



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kalunge v Gitonga (Civil Appeal E031 of 2021)  
[2022] KEHC 10136 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E031 OF 2021  
TW CHERERE, J  
JUNE 30, 2022**

**BETWEEN**

**STANLEY KALUNGE ..... APPELLANT**

**AND**

**RONALD JALIE GITONGA ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Meru CMCC No.  
99 of 2018 by Hon. M.A.Odhiambo (RM) on 28th January, 2021)*

**JUDGMENT**

1. By a plaint amended on 25<sup>th</sup> June, 2019, Appellant pleaded that on 13<sup>th</sup> June, 2017, he was travelling along Meru-Maua Road in motor vehicle KCL 789H (accident motor vehicle) owned by Respondent which was negligently driven that it veered off the road as a result of which he suffered injuries.
2. Respondent by his statement of Defence filed on 28<sup>th</sup> September, 2019 denied the claim and pleaded that the accident was caused by an act of God.

**The trial**

3. Appellant testified that the accident occurred after the driver lost its control as a result of which it overturned. That the accident was self-involving and that the vehicle overturned was confirmed by the investigating officer PW2 PC Daniel Chacha. No evidence was tendered in defence.
4. At the conclusion of the trial, the learned trial magistrate entered judgment on liability at 100% against Respondent and proceeded to award damages as follows:
  1. General damages Kshs. 1,000,000/-
  2. Special damages Kshs. 799,314/-



3. Costs of the suit
4. Interest

### **The Appeal**

5. Appellant was dissatisfied with the lower court's decision on quantum contending that it is inordinately low considering the injuries sustained whereas Respondent on the other hand contended that the award is inordinately excessive.

### **Analysis and Determination**

6. I have considered the evidence at the trial and the submissions and the authorities cited by counsel on behalf the parties.
7. Appellant was treated as an inpatient for 6 days. A medical report by Dr. Nicholas Koome dated 25.01.2018 reveals that Appellant suffered:
  - i. Brain contusion with loss of consciousness for 2 hours and disorientation for 4 days
  - ii. Soft tissue injuries anterior chest
  - iii. Soft tissue injuries left shoulder
  - iv. Let acetabulum fracture with posterior hip dislocation
8. As at the time of examination which was 6 months after the accident, Appellant had a post-surgical left gluteal scar left foot drop due to injury on deep peroneal nerve, was walking with aid of a walking stick, loss of sensation over the lateral of left shin and dorsal aspect of the foot, could not walk long distances and complained of erectile dysfunction. The degree of permanent incapacity was assessed at 20% and assessed cost of removal of implant in situ at Kshs. 100,000/-. Dr. Macharia's report dated 15.11.2019 noted that Appellant suffered tenderness over chest and lower spine (lumbar) and fracture of superior posterior left acetabulum (hip socket). At the time of examination which was 2 years and 5 months after the accident, Appellant was walking with a slight limp on left lower limb and the leg was shortened, there was reduced dorsi-flexion on left foot at the ankle with reduced sensation on left calf and there were surgical scars on lateral aspect of left hip. He noted that the fracture was fixed with total hip replacement with plate and screws, he had severe osteoarthritis, had left perineal nerve affection manifested by reduced dorsi-flexion and educed sensation.
9. At the hearing, Appellant prayed for Kshs. 3,000,000 and cited *John Kibicho Thirima v Emmanuel Parsmei Mkoitiko* [2017] eKLR where the Court awarded general damages at Kshs. 1,800, 000/- for the following injuries;
  - i. Multiple fractures of ribs of the 2<sup>nd</sup> to 5<sup>th</sup> ribs of the chest.
  - ii. Fracture of the right ulna bone.
  - iii. Displaced and comminute fracture of the right mandible.
  - iv. Fracture of right superior and inferior pubic ramus of the pelvis bone.
  - v. Fracture of the left scapula.
  - vi. Fracture of left superior pubic ramus of the pubic bone.
  - vii. Multiple lacerations and cut wounds on the right forearm and both legs.



- viii. Cut wounds on the head.
  - ix. Contusion of the chest.
  - x. Blood loss, physical and psychological pains.
  - xi. 35% permanent incapacity
10. Respondent offered Kshs. 500,000/- and placed reliance on
- a. *Dr. Harish Cunilal Shab vs. Richard Kipkoech Sang & Another* [2004] eKLR where the Plaintiff was awarded Kshs. 150,000/- on 20 May 2004 for loss consciousness, having suffered cerebral concussion, laceration of the forehead, fracture of four ribs on the left side of his chest, as well as fracture of the acetabulum of the left hip joint. He as General Damages for his injuries.
  - b. *Lilian Wanja v Cyprian Mugendi Igonga & 2 others* [2016] eKLR where the Plaintiff was awarded Kshs. 500,000/- on 01.09.2016 for a fracture of the pelvis, a dislocation of the hip and multiple soft tissue injuries to the face, chest, the right wrist and elbows
  - c. *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR where the court on appeal reduced damages for 2<sup>nd</sup> Respondent who suffered deep cut wound on the left ear lobe, tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left forearm, fracture of the left tibia and fibula and dislocation on the left hip joint to Kshs. 450,000/.
11. The learned trial magistrate found that the authority cited by Appellant related to more serious injuries and awarded Kshs. 1,000,000/- in general damages.
12. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that the court's decision is clearly wrong, because the court 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) EA93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor, No. 2* [1985] KLR 30).
13. 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).
14. Concerning assessment of damages, Kneller JA in *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. vs Lubia & Anor*, (supra) at page 35 stated as follows:
- “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 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.”



15. I have considered relied on *Geoffrey Maraka Kimchong v Frechiah Hugiru* [2020] eKLR that the learned trial magistrate relied upon and I note that the sum of Kshs. 1,000,000/- was awarded for:
- (a) Cut wound on the cheek which was tender.
  - (b) Blunt trauma to the pelvis which was tender.
  - (c) Fracture of the right acetabulum.
16. Appellant suffered more serious injuries than those in *Geoffrey Maraka Kimchong v Frechiah Hugiru* (Supra) and I find that an award of Kshs. 1,000,000/- is in the circumstances low considering the injuries sustained.
17. In the result, the appeal succeeds. It is hereby ordered that the award for general damages in Meru CMCC No. 99 of 2018 dated 28<sup>th</sup> January, 2021 be and is hereby set aside and substituted with Judgment in the Appellant's favour for:
- a. Kshs. 1,700,000/- being General Damages
  - b. Special Damages remain as awarded by the trial court
  - c. Interest at court rates from the date of the lower court judgment
  - d. Costs of both the lower court suit and this appeal.

**DATED AT MERU THIS 30<sup>TH</sup> DAY OF JUNE 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

**Court Assistant - Morris Kinoti**

For Appellant - Ms. Kimotho for Gichunge Muthuri & Co. Advocates

For Respondent - Mr. Kirimi for Mithega & Kariuki Advocates

