



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mburugu & another v Nyongesa (Civil Appeal 58 of 2021)  
[2023] KEHC 24047 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24047 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 58 OF 2021  
HM NYAGA, J  
OCTOBER 25, 2023**

**BETWEEN**

**MOSES MBURUGU ..... 1<sup>ST</sup> APPELLANT**

**GEORGE KARANJA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANN NALIAKA NYONGESA ..... RESPONDENT**

*(Appeal against judgment and decree on quantum from the Judgment of Hon.F. Munyi, Senior Resident Magistrate delivered on 26th May, 2021 in Nakuru CMCC No. 92 of 2021))*

**JUDGMENT**

1. It arises from a judgment and decree entered in the aforesaid suit whereby the Respondent sued the Appellants for both general and special damages in respect of a road traffic accident in which she sustained personal injuries.
2. The Appellants were the lawful and beneficial owners of the Motor Vehicle Registration Number KAP 472 S which allegedly hit the respondent while on board motor cycle registration number KMEM 688 A.
3. The claim was fully defended and the trial magistrate delivered a judgement on 26<sup>th</sup> May, 2021 in which she found the Appellants 100% liable for the accident and awarded general damages of Ksh. 300,000/= and special damages of 2550/=, plus costs and interest at court rates.
4. The Appellants are aggrieved with the judgment of the Learned Trial Magistrate on quantum for general damages only and they lodged this appeal on 8<sup>th</sup> June, 2021 setting out the following grounds of appeal:



- I. That the Learned Trial Magistrate erred in law and in fact in awarding damages which was inordinately high in the circumstances.
  - II. That the trial magistrate erred in fact and in law in awarding damages and costs without basis or proof of the same.
  - III. That the Learned Trial Magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions on quantum on applicable principles for assessment of damages.
  - IV. That the learned magistrate erred and misdirected himself in law and in fact in misapplying the principles applicable to assessment of damages.
5. The appellants urged this court to allow this appeal, set aside the judgment on quantum in the subordinate court and assess damages afresh.
  6. The appellants also prayed that the costs of the Appeal be borne by the Respondent.
  7. The appeal was canvassed by way of written submissions.
  8. The appellants' counsel filed their written submissions dated 29/6/2023 on 20<sup>th</sup> July, 2023 whereas the Respondent's counsel filed her written submissions dated 8/06/2023 on 9/6/2023.

### **Appellants' Submissions**

9. It was submitted that it is trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. In support of this proposition reliance was placed on the cases of Denshire *Muteti Wambua vs Kenya Power & Lighting Co. Ltd [2013]* eKLR & Kigaragari vs Aya (1982-88) 1 KAR 768 as cited in the case of *Godfrey Wamalwa Wamba & another vs Kyalo Wambua [2018]* eKLR.
10. The Appellants submitted that the plaintiff sustained soft tissue injuries and urged this court to set aside the lower court award of Ksh. 300,000/= and substitute it with Ksh. 80,000. In support of their submissions reliance was placed on the following cases: -
  - a. George Mugo & another vs A K M (Minor suing through next friend and mother of A M K [2018] eKLR- where the High Court on Appeal set aside the trial court award of Ksh. 300,000/= as General Damages and substituted it with Ksh. 90,000/= for a claimant who had sustained Blunt injury left shoulder; Blunt chest injury interior; Bruises of left wrist region & Blunt injury left arm.
  - b. George Kinyanjui t/a Climax Coaches & Anor vs Hussein Mahad Kuyale (2016) eKLR where the claimant sustained injuries on his chest, neck, knees and lost two teeth. The award of Kshs. 650,000/= was reduced to Kshs. 109,890/= on appeal after the Judge made a finding that the loss of teeth was unrelated to the accident.
  - c. Ndung'u Dennis vs Ann Wangari Ndirangu & Anor (2018) eKLR where the claimant sustained injuries on the right lower leg and bruises on the back. An award of Kshs. 300,000/= was reduced to Kshs. 100,000/= on appeal.
  - d. PF (Suing as next friend and father of SK (Minor) vs Victor O Kamadi & Another [2018] eKLR where the court on appeal enhanced general damages from Kshs. 50,000/- to Kshs. 100,000/- for - Cut wound to the forehead, Multiple small abrasions to the face, blunt injury to the head leading to loss of consciousness for some time, abrasions to the back, abrasion wounds to the dorsum of the right hand and cut wound to the right leg.



- e. Godwin Ileri vs Franklin Gitonga (2018) eKLR where the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs. 300,000/= was reduced to Kshs. 90,000/= on appeal.
- f. Lamu Bus services & Anor vs Caren Adhiambo Okello (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh. An award of Kshs. 200,000/= was reduced to Kshs. 130,000/= on appeal.

