



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL 121 OF 2008**

**TIMOTHY KIARIE**

**KIMANI.....APPELLANT**

**VERSUS**

**KAPCHORUA TEA ESTATE.....1<sup>ST</sup>  
RESPONDENT**

**KENYA POWER & LIGHTING CO. LTD.....2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

**TIMOTHY KIARIE KIMANI** was in the employment of **KAPCHORUA TEA ESTATE** as a driver. Whilst in such employment he was driving his employer’s tractor registration No. KAK 790V Massey Ferguson on the 16<sup>th</sup> day of October 2003. He was transporting green leaf for the employer. At about 7.30 p.m on the said date his tractor was involved in an accident with motor vehicle registration No. KZX 261, a lorry belonging to **KENYA POWER AND LIGHTING CO. LTD**. The said Timothy Kiarie Kimani sustained bodily injuries as a result of the said accident and subsequently he filed suit against the owners of the two motor vehicles in Eldoret CMCCC No. 723 of 2004. After a full trial the trial court resolved the issue of liability against the parties as follows;

Timothy Kiarie Kimani the Plaintiff was to shoulder 10% blame, Kapchorua Tea Estate the 1<sup>st</sup> Defendant was to shoulder 30% blame while the 2<sup>nd</sup> Defendant Kenya Power and Lighting Company was to bear 60% liability. General damages on 100% basis were assessed at Ksh. 950,000/= special damages at Ksh. 1,500/= and the Plaintiff was awarded the costs of the suit and interests.

All the parties were dissatisfied with that outcome and each of them preferred an Appeal.

**KAPCHORUA TEA ESTATE LTD** was the first to file Civil Appeal No. 121 of 2008. They raised seven grounds of appeal against both liability and quantum. Then followed Civil Appeal No. 121 ‘B’ of 2008 by **TIMOTHY KIARIE KIMANI** a day later. His appeal was against quantum only and he complained that the general damages awarded were inadequate in view of the sustained injuries. Five days later **KENYA POWER AND LIGHTING COMPANY LIMITED** filed its Civil Appeal No. 123 of 2008 against both liability and quantum. By consent of all parties the three appeals were consolidated and heard together. All three counsel filed written submissions in support of their respective positions. Only Mr Songok learned counsel for the Appellant in civil appeal No. 123 of 2008 made highlights of his submissions with the other two counsel leaving it to the court to make a determination.

Evidence at trial was that Timothy Kiarie Kimani was driving the tractor while DW2 one Philip Kipkoech Ruto was driving the lorry. The tractor had one head light. The lorry was driving downhill and the tractor uphill. The time was 7.30 p.m. The road was tarmacked but had potholes. There was a collision between the lorry registration No. KZX 261 belonging to Kenya Power & Lighting Company and the tractor driven by Timothy Kiarie Kimani. According to Timothy Kiarie Kimani the lorry hit his (Timothy's) tractor near the driver carrier and also hit the trailer cutting it off the tractor. He said that he never lost control of his tractor. He was on the left lane of the road. The lorry was at high speed. He swerved to the left but the lorry proceeded and hit the tractor. There was a slight bend at the scene of the accident.

According to Philip Kipkoech Ruto the tractor was not stable on the road and was being driven in a zig zag manner. As he passed the tractor the tractor's trailer collided with the lorry he was driving. He thought the tractor was trying to avoid potholes when the collision occurred. He admitted that he was driving downhill, when he saw a vehicle that looked like a motor cycle. He did not apply any brakes. He admitted further that a tractor travels slower than a lorry. He was driving at what he called a high speed of 40 KPH.

Philip Kipkoech Ruto had a passenger called Simeon Abel Mogusu who gave evidence as DW3. He contradicted his driver. He said the tractor was being driven at high speed and it had full light on its one head lamp. The lorry was 40 KPH. He said the driver of the lorry applied emergency brakes after the accident. The other defence witness was not an eye witness.

