



**Mohammed v Kumbi (Civil Appeal E039 of 2021)  
[2022] KEHC 13199 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13199 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E039 OF 2021**

**RK LIMO, J**

**SEPTEMBER 28, 2022**

**BETWEEN**

**HALIMA DAHIYA MOHAMMED ..... APPELLANT**

**AND**

**GALGALLO WAKO KUMBI ..... RESPONDENT**

*(Being an Appeal that arose from the Judgement of Hon. M. Onkoba –  
Principal Magistrate in Mwingi CM’S Court CMCC No. 139 of 2018)*

**JUDGMENT**

1. This appeal arose from the judgement of Hon M Onkoba, Principal Magistrate in Mwingi Chief Magistrate’s Court Civil Case No 139 of 2018. In that case, the cause of action arose from a traffic road accident which occurred on January 2, 2018 along Mwingi – Thika road at Kinginga road involving a motor vehicle registration No KBT 043Z in which the respondent was travelling as a passenger. The respondent averred that the appellant and/or her authorized driver recklessly and carelessly drove the said motor vehicle and as a consequence he sustained serious injuries from the accident.
2. In response the appellant filed a defence dated January 7, 2019 and denied that any accident occurred and that if there was any such accident, the occurrence was solely caused and/or substantially contributed to by the respondent’s own negligence.
3. After hearing the parties, the learned trial magistrate held that he had no reason to doubt the respondent’s version of how the accident occurred essentially apportioning 100% liability for the accident to appellant. The court proceeded to grant damages in favour of the respondent as follows; Kshs 400,000 as general damages for pain and suffering, and Kshs 5,650 for special damages totaling to Kshs 405,650. The respondent was also awarded costs of the suit and interest at courts rates from the date of the judgement.



4. The appellant aggrieved, filed this appeal *vide* a memorandum of appeal dated June 25, 2021 on July 1, 2021 raising the following grounds;
  - i. The learned magistrate erred in fact and in law in finding that the respondent was entitled to general damages of Kshs 400,000.
  - ii. The learned magistrate erred in fact and in law in finding that the respondent was entitled to general damages that were too high in view of the evidence tendered. The same was too high and the same as not justified.
  - iii. The learned magistrate erred in fact and in law in failing to consider the appellant's evidence on quantum.
  - iv. The learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
5. In her written submissions through counsel, the appellant faults the trial court's decision on quantum and submits the trial court considered injuries that were not listed in the initial treatments notes from Mwingi District Hospital. The appellant contends that the medical report of Dr Simeon Kioko should not have been taken into account because it was prepared 7 months after the accident.
6. She submits that the trial court should have gone by the injuries reflected on the initial treatment chit which were a cut on the forehead and dislocation of the shoulder. She contends that the medical report exasperated the injuries suffered by the respondent.
7. She cited the case of *Timsales Ltd v Wilson Libuywa (2008) eKLR* where the court found that the respondent had failed to prove the injuries he claimed to have sustained. The court found that evidence tabled in form of a medical report from a doctor whom it was alleged to have examined the respondent was a forgery. The court also found that a medical report from a doctor who examined injuries much later after an accident without the initial treatment notes was of little value to a court.
8. The appellant submits that Kshs 250,000/- is sufficient compensation for injuries sustained by the respondent and she has relied on the following cases;
  - a. *Veronicah Mkanjala Mnyapara v Patrick Nyasinga Ameyya (2021) eKLR* where general damages were awarded at Kshs 300,000/- for the following injuries contusion to the head, chest contusion, bruises on both hands, dislocation of the left hip joint and bruises on both legs
  - b. *Coast Broadway Co Ltd v Elizabeth Alaka Achebi (2015) eKLR* where the court upheld an award of general damages at Kshs 300,000/- for a dislocated right shoulder and bruises on the respondent's right knee.
  - c. *Patrick Kinoti Miguna v Peter Mburunga G. Muthamia (2014) eKLR* where the respondent was awarded general damages at Kshs 300,000/- for the following injuries bruises on the right parietal region, two loose incisors, dislocation of the right shoulder which was determined would result to post traumatic arthritis, cut on the left leg and bruises on the right leg and right hand
  - d. *Peter Muchiri Njuguna v David Njuguna Muruiri (2020) eKLR* where the appellant was awarded general damages at Kshs 250,000/- for a dislocation of the left metatarsal bone.
9. The respondent has opposed this appeal and has asked this court to uphold the award given by the trial court arguing that the award was not inordinately high to justify intervention by this court.



