



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kamotho v Car Choice Limited & another (Civil Appeal E011 of 2022)  
[2023] KEHC 21522 (KLR) (17 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21522 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E011 OF 2022  
FN MUCHEMI, J  
AUGUST 17, 2023**

**BETWEEN**

**JOHN NJUGUNA KAMOTHO ..... APPELLANT**

**AND**

**CAR CHOICE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GILBERT NDERITU GICHANGA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. M. N. Lubia  
(RM) delivered on 7th March 2022 in Nyeri CMCC No. 161 of 2020)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Nyeri Resident Magistrate in CMCC No. 161 of 2020 delivered on 7<sup>th</sup> March 2022. By consent parties apportioned liability at the ratio of 20:80 with the appellant bearing 80%. The appellant was awarded general damages of Kshs. 800,000/- for pain, suffering and loss of amenities and special damages of Kshs. 3,550/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal to the effect that the learned trial magistrate erred in law and misdirected herself as to the extent and nature of the respondent's injuries thereby assessing of damages which was manifestly low.
3. Parties put in written submissions to dispose of the appeal.

**Appellant's Submissions**

4. The appellant submitted that the learned trial magistrate did not address her mind to the injuries as pleaded in the plaint and the medical report of Dr. F. W. Muleshe. From the judgment, the learned trial magistrate cited the injuries as fractures to the left humerous, tibia and fibula and awarded Kshs.



800,000/- based on the decisions in *Akamba Public Road Services vs Abdikar Adan Galgalo* (2016) eKLR and *Florence Njoki Mwangi vs Peter Chege Mbitiru* (2014) eKLR. The appellant submits that he sustained serious injuries. The report of Dr. Muleshe and Dr. Wambugu shows the following injuries:-

- a. Left humerous – fracture of the neck of the humerous;
- b. Left tibia – fracture of the distal left tibia;
- c. Left fibula – segmental fracture of the left fibula (not femur) right femur femur showed a segmental fracture of the femur.

#### PARA 5.

The appellant further submitted that the injuries sustained in the cases relied on by the trial court are less severe than those he suffered and further that the said cases were decided upon long time ago. The appellant relies on the case of *Denshire Mateti Wambua vs Kenya Power and Lighting* (2013) eKLR and submits that the trial court overlooked the principle that that comparable injuries ought to attract comparable damages.

6. The appellant argued that he sustained four fractures and soft tissue injuries and was admitted for 12 days in hospital. He was discharged in a wheelchair. He submits that about two months later after the date of examination, he was still in a wheelchair and further the doctor could not ascertain the degree of incapacity until full recovery. The appellant further submits that he proposed an award of Kshs. 2,200,000/- and relied on the cases of *Mary Wanja Gachomba vs Jostina Adhiambo* (2021) eKLR and *Michael Njagi Karimi vs Gideon Ndungu Nguribu* (2013) eKLR which are comparable and have been decided recently. The appellant argues that the trial magistrate did not take into account the cases he cited in addition to inflation and the long period of immobilization.
7. The appellant further relied on the case of *Peter Mulanda Wanje vs Capture Transport Limited & 2 Others* (2022) eKLR and submitted that the trial court award was too low and thus deserves the interference of this court on appeal. The appellant thus submits that the award of Kshs. 2,200,000/- is reasonable and fair compensation and urges the court to award him the said amount for general damages.

#### **The Respondents' Submissions**

8. The respondents rely on the cases of *Catholic Diocese of Kisumu vs Sophia Achieng Tete* [2004] eKLR and *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] eKLR and submit that the trial magistrate did not proceed on a wrong principle as she clearly captured the injuries sustained by the appellant. Further, the respondents submitted that the trial court considered the expert medical evidence presented by the appellant and respondents' doctors namely Dr. Muleshe and Dr. Wambugu. Additionally, the trial court considered two past decisions that involved almost similar injuries then it exercised its discretion and assessed damages at Kshs. 800,000/-. The respondents submit that the two authorities cited by the appellant relate to far worse injuries.

#### **Issue for determination**

9. The main issue for determination is whether the award of Kshs. 800,000/- was inordinately low considering the injuries sustained by the plaintiff.



## The Law

10. 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.”

11. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

12. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

13. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

### **Whether the award of Kshs. 800,000/- was inordinately low**

14. 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.”

