



**Mercell & another v Wandera (Civil Appeal E205 of 2023)
[2025] KEHC 12076 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 12076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E205 OF 2023
F WANGARI, J
APRIL 30, 2025**

BETWEEN

HAMPHRAY DA MERCELL 1ST APPELLANT

MWANDANDA MWACHIYAMA CHIBAYE 2ND APPELLANT

AND

EMMANUEL MACDONALD WANDERA RESPONDENT

*(Appeal from the Judgment and Decree of Hon. D.W. Mburu (SPM)
delivered on 13/07/2023 in Mombasa CMCC No. E1278 of 2021)*

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. D.W. Mburu (SPM) delivered on 13/07/2023 in Mombasa CMCC No. E1278 of 2021. The Appeal is on quantum only.
2. Through a Plaintiff dated 04/08/2021, the Respondent claimed general and special damages as a result of injuries sustained in an accident that occurred on 09/10/2010. It was pleaded that the Respondent was a fare paying passenger in tuktuk registration no. KTWB 151Z when the 1st Appellant's motor vehicle which was carelessly driven by the 2nd Appellant hit their vehicle causing an accident resulting to injuries sustained by the Respondent.
3. The Trial Court heard the parties and proceeded to render judgement entering liability at 100% liability against the Appellants. Kshs. 400,000 was awarded as General Damages for pain and suffering, Kshs. 500,000 for loss of earning capacity, Kshs. 100,000 for future medical costs and Kshs. 8,900 as special damages.
4. Aggrieved by the finding of the Trial Court, the Appellants lodged a Memorandum of Appeal dated 08/08/2023 hence this Appeal. The appeal was on quantum only.



5. Upon filing this appeal, this court directed that the appeal be disposed of by way of written submissions and both parties complied by filing of rival submissions. The Appellants filed submissions dated 04/02/2025 submitted that the trial court's award on General Damages was inordinately high and proposed Kshs. 250,000 as the award under that head.
6. The award for loss of earning capacity was said to be unjustified and prayed for costs to the Appellants. He cited authorities relied on in the lower court in support of the submissions.
7. The Respondent in the submissions dated 18/02/2025 stated that the trial court took all relevant factors in assessing the general damages awarded. It was further submitted that the award was comparable to the injuries sustained. He prayed that the judgment of the lower court be upheld.

Analysis

8. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see *Peters v Sunday Post Limited* [1958] EA 424 and *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)

Quantum

9. The Appellant submitted that an award of Kshs. 400,000 was too high for general damages for pain and suffering as commensurate compensation in the circumstances of this case.
10. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd v Meru Express Service v. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.”
11. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.
12. There is no dispute that the Respondent suffered the injuries as pleaded. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages.
13. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
14. The principle on the award of damages is settled. In *Charles Oriwo Odeyo v. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
 - 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.



- 2) The award should be commensurable with the injuries sustained.
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high.
15. The Respondent suffered fracture of the clavicle bone, blunt trauma of soft tissues, bruises on the knees and he suffered 5% partial permanent disability. In *Joseph Kimanthi Nzau v Johnson Macharia* [2019] eKLR, the court, G.V. Odunga J. as then he was, considered a case where the plaintiff suffered cut wound on the occipital region with lacerations on the left temporal region of the head, fracture of the skull on the occipital region, subluxation of the cervical vertebrae C1, C3 and C4, fracture of 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ribs of the left side of the chest, fracture of the left scapula and cut wound on the left hand and left arm and awarded Kshs. 800,000.
16. In comparison to the injuries sustained by the Plaintiff in the above mentioned case, and the injuries sustained by the Respondent in this case, the injuries sustained by the Respondent was far much less than in the above case. I find an award of Kshs. 400,000 was adequate and sufficient considering the loss of value for money.
17. On the award for loss of earning capacity, the trial court found that the permanent partial disability of 5% entitled the compensation under this head. A global sum of Kshs. 500,000 was used. I have perused through the submissions by the Plaintiff/ Respondent in the lower court proceedings where submissions of diminished earning capacity was made and a claim of Kshs. 650,000 was made.
18. The Defendants/ Appellants did not submit on loss of earning capacity. The same was noted by the trial court. I find no reason the disturb the award as granted.
19. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The appeal having failed, costs are awarded to the Respondent.

Determination

20. In the upshot, I make the following orders: -
- a. The Appeal lacks merits and is hereby dismissed.
 - b. Costs awarded to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 30TH DAY OF APRIL, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Wafula Advocate h/b for Wanyama Advocate for the Appellant



N/A by the Respondent

M/S Norah, Court Assistant