10. On the question of injuries, the respondent submits that he sustained the following injuries;
  - a. Pain tenderness and cut wound on the forehead with active bleeding
  - b. Edematous formation over the forehead
  - c. Pain and tenderness and cut wound over the right shoulder
  - d. Dislocation of the right shoulder joint.
11. He has also relied on PW1 Dr Simeon Muli's testimony and medical report dated August 31, 2018 which contained the aforementioned injuries together with a P3 form dated July 20, 2018 which categorized his injuries as maim.
12. On comparative authorities, the respondent has relied on the following cases;
  - a. *Mbugua Elizabeth & Anor v Colleta Imbosa Mukanzi (2017) eKLR* where the court maintained an award of general damages of Kshs 250,000/- for a fracture of the glenoid bone at the right shoulder, dislocation of the right acromion, clavicular joint and soft tissue injuries
  - b. *Agility Logistics Limited v John Wambua Musau & Another (2017) eKLR* where the court set aside an award of Kshs 700,000 as general damages and substituted it with Kshs 500,000 for bruises on the face, tenderness over the chest and left shoulder dislocation fracture.
13. This being a first appeal, the duty of the first appellant court was well stated in *Selle v Associated Motor Boat Co. [1968] EA 123* where the Court of Appeal stated: -
 

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
14. This appeal is basically on quantum and the only issue for determination is whether the award given was justified in view of the injuries suffered. It must be noted that the assessment of damages is a discretionary matter and this court as an appellate court is slow in interfering with an exercise of discretion unless it is demonstrated that the award is excessive or too high as to reflect unjustified estimate.
15. In assessment of damages, the determining factor is the nature of injuries and the principle applied that similar injuries should attract similar awards and this is where past decisions or authorities from other courts come in.
16. In the plaint dated November 1, 2018, the respondent particularized his injuries as follows;
  - a. Pain, tenderness and cut wound over the forehead with active bleeding
  - b. Edematous formation over the forehead
  - c. Pain, tenderness and cut wound over the right shoulder



