



**Mmbaya v Watu Nominee Co. Ltd & another (Civil Appeal E1039 of 2023)
[2025] KEHC 11473 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11473 (KLR)

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

CIVIL

CIVIL APPEAL E1039 OF 2023

AC MRIMA, J

JULY 31, 2025

BETWEEN

WYCLIFFE MATEE MMBAYA APPELLANT

AND

WATU NOMINEE CO. LTD 1ST RESPONDENT

HUSSEIN JAMAL 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Hon. G. Omodho (PM) in Nairobi Chief Magistrates Court Civil Suit No. E1823 of 2022 delivered on 8th September 2023)

JUDGMENT

Background:

1. The appeal, subject of this judgment, is purely on quantum. At the trial Court, the parties consented on liability in the ratio of 75%:25% in favour of Wycliffe Matee Mmbaya, the Appellant herein. When the Learned trial magistrate rendered herself, she assessed and awarded Kshs. 461,500/- and Kshs. 6,000/- as general and special damages respectively.
2. The Appellant was dissatisfied hence the instant appeal

The Appeal:

3. Through a Memorandum of Appeal dated 6th October 2023, the Appellant urged that the judgment be set aside on the two following grounds: -



1. The Learned trial magistrate erred in law and in fact in failing to appreciate the relevant principles, case law and the submissions on record in assessing damages and thereby arrived at a very low award on damages.
2. The Learned trial magistrate misdirected herself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made an erroneous judgment on damages.

The Submissions:

4. The Appellant filed written submissions dated 27th January 2025. It was his case that he suffered a lot of pain and suffering from the injuries sustained. He claimed that he was treated at PCEA Kikuyu Hospital and The Karen Hospital and ORIF was applied to his lower right leg. He stated that he walks with a lot of difficulty and cannot perform heavy duties. Further, the Appellant submitted that the Doctor classified his injuries as grievous harm and assessed permanent incapacity at 30%. It was his position that an in-plant in situ required future medical cost of Kshs. 150,000/- to remove it.
5. The Appellant urged that an award of Kshs. 2,500,000/- and Kshs. 5,500/- for general and special damages respectively were reasonable based on both the circumstances of the accident and the authorities in Michael Nagy Karimi -vs- Gideon Ndonga Nduribu & Another (2013) eKLR and Geoffrey Mwaniki Mwinzi -vs- Ibero (K) Ltd & Another (2014) eKLR where Kshs. 2,000,000/- was awarded as general damages for similar injuries.
6. In urging this Court to interfere with the trial Court's award the Appellant called to his aid the decision of the Court of Appeal in Civil Appeal No. 284 of 2001, Catholic Diocese of Kisumu -vs- Sophia Achieng Tete (unreported) where it was observed that an Appellate Court is right in increasing the amount where the award is exceedingly low that it represents an erroneous estimate.
7. The Appellant prayed that the appeal be allowed and appropriate damages be instead awarded.

The Respondents' case:

8. Watu Nominee Co. Limited and Hussein Jamal opposed the appeal through written submissions dated 7th April 2025. At the outset, it was their case that they had made payment of the decretal sum through the Appellant's Advocates but nonetheless, lodged the appeal herein, an attempt, they submitted, was aimed at reaping excessive awards. On the substance of the appeal, the Respondents submitted that the trial Court reached a fair and reasonable determination and made its findings based on the principle of comparable injuries and comparable awards.
9. In urging the Court not to disturb the award, the Respondents referred to the decision in case of Margaret T. Nyaga -vs- Victoria Wambua Kioko (2004) eKLR as well as the one on Muba & Another -vs- Okoko & 3 Others (2022) KEHC 9828. In the latter, it was observed that a Court must have presence of mind to ascertain to itself the sum of general damages that Courts and especially appellate Courts would ordinarily award in respect of a particular injury.
10. In reference to the nature of injuries as captured by the medical report dated 26th April 2022 and 14th December 2022, the Respondents submitted that the Appellant suffered fracture of the right midshaft tibia and fibula and soft tissue injuries on the head. The Respondents cited the case of Maina Onesmus -vs- Charles Wanjohi Githome (2019) eKLR where the award of Kshs. 650,000/- was substituted with Kshs. 350,000/- for fracture of the midshaft humerus, fracture of the condyles, fracture of the shoulder grid and pain and psychological trauma.



