



REPUBLIC OF KENYA



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**Kalla v Gura (Civil Appeal E014 of 2020)  
[2022] KEHC 15931 (KLR) (29 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15931 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E014 OF 2020  
EM MURIITHI, J  
NOVEMBER 29, 2022**

**BETWEEN**

**ABBAS ADAN KALLA ..... APPELLANT**

**AND**

**ABDUB BORU GURA ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. E. Tsimonjero  
(RM) delivered on 7/10/2020 in Meru CMCC No. 106 of 2019)*

**JUDGMENT**

**Introduction**

1. The Respondent herein, the Plaintiff in the trial court, sued the Appellant vide a plaint dated April 7, 2019 seeking general damages for pain, suffering and loss of amenities, Special damages of Kshs 37,261, future medical expenses, costs of the suit plus interest at court rates. He pleaded that on July 3, 2018, he was lawfully travelling as a fare paying passenger aboard motor vehicle registration number KCF 653 Z Scania Bus along Isiolo- Meru road at Subuiga area when the Appellant's driver and/or servant and/or agent negligently drove, managed and controlled the said motor vehicle that it overturned thereby occasioning him severe bodily injuries. In view of the injuries the Respondent sustained, he will need future medical attention, will incur future medical expenses that is total hip replacement and loss of earnings from the Appellant. The Appellant denied the claim through his statement of defence dated June 4, 2019, and prayed for the claim to be dismissed with costs.
2. The parties recorded a consent judgment on liability at the ratio of 90:10 in favour of the Respondent against the Appellant and upon full hearing on quantum, the trial court awarded general damages of Kshs 500,000, special damages of Kshs 35,361= Kshs 535,361 less 10% contribution= Kshs 481,824.90 together with costs and interest at court rates until payment in full.



## The Appeal

3. On appeal, the Appellant *vide* his memorandum of appeal filed on November 6, 2020 set out 5 grounds of appeal as follows:
  1. The learned magistrate erred in fact and law in finding the nature and degree of injuries was left neck femur fracture, frontal and left parietal scalp swelling with tenderness which finding was against the height of the evidence on record.
  2. The learned magistrate erred in fact and law in awarding the Respondent general damages of Kshs 500,000 with costs and interest for soft tissue injuries.
  3. The learned magistrate erred in fact and law by totally ignoring the evidence on the injuries sustained by the Plaintiff.
  4. The learned magistrate erred in fact and law by totally ignoring the case law in the Appellant's submissions and relied on the case law that was on record.
  5. The learned magistrate erred in fact and law in finding that the Respondent was entitled to general damages that were too high in view of the circumstances of the case.

## Duty of the Court

4. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123*).

## Evidence

5. PW1, Abdub Boru Gura, the Respondent herein, adopted his statement recorded on April 17, 2019 as his evidence in chief. He then produced the treatment notes from Isiolo General Hospital, Referral Letter dated July 10, 2018, P3 form, Police Abstract, Medical Report, Notice of Intention to sue, Bundle of receipts for special totalling to Kshs 37,261, Copy of Records for Motor Vehicle KCF 653 Z and Letter from Directline Insurance Co Ltd dated December 19, 2018 as exhibits in court. He testified that although he was examined by the Appellant's doctor, he had not fully recovered as he still felt some headaches, but he had no other problem. He prayed for special and general damages and costs of the suit.
6. On cross examination, he stated that, "My ID No xxxx. I had a fracture on the head, dislocation of the lumbar. I have documents to confirm the injuries."
7. On re-examination, he affirmed his ID No and the fact that the particulars of injuries were in the treatment notes and the P3 form.
8. PW2 Dr John Kimani Macharia, a medical practitioner testified that:

"I know Dr JW Kihumba. I am conversant with his handwriting and signature. I have a report prepared by him in respect Abdub Boru Gura and a receipt for Kshs 10,000/= signed by Dr JW Kihumba. I wish to produce the medical report on behalf of Dr Kihumba as evidence before court."
9. On cross examination, he stated that, "Am not aware if the hip replacement has been done. As per the description of the injuries, the plaintiff is expected to still be using the walking aid/stick."



