Wangari & another v Mwangi (Civil Appeal 30 of 2018)
[2025] KEHC 9023 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9023 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL 30 OF 2018

TW OUYA, J

JUNE 26, 2025

BETWEEN

NDERITU WANGARI ..... 1ST APPELLANT

PAUL KARIGI NDERITU ..... 2ND APPELLANT

AND

JAMES IRUNGU MWANGI ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon. A Mwangi in Kigumo Senior Principal Magistrate's court civil case no. 7 of 2017 delivered on 16th February 2018)

JUDGMENT

1. By a Memorandum of Appeal dated 27th June, 2017, the appellants, Nderitu Wangari and Paul Karigi Nderitu appealed against the decree and judgement of the lower court, in which the respondent was awarded Kshs. 2,000,000 as general damages, Kshs. 80,000 for future medical expenses and Kshs. 3,000 for special damages, together with the cost of the suit plus interest.

2. The above damages were awarded to the respondent following personal injuries he sustained in a road traffic accident that occurred on the 29th of July, 2016, along the Murang'a Thika road at Kagia junction, involving the appellants Motor Vehicle registration no. KCC 407 B (the suit vehicle) and the respondent's Motor vehicle registration no. KAP 401X.

3. After considering all the evidence adduced before the court together with the written submissions filed by the parties, the trial court entered judgement against the appellants and found them 100% liable for the occurrence of the accident; the learned trial magistrate then proceeded to access damages payable to the appellant, resulting in the awards contested in this appeal.

4. In their Memorandum of appeal, the appellants advanced a total of three (3) grounds of appeal, in which they blamed the learned trial magistrate for finding that the respondent was entitled to

Kshs. 2,000,000 general damages for the injuries sustained; in finding that the plaintiff was entitled to future medical expenses when the same was not sufficiently proved; and in failing to appreciate their submissions on quantum and related authorities as well as conventional awards in cases of similar nature thereby making an erroneous award.

5. On the above grounds, the appellants urged this court to allow their appeal with costs; and that the judgement delivered by the trial court be set aside and this court accesses damages a fresh.

6. The appeal was canvassed by way of written submissions, following the directions issued by this court on the 4th of October, 2022. The written submissions were highlighted before this court on 26th of February, 2025.

7. In their written submissions dated 20th November, 2022, which was filed on their behalf by their learned counsel Kimondo Gachoka & Company Advocates, the appellants contended that the medical report prepared by Dr. P.K Mwangi, which was prepared a few months after the accident, lists further injuries that were not listed in the treatment notes from Sunbeam medical centre; as such, the trial court should have disregarded the said medical report while assessing damages due to the respondent, as those injuries could have been sustained in another accident.

8. The appellants further contended that the general damages awarded by the trial court was inordinately high as the said court considered the exaggerated injuries in Dr. Mwangi's medical report.

9. The appellants submitted that the award of Kshs. 2,000,000 by the trial court was not only disproportionate, but also unfair and not justified, as the award was not comparable to the injuries sustained by the respondent following the accident. The appellants submitted that an award of Kshs. 600,000 would be adequate compensation for the respondent.

10. On the other hand, the respondent in his written submissions dated 14th March, 2023, filed on his behalf by his learned counsel Mutuku Wambua & Associates Advocates submitted that all the injuries he sustained following the accident were supported by the medical report prepared by Dr. P.K Mwangi produced before the trial court, which report was corroborated by treatment notes from Kenol hospital, Murang'a hospital and a P3 form.

11. The respondent submitted that although the appellants alleged in their written submissions that the injuries he sustained are exaggerated and not supported by evidence, they did not plead this fact at the trial court and the same cannot therefore be raised at the appeal stage.

12. The respondent further submitted that his evidence on the injuries he sustained were not controverted by the appellants and that the medical report by Dr. Jenipher Kahuthu, attached to the appellants record of appeal was not filed as part of their list of documents before the trial court, and neither was it adduced as an exhibit before the trial court.

13. It was the respondent's submission that the award of Kshs. 2,000,000 by the trial court was not too high as to warrant this court's interference, as the award is similar to awards issued for comparable injuries.

14. The respondent submitted that the award of Kshs. 80,000 for future medical expenses was pleaded and sufficiently proved, and the learned trial magistrate did not err in awarding the said amount as the amount was not controverted by the appellants. The respondent further submitted that the allegation by the appellants that the learned trial magistrate failed to consider their submissions on quantum was misplaced.

15. In his further submissions dated 29th April, 2024, the respondent reiterated on the fact that the issue raised by the appellants that the injuries pleaded and contained in the medical report by Dr. P.K

Mwangi were exaggerated was not raised in the appellants Memorandum of appeal or at trial, as such, the said issue cannot be considered by this court, as neither himself nor Dr. P. K Mwangi were given a chance to say anything about the issue.

16. The respondent submitted that Dr. Mwangi's evidence on the injuries he sustained were not controverted, as such, the trial court was not wrong to rely on it. The respondent further submitted that the cases relied on by the appellants are not comparable, due to significant differences in the nature and severity of the injuries sustained, as such, this court should not consider them.