- d. Dislocation of the right shoulder joint
17. The accident occurred on January 2, 2018, the respondent was treated at Mwingi District Hospital on the same day and discharged. He was later examined by PW1, Dr Simeon Kioko who prepared a report dated August 31, 2018. In his report, the doctor indicated that he referenced the respondent's treatment notes from Mwingi District Hospital and stated as follows: -
- “The above named was involved in a road traffic accident along Mwingi-Thika Highway on January 2, 2018 and he sustained the following body injuries;  
Head injuries  
Right upper limb injuries
- He was attended at Mwingi Level Hospital on January 2, 2018 and the presenting major complaints were pain and cut wound over the front head right shoulder, pain and being unable to lift right upper limb due to right shoulder pains.”
18. The doctor then proceeded as follows in his report;
- “He had been treated at Mwingi Level 4 hospital. I examined him and prepared my report ...I examined the patient on August 31, 2019. The patient had sustained right shoulder joint dislocation. I saw the x-ray report and clinical notes from Mwingi Level 4 hospital .....
19. The medical report indicates the following at section B on Clinical Examination;
- Detailed body examination**
- a. Head and neck- he had a very tender cut wound which was actively bleeding and also adjacent soft tissues edematous formation...
- b. Thorax and abdomen physical and clinical evaluations within normal limits
- c. Upper limbs-he had severe tenderness over the right shoulder, giving rise to right shoulder joint movements limitations
- d. Lower limbs-physical and clinical evaluations within normal limits
20. The appellant takes issue with the medical report tendered by Dr Simeon Muli (PW1) because of the additional injuries included. The only additional injury listed by the doctor was a “very tender” cut which he found bleeding but the trial court appears not to have been influenced by that insignificant addition.
21. The trial court also noted that the respondent in his submissions in the trial court listed his injuries as fracture of the right humerus bone, mid shaft region and bone angulations over the right arm and held as follows from page 16 of the judgment;
- “The plaintiff had well-articulated the injuries which he said he had suffered pursuant to the road accident of January 2, 2018. I do not know when this metamorphosed into these set of injuries particularized in the final submissions. Indeed, it is clear that the plaintiff had factored in a separate set of injuries when proposing the sum of one million shillings...”
- The trial court considered his injuries as; - “Hand injuries and right upper limb injuries.”
22. The trial court then relied on the case of *Patrick Kinoti Miguna vs Peter Mburuga G Muthania (2014) eKLR*;
- “Where the High Court upheld an award of Kshs 300,000 for shoulder dislocation, leg and right leg injuries, injury to the forehead, two loose teeth, injury on the chest area and right knee areas. The court



then factored in the aspect of inflation as the decision had been made seven years prior and exercised its discretion and awarded Kshs 400,000 instead.”

23. The authority relied by the trial court appears to reflect more grave injuries including loss of two teeth.
24. The appellant has referred the court to two decisions where damages were awarded at Kshs 300,000/- in the year 2014 and 2015. These are [\*Patrick Kinoti Miguna v Peter Mburunga G Muthamia \(2014\) eKLR\*](#) and [\*Coast Broadway Co Ltd v Elizabeth Alaka Achebi \(2015\) eKLR\*](#). The injuries in these two cases were recorded as injuries bruises on the right parietal region, two loose incisors, dislocation of the right shoulder which was expected result in to post traumatic arthritis. The other injuries were a cut on the left leg and bruises on the right leg and right hand on the first case and a dislocated right shoulder and bruises on the right knee. Factoring in the aspect of inflation, the award in the two cases is similar to what the trial court awarded in the instance.
25. In [\*Erick Ratemo v Joash Nyakweba Ratemo \(2018\) eKLR\*](#) the High Court upheld an award of Kshs 300,000/- where the respondent sustained the following injuries, abrasion and deep cut wound on the face, cut wound on the upper lip, contusion on the anterior chest wall, dislocation on the right shoulder, bruises on the right hand, blunt injury on the left and right knee, epistaxis and fracture of the right femur.
26. This court finds that the award by the trial court was slightly on the high side because looking at the above 2 authorities where the awards were in the region of Kshs 300,000 the injuries are far more serious than the ones suffered by the respondent herein.
27. The principles applicable on appeal against quantum of damages were restated in the case of [\*Gitobu Imanyara & 2 Others v Attorney General \[2016\] eKLR\*](#), where the Court of Appeal held;

“...it is firmly established that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in [\*Rook v Rairrie \[1941\] 1 All ER 297\*](#). It was echoed with approval by this Court in [\*Butt v Khan \[1981\] KLR 349\*](#) when it held as per Law, JA that:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 at a figure which was either inordinately high or low.’

In [\*Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v AM 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 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.”



28. It is my respectful view that the award of Kshs 400,000 as general damages was not justified because even if one factors inflation which cuts both ways and affects both parties, the award made was not commensurate with the injuries suffered.

In the circumstances, I find merit in this appeal.

The award made on general damages is set aside and Kshs 200,000 is hereby awarded to the respondent. The award on special damages is upheld. Costs and interests in the lower court shall run from date of this judgement.

The appellant shall have half costs in this appeal.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

