



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kivindu & another v Kivindu (Civil Appeal E984 of 2022)  
[2025] KEHC 11851 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11851 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E984 OF 2022**

**LP KASSAN, J**

**JULY 31, 2025**

**BETWEEN**

**KENNEDY NJIRI KIVINDU ..... 1<sup>ST</sup> APPELLANT**

**NICHOLAS MUTYKU MWASUNA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JEREMY MUENDO KIVINDU ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. S.A. Opande (PM) delivered  
on 4th November 2022 in Nairobi Milimani CMCC No. E10772 of 2021)*

**JUDGMENT**

1. This appeal emanates from the judgment delivered on 04.11.2022 in Nairobi Milimani CMCC No. E10772 of 2021 (hereafter the lower court suit). The suit was instituted by way of plaint dated 03.08.2021 by Jeremy Muendo Kivindu, the plaintiff in the lower court (hereinafter the Respondent) as against Kennedy Njiri Kithuka and Nicholas Mutuku Mwasuna, the 1<sup>st</sup> & 2<sup>nd</sup> defendant/defendants in the lower Court (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Appellant/Appellants). The claim was for general and special damages in respect of an accident that occurred on 29.06.2021. The Respondent on the date in question was lawfully riding motor cycle registration number KMFK 086Q along ICD Road, Kyang'ombe Road when on reaching Githongoro junction the 1<sup>st</sup> Appellant driving motor vehicle registration number KCQ 086Q failed to give way hence hitting the Respondent and thus causing him to suffer harm and bodily injuries.
2. The Appellants filed a statement of defence denying the key averments in the plaint and liability. The Respondents in the alternative averred that if the accident in question occurred as alleged by the Respondent, the same was not and could not have been caused by any actions attributable to the



Appellants and or agents as pleaded but was wholly or substantially by the negligence of the rider of motor cycle registration number KMFK 086Q.

3. At the hearing of the suit, consent judgment on liability in the ratio of 20:80 was entered in favour of the Respondent as against the Appellants whereafter parties agreed to canvass the issue of quantum of damages by way of written submissions by further consenting to the admission of the Respondent's list of documents dated 03.08.2021 and Appellants' medical report dated 28.01.2022. In its judgment, the Court proceeded to award damages in favour of the Respondent as hereunder: -

General Damages – Kshs. 2,000,000.00/- less 20%

Special Damages – Kshs. 3,550.00/-

4. Aggrieved with the outcome the Appellants preferred this appeal solely on the question of quantum of damages based on the following grounds in their Memorandum of Appeal; -

1. That the Honourable learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs.2,000,000/- general damages which award is inordinately excessive considering the injuries sustained by the respondent
  2. That the Honourable learned trial magistrate erred in law in failing to consider that the injuries sustained by the Respondent were soft tissue injuries and a single fracture of the head of the left radius that had fully healed and thereby arrived at an award that it is inordinately excessive.
  3. That the Honourable Learned Magistrate erred in law and fact in failing to consider the submissions tendered by the Appellant herein vis-à-vis those of the Respondent hence arriving at the wrong decision considering the injuries sustained by the Respondent.
  4. That the Honourable Learned Trial Magistrate greatly misdirected himself in treating the submissions of the Appellant very superficially thereby erroneously arriving at a wrong conclusion on award of general damages.
  5. That the Honourable learned Magistrate erred in law and fact by awarding the Respondent a sum of (Kenya Shillings Two Million Kshs 2,000,000/=) in General Damages which award was manifestly excessive considering the evidence tendered in court.
  6. That the Honourable Learned Magistrate failed to consider that the respondent neither pleaded loss of earning capacity so as to arrive at the award of general damages at Kshs 2,000,000/=.
  7. That the Honourable Learned Magistrate erred in law and fact in awarding general damages at Kshs 2,000,000/= without taking into account comparable authorities and in fact in not making an award which was within limits of already decided cases of similar nature.” (sic)
5. The appeal was canvassed by way of written submissions, of which the Court has duly considered alongside the authorities relied upon and record of appeal before this Court. It warrants mentioning that as at writing of this judgment, the Court did not have the benefit of the original lower Court record, as the instant appeal was admitted and disposed of as part of the Judiciary Rapid Results Initiative (RRI) program.
  6. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in *Selle – v- Associated Motor Boat Co.* [1968] EA 123. Further, it is trite that 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 v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR



278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court, it is evident that the appeal turns on the singular issue of whether the trial Court's award on damages was justified.

7. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See Court of Appeal decision in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91. This Court had earlier in its judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Thus, in order to contextualize the appeal and the key query advanced for purposes of determination by this Court, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself as follows on the issues of quantum -;

“ 11. Having considered and analyzed the evidence of both parties and their submissions, I place reliance on the case of Joseph Musee Mua v Julius Mbogo Mugi & 3 Others [2013] eKLR whose judgment was delivered on 21<sup>st</sup> November 2013, the Court held .....”in the present case the disability has been assessed at 5%. I am of the view that an award of Kshs. 1,300,000/- as general damages in the present case for pain and suffering will be adequate compensation. I so award” The Defendant's medical report is the latest report, I therefore hold that the Plaintiff suffered 10% level of permanent incapacity and is therefore entitled to general damages of Kshs. 2,000,000/-, this Court has taken into account the passage of time, inflation and the Plaintiff's 10% permanent incapacity.

12. Both parties do not dispute that the Plaintiff has proved special damages of Kshs. 3,550/-

13. ....” (sic)

8. With the above in reserve, regarding this trial Court's role in assessing quantum of damages, it is useful at the outset to restate the applicable principles on assessment of damages. The exhortation by the English court in Lim Poh Choo v Health Authority (1978)1 ALL ER 332 as echoed by Potter, J.A in Tayab v Kinany (1983) KLR14, quoting *dicta* by Lord Morris Borth-y-Gest in West (H) v Shepherd (1964) AC 326, at page 345 stated as follows-;

“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.” (Emphasis added).

See also Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd. [2013] eKLR.

9. More recently, the Court of Appeal in SJ v Francesco D. Nello & Another [2015] eKLR observed that -;

“The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case, we refer to the Ossuman Mohammed & Another v.



*Saluro Bundi Mobamud*, CA 30/1997 (unreported) wherein the following passage, in the case of *Kigaragari v. Aya* (1982 – 1988), KAR 768 is employed;

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance or increased fees. Over time, courts have held that damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimate of damage.”(emphasis added)

10. Whereas on appeal, regarding the Appellants challenge on awarded damages it was held in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I 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”.

11. In *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30, it was held that:-

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied 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.” see also *Butt v Khan* (1981)KLR 349 and *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.”

12. 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”.

13. That said, as earlier captured herein, apposite to the issues, are the pleadings. The Respondent particularized his injuries in the plaint at paragraph 11 to constitute ... “

- (a) bruises on the face,
- (b) fracture on the head of the left radius,
- (c) bruises on the left leg and
- (d) pain on the left elbow”. By Dr. Okere’s medical report on Respondent dated 29.07.2021 which was adduced into evidence by consent as PExh.7, he particularized the injuries as pleaded in the plaint save for pain on the left elbow as captured in the plaint. His final opinion and prognosis on the Respondent was to the effect that “He sustained bruises on the face and left leg and a fracture of the head of the left radius. The injury can be classified as grievous harm. The degree of permanent incapacity will be 20%.”

14. The earliest documentation of the Respondent’s injuries were treatment notes from Sheba Medical Centre Limited - PExh.5, that was prepared on the same day the Respondent sustained his injuries.



It captured and or confirmed the injuries as pleaded in the plaint. However, it must be noted that the Respondent was subjected to a second medical examination, at the behest of the Appellants. The medical report dated 28.01.2022 by Dr. Ruga was tendered into evidence by consent of the parties with the same being the most recent medical report on the Respondent. It confirmed the Respondents' injuries. Notably, the latter report was prepared some seven (7) months after the accident. On his part, his final opinion, prognosis and attendant sequela on the Respondent was to the effect that "he sustained fracture of the left radius distal end. The fracture has not healed. I assess his level of permanent incapacity at 10%". Thus, from the foregoing, the most significant injury suffered by the Respondent was the fracture of distal end radius bone which as at 28.01.2022 by Dr. Ruga's prognosis had healed though it must have caused the Respondent significant pain, discomfort and attendant sequela.

