Kungu & another v Chepkwony (Civil Appeal E149 of 2021)
[2023] KEHC 21496 (KLR) (Civ) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21496 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E149 OF 2021

CW MEOLI, J

JULY 28, 2023

BETWEEN

KENNEDY NDIRANGU KUNGU ..... 1ST APPELLANT

DAVID WAWERU KAMAU ..... 2ND APPELLANT

AND

COLLINS KIPNGETICH CHEPKWONY ..... RESPONDENT

(Being an appeal from the judgment of G.A Mmasi (Mrs.) SPM. delivered on 15th March 2021 in Nairobi Milimani CMCC No. 7106 of 2019)

JUDGMENT

1. This appeal emanates from the judgment delivered on 15.03.2021 in Nairobi Milimani CMCC No. 7106 of 2019. The suit had been commenced by Collins Kipng'etich Chepkwony, the plaintiff in the lower court (hereafter the Respondent) by way of a plaint filed on 26.09.2019. Kennedy Ndirangu Kungu and David Waweru Kamau were named therein as the 1st and 2nd defendant/defendants (hereafter the 1st and 2nd Appellant/Appellants). The Respondent's claim arose from a road traffic accident involving himself and motor vehicle registration number KCG 323F (hereafter suit motor vehicle), that occurred on 06.07.2019.

2. It was averred that at all material times that the 1st Appellant was the beneficial owner, driver, or agent of the 2nd Appellant while the 2nd Appellant was the registered owner of the suit motor vehicle and the same was under the control and or management of its driver and or agent. That the Respondent was lawfully and carefully walking off the road along Wakulima Market Exchange Lane when the suit motor vehicle was so negligently and carelessly driven, managed and or controlled that it veered off the road and knocked down the Respondent, occasioning him severe bodily injuries, loss and damage.

3. The Appellants filed a joint statement of defence denying the key averments in the plaint and pleaded in the alternative, and without prejudice to the averments in the statement of defence that, if indeed the Respondent was injured in the alleged accident, which was denied, the Respondent wholly and or substantially contributed to the occurrence of the subject accident.

4. The suit proceeded to full hearing during which all the respective parties adduced evidence. In its judgment, the trial court found the Appellants substantially liable for causing the accident and proceeded to apportion liability in the ratio of 90:10 in favour of the Respondent. Judgment was entered in favour of the Respondent against the Appellants jointly and severally in the sum of Kshs. 1,623,825/- made up as follows:

    a. General damages Kshs. 1,800,000/-;

    b. Special damages Kshs. 4,250/-;

    Less 10 %

    Total Kshs. 1,623,825/-

5. Aggrieved with the judgment of the trial court, the Appellants preferred the instant appeal on the following grounds: -

> " 1. That the learned magistrate erred in Law and in fact in finding that the appellants were 10% liable for the plaintiff's injury in view of the plaintiff's evidence on record which did not sufficiently proof liability.
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> 2. That the learned magistrate erred in Law and in fact in failing to apportion liability equally and disregarded the evidence on record which showed the plaintiff was a pedestrian who failed to discharge his duty of care while on the road.
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> 3. That the learned magistrate misdirected herself in Law and in fact in failing to note that the plaintiff failed to proof particulars of negligence pleaded in the plaint and failing to appreciate the evidence of DWI and PW1 which did not lay blame on the defendant.
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> 4. THAT the learned magistrate erred in law and in fact in holding that the appellants 10% to blame for the occurrence of the suit accident contrary to trite rule of evidence that allegations of negligence must be proved strictly which the plaintiff didn't.
>
> 5. THAT the learned magistrate erred in law and in fact in holding that the plaintiff /respondent was 10% liable yet the factual evidential materials and testimonies before her did not amount to the same nor support and justify such a holding.
>
> 6. THAT the learned magistrate erred in fact and ended up misdirecting herself in awarding an exorbitant quantum of damages of Kshs.1,800,000 by failing to appreciate and be guided by the prevailing range of comparable awards on of closely related injuries.
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> 7. THAT -the learned magistrate erred in Law in making such a high award on damages as to show that the magistrate acted on a wrong principle of law.

8. THAT the learned magistrate's award on damages was so high as to be entirely erroneous.

9. THAT the learned magistrate's award was made without considering the medical evidence before the Court and failed to appreciate the nature of injuries sustained by the respondent and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence

10. THAT the learned magistrate erred in Law and fact in arriving at award of general damages and totally relied on plaintiff's submissions and evidence in arriving at the award without justification.

