



**Kala & another v Huka (Civil Appeal E040 of 2024)
[2025] KEHC 10537 (KLR) (Civ) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CIVIL
CIVIL APPEAL E040 OF 2024
SC CHIRCHIR, J
JULY 17, 2025**

BETWEEN

ADAN KALA 1ST APPLICANT

BILLY TUNU OYOO 2ND APPLICANT

AND

WAKO HUKA RESPONDENT

*(Being an appeal from the judgement of Hon. L. Mutai (CM)
in Isiolo CMCC NO. E032 OF 2022 delivered on 3/9/2024)*

JUDGMENT

1. The Respondent sued the Appellants at the Chief Magistrate's court at Isiolo seeking for damages for injuries and related loss, sustained following a road accident.
2. During the hearing, liability was settled through the consent of the parties in the ratio of 10% against the Respondent and 90% against the Appellant. Assessment of damages was left to the court. All the medical reports were produced by consent without calling the Authors of the documents.
3. In a judgement delivered on 3/9/2024, the trial Magistrate awarded general damages of Ksh. 2,000,000 and special damages of Ksh. 15,000. The Appellants were aggrieved by the award on general damages and proffered this Appeal.

Memorandum of Appeal

4. The Appellant has presented the following grounds for consideration:



- a. That the learned Magistrate erred in law and fact by failing to consider the medical report by Dr. John Macharia (produced by consent on 9/7/2024 as defence exhibit 1, which was categorical that some of the injuries pleaded by the Respondent were not related to the accident in question and thereby arrived at an award for general damages in the sum of Ksh.2,000,000 that is inordinately excessive.
 - b. That the trial Magistrate erred in law and fact by failing to consider the findings of the second medical report (DExb.1) which was a useful guide on the extent of injuries and the recovery made by the Respondent and thereby made an award on general damages in the sum of Ksh.2 Million that is inordinately excessive.
 - c. That the award of the trial Magistrate with regard to general damages is against the weight of evidence on record.
5. The Appeal was prosecuted by way of written submissions .

Appellant's submissions

6. The Appellants submit that the trial court did not consider the 2nd medical report by Dr. John Macharia , as evidenced by the fact that the court did not make any reference to it; that failure to consider the said report led to an excessive award. In effect, it is submitted, the trial court arrived at the decision without considering the evidence of the Appellant.
7. The Appellant also faults the trial court for adopting the 25% permanent disability as assessed by the Respondent's doctor without considering the 7%(sic) degree of permanent disability arrived at by the Appellant's doctor.
8. The Appellant proposes an award of Ksh.800,000 on the basis of the following past decisions:
 - a). *Godfrey M. Mwiti Mwinebua v Marcella Mpake* (2022) eKLR in which the claimant had sustained fractures of the femur, tibia and fibula with permanent incapacitation of 22% plus soft tissue injuries. The court awarded Ksh.900,000.
 - b). *Jane Njeri Macharia v Godfrey Murimi Muya & Ano* (2020) eKLR where the Claimant suffered a fracture of the tibia and fibula with incapacitation of 20%, plus soft tissue injuries.

Respondent's Submissions

9. The Respondent has restated the injuries as contained in the various medical reports produced by the Respondent and submits that the injuries were indeed severe.
10. On the award, the Respondent urges the court to maintain the Ksh. 2,000,000 and has relied on the following authorities to buttress his submissions:
 - a). *Kenblest Kenya Ltd v Musyoka Kiema* (2020) eKLR - In this case, the Claimant sustained fractures of cervical spine at the level of C5-C6. The court awarded Ksh. 2,000,000.
 - b). *Mburugu Fredrick Kiema v Keneta Ntobiri* (2020) eKLR Ksh.1,000,000 was awarded for injuries stated as tenderness over C4,C5 and C6 with upper limb weakness power grade 3 in all muscle group, and cord compression and fracture of C6 posterior elements.
 - c). *Samuel Machoka Oira v Josephat Mwangi Kiburo and Ano* (2008) eKLR. The award was Ksh.1,750,000 and the injuries consisted of tenderness of the spine and fluctuant swelling on



top of the head, tenderness of spine and limitation of movement in all planes. Tenderness of 5th lumber with posture straight leg rising at 45 degree, left side.