17. This being a first appeal, it is the duty of this court to re-analyse and reconsider the evidence before the trial court a fresh, and to come to my own independent conclusion on whether or not to support its findings; all the while bearing in mind that unlike the trial court, I neither saw nor heard the witnesses, and to make due allowance in that regard.

18. This duty was reiterated in the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR; as follows: "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: - "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

19. Again, the Court of Appeal in Gitobu Imanyara & 2 others versus Attorney General [2016] eKLR; stated as follows: "This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect."

20. Having stated that, I have duly considered the grounds of appeal as well as the rival written submissions filed on behalf of the parties; having done so, I find that the main issue for consideration is whether the present appeal on the issue of quantum is merited.

21. Before delving into the above issue isolated for determination, I would first like to deal with the respondent's complaint, that this court cannot consider the issue raised by the appellants in their written submissions that the injuries pleaded and contained in Dr. P.K Mwangi's medical report were exaggerated; as this was an issue of fact which the respondent did not raise at the trial court or his Memorandum of appeal.

22. The appellants had alleged in their written submissions, that the medical report by Dr. P.K Mwangi, exaggerated the injuries that the respondent had sustained following the road traffic accident, as the said report lists further injuries not listed in the treatment notes. The appellants contended that the respondent's further injuries listed in the medical report by Dr. P.K Mwangi could have been as a result of another road traffic accident, as such, the learned trial magistrate was wrong in relying on the said report to assess the general damages due to him.

23. On my part, I have perused the record of the trial court and the Memorandum of Appeal, and I agree with the respondent that the appellants did not raise the issue that the medical report by Dr. P.K Mwangi contained injuries that were exaggerated and that were not listed in the initial medical report from Sunbeam Medical Centre.

24. It is trite that it is within the discretion of the court to allow a party raise a new point on appeal, that was not raised before the trial court. This position was restated by the Court of Appeal in Republic versus Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others Ex-Parte Tom Mbaluto [2018] KECA 576 (KLR); as follows: "It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, *CA No. 39 of 2015* and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See North Staffordhire Railway Co. v. Edge [1920] AC 254)."

25. In this case, I do not agree with the respondent that this court cannot consider the issue raised by the appellants that the medical report by Dr. P.K Mwangi exaggerated the injuries sustained by the respondent. I say so because, although the appellant did not raise this issue at the trial court or his memorandum of appeal, this court being a first appellate court, has the duty to re-consider, re-analyse and re-evaluate the evidence adduced at the trial court afresh and to come to its own independent conclusion on whether or not the findings of the trial court should be upheld. As such, as much as the appellants did not bring this issue up at the trial court, this court, as a first appellate court still has the duty, not to take the trial court's findings on the injuries sustained by the appellant at face value or rather has a duty not to rely on the findings of the trial court.

26. As an appellate court, this court must analyse all the evidence adduced before the trial court afresh, including analysing the medical evidence adduced by the respondent in support of his case and to make a determination on whether or not the appellant actually sustained the injuries that he claims to have sustained following the road traffic accident. As such, I am of the considered view that this complaint should be addressed.

27. Turning now to the issue isolated for determination, from the plaint dated the 26th January, 2017, as a result of the road traffic accident that occurred on the 29th July, 2016, the appellant had sustained the following injuries:

    i. Compound fracture with displacement of the right tibia/fibula bones;

    ii. Fracture of the left tibia/fibula bones;

    iii. Fractured right patella bone;

    iv. Soft tissue injuries (laceration and bruises of the right arm);

    v. Cut wound on both knees.

28. These injuries were supported by the Medical Report dated 8th October, 2016, by Dr. P.K Mwangi of Highway Clinic. The respondent had also adduced before the trial court, a P3 form dated 30th September, 2016, which showed that the he had healing bruises on the abdomen, healing bruises and laceration on the right arm, multiple healing laceration on both legs, healing cut wounds on both knees, and that the respondent had a palpable internally fixated metal on the right leg. The treatment/referral note from Kenol Hospital dated 29th July, 2016 showed that the respondent sustained fracture of the right limb as well as multiple fractures.

29. The treatment notes from Sunbeam Medical centre dated 6th September, 2016 showed that the respondent sustained fracture of the right femur, soft tissue injuries of the left ankle joint and right elbow. The discharge summary from the same medical facility also dated 6th September, 2016, indicated that the respondent suffered a fracture of the patella, multiple fractures of the femur, as well as soft tissue injuries to the elbow and ankle.

30. Having analysed all the medical evidence adduced by the respondent in support of his case, and the entire evidence as a whole, I am of the considered view that the respondent sustained the injuries pleaded in his plaint, which are the same one's contained in the medical report by Dr. P. K Mwangi.

31. I say so because, the referral notes from Kenol Hospital, where the respondent was first taken for medical treatment before being transferred to Murang'a county referral hospital indicated that the respondent had suffered multiple fractures, including a fracture of his right limb. The P3 form showed that as part of his treatment, the appellant had a palpable internally fixated metal on the right leg, which is a mode of treatment used to heal bone fractures, the appellant also had an ORIF surgery done, which is a treatment used to repair severely broken bones, he had on POP for a period of about six (6) weeks, which is treatment done for fracture management and he also had Patella wiring done, which is used to treat a fracture of the patella.

