



**Hakimi Paints and Hardware Limited v Kubai (Civil Appeal  
116 of 2022) [2023] KEHC 17435 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17435 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 116 OF 2022  
DKN MAGARE, J  
APRIL 28, 2023**

**BETWEEN**

**HAKIMI PAINTS AND HARDWARE LIMITED ..... APPELLANT**

**AND**

**JOSEPH KUBAI ALIAS YUSUF ATHMAN ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the decision of Hon JB Kalo given on August 4, 2022 in Mombasa CMCCC 2037 of 2021. The appeal is on Quantum of damages. Although 100% liability is mentioned there is no appeal on liability.
2. My understanding that the 9 grounds of Appeal just raise one ground., that is whether the Court awarded damages which were inordinately high as to amount to an erroneous estimation of damages.

**Pleadings**

3. The plaintiff pleaded the following injuries;
  - A. Head injuries with – Loss of consciousness, Frontal cystic hygroma, Fracture right zygomatic and right orbital wall Fracture left mandible
  - B. Fracture/dislocation left radius/ulna bone
  - C. Fracture right neck of femur
  - D. Fracture right patella
  - E. Puncture /laceration left cheek and wound upper abdomen
  - F. Multiples scars on the right cheek, upper abdomen, right thigh/hip area, left thigh and both knees.



- G. Multiple loose teeth with malalignments
- H. Stiff and tender right hip.
4. The Respondent produced the exhibits at page 10 of the record of appeal and testified on the injuries. Dr Darius Wambua testified that the Respondent suffered 35% disability. He stated that implants will require 120,000 to 150,000 to remove. The permanent disability continues for life.
5. The pleadings relate to a road accident on May 27, 2021. The Respondent testified and adopted his statement filed on December 11, 2021. He still has implant in situ.

### **Appellants submissions**

6. The appellant consolidated 9 grounds of appeal into 1. The appellant raised and relied on the case of *Henry Hidayat Ilanga v Manayema Manyoka (1961) 1 EA 705 (CAD)* which applied the rule laid down by the *Privy Council in Nance v British Columbia Electric Railway Co Ltd (4) (1951) AC 601* at p 613 as follows: -

' When discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a judge, the principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a worthy erroneous estimate of the damage ( *Flint v Lovell*, (1935) 1KB 354), approved by the house of lords in *Davies v Powell Duffryn Associated Collieries Ltd*, ( 1942) AC 601.'

7. They state that there is a need to have uniformity in decision and as such place reliance on the case of *Sammy Kipkorir Kosgei v Edina Musikoye Mulinya & Another [2017] eKLR* where the court cited with approval the decision of the Court of Appeal in *Shabani -vs- City Council of Nairobi (1985) KLR 516* that: -

' There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is to have regard to recent award in comparable cases in the local courts.'

8. They urge the court to award 600,000/=. They used various authority which are attached to their submissions.

### **The Respondent's submissions**

9. The Respondent relied on the authority of the *Catholic Diocese of Kisumu vs Sophia Achieng Tete [2004] eKLR* (Tunoi, O'Kubasu & Githinji JJA) in reiterating what had earlier been held in *Kitavi v Coast Bottlers Limited [1985] 470* (Kneller JA) where it was stated as follows:

' It is the law that the assessment of 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



simply because it would have awarded a different figure if it had tried the case at the 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 represent an entirely erroneous estimate.'

10. On quantum, they rely on the decisions which I shall shortly analyze together with the Appellants authority

### **Analysis**

11. The analysis will cover three parts. This will be understanding the duty of the court, the duty as regards damages and finally analysis of evidence on record vis-à-vis the record of appeal.

### **Duty of the appellate court**

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
13. This was aptly stated in the cases of *Peters vs Sunday Post Limited [1985] EA 424* where in the court rendered itself as follows: -

' It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion.'

14. Further, I must satisfy myself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123*, this principle was enunciated thus:

' This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.'

15. In the celebrated case of *Butt v Khan {1981} KLR 470* and *Kitavi v Coastal Bottlers Ltd (1985) KLR 470*, the court had this to say: -

' Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low.'



16. This has been repeated and refined over time. In the case of *Kilda Osbourne v George Barked and Metropolitan Management Transport Holdings Ltd & another Claim No 2005 HCV 294* being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H West & Sons Ltd v Shephard (1963) 2 ALL ER 625* Sykes J stated as follows:

' The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite some time, is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.'

