



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaaria v Japhet (Civil Case E005 of 2022) [2023] KEHC 369 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE E005 OF 2022  
TW CHERERE, J  
JANUARY 26, 2023**

**BETWEEN**

**ELIAS KITHINJI KAARIA ..... APPELLANT**

**AND**

**SILAS KIMATHI JAPHET ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree in Maua CMCC No. 18 of 2018 by Hon. M.A. Odhiambo (RM) on 30th September, 2020)*

**JUDGMENT**

**Background**

1. On 09<sup>th</sup> May, 2017, Respondent was travelling in Appellant’s motor vehicle KCD 713 B along Meru-Katheri Road when the driver lost control of the vehicle as a result of which it veered off consequent to which Respondent suffered bodily injuries.

**The trial**

2. At the hearing, Respondent blamed the for driving M/V KCD 713 B carelessly and negligently thereby causing the accident. Appellant did not tender any evidence.
3. At the conclusion of the trial, the learned trial magistrate found the accident motor vehicle was driven negligently and found Appellant liable at 100% and proceeded to award Respondent damages as follows: General damages KES. 900,000/-, Special damages KES. 24,230/- costs of the suit and interest

**The Appeal**

4. Appellant dissatisfied with the lower court’s decision preferred this appeal only on quantum.



## Analysis and Determination

### Quantum

5. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shab* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2* [1987] KLR 30).

6. In *Catholic Diocese of Kisumu v Tete* [2004] eKLR the Court of Appeal identified the circumstances under which an appellate court can interfere with an award of damages and rendered itself as follows:

“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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”

7. Again, in *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457, the Court of Appeal stated that:

“This court, I remind myself, 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:

- (a) proceeded on a wrong principle; or
- (b) misapprehended the evidence in some material respect.

And 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.”

8. The Respondent’s medical report prepared by Dr. Nicholas Koome dated 11<sup>th</sup> November, 2017 reveals that he suffered fracture of left clavicle distal fracture and muscle sprain on left shoulder. The fracture to the distal third left clavicle was confirmed by Dr. John Macharia in his report dated 30<sup>th</sup> November, 2019. At the time of examination, about 2 years after the accident, Dr. Macharia noted that Respondent’s left hand had reduced power movements that required to be treated by way of physiotherapy.

9. At the hearing, the Respondent prayed for KES 2,000,000/- and cited *H.K.N v Kenafri Bakery Ltd & another* [2010] eKLR where where the Court awarded general damages at Kshs. 2,500, 000/- for the following injuries;

- a) Severe brain concussion leading to edema and loss of consciousness



- b) Fracture of left mandible (chewing bone).
- c) Fracture of left fore-arm bones (ulna and radius) at distal third zone.
- d) Fracture of left collar bone (clavicle) between middle and outer third.
- e) Traction injury of left brachial plexus.
- f) Laceration wound on the left cheek.
- g) Severe contusion of right thigh quadriceps muscles (upper third).
- h) De-gloving injury of the skin that covered the right thigh muscle.
- i) Laceration of right saphenous and anterior cutaneous vein of the thigh compromising the venous return of lower limb.

The court also noted that the injuries had healed with:

- a) Weakness left upper limb.
  - b) Swollen right lower limb
  - c) Unappealing scar on the face and right thigh.
  - d) Pain left upper arm.
  - e) Long standing wound on the left dorsum of the hand.
  - f) Deformity of the upper limb.
10. Appellant offered KES. 200,000/- and placed reliance on *Hassan Noor Mahmood vs. Tae Youn Aun* [2001] eKLR where the Court awarded general damages at Kshs. 200,000/- for fracture of left leg tibia and fibula, dislocation of left ankle and fracture of left collar bone and *Joyce Wanjiru Kamau v Kenya Cannery Ltd & Another* [2004] eKLR where the High Court awarded of KES. 100,000/- for fracture –Left collar bone and multiple fractures of the pelvis.
  11. In awarding KES. 800,000/- the learned trial magistrate placed reliance on Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs Adano Isacko (2019) eKLR where the High Court upheld an award of Kshs. 700,000/- in the case where the Plaintiff sustained fracture of the clavicle.
  12. The Court of Appeal in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR settled the principles to be applied in assessing damages and stated that:  
Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. (Emphasis added).
  13. From the foregoing, I find that the learned trial magistrate correctly applied the principle of comparable injuries and I do not find any reasonable cause to interfere with the award on general damages.
  14. In the end, I find that this appeal has no merit and it is disallowed with costs to the Respondent.

**DATED AT MERU THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**



## **Appearances**

Court Assistant - Morris Kinoti

For the Appellant - Mr.Kirimi for Mithega & Kariuki Advocates

For Respondent - Ms. Kimotho for Gichunge Muthuri & Company Advocates