11. They further relied on the case of Patricia Adhimabo Omollo -vs- Emily Mandala (2020) eKLR and the one in Patrick Marianya -vs- Ronald Ondicho Mose (2021) eKLR. In the former, where, for fracture of the left forearm radius and ulna bones, colles fracture of the left forearm, swollen deformed distal aspect among others, the Court of Appeal maintained an award of Kshs. 180,000/-. In the latter the Court awarded Kshs. 450,000/- for contusion on the lower back, fracture of the malleoli, fracture of the right hip, dislocation of the right elbow joint and sprain on the right ankle joint.
12. In responding the ground that the trial Court ignored the Appellant's submissions and authorities, the Respondents stated that there was reference to the appellant's pleadings, evidence and submissions.
13. In the end, the Respondents urged that the appeal was without merit and ought to be dismissed with costs.

Analysis:

14. Having carefully read the record and parties' submissions and the decisions referred to, this Court is now called upon to determine whether the Appellants' concerns are valid. As the appeal is on quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277).
15. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be 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 damage.
16. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.
17. It is the above legal threshold that will guide this Court in determining this appeal. The Appellant produced among other documents, Dr. Okere's Medical Report. It is dated 21st October 2021. He observed that the Appellant sustained right 'tibia-fibular communitated fractures' and that he presented complaint of pain on the right leg, difficult walking and inability to perform heavy duties. The Doctor observed that there was a surgical scar on the lower leg and an implant in situ which could be removed in future at a cost of about Kshs. 150,000/-. He assessed permanent incapacity at 30%. There is also the X-Ray report from PCEA Kikuyu Hospital. It shows that the Appellant suffered communitated fractures of distal third tibia and fibula shafts. There were no callous formation or dislocation. The bone density was normal and there was no lytic or sclerotic bone lesion. It was also noted that the adjacent soft tissue were normal.



18. The Respondents relied on the Medical report of Dr. Maina Ruga. It is dated 14th December 2022. He indicated that the Appellant presented pain on the right leg but walked normally. He noted small bruise scars on the head, and two surgical scars on the leg but there was no swelling or deformity neither was any tenderness. The said Doctor formed the opinion that the Appellant sustained a fracture of right tibia and fibula which were fixed by plating through surgery and had healed. He indicated that the Appellant suffered permanent incapacitation of 12% and would need surgery to remove the metal plates at an estimated cost of Kshs. 150,000/-.
19. This Court has considered the Complaint. In paragraph 6, the Appellant pleaded that he suffered a fracture of the right midshaft tibia and fibula. From an assessment of the two medical reports where one of them was taken a month after the accident and the other report prepared slightly more than a year after, there is a concurrence on the nature and extent of the injuries the Appellant suffered.
20. With the foregoing evidence, this Court is alive to the principle that comparable injuries ought to attract comparable awards. In exercising the foregoing jurisdiction, this Court takes cognizance of the fact that damages is a discretion that resides in the trial Court and ought to have been exercised judiciously. The Learned trial magistrate, upon considering the parties' rival authorities on amount awardable, simply stated that she was guided by more recent authorities. On that basis she awarded Kshs. 450,000/-. The authorities referred to by the trial Court were not cited. This Court will therefore re-look at what Court have generally awarded for injuries in fracture of midshaft tibia and fibula.
21. In the case of Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR the Respondent suffered compound fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg. The appellate court revised the damages downwards from Kshs. 600,000/- to Kshs. 300,000/-. In Joseph Mwangi Thuita -vs- Joyce Mwole (2018) eKLR the Plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg with inability to walk without support. The court awarded Kshs. 700,000/- as general damages.
22. In Tirus Mburu Chege & Another -vs- JKN & Another (2018) eKLR, the Respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, had a nose bleed and lost consciousness. On appeal, the Learned Judges of the Court of Appeal lowered the award for general damages from Kshs. 800,000/= to Kshs. 500,000/=.
23. A common thread running through the foregoing cases is the occurrence of a fracture of the tibial and fibula. In the last case there was a fracture of both legs, among other injuries. The Court of Appeal awarded Kshs. 500,000/-. The difference, however, is the implants in this case, which were introduced to aid the healing process. There is also the uncontroverted fact that that they might have to be removed at some point at a cost of Kshs. 150,000/-. The foregoing are factors which were not considered by the trial Court.
24. Based on the decision of the Court of Appeal in Bashir Ahmed Butt -vs- Uwais Ahmed Khan, this Court is inclined to increasing the award of damages, albeit marginally. That said, this Court cannot ignore the long passage of time, the change in economic times and inflationary trends. The comparable decisions cited in the preceding paragraphs were rendered between 5 to 8 years ago.
25. In the premises, the appeal succeeds and the following final orders hereby issue: -
 - (a) The general damages of Kshs. 450,000/- is hereby enhanced to Kshs. 700,000/-.
 - (b) The rest of the awards by the trial Court are hereby affirmed.
 - (c) The Respondents shall bear the costs of the appeal.



Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Kulecho, Learned Counsel for the Appellant.

Amina/Michael – Court Assistants.