15. With the above in reserve, as important as consistency in awards for similar injuries might be, this 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.
16. The Appellants complaint before this Court is that the trial Court's award on damages was excessive, not conventional in comparison to cases with similar injuries, did not pay due regard to the medical evidence before it therefore it ought to be substituted. Before the trial Court, in urging the Court to award Kshs. 300,000/- the Appellants relied on the decision in -; *Patrisia Adbiambo Omolo v Emily Mandala* [2020] KEHC 5099 (KLR) wherein the claimant sustained swollen deformed left wrist joint (radius-ulna) fracture of the radio-ulna bones otherwise known as colles fracture and on appeal this Court sustained the trial Court's award of Kshs.180,000/- in general damage for pain and suffering; the decision in *Odinga Jactone Ouma v Moureen Achieng Odera* [2016] KEHC 2922 (KLR) wherein the claimant sustained multiple soft tissue injuries in the upper limb and neck, a fracture of the first and second ribs, shoulder dislocation on the left & also a fracture on the left metatarsal and on appeal this Court set aside the trial Court's decision and awarded Kshs. 180,000/- in general damages for the aforesated injuries; the decision in *Jane Warugurumiano v Jotham Nguri Magondu & another* [2018] KEHC 6902 (KLR) wherein the claimant sustained headache, had huge haemotoma, had neck pain, left scapular fracture with tenderness, dislocation of right shoulder joint, fracture of 8<sup>th</sup> rib with tenderness, lumbar spine, pain & bruises of lower limbs and on appeal this Court sustained the trial Court's award of Kshs.250,000/- in general damage for pain and suffering; and the decision in *Nyamai Petronilla & Another v Monicab Musyoki* [2020] KEHC 1979 (KLR) wherein the claimant sustained a fracture of the right thumb & a degloving injury to the right leg and on appeal this Court set aside the trial Court's decision and awarded Kshs. 200,000/- in general damages for the aforesated injuries
17. On his part, the Respondent urged this Court to maintain the trial Court's award of Kshs. 2,000,000/- having earlier proposed the same before the lower Court. In support of their submissions before the trial Court, counsel relied on the decisions in *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another* [2015] KEHC 5180 (KLR) wherein the claimant sustained multiple soft tissue injuries, blunt injury to the head, fracture to the radius/ulna (left), compound fracture to the right tibia/fibula & compound fracture to the left tibia fibula and on appeal this Court sustained the trial Court's award of Kshs. 2,000,000/- in general damages for the aforesated injuries and the decision *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] KEHC 803 (KLR) wherein the claimant sustained an injury to the left leg, on the head, and face, left leg tibia and fibula were fractured, had two broken upper jaw teeth i.e. one molar and one canine tooth, had chest injury, had right shoulder injury as well as bruises on the left elbow, left leg was shortened due to the injury with the treatment procedures undertaken & as a consequence the nerves therein were also affected He suffered 5 % disability. This Court in its decision as the trial Court's award of Kshs. 1,300,000/- in general damages for the aforesated injuries.



18. Despite the foregoing, while the trial Court stated in its judgment that it considered the submissions before it there was no in-depth analysis and or consideration of the same and or authorities relied on by the respective parties. The trial Court appeared to singularly rely on the decision in Joseph Musee Mua (*supra*) at arriving at its determination. Nevertheless, from the medical evidence presented before the trial Court, the Respondent's injuries seemed moderately severe. However, it warrants mentioning that on appeal both the Appellants and Respondents are guilty of relying on decisions not placed before the trial Court. This practice is to be frowned upon, to wit, I echo the sentiments of Ochieng, J. (as he then was) in *Silas Tiren & Another v Simon Ombati Omiambo* [2014] eKLR wherein he observed 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.”

19. Interestingly, despite urging the Court to assess damages at Kshs. 300,000/- before the trial Court, on appeal the Appellants have urged Kshs. 500,000/- on the premise of authorities not relied on before the trial Court. Meanwhile, having reviewed the authorities cited before the lower Court, it must be appreciated that the same were not on all fours similar to the injuries sustained by the Respondent in this matter. The Appellants authorities appear to have some close semblance to the injuries sustained by Respondent and were fairly recent to the Respondent's authorities and notably wherein the claimants had sustained more severe injuries. Obviously, the trial Court relied on *Joseph Musee Mua* (*supra*) wherein the claimant sustained more severe injuries as compared to those sustained by the Respondent herein.

20. That said, it can equally be gathered from the material presented before the trial Court, particularly the medical reports that the Respondent sustained some form of incapacitation averaging 15% going by both reports. Ultimately, it appears from my own review of the material presented before the trial Court and comparisons with authorities cited that the Appellants complaint in regard of the awarded damages is slightly merited and the Court does feel justified to interfere given the nature of injuries disclosed in the medical evidence available.

21. Although the Respondent must have endured much pain in the period of morbidity, the Respondent appears to have sufficiently recovered from his injuries with little or no attendant sequela save for the incapacitation. Comparing these injuries with those in the above cases, adjusting for severity and inflationary trends and the decision in *Issa Transporters limited v Tsama* (Civil Appeal 107 of 2019) [2021] KECA 296 (KLR) the Court is persuaded to disturb the award by the trial Court and decreasing it to the sum of Kshs. 750,000/- being the award of general damages for pain and suffering after subjecting the same to liability.

22. The award of special damages is left as is.



23. The upshot is that the Appellants appeal succeeds by way of the trial Court award on general damages to the tune of Kshs. 2,000,000/- is set aside and substituted with an award of Kshs. 750,000/- with the attendant costs of the appeal being awarded in favour of Appellants.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF JULY 2025**

**LINUS P. KASSAN**

**JUDGE**

In the presence of:-

Mugur for Appellant

Muosiu for Respondent

Carol – Court Assistant

