



**Muthamia v James (Civil Appeal E156 of 2021)  
[2023] KEHC 26137 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26137 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E156 OF 2021  
EM MURIITHI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JONAH KIRIMI MUTHAMIA ..... APPELLANT**

**AND**

**DAVID KIMATHI JAMES ..... RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. R.  
Ongira (RM) on 19/10/2021 at Tigania PMCC No. 70 of 2020)*

**JUDGMENT**

1. By a plaint dated 15/7/2020, the Respondent sued the Appellant seeking special damages, general damages, cost of this suit and interest at court rate. He pleaded that on or about 16/1/2020, he was a lawful fare paying passenger aboard Motor Vehicle Registration No. KCQ 963P travelling along Meru-Maua road at Thangarine area, when the driver of the said motor vehicle while in the course of his employment so negligently, carelessly and/or recklessly drove, managed and/or controlled it that it overturned occasioning him serious injuries.
2. The Appellant denied the claim by his statement of defence dated 17/8/2020 and prayed for the Respondent's suit to be dismissed.
3. Upon full hearing of the case, the trial court found the Appellant to have 100% liable and awarded general damages of Ksh. 700,000 and special damages of Ksh. 5,000.

**The Appeal**

4. On appeal, the Appellant filed his memorandum of appeal raising 5 grounds as follows:
  1. The learned magistrate erred in law and fact in finding that the plaintiff/respondent had proved their case on the weight of the medical evidence adduced.



2. The learned magistrate erred in law and fact in finding that the plaintiff/respondent had proved the injuries sustained on a balance of probabilities.
3. The learned magistrate erred in law and fact in awarding Kshs 700,000 General damages for the injuries sustained.
4. The learned magistrate erred in law and fact by awarding general damages that were exorbitant and inordinately high without regard to the laid down principles without giving any legal basis for the stated sum.
5. The learned trial magistrate erred in law and fact in failing to consider conventional awards in cases of similar nature.

### **The Cross Appeal**

5. The Respondent filed a cross appeal on 22/6/2022 on grounds that:
  1. The Learned Trial Magistrate erred in law and fact in her assessment of both general and special damages.
  2. The award of general damages by the Learned Trial Magistrate was too low under the circumstances of this case.

### **Duty of the Court**

6. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

### **Evidence**

7. PW1 James Kimathi David, a pastor and the Respondent herein produced the demand letter dated 27/02/2020, copy of motor vehicle records from NTSA, police abstract, P3 form, treatment card Nyambene hospital, X-ray request form - Fortis hospital, receipt for payment of x-ray for Kshs. 9,000, medical report from Nairobi hospital, medical report dated 5/07/2020 by Dr. Wambugu, receipt by Dr. Wambugu for medical report, outpatient invoice from Nairobi Women's hospital and final invoice from Nairobi hospital for Kshs. 205,535 as exhibits in court. He testified that, "On 16/01/2020 I was going for a meeting in Imenti south and I took a matatu and when I reached a place called Thangarine I don't know what happened but the vehicle got an accident. Motor vehicle is KCQ 963 P. Toyota horse. I was a passenger abode the said motor vehicle and I was unconscious and I was rushed to St. Johns and later I was rushed to Nairobi women. I recorded all these in my statement dated 08/07/2020 and filed on 21/07/2021 which the court can adopt as evidence in chief."
8. On cross examination, he stated that, "I cannot say what caused the accident. I was seated at the back seat. After first aid I was told that the matatu hit someone when it turned. I don't have my ID before court today. I recorded my statement at the police after being discharged from the hospital. I was admitted for about 5 days at Nairobi women hospital. I sustained injuries on the head as there were shattered glasses. There was a fracture of the clerical bone. There's a rectal on the clerical bone. As per Pexh 5 I was Nyambene hospital but I cannot recall but the same was for writing p3 form. The medical bill was paid via insurance. There are amounts of money we paid cash for. Yes I lost an Ipad phone on the accident but I was not given an abstract. I don't know if the lost items were noted in the OB. There's



