



**Wabomba v Wanyama (Civil Appeal E007 of 2021)
[2024] KEHC 2191 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E007 OF 2021
REA OUGO, J
FEBRUARY 27, 2024**

BETWEEN

HUDSON SIMIYU WABOMBA APPELLANT

AND

GLADYS WANYAMA RESPONDENT

(Being an appeal from Judgment made by Hon. D. Mutai, in Bungoma CMCC No. 129 of 2016)

JUDGMENT

1. The appeal before the court is solely against the trial magistrate's award of damages. According to the plaint filed at the subordinate court, on April 1, 2015, the respondent was travelling as a pillion passenger aboard on Motorcycle Reg. No. KMCU xxxx when the appellant's vehicle Registration No. KAZ xxxx driven negligently at high speed hit a pothole, lost control and rammed into the motorcycle occasioning the respondent serious injuries. The respondents suffered soft tissue injuries and psychological trauma and also sustained fractures of the right *tibia and fibula*. The suit was opposed by the appellant who filed his statement of defence. In due course, the parties settled the issue of liability through consent, and liability was settled at 70:30 in favour of the respondent. The trial magistrate in his judgment awarded the respondent Kshs 800,000/- as general damages, special damages of 550,000/- and future medical expenses of Kshs 150,000/- all totalling Kshs 1,500,000/- but subject to the agreed liability.
2. The appellant's appeal on quantum is based on the following grounds:
 1. That the Honourable Magistrate erred in law and fact in awarding damages that were too high without any justification or basis of the same.
 2. That the Honourable Magistrate erred in law and fact by taking into account irrelevant and extraneous factors leading to an excessive award of general damages.



3. That the Honourable Magistrate erred in law and fact by misapprehending or even wrongly applying the principles applicable in awarding of damages under special damages for future earnings.
 4. That the Honourable Magistrate erred in law and fact by misapprehending or even wrongly applying the principles applicable in awarding damages under future earnings.
 5. That the Honourable Magistrate erred in law and fact in failing to appreciate the principles applicable in awarding damages for future earnings despite the same not being pleaded and when there was no evidence tendered to support the same in awarding damages under the said head.
 6. That the Honourable Magistrate erred in law and fact and proceeded on wrong principles when assessing damages to be awarded to the respondent under future medical expenses if any and failed to apply applicable precedents and tenets of the law.
 7. That the Honourable Magistrate erred in relying heavily on the respondent's submissions and ignoring the appellant's submissions, grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellants and consequently coming to a wrong conclusion on the same.
3. The appeal was canvassed through written submissions and the parties have filled their respective submissions.
 4. The appellant in his submissions abandoned all other grounds of his appeal and identified the sole issue for the court's determination as whether the trial court failed to take into account the submissions of the appellant thereby arriving at a high award in terms of the general damages. The appellant submits that an award of Kshs 400,000/- was sufficient as the respondent sustained soft tissue injuries as well as a fracture of the *tibia and fibula*. He relied on the case of *Wakim Sodas Limited v Sammy Aritos* [2017] eKLR where the respondent therein sustained a fracture on his 4th rib and a compound fracture of the left *tibia and fibula* and was awarded Kshs 400,000/-. *In Mwavita Jonathan v Silivia Onunga* [2017] eKLR the appellant sustained the following injuries: left hip comminuted intertrochanteric fracture; blunt chest injury; dislocated right knee joint' sprain at the cervical spine of the neck and lumber sacral spine of the back; and a deep wound on the left lower leg and was awarded Kshs 400,000/- as general damages. He also relied on the case of *Dickson Ndungu Kirember & Another v Theresa Atieno & 4 Others* [2014] eKLR where the 3rd respondent sustained injuries to the head, chest and ankle joint; bruises on the forearm; and a compound fracture of the left *tibia and fibula* and was awarded Kshs 400,000/- as general damages. The appellant urged the court to set aside the award of general damages.
 5. The respondent in his submissions argued that he suffered psychological trauma; soft tissue injuries and fracture of the right *tibia and fibula* and was entitled to damages. He cited the case of *Caroline Endovelia Mugayilwa v Lucas Mbae Muthara* (2016) eKLR.

Analysis And Determination

6. I have carefully considered the rival submissions by parties and the evidence adduced before the lower court. The only issue is whether the damages awarded by the trial court were excessive. I stand guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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”

7. The nature of the injuries as pleaded by the respondent is not disputed. I therefore have to consider whether the award of Kshs 800,000/- was correct the respondent having sustained psychological trauma, soft tissue injuries and fracture of the right *tibia and fibula*. The authorities that both parties have relied on to give guidance to the court on comparable awards are more than 7 years old and will therefore not take into account the current rates of inflation. In the case of *Ndwiga & another v Mukimba* (Civil Appeal E006 of 2022) [2022] KEHC 11793 (KLR) (13 July 2022) (Judgment) where the respondent sustained soft tissue injuries and fracture of *tibia and fibula* left leg and the court awarded Kshs 500,000/- as general damages. The decision in *Ndwiga & another v Mukimba (supra)* is more recent and has comparable injuries to those sustained by the respondent herein. Therefore, I find that an award of Kshs 800,000/- awarded by the trial magistrate as excessive warranting interference by this court. In that regard, I hereby set aside the award of Kshs 800,000/= and substitute it thereof with an award of Kshs 500,000/=.
8. Accordingly, the judgment of the trial court is set aside and substituted with judgment as follows:
 - a. Liability 70%:30% in favour of the respondent against the appellant.
 - b. General damages Kshs. 500,000/-
 - c. Special damages Kshs. 550,000/-
 - d. Future medical expenses Kshs 150,000/-
Kshs. 1,200,000/-
Less 30% contribution Kshs. 360,000/-
Net Award Kshs. 840,000/-
9. The appellant shall have half the costs of the appeal. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2024

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Mr. Wanyama h/b for Mr.Kassim for the Respondent

Wilkister C/A