17. In the case of *Mbogo and Another vs Shab [1968] EA 93* where the Court of Appeal stated:

' That this Court will not interfere with the exercise of judicial discretion by an inferior court unless it 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'

18. The decision of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A M Lubia and Olive Lubia [1982 – 88] 1 KAR 727* at p 730 Kneller JA said: -

' 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 judge were held by the former Court of Appeal of Eastern Africa to be that I must be satisfied that either that 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 damage.' See also *Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003* and *Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*).

19. The words of Lord Denning in the *West (H) & Son Ltd (supra)* at page 341 on excessive awards on damages important to replicate herein thus: -

' I may add, too, that if these sums get too large, we are in damage of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national Health Service. But the health authorities cannot stand huge sums without impeding their service to the community.

The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than a fair compensation.'

20. I therefore need to look at the recent decisions related to similar cases. If the award is inordinately high then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so.



21. In the case of *Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR*, where the Court, justice H P G WAWERU gave damages of 2,000,000 for Pain, suffering and loss of amenities for Extensive compound fractures of the left tibia and fibula and extensive damage to the soft tissues of the left leg and Fractured left collarbone.
22. In the decision of *Duncan Kimathi Karagania v Ngugi David & 3 others [2016] eKLR*, the court awarded Kshs 4,000,000 where the following injuries involved were, that is, Blunt head injury with loss of consciousness for over two hours., Lacerations over the face on both sides, Comminuted fractures of the maxilla bilaterally at the Le Fort 11 level, Compound fracture of the mandible, Comminuted fracture of the right humerus, Articular region of the elbow surface of radio carpal and Multiple laceration of the hands and forearms.
23. The authorities used by the Appellant are out of range for the kind of injuries suffered. I am satisfied that the court used its discretion properly. It is not enough that I could have given a different figure, either way.
24. The case of *Elizaphen Mokaya Bogonko V Fredrick Omondi Ouna [2022] eKLR*, the court stated that the same involved head injury with loss of consciousness, Fracture of the right zygoma (facial bone), Multiple facial laceration, Blunt injury to the shoulders and Blunt injury and bruises to both lower limbs.
25. These are far less serious injuries with disability of less than 20 %.
26. The test is whether the court considered relevant evidence. The Respondent herein suffered 35% permanent disability and fractures all over the body. I am satisfied that the damages are well within the range.
27. The court stated in *James Mukatui Mavia v MA Bayusuf & Sons Limited [2013] eKLR*

' The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see McGregor on damages, 18<sup>th</sup> edition paragraph 35 – 065).'
28. In *Duncan Kimathi Karagania v Ngugi David & 3 others [2016] eKLR*, the court of Appeal held as doth: -

' It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera store, Civil Appeal No 5 of 1990* (unreported) and *Idi Ayub Sahbani v City Council of Nairobi (1982-88) IKAR 681* at page 684: 'special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs Hyde Park Hotel Limited [1948] 64 TLR 177* thus: -

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the



head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it'

29. Further, in the case of *David Bagine Vs Martin Bundi [1997] eKLR* settles what is required of special damages. The law Lords posited as follows: -

' It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M Nyambu t/a sisera store, Civil Appeal No 5 of 1990 (unreported)* and *Idi Ayub Sahbani v City Council of Nairobi (1982-88) IKAR 681 at page 684*: 'special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard CJ in *Bonham Carter vs Hyde Park Hotel Limited [1948] 64 TLR 177* thus:

Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it 'We also refer to the cases of *Ouma vs Nairobi City Council [1976] KLR 297 at page 304* and *Kenya Bus Services vs Mayende (1991) 2 KAR 232 at page 235.*'

30. I am satisfied that the special damages and future medical expenses were properly pleaded and proved.

31. The upshot is that I dismiss the Appeal with costs.

#### **Determination**

32. In the circumstances, I make the following orders: -

- a. The Appeal is bereft of merit and is therefore dismissed with costs of Kshs 215,000/= to the Respondent.
- b. The same be paid within 30 days in default execution to issue.
- c. Any money held as security be released to the Respondent, forthwith.
- d. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**DENNIS KIZITO MAGARE**

#### **JUDGE**

#### **In the presence of:**

Okoko for the Respondent

No appearance for the Respondent

**Court Assistant - Firdaus**