15. Similarly in *Sheikh Mustaq Hassan v 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.”

16. According to the reports of Dr. Muleshe and Dr. Wambugu, the appellant suffered the following injuries:-
  - a. Left humerus- fracture of the neck of the humerus;
  - b. Left tibia- fracture of the distal left tibia;
  - c. Left fibula- segmental fracture of the left fibula (not femur) right femur showed a segmented fracture of the right femur.
17. The trial magistrate awarded a sum of Kshs. 800,000/- for general damages for pain and suffering. The appellant submits that the said award is low and is not justifiable in comparison to the injuries he sustained. He urges the court to award a sum of Kshs. 2,200,000/- relying on the cases of Mary Wanja Gachomba vs Jostina Adhiambo (2021) eKLR; Michael Njagi Karimi vs Gideon Ndugu Nguribu (2013) eKLR and Peter Mulanda Wanje vs Capture Transport Limited & 2 Others (2022) eKLR. The respondents submit that the award given is reasonable and adequate and the authorities as cited by the appellant contain injuries which are more severe than the injuries he sustained.
18. Before the trial court, the appellant relied on the case of Mary Wanja Gachombah vs Jostina Adhiambo Ogana (2021) eKLR where the respondent sustained bruises on the scalp, chest contusion, fracture of the right humerus, deep cut wound on the left arm, cut wound on the right lower limb, fracture of the right tibia & right fibula. The appellate court upheld the award of the trial court of Kshs. 2,000,000/-. The appellant also relied on the case of Michael Njagi Karimi vs Gideon Ndungu Nguribu & Another (2013) eKLR where the plaintiff sustained bruises swelling and tenderness of the right arm and forearm and a displaced fracture of the right humerus, deformity and swelling of the right forearm and fractures of the right radius and ulna with displacement, injury to the right lower limb involving the right leg which was tender and swollen and deformed, fracture of the right tibular and fibular and swelling and deformity of the left thigh. The court awarded a sum of Kshs. 2,000,000/- as damages for pain and suffering.
19. On their part, the respondents relied on the case of Akamba Public Road Services vs Abdikadir Adan Galgalo [2016] eKLR where the respondent sustained a fracture of the right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. Further, the respondent suffered a permanent partial disability at 3%. The High Court maintained the award of Kshs. 500,000/- as general damages. The respondents also relied on the case of Florence Njoki Mwangi vs Peter Chege Mbitiru [2014] eKLR where the appellant sustained a fracture of the right mid shaft femur, fracture of the left mid shaft femur, degloving wound on the right fibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead. The High Court on appeal maintained the award of Kshs. 700,000/-.
20. Looking at the decisions relied on by both parties in the trial court and applying the principle of assessment of damages that comparable injuries ought to attract comparable damages being aware that an award of general damages is an exercise of judicial discretion for which the appellate court ought to freely and lightly interfere with, it is my considered view that the award of 800,000/- given by the court below is adequate compensation for the injuries suffered.



21. The respondents in the cases cited by the appellant sustained far more severe injuries than those suffered by the appellant herein. Furthermore, the respondent in the case of Michael Njagi Karimi vs Gideon Ndungu Nguribu (2013) eKLR underwent multiple major surgeries and was in need for future medical expenses which involved five other surgeries. Notably, the appeal that followed in the Court of Appeal, Gideon Ndungu Nguribu vs Michael Njagi Karimi [2017] eKLR court upheld the award of Kshs. 2,000,000/- taking into account the nature and extent of the injuries, the extended hospitalization and the future medical needs of the respondent. The case of Peter Mulanda Wanje vs Capture Transport Limited & 2 Others [2022] eKLR cited by the appellant also shows that the appellant suffered more severe injuries than those sustained the appellant. The appellant was in the ICU for 4 days, admitted in hospital for 21 days and underwent two surgeries. The cases cited by the respondents in my view are more comparable to the injuries sustained by the appellant herein.
22. I am of the view that the authorities relied on by the appellant had more severe injuries and that those relied on by the respondent were not far below the injuries suffered by the appellant. I have perused the medical report of Dr. Muleshe dated 2<sup>nd</sup> June 2020 which was prepared about two months after the accident. The appellant was discharged from hospital after two (2) weeks admission with a wheelchair to assist in mobility. The report of the doctor indicates that the appellant was required to go back for medical assessment of the degree of incapacity after he was fully healed. Upon perusal of the record, I did not come across a doctor's report that assessed the permanent incapacity.
23. Dr. Wambugu examined the appellant on 14/08/2020 which was about (4) months after the accident and agreed with Dr. Muleshe on the injuries suffered. By then, the PoP cast on the leg had been removed about one (1) week earlier. The plaintiff still complained of inability to walk unaided and had pains on the left shoulder upon exertion. The doctor on examination confirmed these two complaints and said that the assessment of total incapacity would be done after complete healing in the next 6-8 months. The appellant did not produce any report on the degree permanent incapacity done after the recommended period.. At the age of 62, the appellant must have suffered permanent capacity upon healing of the fractures. It is only the degree that is not known. It was upon the appellant to prove he suffered permanent incapacity and the degree of such incapacity.
24. I have noticed that the respondent's authorities relied on were comparable but were of the years 2014 and 2016 whilst the judgement was delivered in 2022. The factors of inflation for about 6-8 years was not taken into consideration during the assessment of damages. This was a factor that ought to have been considered.
25. In conclusion, I hereby set aside the award of the learned magistrate and award the appellant Kshs.1,000,000/- for pain and suffering. The award of special damages of Kshs.3,550/- remains undisturbed. The ration of 80:20 shall be accordingly applied.
26. The following sums shall abide in this appeal.  
Kshs.
  - a. General damages 1,000,000  
Less 20% contribution 200,000  
800,000
  - b. Special damages 3,550  
Total 803,550
27. This appeal is accordingly allowed.



28. The appellant is awarded the costs of this appeal.

29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 17th day of August 2023.