Timothy Kiarie Kimani's injuries were assessed by Dr. S.I. Aduda on 5/5/2004. The accident occurred on 16/10/2003. He was admitted at Moi Teaching Referral Hospital until he was discharged on 17/12/2003. He sustained a blunt trauma to the chest which was tender, fractures of the 11<sup>th</sup> and 12<sup>th</sup> ribs on the left and right sides, a swollen and tender right arm and a cut wound; a fracture of the right humerus, a dislocated swollen and tender right ankle; a dislocated swollen and tender right wrist and a dislocation of the spinal column. His cut wound was stitched and dressed. At the time of examination on 5/5/2004 he had slight tenderness in the chest, right arm, right ankle, left wrist and spinal column. He had a scar on the right arm and the 4 fractured ribs and humerus. The movements in the spinal column were limited. The doctor's opinion was that the injuries had healed and the occasional pains subside with the use of analgesics. He described the injuries as severe. The scars were permanent and he would need physiotherapy to sort out the limitation in movements.

A second medical examination was undertaken by Dr. Z. Gaya on 11/2/2008 and the said doctor found the vital signs and general systemic examination within normal limits. He walked with a lot of difficulty and a tendency to limp. There was an element of hypersensitivity and he jumped every time he was touched on various parts of his body especially the areas where he said he had been hurt during the accident. The chest was found normal. He had a 3cm x 2cm scar on the medial aspect of the left leg. The doctor's opinion was that the soft tissue injuries sustained had healed without permanent disability although the scar was permanent in nature. He may develop early post traumatic osteoarthritis of the injured shoulder and ankle joints. The doctor made one very important observation – Timothy Kiarie Kimani walked quite freely with no signs of distress after the examination. This doctor had examined the injured driver earlier after the accident.

The duty of the first appellate court is to reassess the evidence and will not interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or it is shown that the trial court demonstrably acted on wrong principles – **see EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA V DUNCAN MWANGI WAMBUGU (1982 – 1988) I KAR 278.**

This court has therefore thoroughly re-assessed the evidence at trial and has found no evidence that the tractor was defective. That was not led and it was definitely not proved. There is nowhere in evidence where Kapchorua Tea Estates was said to have been negligent and therefore the cause of the accident. Its own driver Timothy kiarie Kimani did not attach any blame to Kapchorua Tea Estates. The said driver pleaded in his Amended Complaint that the said Kapchorua Tea Estates was negligent yet proceeded to absolve it from blame in his oral evidence. It was not shown that the employer forced the driver to drive a defective motor vehicle and could therefore have liability attributed to it. The driver (Timothy) never

alleged and it was therefore not proved that the driver was made to work past working hours and it was such working past working hours that caused the accident. This court is unable to find the evidence as adduced that attributed liability or fault to Kapchorua Tea Estates. To have found the said Kapchorua Tea Estates liable without evidence was a terrible error that the trial court fell into. As held in the case of **MUTHUKU V KENYA CARGO SERVICES LTD (1991) KLR 464**, Kenyan law has not reached the stage of liability without fault. The trial court misapprehended the pleadings and evidence and attributed liability to the employer for breach of contract, whose terms were neither given nor breach proved and made a worse error in awarding general damages for such breach of contract. That is contrary to Law as enunciated in various case law – see **ELIUD NGUGI MUNGAI V SAMUEL KANGAU NJENGA Civil Appeal No. 561 of 1999**.

And

**JOSEPH UNGADI KEDERA V EBBY KANGISHA KAVAI – Civil Appeal No. 239 of 1997.**

The above is enough to show that the trial court fell into an error of law and completely misapprehended the evidence and thereby arrived at a decision not supportable in law. For that reason I hereby allow Kapchorua Tea Estates' appeal against liability and substitute a finding of no liability against the said Kapchorua Tea Estates in place of the 30% liability entered by the trial court.

The evidence at trial was not given sufficient scrutiny by the trial court as it ought to have done. Had the trial court discharged its duty of adequately assessing the evidence it would have appreciated that the tractor was going uphill at a low speed. The lorry was being driven downhill at high speed. The driver of the lorry gave evidence that he did nothing to avoid the accident, he did not apply brakes or swerve. His passenger (DW3) could not be believed when he contradicted the driver by saying that the driver applied emergency brakes and that the tractor was travelling at high speed. The trial court failed to appreciate that evidence. In attributing 60% blame to the lorry driver may have shown that the driver of the lorry played a bigger role in the causation of the accident than did the driver of the tractor to whom he attributed 10% blame. That totals to 70% liability. The accident occurred between two motor vehicles. One was driven by the Plaintiff in the initial case (Timothy) and the other by the driver of Kenya Power & Lighting Co. LTD. From the evidence blame must be shared between the two drivers. Evidence was clear that the driver of the lorry was largely to blame. He noticed the tractor from a distance. He said it was being driven in a zig zag manner yet he took no evasive action to avoid the accident. He must have been doing a great speed, as stated in evidence, as that can be the only reason why he hit the tractor thereby severing its trailer away. He must bear the larger blame. The trial court's finding that the tractor driver who was driving uphill was to blame 10% appears reasonable in the circumstances of the case and the trial court was right on that score. This court has the duty to correct the error in the apportionment of liability and hereby finds that the driver of lorry registration No. KZX 261 was 90% to blame for the accident and the tractor driver 10% to blame. In the premises Kenya Power & Lighting Co. Ltd's appeal on liability is dismissed and judgment on liability is apportioned as above and hereby entered in favour of Timothy Kiarie Kimani.