11. THAT the learned magistrate erred in Law and fact by failing to consider the appellants submissions and authorities in arriving at his decision.

12. THAT the whole judgment on quantum and liability was against the weight of evidence before the court" (sic)

6. The appeal was canvassed by way of written submissions. From the Appellants grounds of appeal, it is noted that the appeal was centered on the twin issues of liability and quantum. Addressing the issue of liability as captured in grounds 1, 2, 3, 4, 5 & 12 in the memorandum of appeal, counsel relied on the Appellants' pleadings and evidence before the trial court to contend that the court finding on liability against the Appellants was a misdirection as the witnesses who testified failed to prove any negligence on the part of the driver of the suit motor vehicle. That the trial court did not address the discrepancies in the Respondent's testimony on the circumstances of the accident as weighed against the 1st Appellant's witness statement that was admitted as evidence by consent of both parties.

7. Calling to aid the decisions in Lilian Birir & Another v Ambrose Leamon [2016] eKLR counsel contended that a conviction in a traffic offence was not sufficient of itself to fix liability in negligence against the Appellants. He complained that the Respondent's evidence was riddled with inconsistencies that could not be cured by the Police officer's evidence. Further citing the decision in Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR concerning the Respondent's legal burden under the *Evidence Act*, counsel argued that the Respondent was the party to blame for the accident as he failed to prove that the accident occurred off the road. Pointing out that no sketch map of the scene of the accident was tendered to support the trial court's finding on liability.

8. Concerning the challenge regarding damages as captured in grounds 6, 7, 8, 9, 10, 11 & 12 in the memorandum of appeal, counsel argued that there was no justification why the injuries suffered by the Respondent which did not result in permanent incapacitation attracted the award of Kshs. 1,800,000/-. Citing the medical reports produced by consent, counsel asserted that the trial court failed to indicate factors and or authorities in support of the conclusion that the injuries sustained by the Respondent warranted the award in general damages.

9. That despite the awarding of damages being discretionary, the trial court's award was a wholly erroneous estimate and the same ought to be disturbed. In urging the court to reduce damages awarded to Kshs. 300,000/- , counsel relied on the decisions in Joseph Njeru Luke & 3 Others v Stellah Muki Kioko [2021] eKLR, The Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo [2019] eKLR, Peter Gakere Ndiangui v Sarah Wangari Maina [2021] eKLR and Fred Ogada Azere & Sony Trading Co. Ltd v Ezekiel Kiarie Ng'ang'a [2019] eKLR. The court was thus urged to allow the appeal with costs.

10. The Respondent naturally defended the trial court's findings. Counsel for the Respondent in responding the Appellants submissions on whether the Respondent had proved his case before the trial court on a balance of probabilities, relied on the decisions in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2004] eKLR and William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR. To submit that the Respondent proved that the 1st Appellant was wholly to blame for the accident as he owed a duty of care to other road users including the Respondent who was walking on a pedestrian pavement. That the Appellants failed to controvert the Respondent's evidence that the 1st Appellant was reversing along a pedestrian walkway.

11. In supporting the trial court's apportionment of liability, counsel called to aid the decisions in Masembe v Sugar Corporation & Another [2002] 2 EA 434, Abson Motors & 2 Others v Sinema Kitsao & Another (Administrators of the estate of the late Kitsao Kajefwa Kitunga Deceased) [2016] eKLR, Abdalla Rubeya Hemed v Kajumwa Mvurya & Another [2017] eKLR and Hussein Omar Farah v Lento Agencies [2006] eKLR to submit that even in the unlikely event the Appellants' version of events were true, the 1st Appellant had a duty of care to effectively control the suit motor vehicle and therefore the trial court properly evaluated the evidence before it in determining liability.

12. Concerning damages, counsel anchored his submissions on the decision in Catholic Dioceses of Kisumu v Sophia Achieng Tete (2004) 2 KLR 55 as cited in Joseph Kimathi Nzau v Johnson Macharia [2019] eKLR on the principles that ought to guide a court in assessing damages. That the trial court did not misdirect itself in assessing damages as the award was not inordinately high or erroneous but comparable with other decisions relating injuries like those suffered by the Respondent. While restating the injuries as pleaded and demonstrated in evidence, counsel submitted that the general damages award for pain and suffering was reasonable, justifiable, commensurate with the awards in the authorities cited before the trial court and reiterated on this appeal. The decisions in Milicent Atieno Ochuonyo v Katola Richard [2015] eKLR and Penina Waithira v LP [2019] eKLR were called to aid in urging the court to uphold the award.

