to Kshs. 250,000/-.

5. The appellant argues that the lower court disregarded the decision in **Rege vs Otung (Civil Appeal E108 of 2021) [2022]** where the respondent sustained blunt trauma to the neck, chest trauma, blunt trauma to the back, cut wounds to the hands and bruises on the right lower limb where the appellate court reduced the award of Kshs. 500,000/- to Kshs. 150,000/-. Furthermore, the learned trial magistrate failed to consider that the respondent had relied on authorities in support of an award of general damages of Kshs. 300,000/- and no more. Thus the sum of Kshs. 400,000/- as awarded by the trial magistrate is inordinately high and excessive in the circumstances occasioning miscarriage of justice warranting the interference of this court.
6. The appellant submits that the trial court failed to give a detailed reasoning on how it arrived at the award of Kshs. 400,000/- and why it failed to consider his authorities which supported the award of Kshs. 100,000/- and were clearly related to the respondent's injuries. The appellant submits that the respondent ought to be awarded a sum of Kshs. 100,000/- as supported by the cases of **Jyoti Structures Limited & Another vs Truphena Chepkoech Too & Another [2020] eKLR** where the

plaintiffs sustained a blunt injury to the head, neck, chest, back and both thighs and the other plaintiff sustained an injury to the parietal scalp, blunt injury to the chest, deep cut wound on the right forearm and right hand and the court substituted the award of Kshs. 250,000/- to Kshs. 200,000/-. In **Daniel Gatana Ndungu & Francis Kibe Nganga vs Harrison Angore Katana aka Harrison Angore aka Harrison Ngumbano [2020] KEHC 6806 (KLR)** the plaintiff sustained a cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee and the appellate court reduced the award of Kshs. 350,000/- to Kshs. 140,000/-.

Issues for determination

7. The main issues for determination are:-
 - a) Whether the appeal is properly before the court.
 - b) If not, whether the award of general damages was inordinately high.

The Law

8. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under **Section 38 of the Small Claims Court Act**, set out the duty of the second appellate court in the case of **Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR** as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

9. In distinguishing between matters of law and fact the Court of Appeal stated in **Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR** as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See **Selle and Another vs Associated Motor Boat Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown**

that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the appeal is defective

10. **Section 38 of the Act** provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

11. The Court of Appeal in **Mwangi vs Wambugu [1984] KLR 453** commented of what amount to points of law as follows:-

A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

12. Similarly in **Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR** the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the Elections Act, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

13. I have perused the grounds in the memorandum of appeal and noted that the grounds touch on law particularly that the award of general damages of Kshs. 400,000/- was inordinately high and excessive.

14. The Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:-

“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 awarded different figure if it had tried the case at first instance. The appellant 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

15. Similarly, in **Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low

figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own

figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

16. According to the statement of claim, the respondent suffered the following injuries:-

- a) Wound occipital region
- b) Pain and tenderness (blunt injury) lower back
- c) Pain and tenderness (blunt injury) abdomen
- d) Hematoma right kidney
- e) Bruises right 2nd and 3rd hand fingers.

17. The learned adjudicator awarded a sum of Kshs. 400,000/- for general damages for pain and suffering. The appellant submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent.

18. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr. G. K. Mwaura in his medical report dated 15th July 2024. The doctor assessed the respondent's injuries and classified them as soft tissue injuries. The said injuries were further confirmed by Dr. Waithaka Mwaura in his medical report dated 4th December 2024 where the doctor

indicated that the respondent had no residual permanent disability and none was anticipated.

19. Looking at the decisions relied on by the respondent in the lower court and the appellant, both parties have cited decisions that show injuries which are comparable to those sustained by the respondent, those cited by the appellant are more similar to those sustained by the respondent whereas the respondent's cases show injuries which are more severe than those he sustained.

20. The learned trial magistrate in arriving at the award of Kshs. 400,000/- took into account the severity of the injuries sustained by the respondent, the evidence on record, authorities cited, the passage of time and inflation. The trial court was guided by the cases of **Equity Bank Kenya Ltd & 2 Others vs David Githuu Kuria [2020] eKLR** where the High Court awarded a sum of Kshs. 250,000/- to the respondent who sustained blunt injury (tender) anterior chest wall, cut wounds, left knee and swollen, tender left knee, all of which were soft tissue injuries and the case of **Michael Okello vs Priscilla Atieno [2021] eKLR** where the plaintiff suffered an injury to the right shoulder, injury to the chest, injury to the back and injury to the left leg with hematoma and the appellate court reduced the award of Kshs. 500,000/- to Kshs. 250,000/-.

21. Taking into consideration the severity of the respondent's injuries, it is my considered view that the award of Kshs. 400,000/- was excessive in the circumstances and considering the medical report that classified the injuries as soft tissue injuries. Further the

doctor in his report stated that the respondent complained of pains on sites of injuries and recurring headaches. It is my considered view that a sum of Kshs. 300,000/- suffices as reasonable compensation for general damages for pain, suffering and loss of amenities which I hereby award.

22. The award of Ksh.400,000/= made by the court below is hereby set aside.

23. I find the appeal meritorious and hereby allow it accordingly.

24. It is hereby ordered that each party meets their own costs of this appeal considering that none of them was at fault.

25. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 13TH DAY OF MARCH 2026.***

**F. MUCHEMI
JUDGE**