



**Kariuki & another v Kabiru & 2 others (Civil Appeal 20 of 2017)  
[2022] KEHC 10812 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10812 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL 20 OF 2017  
CM KARIUKI, J  
MAY 26, 2022  
FORMERLY NAKURU CIVIL APPEAL NO. 23 OF 2015**

**BETWEEN**

**ELICANER MBUGUA KARIUKI ..... 1<sup>ST</sup> APPLICANT  
DUNCAN NGANGA NGUNJIRI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN THIGA KABIRU ..... 1<sup>ST</sup> RESPONDENT  
KENNEDY GATHAGE NJUGUNA ..... 2<sup>ND</sup> RESPONDENT  
HENRY WAWERU MBURU ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgment delivered on 27<sup>th</sup> January, 2015 in Nyahururu PMCC No. 224 of 2011 whereby it was found for the plaintiff and against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants at 50:50% liability and an award of Ksh. 400,000 in general damages and Kshs. 6,920 in special damages award.
2. The background of the matter is that on 17<sup>th</sup> January 2011, the plaintiff allegedly sustained injuries as he rode in motor vehicle KBB 270K along Olkalou/Nyahururu road as a result of a collision with motor vehicle KAQ 890C.
3. Being aggrieved by the aforementioned judgment, the Appellant herein instituted this Appeal dated 27<sup>th</sup> February, 2015.



## Grounds For Appeal

- i. That the Learned trial Magistrate erred in law and in fact in proceeding to deliver a determination on liability whereas he had directed that he would stay delivery of judgment pending determination of the Appeal in Nakuru HCCA No. 59 of 2022 which was the lead file on the issue of liability.
- ii. That the learned trial Magistrate erred in fact and in law in awarding excessive General Damages to the Respondent which in the circumstances were unfair and unjust
- iii. That the learned Magistrate erred in law and in fact in failing to take into consideration the submissions of the appellants on quantum
- iv. That the Learned Magistrate erred in fact and in law in failing to consider conventional awards on General damages in similar and or related cases by superior court (s) of law.

## Applicant's Case And Submissions:

4. This appeal is hinged on the fact that the lead filed in the lower court is on Appeal as well. In the lead file which is Nakuru Civil Suit No. 59 of 2011, appeal was preferred against the finding of 50% liability. The appeal is Nakuru HCCA 7 of 2014 – Elicaner Mbugua Kariuki and Duncan Nganga Ngunjiri versus Joyce Nyambura Mwangi & 2 others.
5. Being the lead file in the aspect of liability the trial Magistrate ought to have waited for liability determination in this matter before pronouncing judgment in trial court.
6. Thus this court is urged to set aside the judgment rendered by the trial Magistrate and in doing so, allow the lead file to run its course as it shall determine the main issue of liability.
7. He appellant submit that judgment of the trial Magistrate was premature and they jumped the gun in this matter.
8. The liability was determined in Nakuru Civil Suit 59 of 2011. This was not the Appeal. The appeal is Nakuru HCCA 7 of 2014.
9. That the Memorandum of Appeal was erroneously cited “the Appeal in Nakuru HCCA 59 of 2011” instead of Nakuru Civil suit 59 of 2011 which would be the correct.
10. That it is trite law that costs follow the event. The Appellants pray for costs of this Appeal based in Section 27(1) of the [Civil Procedure Act](#)

## Respondent Case And Submissions:

11. The Respondent submitted that the learned Trial Magistrate erred in both law and in fact proceeding to deliver a determination on liability whereas he had directed that he would stay delivery of the judgment pending determination of the Appeal in Nakuru HCCA No. 59 of 2011 which was the lead file on the issue of liability.
12. The Respondents brought the suit against the Applicants seeking compensation for the injuries they sustained as a result of the accident that occurred on 17<sup>th</sup> January 2011. The matters proceeded and a lead file was selected for purposes of determining liability.
13. That the trial court determined liability at 50:50 however, the defendant in the lead file being aggrieved by the said decision filed an appeal against the judgement on liability.