### **Respondent's Submissions**

11. The respondent did not cross appeal, but submitted that an award of Ksh. 1,000,000/= as general damages would be sufficient compensation. In support of his submissions reliance was placed on the cases of submitted that an award of Wycliffe Lumula M'masi vs Ernest Waithatka & another [2020] eKLR where the claimant sustained Extensive degloving injury on the right foot and Extensive skin loss on the right foot with an assessed degree of harm of 30 % and he was awarded general damages of Ksh. 400,000/=. On appeal the High Court substituted the said award with Ksh. 700,000/-. Also cited was Rent Works East Africa Limited v SSM (Minor Suing through SMH as Next Friend) (Civil Appeal E004 of 2021) [2022] KEHC 9969 (KLR) (30 June 2022) (Judgment) where an award of Kshs. 1,200,000/= in general damages was substituted with an award of Kshs. 700,000/= on appeal for a claimant who had sustained degloving injury to the left eye, nose and lip.
12. On costs, the Respondent submitted that the same should follow the event. In support of this proposition, the respondent cited the cases of Orix Oil (Kenya) Limited V Paul Kabeu & 2 Others [2014] eKLR, Republic vs Rosemary Wairimu Munene (Ex parte Applicant) vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 and Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another [2016] eKLR.
13. The respondent urged the court to dismiss the appeal with costs to her.

### **Analysis & Determination**

14. This appeal is against quantum only.
15. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
16. In *Gitobu Imanyara & 2 others vs Attorney General [2016]* eKLR, the Court of Appeal stated that;  

“[A]n 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”
17. In *Peters vs Sunday Post Ltd [1958] EA 424*, the Court held that;  

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if



there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

18. Similarly, in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013]* eKLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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”

19. With the above in mind, I will now proceed to determine the Appeal.

20. Having considered the record of appeal, the submissions and the authorities relied on by the respective parties, I opine that the only issue for determination is whether the quantum for general damages awarded by the trial court was manifestly excessive.

21. It is imperative to note that an appellate court would not easily interfere with the trial courts’ discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding. As stated by the Court of Appeal in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A M. Lubia and olive Lubia (1985) 1 KAR 727*:

“.... 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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

22. The same Court in *Odinga Jackton Ouma vs Moureen Achieng Odera [2016]* eKLR stated that- “comparable injuries should attract comparable awards”

23. The Respondent pleaded that she sustained the following injuries: -

- i. Degloving injury to the right knee joint
- ii. Severe soft tissue injuries of the right leg.

24. The discharge summary shows that the respondent was admitted for 5 days. Dr. Omuyoma who examined the Respondent confirmed she sustained the above injuries and classified the degree of injury as harm.

25. The injuries sustained by claimants in the cases cited by the Appellants were less severe compared to those by the Respondent herein. The respondent not only suffered soft tissue injuries but also degloving injury.

26. In arriving at an award of Ksh300,000/=, the learned trial magistrate was guided by the case of *H. Young Construction Company Ltd v Richard Kyule Ndolo [2014]* eKLR where the court awarded a sum of Kshs. 250,000/= for degloving injury to the left leg with loss of skin over the calf muscles and blunt injury to the left ankle joint.



27. The court held as follows: -

“I am convinced that the award in H.Young case is comparable. However, the judgement in that case was delivered in July,2014. I have also noted that the plaintiff in that case was admitted in hospital for three months and the injuries caused pains and morbidity with remnant wound scars. Considering the nature of injuries sustained, comparable award and inflation trends, I am of the opinion that an award of Ksh. 300,000/= is reasonable.”

28. I have also referred to the following comparative cases

- i. *Francis Ndungu Wambui & 2 others vs Purity Wangui Gichobo [2019] eKLR* in which the High Court sitting on appeal assessed downwards an award in the sum of Kshs. 450,000/= to one in the sum of Kshs. 250,000/= in the instance of a plaintiff with a laceration to the left foot as well as a degloving injury to the base of the thumb which healed well leaving scars
- ii. *Jubilee Hauliers Ltd & Another vs Mary Waithera Wanja (2019) eKLR* where respondent had suffered degloving injuries to the right elbow, multiple lacerations on the right arm, and soft tissue injuries on the chest; cut wound on the tongue and bruises on the forehead. An award of Kshs. 200,000/= was upheld.

29. Taking all factors into account, I am of the considered view that the trial court took into account the inflationary trends in arriving at the award. The award was within the range of awards made by various courts for comparable injuries.

30. Accordingly, the Appeal fails and it is dismissed with costs to the Respondent.

31. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

C/A Jeniffer

Mrs. N. Njoroge for Respondent

N/A for Appellant

