



**Kuria & another v Kamau (Civil Appeal 330 of 2023)  
[2024] KEHC 10411 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10411 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 330 OF 2023  
FN MUCHEMI, J  
AUGUST 21, 2024**

**BETWEEN**

**PATRICK NJIRU KURIA ..... 1<sup>ST</sup> APPELLANT**

**KENYA MPYA SACCO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BERNARD GAKURE KAMAU ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. O. Wanyanga  
(SRM) delivered on 30th August 2023 in Thika CMCC No. 351 of 2020)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. 351 of 2020 arising from a road traffic accident whereby the trial court liability in favour of the respondent as against the appellants at the rate of 100%. The respondent was awarded general damages for pain and suffering at Kshs. 500,000/- and special damages at Kshs. 3,550/-.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 8 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact by finding the appellants 100% liable for the accident and awarding the respondent Kshs. 503,550/- being quantum of damages as the award was excessively high.
  - b. The learned trial magistrate proceeded on wrong principles when assessing the general damages to the respondent.



- c. The learned trial magistrate erred in law and in fact in failing to uphold the doctrine of precedent and as a result arrived in unjustified decision.
3. Directions were issued that the appeal be canvassed by way of written submissions and from the record only the appellants complied by filing their submissions on 13<sup>th</sup> June 2024. The respondent on the other hand had not filed his submissions by the time of writing this judgment.

### **Appellants' Submissions**

4. The appellants submit that the respondent was travelling as a passenger along Thika Nairobi road when the appellants negligently controlled motor vehicle registration number KCF 300Y causing it to lose control and ram into another vehicle. The appellants rely on the case of Farida Kimotho vs Ernest Maina (1995) KLR argue that although the respondent claimed that the driver of the suit motor vehicle was speeding, he did not produce any motor vehicle inspection report to illustrate what speed the vehicle was being driven at.
5. The appellants submit that the respondent pleaded that he sustained an avulsion and fracture of the tooth, bruises on the upper lip, loss of a tooth in the upper jaw and bruised scars on the upper jaw. The appellants rely on the case of Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd [2013] eKLR and submit that comparable injuries should as far as possible be compensated by comparable awards. Furthermore the appellants rely on the case of Power Lighting Company Limited & Another vs Zakayo Saitoti Naingola & Another (2008) eKLR cited with approval in the case of Jennifer Mathenge vs Patrick Muriuki Maina [2020] eKLR and submit the award of Kshs. 500,000/- is high and ought to be substituted with a sum of Kshs. 150,000/-.

### **Issues for determination**

6. The issues for determination are:-
  - a. Whether liability apportioned by the trial court was against the weight of the evidence adduced;
  - b. Whether the damages awarded by the trial magistrate are too high as to amount to an erroneous estimate.

### **The Law**

7. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

8. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

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.



9. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
  - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

**Whether liability apportioned by the trial court was against the weight of the evidence adduced.**

10. The appellants seek to have the court set aside the trial court's findings of 100% liability against them. According to the appellants, the respondent did not produce any proof that the driver of motor vehicle registration number KCF 300Y, where he was travelling as a passenger, was being driven at a high and reckless speed.
11. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In *Khambi & Another vs Mahithi & Another* [1968] EA 70 it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.
12. According to the respondent, on 19<sup>th</sup> April 2019, he was travelling as a passenger aboard motor vehicle registration number KCF 300Y along Thika Nairobi Super Highway when at fly over area, the said motor vehicle lost control causing it to collide with another motor vehicle thereby occasioning the respondent severe bodily injuries. The respondent testified that the subject motor vehicle was being driven recklessly and carelessly and the driver was over speeding. The appellants did not call any witnesses. They further argue that the respondent did not prove his case beyond probability because he did not provide proof like a motor vehicle inspection report to show that the driver of the suit motor vehicle was over speeding.
13. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

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 exist.
14. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-

As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.
15. From the evidence, it is evident that an accident occurred on 19<sup>th</sup> April 2019. From the record the respondent witnessed the accident and gave an account in his testimony of how the accident occurred.



The evidential burden was thereby shifted to the appellants to disprove that their driver was not over speeding on the material day. However, they did not call any witnesses to give an account of how the accident occurred. Furthermore, on the allegations that the respondent ought to have produced a motor vehicle inspection report, the appellants could have done the same to discount the fact that the driver was not over speeding. As such, it is my considered view that the respondent discharged the burden of proof and proved on a balance of probabilities that the appellants' driver was negligent.

**Whether the damages awarded by the trial magistrate are too high as to amount to an erroneous estimate.**

16. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

17. Similarly, in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

18. According to the plaint, the respondent suffered the following injuries:-

- a. Avulsion and fracture of tooth.
- b. Bruises on the upper lip.
- c. Loss of a tooth in the upper jaw.
- d. Bruised scars on the upper jaw.

19. The trial magistrate awarded a sum of Kshs. 500,000/- for general damages for pain and suffering. The appellants submit that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. The appellants further argue that a sum of Kshs. 150,000/- would be reasonable compensation.

20. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr. Cyprianus Okoth Okere in his medical report dated 12<sup>th</sup> September 2019. The doctor



classified the injuries as severe harm and indicated that the respondent would require Kshs. 10,000/- for tooth replacement of an ordinary tooth.

21. Looking at the decisions relied on by the appellants on appeal and those of the respondent at the trial court, the decisions cited by the appellants, the injuries are less severe than those sustained by the respondent. Notably, the respondent in his submissions at the trial court proposed that the court award a sum of Kshs. 800,000/- he relied on decisions where the award given was Kshs. 500,000/ in 2005 and Kshs. 500,000/- in 2012. I have further looked at the decisions cited by the respondent and noted that the injuries sustained by the respondents in both cases are more severe than the present case.
22. The learned trial magistrate in arriving at the award of Kshs. 500,000/- considered the nature of injuries sustained and the authorities cited by both parties. Taking into consideration that comparable injuries ought to attract comparable awards, it is my considered view that the sum of Kshs. 500,000/- is inordinately high for the injuries sustained by the respondent. As such, it warrants this court's interference with the trial court's finding on the award of general damages. I am guided by the decision in Paul Kipsang Koech & Another vs Titus Osule Osore [2013] eKLR where the plaintiff was awarded Kshs. 200,000/- in general damages for a bruised lower lip cheek elbow and left knee, fracture of the right upper lateral incisor tooth, loosening of the right upper canine tooth, loosening of the right upper medical incisor tooth and blunt injury to the neck and abdomen. It is therefore my considered view that Kshs. 350,000/- would be reasonable compensation as general damages for pain, suffering and loss of amenities.

### **Conclusion**

23. In view of the foregoing, I find that the appeal is partly merited. The award of Kshs. 500,000/- on general damages for pain, suffering and loss of amenities is hereby set aside and substituted with an award of Kshs. 350,000/-.
24. The respondent is awarded the costs of this appeal.
25. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21<sup>ST</sup> DAY OF AUGUST 2024.**

**F. MUCHEMI**

**JUDGE**