- nothing to show I had the said items. I have not produced receipts for the lost items. I cannot say what caused the accident. I sued the defendant as he had a duty to ensure I reached where I was going safely.”
9. On re-examination, he stated that, “I shed the driver of the vehicle. At the hospital I paid some bills. The vehicle did not collide with another vehicle. The driver is to blame for the accident.”
  10. PW2 Dr. Paul Wambuga, a medical officer at Githongo sub-district hospital produced the Respondent’s medical report dated 5/7/2020 together with the receipt as exhibits in court. He testified that the patient was involved in a road traffic accident on 16/1/2020 and admitted in hospital. The patient sustained scalp wound, a right clerical fracture and he was managed as an inpatient in theater with clavicular plating on 17/01/2020. There was a removal of a shrapnel in situ in the skull together with slashing and cleaning. At the time of examination, the patient was still doing follow up on orthopedic clinic.
  11. On cross examination, he stated that, “I examined patient on 05/07/2020 approximately 5 months after the accident. Injuries cut on the scalp and fracture of the right clerical. We recommended he attends orthopedic clinic. There are no expenses to be incurred in the future. Physiotherapy was to better quality of life but not mandatory. Plaintiff at the time of examination attended my clinic on 06/07/2020.”
  12. PW3 C.I Stanly Koech, and the investigating officer testified that, “On 16/01/2020 at about 1330 hours while at Muthara police station we received information of a road traffic accident at Thangarine area along Meru-Maua road. I and other officers proceeded to the scene of the accident. On reaching there we found that the accident involved motor vehicle reg KCQ 963 P Toyota PSV driven by Jonah Kirimi Muthamia from Maua general direction toward Meru. We found a lifeless body of a fatally injured pedestrian who was lying near left edge of the road as you face Meru direction from Maua side. We also found the PSV Matatu had rolled severally and landed on its right side or offside in a manner that was perpendicular to the said right edge of the road. We found out that a number of passengers or occupants had sustained injuries of varying degrees and they were rushed to various hospitals within Meru. One of the victims who was occupant of PSV Matatu was one David Kimathi who sustained serious injuries as per P3 form. We took the necessary action and did a sketch of the scene, identified witnesses. Looked at the road as it was, sketched the scene before we moved the deceased body to the mortuary to await action and we turned motor vehicle to Muthara police station to await inspection by motor vehicle inspector. I have the police abstract and the sketch map of the scene and a copy of the P3 form. The said motor vehicle was damaged almost extensively and victims who were passengers had been rushed to different hospitals including Muthara sub-county hospital and St. John of God Mission Hospital for treatment. We conducted a follow up to ascertain state of victims. We also recorded statement and compiled police file for further necessary action. Yes David James Kimathi was among the passengers in the PSV Matatu who sustained injuries. He was first rushed to St. Johns of God for treatment before being referred to Nairobi Womens’ Hospital Meru where he was admitted for some 5 days. I wish to produce the 2 exhibits for court record. Police Abstract – P exb 3.”
  13. On cross examination, he stated that, “The lifeless body was almost on the left edge of the road. The vehicle was found a few meters from deceased body on the right edge of the road lying perpendicular to the right side of the road. The accident was between PSV Matatu and a pedestrian who was crossing from the right side to the left side as you face Meru direction from Maua side. The point of impact, the pedestrian was hit by the front offside of the motor vehicle. Vehicle was headed to Meru from Maua and it was being driven on its left lane. Point of impact was almost at the center of the road. The pedestrian was crossing from the right to left then all of a sudden he returned to the right side where he came from. I did not apportioning move blame to either party and I blamed both of them equally. There was no Zebra crossing at the point of impact. We opened an inquiry into the matter and exercised discretion



and did not charge the driver. The point of impact was near the middle of the road from the left side. The side of the motor vehicle that hit the pedestrian was the front near side of the motor vehicle i.e the front left side. Investigations were concluded and as per our investigations the finding was that the accident occurred after the pedestrian crossed the road, was hit and so the PSV Matatu lost control and accident occurred.”