14. The Appeal was determined and the issue of liability determined before the judgment in the matter that forms basis for this appeal was delivered. The Appeal court upheld the judgment on liability at 50:50 against the 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> Defendants/Appellants herein.
15. That the parties confirmed to court that the court had determined the issue of liability in HCCA 59 of 2011 before the matter forming basis for this appeal proceeded to hearing on quantum.
16. That also the 1<sup>st</sup> defendant was withdrawn in accordance with the decision of the appellate court in HCCA 59 of 2011.
17. That the trial court in its judgment notes on record of appeal stated that liability had been apportioned at 50% to 50% against the 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> Defendants which was the position the appeal arising from the lead file.
18. That the respondents submit that the appeal on liability is misplaced, does not have any merit, a waste of the courts time and therefore pray that the appeal be found to lack merit and the same be dismissed with costs to the Respondents.
19. That as a result of the accident the Respondent sustained the following injuries.
  - i. Fracture of the left tibia
  - ii. Deep cut wound on the left leg
  - iii. Soft tissue injuries of the right leg
  - iv. Bruises on the forehead.
20. The respondent confirmed these injuries in his testimony at the trial court as recorded at page 40 of the record of Appeal. He stated that he had not healed from the injuries as he feels pain on the left leg. The injuries were equally confirmed by Dr. Kiamba in his medical report the P3 form and the discharge summary form Olkalou Hospital.
21. From Dr. Kiamba's medical report he made the following opinion.

“John Thiga Kabiru sustained fracture of the left tibia, deep cut wound on the left leg, soft tissue injuries of the right leg and bruises on the forehead during the accident. The wound healed with a permanent scar. Although the fracture of the left tibia has united, he suffers from pain and swelling of the left ankle joint and pain in the left leg. I classify the degree of injury as “grievous harm” he should be awarded a temporary disability of five months and a permanent disability of ten percent (10%).
22. The trial court from its judgment notes at page 22 and 23 of the record of appeal noted the injuries sustained by the Respondent and the documents supporting the same. Trial court also considered the submission by both parties on quantum before giving its award.
23. At page 23 of the record of appeal the trial court in its judgment notes noted:

“... the injuries were not disputed by the defendant. The plaintiff in their submissions submitted that a sum of Kshs. 1,000,000/= general damages would be adequate compensation. They were guided by the case of Margaret Achieng Opiyo v Matiku Kyengo T/A Taifa Express and Another HCCC No. 530 of 1995 which I have considered. The Defendant on the other hand has submitted for Kshs. 180,000/= general damages to be



adequate compensation relying on the authority of *Kroma Musa versus Mapus Pall & another* NRB HCCC No. 5285 of 1992.

24. The trial court stated that it had considered the injuries sustained, the authorities cited by both parties and their submissions and considering the lapse in time since the authorities were cited do find that a sum of Ksh. 400,000/= would be adequate compensation in the circumstance.
25. It is respondent submission that the award of general damages by the trial court was not excessive as claimed by the Appellant's but reasonable and within range of the awards made for similar injuries and therefore pray that this court finds the appeal on quantum unmeritorious and that this appeal be dismissed with costs of the Respondent.
26. On the case of *Dickson Kariuki Nyaga & another v Emma Mbandi Nyaga* [2015]eKLR where the trial court on 21/2/2013 awarded to a person who had sustained injuries of the fracture of the tibia and multiple soft tissue injuries Ksh. 600,000/= as general damages however, upon appeal the appellate court awarded Ksh. 400,000 as reasonable general damages.
27. The position on when a court can interfere with the award of damages was held in the case of *Tridev Construction v Charles Wekesa Kasembeli* [2005] eKLR and it was stated as follows:

“The award of general damages is discretion of the trial court. An appellate court will be slow to interfere with the exercise of discretion. Unless on justifiable legal reasons. Several cases support this position.
28. It will suffice if I cite the case of *Stanely Maore v Geoffrey Mwenda* Nyeri Civil Appeal No. 147 of 2002 – in which the court of Appeal stated that the general method for assessment of general damages should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct awards in similar cases.
29. The court of Appeal went further to reiterate the principles to be observed by appellate courts for disturbing the quantum of damages as enunciated in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.m. Lubia And Olive Lubia* (1982-99)L KAR 727 at page 730 where Kneller J A 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 it must be satisfied that either the Judge, in assessing 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 damages”.
30. It is submitted that the trial court had discretion in awarding the said amount and that an appellate court should be slow to interfere with that exercise of this discretion unless on justifiable legal reasons. It and that the Appellant's have not raised such justifiable legal reason hence the award should not be disturbed.

