



REPUBLIC OF KENYA



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**Kamau v Masasi (Civil Appeal 21 of 2022) [2025] KEHC 5390 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL APPEAL 21 OF 2022**

**JN KAMAU, J**

**APRIL 24, 2025**

**BETWEEN**

**JAMES NJOROGE KAMAU ..... APPELLANT**

**AND**

**LYDIA AKHAULE MASASI ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon R. Ndombi (SRM) delivered at Vibiga in the Principal Magistrate's Court Civil Case No 39 of 2018 on 25th July 2022)*

**JUDGMENT**

**Introduction**

1. In her decision of July 25, 2022, the Learned Trial Magistrate, Hon RM Ndombi, Senior Resident Magistrate, found the appellant wholly liable for the injuries that the respondent sustained and entered Judgment in her favour against him in the following terms:-  
General damages Kshs 450,000  
Special damages Kshs 18,406  
Kshs 468,406  
Plus costs of the suit and interest thereon and on general damages, special damages at court rates
2. Being aggrieved by the said decision, on July 27, 2022, the Appellant herein filed a Memorandum of Appeal dated July 28, 2022 (sic). He relied on seven (7) grounds of appeal out of which only four (4) were substantive Grounds of Appeal.
3. His Written Submissions were dated August 29, 2024 and filed on November 6, 2024 while those of the respondent were dated October 23, 2024 and filed on October 25, 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.



## Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Learned Trial Magistrate erred in finding the appellant wholly liable for the accident;
  - b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.
7. The court deemed it prudent to address the issues under the following distinct heads.

### I. Liability

8. The Appellant did not submit on this issue. On its part, the Respondent referred to section 78 of the *Civil Procedure Act* and placed reliance on the case of *Selle vs Associated Motor Boat Company Limited* (Supra) and further on the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another* [2005] 1 EA 346 where it was held that as a general proposition under section 107(1) of the *Evidence Act* cap 80 (Laws of Kenya), the legal burden of proof lay with the party who invoked the aid of the law and substantially asserted the affirmative of the issue (sic).
9. She relied on the case of *Isaac K. Chemjor & Another vs Laban Kiptoo* [2019] eKLR where it was held that the respondent therein had discharged his burden of proof under sections 107 and 108 of the *Evidence Act* where no evidence could lead to any other probability that another person was involved or caused the accident.
10. She submitted that the accident was self-involving and that as a passenger in the subject motor vehicle, she had no control over the same and could not have contributed to the occurrence of the accident. To buttress her point, she relied on the case of *Rosemary Mwasya vs Steve Tito Mwasya & 2 Others* [2018] eKLR where it was held that the deceased who was a passenger had no control over the manner in which the appellant drove and/or controlled the accident vehicle prior to the accident.
11. She contended that having discharged her duty under Sections 107 and 108 of the *Evidence Act*, the burden of proof shifted to the Appellant to prove that the accident did not happen as stated. She added that although he denied that his vehicle was involved in an accident, he did not call his driver to confirm his allegation but instead alleged that he did not know who was driving the said vehicle at the material time. She pointed out that he did not object to the production of the Police Abstract Report confirming that a report of the accident was made to the station.



12. It was her contention that she had proved her case on a balance of probability and that the Trial Court had correctly held and found that the Appellant was wholly liable for the accident in which she sustained injuries.
13. According to the Amended Plaintiff dated July 3, 2019 and filed on July 5, 2019, the Respondent was a lawful passenger in the Appellant's Motor Vehicle registration number KAS 270Y Toyota Hiace Matatu (hereinafter referred to as the "subject Motor Vehicle") which was being driven along Majengo-Luanda Road at Vihiga County Assembly or thereabout on 17<sup>th</sup> February 2018 when the said subject Motor Vehicle lost control and rolled as a result of which she sustained injuries.
14. She blamed the appellant as the driver of the subject Motor Vehicle was careless. When she was cross-examined, she explained that the said subject Motor Vehicle lost control and hit the wall of the County Assembly. She added that she was seated behind the driver and she hit the iron bar. She was emphatic that there was no other motor vehicle in front of them.
15. The appellant admitted being the owner of the subject Motor Vehicle but denied that the same was involved in an accident. He told the Trial Court that he learnt of this case when he was served with court summons. He averred that he could not tell who was driving his subject Motor Vehicle on the material day.
16. The Police Abstract dated February 17, 2018 indicated that the accident involved his subject Motor Vehicle Registration. He did not call any eye witness to explain what may have happened and/or whether the Respondent contributed to the causation of the accident to enable the court exonerate him from liability in the said accident.
17. The respondent was a fare-paying passenger in his subject Motor Vehicle and was not in control of the said vehicle. She was under no duty therefore to exercise caution to avoid the accident.
18. Notably, in the case of *Khambi and Another vs Mahithi & Another* [1968] EA 70, it was held that an appellate court would not interfere with the apportionment of liability save where such apportionment was manifestly erroneous.
19. The Trial Court observed that the said accident was self-involving and held the Appellant wholly vicariously liable for the said accident. The Trial Court could not therefore have been faulted for having arrived at the said conclusion. This court therefore left the determination on apportionment of liability undisturbed
20. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) were not merited and the same be and are hereby dismissed.