32. It is thus evident that the respondent sustained severe bone injuries, which needed extensive treatment to be able to manage his injuries. I am therefore of the view that the injuries contained in the medical report by Dr. P.K Mwangi were a true reflection of the injuries sustained by the appellant. Furthermore, I have noted that the appellants did not adduce any medical evidence to challenge that of the respondent; as such, the medical evidence by the respondent as to the extent and severity of his injuries remained uncontroverted.

33. Having found that the appellant sustained the injuries pleaded in paragraph 5 of his plaint, the next step is to determine whether the award of Kshs. 2,000,000 by the trial court was excessive.

34. The circumstances under which a trial court will be allowed to interfere with an award made by a trial court was discussed by the court of appeal in the case of Catholic Diocese of Kisumu versus Tete (2004) eKLR; as follows: "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."

35. Again, the Court of Appeal in Douglas Kalafa Ombeva versus David Ngama (2013) eKLR; stated thus: "The principles upon which an appellate court will interfere with an award of damages in the High Court are well settled – the court will only interfere where the trial judge considered matters that ought

not to have been considered, misapprehended aspects of the case, or made an award that was too low or too high that must have been improper. See Tracom Limited &Another V Hassan Mohamed Adan [2009] eKLR (Civil Appeal 192 of 2006) where this court stated that: "In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or too high that it must have reflected improper award."

36. The learned trial magistrate while awarding the respondent a sum of Kshs. 2,000,000 as general damages, relied in the case of Dorcas Wangithi Nderi versus Samuel Kiburu Mwaura (2015) eKLR. The learned trial magistrate found that the injuries sustained by the victim in that case were similar to those sustained by the respondent in this case.

37. I have also perused the authorities cited by both the appellants and respondent in support of their case, and I am of the view that the authorities cited by the appellants contains injuries that are less severe than the ones sustained by the respondent in this case.

38. The respondent in this case sustained very severe bone fractures on both his legs; he had a compound fracture with displacement of the right tibia/fibula bone and fracture of the left tibia/fibula bone. The respondent also sustained a fracture to his patella bone, which according to Dr. Mwangi's testimony, the respondent's patella bone was crushed. He had internally fixed plates to aid in healing his fractures.

39. Furthermore, Dr. Mwangi in his evidence before the trial court, indicated that the respondent may never fully recover from his injuries. It is therefore evident that the respondent's injuries were more severe than those injuries suffered by the claimants in the authorities cited by the appellants.

40. On my part, I find the following case relevant:

> Kakuli versus Ngase & another (Suing as the legal representatives of the Estate Stanley Alemba Chavasi - Deceased) (Civil Appeal E192 of 2021) [2022] KEHC 12132 (KLR) (Civ) (21 July 2022) (Judgment). In this case, which was decided three (3) years ago the victim sustained a fractured tibia and fibula on both legs. The left leg had a bonny protuberance and deformity on the lower shin. There was a slight bonny angulation on the right lower shin. The left tibia was also fixed with a metal plate. On appeal the high court set aside the award of Kshs. 1,800,000 and substituted it instead with an award of Kshs. 1,300,000.

41. Based on the above, I am of the considered view that an award of Kshs. 2,000,000 by the trial court was excessive and warrants interference by this court. I am therefore of the considered view that an award of Kshs. 1,400,000 would be sufficient compensation in this case, given the indices of inflation and the purchasing power of the Kenya shilling.

42. Regarding the award for future medical expenses, the appellant had alleged that the respondent's claim for future medical expenses was not proved as such, the trial court should not have awarded them the Kshs.80,000.

43. Dr. P.K Mwangi, had indicated in his medical report and in his testimony before the trial court, that the respondent had in place internally fixated plates that would require surgical removal after five years at a cost of Kshs. 80,000. The appellants did not adduce any evidence to challenge or controvert that of the respondent that he would require Kshs. 80,000 for the surgical removal of his internally fixated

plates. Based on the above, I am of the considered view that the respondent proved on a balance of probabilities his claim for future medical expenses.

44. Flowing from the foregoing, the present appeal partially succeeds, to the extent that the award of Kshs. 2,000,000 by the trial court is set aside and substituted instead with an award of Kshs. 1, 400,000.

45. As regards costs, it is trite that costs follow the event and are awarded at the discretion of the court; In this case, given that the appeal has partially succeeded, I am of the view that each party should bear their own costs.

46. The final orders will read as follows:

    i. The appeal succeeds partially to the extent that the general damages award of kshs. 2,000,000 is hereby set aside and substituted with an award of kshs. 1,400,000.

    ii. The special damages award of kshs. 80,000 is upheld.

    iii. Each party to bear their costs of this appeal.

    iv. Thirty (30) days stay of execution orders granted.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 26th JUNE, 2025.

HON. T. W. OUYA

JUDGE