Now I turn to the issue of assessment of general damages. The guiding factor in this court's interference with general damages assessed by a lower court are the principles set out in many authorities such as in the cases of :\_

1. **KITAVI –VS- COASTAL BOTTLERS LIMITED (1985) KLR 470 and also in**
2. **BASHIR AHMED BUTT –VS- UWAW AHMED KHAN (1982-88) I KAR I**

to cite but a few. Those principles are that an appellate court will not disturb the award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate and that the trial court must have proceeded on wrong principles or that it misapprehended the evidence in some material respect.

I set out the injuries sustained by the driver of the tractor earlier in this judgment. For those injuries the trial court awarded general damages of Kes. 950,000/=. The Kenya Power & Lighting counsel had

proposed general damages of Kes. 200,000/= while Kapchorua Tea Estates' counsel proposed general damages of Kes. 100,000/=. For the kind of injuries sustained by the driver of the tractor general damages as proposed by the Kenya Power & Lighting Co. Ltd and Kapchorua Tea Estates are most definitely inordinately low.

The authorities relied on by the Plaintiff at trial had injuries not similar to the ones he sustained. He did not sustain a fractured pelvis as did Mutua in **Machakos HCCA 364/98** where general damages of Kes. 800,000/= were awarded in 2001. There the Plaintiff sustained fracture of 5 ribs, fracture of clavicle and blunt injuries to the chest in addition to the fractured pelvis. Allowing for the absence of the fracture of the pelvis in respect of Timothy Kiarie Kimani the injured driver in this appeal, and allowing for the lapse of time since 2001 when the Machakos case was decided and considering the injuries of Timothy Kiarie Kimani arising from the accident herein and the fact that the doctors who examined him found him to have fully recovered (despite his pretended limp when entering Dr. Z. Gaya's clinic which quickly transformed into a free walk after examination!), I would consider a sum of general damages in the sum of Kes. 600,000/= on a basis of 100% liability an adequate and proper award of damages. Accordingly I substitute the trial court's general damages of kes. 950,000/= with an award of Kes. 600,000/= on 100% liability basis. In the premises Kenya Power & Lighting Company Limited's appeal on liability (Appeal No. 123/2008) is dismissed with costs. Its appeal on quantum is successful save that general damages are not at the rate suggested by it. Timothy Kiarie Kimani's appeal on quantum (Appeal No. 121 'B' of 2008) is dismissed with costs. Appeal No. 121 of 2008 by Kapchorua Tea Estates on liability is allowed. In the end it is ordered as follows:—

General damages	Kes. 600,000/=
Less 10% liability	<u>Kes. 60,000/=</u>
	Kes. 540,000/=
Add special damages	<u>Kes. 1,500/=</u>
	<u>Kes. 541,500/=</u>

Accordingly there will be judgment for the Appellant in HCCA No. 121'B' of 2008 one Timothy Kiarie Kimani in the sum of Kes. 541,500/= together with interest at court rates from the date of judgment in the lower court as against Kenya Power & Lighting Co. Ltd. He will also have costs of the case in the lower court and of the appeal at 90% of the agreed or taxed costs in view of the fact that general damages have been reduced.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF **SEPTEMBER 2012**.

**P.M. MWILU**  
**JUDGE**

DELIVERED AT ELDORET ON 27<sup>TH</sup> SEPTEMBER 2012 BY A. MSHILA, JUDGE.

In the presence of:-

.....	Advocate for Appellant
.....	Advocate for 1 <sup>st</sup> Respondent
.....	Advocate for 2 <sup>nd</sup> Respondent
.....	Court Clerk

**A.MSHILA**  
**JUDGE**