10. DW1 Dr Ruth Ichamwenge, a medical practitioner, testified that: “I have a report for Abdu Boru Gura. He was examined on October 18, 2019 after being involved in an accident on July 3, 2018. He was initially seen at Isiolo County Referral Hospital where he was managed for injuries to the back, left hip and the forehead with analgesics and antibiotics. At the time of examination he had back pain and headache. On examination, I found that he was in a fair condition walking in a normal gait. All the other findings were normal. There was an MRI of the lumbar spine was done on November 23, 2018 which showed straightening of the lumbar spine curvature likely due to muscles spasm. Dr Kihumba in his report dated January 19, 2010 states that the claimant sustained a fracture to the left neck of the femur. This injury was not mentioned in the initial treatment notes from Isiolo County Referral hospital which gave the diagnosis as a soft tissue injury with left hip arthritis which is basically joint inflammation. There was pain at the hip joint but there was no mention of a fracture which could not be omitted if it were present. The patient was later seen at Mbagathi hospital and 5 months later at Nairobi West Hospital where his presenting complaints were of low back pain. There was no mention of a former fracture. There was no X-ray of the lower limbs presented at the time of the re-examination and there is no indication from the treatment notes availed that said an X-ray was done. It is though difficult to ascertain that a fracture was sustained in this accident. On conclusion is that the patient sustained soft tissue injuries. I personally examined the patient and prepared the report. The patient presented treatment notes from Isiolo County Referral hospital. The treatment notes should indicate as injuries and particularly if there are severe injuries that require further consultation. There was no mention of X-ray requested for. There was no treatment for fracture. The patient was treated 5 months at Mbagathi hospital. It is not possible to stay for 5 months. There is no mention of a fracture from any of the facilities. No X-ray was presented. The only way to confirm a fracture is by an X-ray. The patient herein sustained soft tissue injuries. I produce the report as an exhibit.”
11. On cross examination, she stated that, “I qualified in the year 2015. I work at Directline Assurance Co Ltd. We are based at Hazina Towers Nairobi. Am not aware if the motor vehicle was insured by Directline but I assume so. It is the insurance company that referred the patient to me. I only work for insurance. I do not know Dr Kihumba and I do not know where he works. I did not meet the patient. The treatment notes indicate that there was a hip-joint pain. The neck of the femur is at the hip. The neck of the connects the shaft and the head of the femur. The hip joint comprise of the head of the femur. There was pain on the left hip. Dr Kihumba talks of a fracture. I looked at the P3 form, it shows that there was persistent migraines (headaches), scalp swelling (frontal). Fracture of the head of the femur. It was filled by Dr Paul Wambugu 5 months after the accident. It talks of traumatic osteoarthritis of the left hip joint. It means there is joint inflammation. It can be persistent depending on the prevailing factors. The one herein can resolve with time. I examined the patient after one year and few months. He was complaining of back pain and headache. He had complained the same to Dr Kibumba. Dr Kibumba states that he used P3 form, abstract form, medical notes and radiographs (X-ray, CT scan, MRI) of the pelvic and lumber (lower part of the neck. It is a sensitive area if there is a spinal injury or a fracture that is significant. The patient was complaining of back pain. I classified the injuries as STI due to the MRI result which referred to muscle injuries. I do not see any other medical report. What is before court is my opinion and that of Dr Kihumba which are different. Dr Kihumba is that the patient will require hip replacement.”
12. On re-examination, she said:

“My employers do not dictate my reports. I do reports Professionally based on the examination I make. I was not informed in any way. The drafters of P3 forms have to look at the initial treatment notes. It is not common practice to do an X-ray during P3 form filling. I was not presented with any X-rays. There is no indication of the results of the radio-



graph. There are other documents including the initial treatment notes. I personally saw the patient. There was no need for hip replacement because all my findings did not point to that. Pain does not only come as a result of a fracture. It is not possible to ascertain the existence of a fracture is by way of an X-ray. I was not given any X-ray and it was not mentioned.”

## Submissions

13. The Appellant submits that the Respondent did not prove through evidence such as X-rays his injuries especially the fracture later added onto the case on a balance of probabilities, and relies on [\*Benter Atieno Obonyo v Anne Nganga & Another \(2021\) eKLR\*](#) and [\*Sospeter Kimutai & Another v Isaac Kiplating Boit \(2021\) eKLR\*](#). He urges that it is trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards, and cites [\*Michael Okello v Priscilla Atieno \(2021\) eKLR\*](#), [\*Godfrey Wamalwa Wamba & Another v Kyalo Wambua \(2018\) eKLR\*](#), [\*PF \(Suing as next friend and father of SK \(Minor\) v Victor O Kamadi & another \(2018\) eKLR\*](#) and [\*Blue Horizon Travel Co Ltd v Kenneth Njoroge \(2020\) eKLR\*](#). He urges that since the injuries suffered by the Respondent were soft tissue in nature with absolutely no disability or permanent incapacity, the award was erroneous and unjustified in the event. He urges that he should be awarded costs of the appeal and opines that a sum of Kshs 80,000 would suffice.
14. The Respondent urges the court to disregard the Appellant’s submissions on quantum as the authorities cited therein are old and have no relevance to the injuries he sustained. He applauds the trial court for properly exercising its discretion in awarding the sum of Kshs 500,000 which in his view was fair and reasonable. He urges the court to dismiss the appeal with costs, and relies on [\*Morris Mugambi & Silas Imanene \(Jashid\) v Isaiah Gitiru \(2004\) eKLR\*](#), [\*Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini v A.M Lubia & Olive Lubia \(1985\) eKLR\*](#) and [\*Silas Muthuri Muraga & Anor v Margaret Mwangwa Munene \(2015\) eKLR\*](#).