13. In conclusion, counsel relied on the decision in Price & Another v Hilder [1996] KLR 95 in reiterating the applicable principles that an appellate court ought to consider in considering whether to disturb an award on damages by the trial court. Asserting that the instant appeal has failed to meet the said threshold, he prayed that the appeal should be dismissed with costs.

14. The court has considered the record of appeal, the original record of proceedings as well as the submissions by the respective parties. As noted earlier, the appeal turns on the twin issues of liability and damages. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> 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 allowance in this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. As rightly argued by the Respondent, 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 vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

16. The trial court after restating the evidence tendered before it addressed itself as follows concerning liability in its judgment; -

> "The circumstance which lead to the occurrence of the accident is not highly contested.....While this is the case, the court then has to seek reliance on the testimony of the witnesses; where PW1 has led in his testimony if the Plaintiff having been reversed on the pedestrian lane and carelessly a result of which was her being knocked down.
>
> The Defendants on the other part have led testimony for evidence that it was the Plaintiff who had crossed the road without being on the lookout, so that the injuries occasioned to him were so as a result of his own negligence.
>
> The law puts a special responsibility on person in charge of lethal machine to exercise a greater duty of care to other road users including pedestrians, the rationale for this lays in the grave consequences which might occur if such care and duty is not observed. It is for this reason that drivers for example are required to undertake a driving training and exam before hitting the road, no such requirement in law is existent on pedestrians, indicative of the balance of risk as to the dangers posed by these different classes of road users.
>
> While this is the case, the 1st Defendant while in control of her vehicle hit the Plaintiff and there is evidence of the accident having occurred during the day time. The circumstances of this occurrence point to a driver in the 1st Defendant who while in control failed to have the said vehicle in control on the preponderance of the material on record, for this reason and based on the duty imposed on a driver as I have elucidated above, I do find the Defendant as substantially liable for causing the accident, this liability is assessed at 90% with the Plaintiff shouldering the remainder of the same." (sic)

17. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

18. Hence, the duty of proving the averments contained in the plaint lay squarely on the Respondent. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

19. As held by the Court of Appeal in Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the "determination of liability in a road traffic case is not a scientific affair" . The court proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant

in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

20. During the trial the Respondent testified as PW1. The gist of his evidence was that on the date in question the suit motor vehicle reversed as he was walking along the pedestrian lane near Wakulima market. He denied that he was negligent. In cross-examination he stated that the accident occurred at around 6pm and reiterated that the suit motor vehicle, while reversing along the pavement where he was walking, hit him.

21. PC Femina Omugana No. 78573 testified as PW2. On her part she confirmed that the occurrence of an accident involving the Respondent and the suit motor vehicle which was being driven by the 1st Appellant. She [produced the Police Abstract as P. Exh.9. Under cross-examination she confirmed that she was not the investigating officer in relation to the accident and did not have the police file with her in court. She further stated that the Occurrence Book (OB) was in the custody of the Independent Police Oversight Authority (IPOA) while the investigating officer was transferred to Juja.

22. On the part of the Appellants, the 1st Appellant witness statement was produced by consent without calling him. The gist of his unsigned and undated witness statement essentially summarized the accident in the statement that "I was reversing didn't notice there was a pedestrian behind hence hitting him".

23. It is evident that PW2 did not witness the material accident. Further, she neither had the Occurrence Book (OB) with her in court nor was she the investigating officer concerning the material accident. Thus, her evidence comprised a restatement of the entries in the Police Abstract (P. Exh.9) as related to the accident. The entries therein were made after the fact and therefore inadmissible regarding proof as to the actual manner in which an accident occurred. PW2's evidence therefore merely confirmed the occurrence of the accident as reported to police.

24. PW1 blamed the 1st Appellant who was the driver of the suit motor vehicle for causing the accident by reversing along a pedestrian walkway where PW1 was walking at the time. He denied any negligent conduct on his part. As regards the contents of the 1st Appellant's witness statement produced by consent without calling the maker, the court observes as follows. Section 35 of the *Evidence Act* as pertains to admissibility of documentary evidence as to facts in issue, does not envisage a witness statement such as produced herein, the parties' consent notwithstanding.