## II. Quantum

21. The Appellant did not submit on this issue. On its part, the Respondent submitted that there were well-known principles for interference of an award of damages by a trial court as laid out in the case of *Nance vs British Columbia Electric Railway Co Ltd* (1951) A.C 601, 613 where it was held that before an appellate court could intervene, it had to be satisfied that either the judge, in assessing the damages, applied a wrong principle of law such as taking into account some irrelevant factor or left out of account some relevant one or that the amount awarded was so inordinately low or so inordinately high that it had to be a wholly erroneous estimate of the damage.
22. She submitted that she produced a Discharge Summary, Treatment Notes, Medical Report, invoice and receipts to prove the injuries that she sustained. She added that the Trial Court considered the oral and documentary evidence and authorities which guided her in making the award. She was categorical



- that there was no contradictory evidence as the Appellant claimed. She pointed out that his contention that the Trial Court rejected his evidence was not true as it considered all relevant factors before making its conclusion.
23. In that regard, she placed reliance on the case of *Mwangi vs Wambugu*[1984]KLR 453 where it was held that an appellate court would not normally interfere with a finding of fact by the trial court unless such finding was not based on any evidence or it was based on a misapprehension of the evidence or where the court had clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of evidence. She thus urged this court to dismiss the Appellant's appeal with costs.
  24. It was well settled in law that an appellate court would not disturb an award of general damages unless the same was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of *Margaret T. Nyaga vs Victoria Wambua Kioko* [ 2004] eKLR.
  25. It must be understood that money can never really compensate a person who had sustained any injuries. No amount of money could remove the pain that a person went through no matter how small an injury appeared to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person had sustained. It was merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who had suffered an injury.
  26. However, this assessment was not without limits. A court had to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court therefore had to be guided by precedents.
  27. Indeed, in the case of *Kigaraari vs Aya*(1982-88) 1 KAR 768, it was stated that damages had to be within the limits set out by decided cases and also within the limits the Kenyan economy could afford. This was because high awards would lead to higher insurance premiums which would in turn affect the members of the public.
  28. This court also had due regard to the case of *Lim vs Camden HA* [1980] AC 174 where it was held that even in assessing compensatory damages, the law sought to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury that he had caused.
  29. Similar injuries ought to attract comparable awards. However, in the quest for consistency, courts also had to recognise that no case was exactly the same as the other. It must be noted that cases cannot contain exact injuries and they are merely for comparison purposes. Each case therefore had to be decided according to its own peculiar circumstances but keeping in mind that any monies awarded had to be sustainable.
  30. Towards this end, an appellate court ought not to interfere with the discretion of a trial court merely because it could have awarded a lower or higher sum than that which was awarded by the trial court. It could only interfere where the award of general damages was so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended as was held in the case of *Margaret T. Nyaga vs Victoria Wambua Kioko* (Supra).
  31. In her Amended Complaint, the Respondent indicated that she suffered a fracture of the left distal fibula bone, dislocation of the left ankle joint, broken teeth on the upper jaw, tenderness on the chest, the left leg and upper lip with cut wound, injuries to the left wrist joint, nose with cut wound, abdomen and left leg with a fracture and a cut wound.



32. The Medical Report of Dr L. W. Okombo dated 22<sup>nd</sup> March 2018 confirmed the aforesaid injuries. At the time of the medical examination, the Respondent complained of headache and pain on the neck, chest, lip, nose, abdomen and the left leg. The doctor indicated that she still needed further treatment by an orthopaedic surgeon, a dental surgeon, physiotherapist in addition to reconstructive surgery for the scars that resulted from the unhealed wounds that were still being dressed. He termed her injuries as “grievous harm.”
33. Remaining faithful to the doctrine of stare decisis and taking the inflationary trends into consideration, it was the considered view of this court that general damages in the sum of Kshs 450,000/= that was awarded by the Trial Court was not unreasonable. This court did not therefore disturb the same.
34. In arriving at the said conclusion, this court had due regard to the following cases:-
1. *Akamba Public Road Services vs Abdikadir Adan Galgalo* [2016] eKLR  
This very court awarded general damages in the sum of Kshs 500,000/= where the respondent therein had sustained a fracture of the right tibia leg malleolus and right fibular bone, with a blunt injury to the ankles.
  2. *Mohammed Younis Quereshi & Another vs Chris Maina Mathu* [2020] eKLR  
The respondent therein sustained bruises on the head, on both hands, and left leg and a fracture of the left tibia. The injuries would heal but leave him with disability at 20%. The appellate court reduced the general damages from Kshs 800,000/= to Kshs 400,000/= general damages.
35. As the issue of special damages was not in contention between parties, this court found no reason to disturb the same.
36. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) were not merited and the same be and are hereby dismissed.

### **Disposition**

37. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was dated 28<sup>th</sup> July 2022 and lodged on July 27, 2022 (sic) was not merited. For the avoidance of doubt as it was not clear from the decision of the Trial Court that was delivered on 21<sup>st</sup> July 2022, interest on special damages will accrue at court rates from the date of filing suit while interest on general damages will accrue at court rates from the date of judgment. The order that interest would accrue on costs be and is hereby set aside and/or vacated.
38. Although the Appellant was not successful in his Appeal herein, this court noted that he was a layman. For that reason, this court deviated from the general principle that costs follow the event and hereby directs that each party will bear its own costs of the Appeal herein.
39. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 24<sup>TH</sup> DAY OF APRIL 2025**

**J. KAMAU**

**JUDGE**