### **Issues, Analysis and Determination**

31. After going through pleadings, proceedings and parties submissions I find the issues are; whether the liability in cmcc no 59 of 2011 Nakuru was properly adopted in the cmcc 224 of 2011 Nakuru without waiting lead file above determination on liability? Was award in general damages excessive? What is the order as to costs?



32. On ground one the appellant complains that, trial Magistrate erred in law and in fact in proceeding to deliver a determination on liability whereas he had directed that he would stay delivery of judgment pending determination of the Appeal in Nakuru HCCA No. 59 of 2022 which was the lead file on the issue of liability.
33. The record shows that the lead file Cmcc 59 of 2011 determined liability at 50:50 however, the defendant in the lead file being aggrieved by the said decision filed an appeal against the judgement on liability HCCa no 7 of 2014.
34. The respondent submits that the Appeal was determined and the issue of liability determined before the judgment in the matter that forms basis for this appeal was delivered. The Appeal court upheld the judgment on liability at 50:50 against the 2nd 3rd and 5th Defendants/Appellants herein. Though no record is produced, the appellants have not denied the aforesaid.
35. That the parties confirmed to court that the court had determined the issue of liability in lead file cmcc 59 of 2011 before the matter forming basis for this appeal proceeded to hearing on quantum.
36. During trial of file giving rise to the instant appeal parties were represented and no objection was raised to the hearing nor was stay of proceedings sought to await appeal thus this court finds no merit in the ground.
37. On quantum, the complaint is that file That the learned trial Magistrate erred in fact and in law in awarding excessive General Damages to the Respondent which in the circumstances were unfair and unjust.
38. The trial court from its judgment notes at page 22 and 23 of the record of appeal noted the injuries sustained by the Respondent and the documents supporting the same. Trial court also considered the submission by both parties on quantum before giving its award.
39. At page 23 of the record of appeal the trial court in its judgment notes noted:that “... the injuries were not disputed by the defendant. The plaintiff in their submissions submitted that a sum of Kshs. 1,000,000/= general damages would be adequate compensation. They were guided by the case of *Margaret Achieng Opiyo v Matiku Kyengo T/A Taifa Express and Another* HCCC No. 530 of 1995 which I have considered. The Defendant on the other hand has submitted for Kshs. 180,000/= general damages to be adequate compensation relying on the authority of *Kroma Musa v Mapus Pall & another* Nrb HCCC NO. 5285 of 1992.
40. The trial court stated that it had considered the injuries sustained, the authorities cited by both parties and their submissions and considering the lapse in time since the authorities were sited do find that a sum of Ksh. 400,000/= would be adequate compensation in the circumstance.
41. This court finds that the award of general damages by the trial court was not excessive as claimed by the Appellant’s but reasonable and within range of the awards made for similar injuries thus the appeal the appeal on quantum is unmeritorious. The court is guided by the case of *Dickson Kariuki Nyaga & another v Emma Mbandi Nyaga* [2015]eKLR where the trial court on 21/2/2013 awarded to a person who had sustained injuries of the fracture of the tibia and multiple soft tissue injuries Ksh. 600,000/= as general damages however, upon appeal the appellate court awarded Ksh. 400,000 as reasonable general damages.
42. In the case of *Stanely Maore v Geoffrey Mwenda* Nyeri Civil Appeal No. 147 of 2002 – in which the court of Appeal stated that the general method for assessment of general damages should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct awards in similar cases.



43. The court of Appeal went further to reiterate the principles to be observed by appellate courts for disturbing the quantum of damages as enunciated in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.m. Lubia And Olive Lubia* (1982-99)L KAR 727 at page 730 where Kneller J A 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 it must be satisfied that either the Judge, in assessing 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 damages”.

44. Thus the court makes the orders that;

- i. The appeal is dismissed.
- ii. Costs to the respondent.

**DATED AND SIGNED AT NYAHURURU THIS 26TH. DAY OFMAY, 2022.**

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**CHARLES KARIUKI**

**JUDGE**