25. Besides, the statement was not made or produced under oath or subjected to the test of cross-examination. Arising from the pleadings of the parties, and the matters raised in cross examination by the defence of PW1, the issue of liability was disputed. A five-judge bench of the Court of Appeal in

Kariuki v Kiore & 4 others (Civil Appeal 171 of 2016) [2022] KECA 864 (KLR) though addressing a different issue underscored the value of viva voce evidence regarding contested issues, by stating that: -

> " We hasten to state, however, that in contested issues where determination is dependent on adduction of oral evidence, it is good practice to allow parties to adduce viva voce evidence so that the veracity of the evidence adduced can be tested by way of cross- examination."

26. Not only was the statement not tested by cross-examination of the maker, but further its authenticity was diminished by the fact that the statement was not made under oath, dated, or signed by the alleged maker. In the court's view the statement was of no probative.

27. Hence the uncontroverted evidence of the Respondent at the trial, and which the court apparently accepted, points to the 1st Appellant as culpable, through his proven negligence, for the accident, and vicariously the 2nd Appellant. The Respondent had pleaded particulars of negligence against the driver of motor vehicle KCG 323F and through his evidence supported them to the required standard.

28. In view of the above, this court is of the view that the trial court erred, in the absence of credible proof by the Appellants, in apportioning liability against the Respondent and the finding cannot stand and the appeal succeeds on that score.

29. Regarding quantum, 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".

30. 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."

31. 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". That said, as earlier captured herein, apposite to the issue, are the pleadings.

32. The Respondent particularized his injuries in the plaint as follows;-

> "
>
> " 6. As a consequence of matters aforesaid, the Plaintiff has suffered damages.
> Particulars of injuries sustained by the Plaintiff

a. Major blunt injuries to the pelvis

b. Fracture of the right superior pubic ramus" ..... (sic)

33. In its judgment, the trial court went on to express itself on the issues of damages as follows: -

> " Quantum of Damages
>
> The assessment of damages, as is trite is done by considering other things that comparable awards should be made for near similar injuries so that the courts should not make decisions that would have the effect of otherwise making insurance premiums inexcusably high, while factoring the degree and extent of the said injuries suffered by the Plaintiff including the need or otherwise for future medical treatment.
>
> The above principle which stand as a guide for the award and quantification of damages have been enshrined in different decisions now law and coming from the Higher Courts over the courts over the course of time, this curt is guided by the same. The Plaintiffs injury as per the evidence on record indicates that she suffered a blunt injury to the pelvis, and a fracture of the right pubic ramus.
>
> Noting the nature of injury, this court awards Kshs. 1,800,000 as general damages. The same is in this court mind a sufficient amount to recompense the Plaintiff for the injuries he sustained." (sic)

34. PW1 testified that he sustained injuries on the right hand and pelvis region. He produced treatment notes from Kenyatta National Hospital (KNH) as PExh.2 - 7, P3 Form as PExh.8 and a medical report dated 10.09.2019 by Dr. Wokabi as PExh.10. The earliest documentation of the Respondent's injuries was PExh.3 and PExh.5 which were both prepared roughly three weeks after the accident. They essentially captured the Respondent's injuries as set out in the plaint. These injuries were disputed, and the Respondent subjected to a second medical examination at the behest of the Appellants which report was produced by consent during the trial. The Appellant's second medical report by Dr. Wambugu dated 02.09.2020 was produced as DExh.1. It captured the Respondent's injury as a non-displaced fracture pelvis involving the right superior pubic ramus.

35. The report marked PExh.8 was prepared some two (2) months after the accident. The report set out in detail the Respondent's injuries and attendant sequela. The prognosis on the Respondent was captured in extenso therein as follows; -

> " He suffered pain from the major injuries that he sustained on the pelvis region.
>
> He was treated appropriately as described.
>
> As with similar cases of such injuries he should recover fully from the injuries in the next 6 to 8 months from now. "(sic)

36. DExh.1 on the other hand was prepared more than a year after the accident and is the most recent on the Respondent's injuries. The report set out in detail the Respondent's injuries and attendant sequela. The prognosis on the Respondent was captured in brief therein as follows; -

> " Kipngetich's injuries are consistent with those due to blunt trauma as may have occurred during the accident. He sustained skeletal and soft tissue injuries from which he has since made adequate recovery. The fracture pelvis has united." (sic)

37. The two reports were essentially in agreement as to the extent of the Respondent's injuries. Undoubtedly, the most significant injury suffered by the Respondent was the fracture of the pelvis involving the right superior ramus which must have caused him a great deal of pain and extended periods of morbidity. Further, PExh.10 opined that the Respondent would recover fully from the injuries within 6 to 8 months from the date of examination. Indeed, a year later when the Respondent was re-examined at the Appellant's behest, the resultant report (DEXh.1) indicated that the Respondent had made adequate recovery from the injuries he sustained in the accident.