## Analysis and Determination

15. The issues for determination from the grounds of appeal are whether the general damages awarded were excessive in view of the injuries sustained by the Respondent, and whether the trial court ignored the Appellant’s submissions and authorities.
16. This court has previously considered the principles for appellate interference with an award of damages by a trial court in [\*Crown Bus Services Ltd & 2 others v BM \(Minor suing through his mother & Next Friend\) SMA \[2020\] eKLR\*](#) as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the [\*Privy Council in Nance v. British Columbia Electric Railway Co. Ltd. \(1951\) A.C. 601, 613\*](#) and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in [\*Henry H. Ilanga v. M. Manyoka \[1961\] EA 705, 713\*](#) as follows:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly



erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 KB.), approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd.* [1942] AC 601.”

17. The parties herein are in agreement that the Respondent sustained some injuries as a result of the accident. The bone of contention is whether the Respondent sustained a fracture. The plaintiff’s doctor whose report is presented by PW2 and the defendant’s Insurance’s inhouse doctor DW1 differed on whether there had been a fracture. This court notes that the Respondent was reported to have sustained a fracture as was captured in the P3 form filled by Dr Paul Wambugu as follows, “Fracture Head of femur (Left) with attendant traumatic osteoarthritis of the left hip joint” and he classified the degree of injury as maim. It appears that although the Respondent did not produce the X-ray report, he actually paid Kshs 2,000 for X-ray of the Lumbar spine as shown by the receipt dated November 23, 2018. The doctor who filled the P3 Report four months after the accident is unlike Dr Kihumba and DW1 independent of the parties’ influence as he was not hired by either of them. Furthermore, it is not lost to this court that the P3 form was filled 4 months after the accident when the said fracture was noted and recorded in the P3 form.
18. The documents used by Dr Kihumba J.W. to prepare the medical report dated January 19, 2019 were P3 form, Abstract form, Medical notes and Radiographs (pelvic, lumbar) and the injuries listed therein are severe headaches, frontal and left parietal scalp swelling with tenderness, left neck of femur fracture and back pain with loss of lumbar curvature due to muscle spasms.
19. The sources of information relied on by Dr Ichamwenge Ruth to prepare her report of October 18, 2019 are the “claimant’s history: Self, treatment record dated July 3, 2018 Isiolo county referral hospital, December 18, 2018 Nairobi west, Medical report dated January 19, 2019 Dr J.W Kihumba, X-ray/scan report dated 23/11/2018 MRI Lumbar Spine German Medical Centre and clinical examination October 18, 2019.”
20. This court notes that DW1 may not have been truthful when she told the court that, “there was no mention of X-ray requested for... There was no mention of a fracture from any of the facilities. No X-ray was presented.” She admitted during cross examination to have examined the Respondent one year and a few months after the accident, and, therefore, it may be reasonably expected that the Respondent had since fully recovered. Besides, the injuries noted by Dr Kihumba, who examined the Respondent six months after the accident, cannot possibly resemble those noted by DW1 who saw the Respondent one year and a few months later.
21. It is not in doubt that the injuries sustained by the Respondent were quite severe as he was first treated at Isiolo County Referral Hospital, then later at Nairobi West Hospital before being referred to another facility. He further sought medical attention from Mbagathi hospital, Alice Nursing Home and German Medical Center. This court respectfully agrees with the trial court that in addition to sustaining soft tissue injuries, the Respondent also suffered a fracture, and thus the award of Kshs 500,000 for general damages was wholly merited in the circumstances.
22. The Appellant faults the trial court for ignoring his submissions and authorities, and relying on those which were not on record. This court finds the said fault to be manifestly unfounded as the trial court considered both parties submissions and authorities on equal measure before arriving at the decision it did. In reaching that decision, the trial court purely relied on only the authorities that had been cited by the parties, as can be seen from the judgment as follows:

“Considering the cited case law, I note that in some of the cases, the injuries sustained by the plaintiffs therein are more severe than in the current case while some are less severe yet the awards are more or less the same. Doing the best I can and guided by the cited case law



and considering the current inflation I award Kshs 500,000 for pain, suffering and loss of amenities.”

23. This appellate court does not find any error of principle as would entitle it to interfere with the discretion of the trial court in assessing damages. See principles restated in *Kemfro Africa Ltd T/ A Meru Express Service Gathogo Kanini v AM Lubia & Olive Lubia*, supra. The amount of Kshs 500,000/- for pain and suffering and loss of amenities for injuries herein including a fracture of the head of femur (left) is not so inordinately high as to amount to a wrong estimate. While this Court might have considered a lesser amount that is no ground for interfering with the discretion of the trial court considering the inflationary trend as cited by the trial court.

### **Orders**

24. Accordingly, for the reasons set out above, this court finds no merit in the appeal and it is accordingly dismissed. There shall be a stay of execution for thirty days to facilitate payment of the decretal sum before application for execution.

25. The appellant shall pay the costs of the appeal to the Respondent.

Order accordingly.

**DATED AND DELIVERED ON THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**EDWARD M MURIITHI**

**JUDGE**

### **Appearances**

M/S & Co. Advocates for the Appellant.

M/S Kiogora Arithi & Associates Advocates for the Respondent.