14. DW1 Jonah Kirimi Muthamia, the Appellant herein and a driver adopted his statement as his evidence in chief. He went on to testify that, “I was from Maua and was headed to Meru when someone came on the road from right crossing to the left. The person was hanging from a lorry. Lorry was from Meru and headed to Maua. The person crossed the road so I tried avoiding him but I hit him. 2 other people were with the said pedestrian but they did not cross. I hit the guard rail while avoiding to hit the pedestrian. I blame the pedestrian for the accident. I was carrying passengers at the time and they were taken to the hospital for treatment.”
15. On cross examination, he stated that, “I was driving motor vehicle reg KCQ 963 P and I am the owner of the said motor vehicle. Plaintiff was in the vehicle though I don’t know all passengers. I was from Maua heading to Meru. I saw the pedestrian at about 10 meters and I tried avoiding him and he crossed the yellow line and I hit the guard rail. If I was driving driving at a high speed I would have killed the 3 people. I was driving at 70km/h. the passengers were not at fault. It’s the pedestrian who was at fault.”
16. On re-examination, he stated that, “I was driving at a slow speed. The accident was caused by the deceased pedestrian and I did everything to avoid the accident. I hit pedestrian on the left side. I blame the pedestrian.”

### Submissions

17. The Appellant urges that the awards of general damages must be within consistent limits, and cites *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* (2013) eKLR, *Kigaraari v Aya* (1982-88) 1 KAR 768, *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* (2019) eKLR and *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* (2019) eKLR. He urges that since the Respondent sustained a single fracture of the distal 1/3 of the right clavicle and soft tissue injuries, an award of Ksh. 300,000 would have sufficed, and prays for the appeal to be allowed.
18. The Respondent urges that the trial court’s decision on liability is sound and correct. He urges that he suffered serious injuries as evidenced in the P3 form, which attracts an award of Ksh.1,000,000 as general damages due to the rate of inflation, and cites *Penina Waitbira Kaburu v LP* (2019) eKLR. He urges that he produced a bundle of receipts in support of his claim for special damages, and cites *National Social Security Fund Board of Trustees v Sifa International Limited* (2016) eKLR. He urges the court to dismiss the appeal with costs, and cites *Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others* (2014) eKLR.

### Analysis and Determination

19. From the grounds of appeal and the cross appeal, the 2 issues that isolate themselves for determination are whether the Respondent proved his case on a balance of probabilities and whether the award of general damages of Ksh. 700,000 was low.

### Proof of the case

20. The evidence on record is that the Respondent was travelling aboard the accident motor vehicle which was being driven by the Appellant, when the accident occurred. The Appellant’s admission that the Respondent and the other passengers were not to blame for the accident, points towards his negligence,



and the inference this court draws is that the Appellant, being the driver of the accident motor vehicle, owed a duty of care to the passengers to ensure they arrived at their destination safely. The fact that he did not swerve or apply brakes in order to avoid the accident can only be construed to mean that he was reckless and driving at a high speed in the circumstances. This court therefore finds that the trial court's holding that the Appellant was 100% liable for the accident is beyond reproach.

### **Award of Damages**

21. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR 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. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470)”

22. The trial court awarded the Respondent general damages of Ksh. 700,000, which he feels is on the lower side. The injuries sustained by the Respondent are particularized in the plaint as a fracture of the Distal 1/3 of the right clavicle with displacement of the distal segment, scalp injury, injury on the knee joints and pains all over the body.
23. The Respondent told the court that he was admitted for about 5 days at Nairobi women's hospital after sustaining injuries on the head and a fracture of the clerical bone.
24. PW2 testified that when he examined the Respondent on 5/7/2020, he was still doing follow up on orthopedic clinic. On cross examination, he stated that, “I examined patient on 05/07/2020 approximately 5 months after the accident. There are no expenses to be incurred in the future. Physiotherapy was to better quality of life but not mandatory.”
25. There is no contestation from the evidence on record that the Respondent's injuries were majorly soft tissue in nature save for a single fracture of the clerical bone.
26. This court finds that the award of general damages of Ksh.700,000, in view of the principle that comparable injuries should attract comparable damages, was a proper estimate of the pain suffered by the Appellant as a result of the injuries he sustained.

### **Orders**

27. Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.
28. The Cross-appeal is dismissed.
29. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**



**EDWARD M. MURIITHI**  
**JUDGE**