38. As observed by the English Court in Lim Poh Choo v Health Authority (1978)1 ALL ER 332 and echoed by Potter JA in Tayab v Kinany (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Sheperd (1964) AC 326, at page 345:

> "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."
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> See also Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR and Kigaraari v Aya (1982-88) 1 KAR 768.

39. As important as consistency in awards for similar injuries might be, the 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. The trial court, while seemingly alive to relevant principles, did not restate or analyze in any detail the evidence and submissions before it regarding the Respondent's injuries and eventual award. According to the medical reports presented before the court, the Respondent's injuries, though relatively severe, did not result in any form of permanent incapacitation and evidently Dr. Wokabi's expectation on recovery and confirmed by Dr. Wambugu.

40. The decision in Milicent Atieno Ochuonyo v Katola Richard [2015] eKLR and Penina Waithira Kaburu v LP [2019] eKLR cited by the Respondent at the trial court and before this court, appear to relate to slightly more severe injuries, the injuries of the plaintiffs therein involving inter alia a fracture of the pelvic with separation of symphysis pubic and fracture of the pelvic with bilateral involvement of the superior and inferior rami respectively. These injuries were severe, and the claimants therein were awarded Kshs. 2,000,000/- in general damages each.

41. The Appellants' three-pronged complaint on the issue of damages was that the trial court awarded damages that were inordinately high in comparison with the injuries; that the trial court made an award on damages without appreciating the medical evidence, injuries and failing to take guidance from authorities with comparable awards for the injuries sustained by the Respondent; and the trial court's failed to consider the Appellants submissions. The Appellants relied on decisions in Bildad Mwangi Gichuki v TM-AM Construction Group (Africa) [2000] eKLR, James Ngugu Kamoche v Joseph N. Muniu & 3 Others [1991] eKLR and Shah & others v Linscott [2004] eKLR before the trial court. Though dated, these cases involved slightly more severe injuries than those sustained by the Respondent. Equally the proposed award of Kshs. 300,000/- seems too low given inflationary trends since the decisions.

42. The Appellants have before this court cited a raft of decisions that were not relied on before trial court hence it did not have the benefit of said decisions. Here, the court entirely agrees with the disapproval expressed towards such conduct by Ochieng J (as he then was) in his judgment in Silas Tiren & Another v Simon Ombati Omiambo [2014] eKLR. The learned Judge taking exception to the introduction of new authorities at the appeal stage, stating inter alia 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."

43. From a reading of the trial court's judgment, there is little reasoning demonstrating how it arrived at the award of Kshs. 1,800,000/- in general damages for the injuries sustained by the Respondent. No reference was made to authorities cited by the parties before it. It thus appears from my own review of the material presented before the trial court and comparisons with authorities cited on this appeal, that the Appellants complaint in that regard is merited and the court does feel justified to interfere especially in view the injury and medical evidence placed before the trial court.

44. Reviewing the cases cited in the lower court by both parties, the court considers the case of Milicent Atieno Ochuonyo v Katola Richard [2015] eKLR and Penina Waithira Kaburu v LP [2019] eKLR cited by the Respondent, and those by the Appellant, namely, James Ngugu Kamoche v Joseph N. Muniu & 3 Others [1991] eKLR and Shah & others v Linscott [2004] eKLR as most relevant. Although he must have endured a great deal of pain in the period of morbidity, the Respondent appears to have sufficiently recovered from his injuries with no attendant sequela. Comparing these injuries with those in the above cases, adjusting for severity and inflationary trends, the Court is persuaded that an award of Kes. 1,200,000/- is adequate as general damages for pain and suffering. Special damages awarded in the lower court amounted to Kes. 4,250/- and have not been challenged.

45. The appeal has therefore partially succeeded and the judgement of the lower court is hereby set aside. The court substitutes therefor a finding that the Appellants are wholly liable in negligence and enters judgment for the Respondent against both Appellants jointly and severally, in the total sum of Kes. 1204,250/- (One Million Two Hundred and Four Thousand Two Hundred and Fifty) with costs and interest in the lower court suit. Parties will however bear their own costs in the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellants: Mr. Mwangi h/b for Mrs. Muchemi

For the Respondent: Ms. Mwenja /b For Mr. Wanjohi

C/a: Carol