Analysis and determination

11. This Appeal being the first one, the duty of this court is to review the evidence, evaluate it and arrive at its own conclusion, while giving allowance for the fact that the trial court had the benefit of hearing and seeing witnesses first hand (Ref. *Gitobu Imanyara & 2 others v A.G* (2016)eKLR)
12. I have considered the trial court record, the grounds of Appeal and the rival submissions of the parties, and I have identified the following issues for determination:
 - a). Whether the trial Magistrate court considered the medical report by Dr. John Macharia
 - b). Whether the award was excessive.

Whether the trial Magistrate considered Dr. John Macharia's report

13. The record shows that on 9/7/2024, when the parties herein entered a consent, one of the documents produced was the medical report by Dr. John Macharia dated 2/12/2022. The said report was marked as Defence Exhibit No.1.
14. However, a reading of the judgment shows that the trial Magistrate did not make any reference to the said report. Further, I notice there is no reference to the Appellant's submissions in the said judgment. Further a reading of the portion of the judgement that addresses the assessment of damages appear as though, the matter proceeded ex parte as there is no mention at all of any evidence submitted by, or submissions made by the Appellants.
15. This was an error on the part of the court. The concept of fairness entails every party to a dispute being heard. And it is not enough to hear them, but to actually demonstrate by entering on the record the evidence presented by the parties. This is the only way each party gets the assurance that they have been heard. For the record having failed to reflect such evidence, the Appellant's submission that the decision was arrived at without considering their evidence is valid.

Whether the award was Excessive

16. Assessment of damages is at the discretion of the trial court and there are well-settled principles upon which an appellate court may interfere with the said discretion. In *Butt v. Khan* [1981] KLR 349 the Judge held: "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."
17. According to Dr. Muthuri's report dated 23/4/2022, the Respondent suffered a frontal cut wound measuring 6 cm long, cut wound on the left chin- 4 cm and associated with numbness of the left lower lip, posterior neck tenderness, fracture dislocation of the left first finger, 3rd finger deformity, numbness of upper arm and right proximal thigh cut wound measuring 5cm. In his report of 16/11/2022 he has included what appears to be the effects of the injuries sustained during the accident, based on MRI reports of the left shoulder and cervical spine.
18. On the other hand, Dr. Macharia examined the Respondent on 2/12/2022, about 2 weeks after the 2nd examination by Dr. Muthure. He identified the injuries as multiple superficial bodily injuries, cut wound on the forehead, cut on the chin, left shoulder pain, dislocated left thumb at MCP joint. He further stated that the Respondent was seen on 16/9/2022 and MRI done showed: on the neck, there



were degenerative changes on the vertebrae and discs of the cervical spine, and degeneration associated with spinal canal stenosis. On the left shoulder there were tears of the supraspinatus, rotator interval tendons tears and associated tendinitis and acromioclavicular osteoarthritis. He concludes his report by stating that the mentioned neck lesions cannot be attributed to the accident and are age related. He assessed permanent disability at 10% which he attributed to the shoulder and thumb injuries.

19. In view of the varying opinions of the two doctors, this is a matter in which the two doctors should have taken the stand for each to defend their findings. The production of the documents without the Authors, was in my view not well thought out.
20. Thus whereas Dr. Macharia clarified that the deterioration of the cervical spine were age related, Dr Muthuri's report is silent on it . Further there is a big variance on the degree of permanent disability assigned by each doctor. The other difference I have observed is that, whereas Dr. Macharia talks about a dislocation of the left thumb, Mr. Muthure is talking of a fracture dislocation .without the benefit of clarification by the two experts ,which no doubt would have come out on cross- examination , I will now proceed to examine the veracity of each of their conclusions.
21. On whether the thumb injury was a fracture or dislocation, I have referred to treatment chits from Catholic hospital – Wamba and St. Theresa Mission hospital. On the day of the accident, the respondent was treated at Catholic hospital – Wamba and was found to have sustained multiple soft tissue injuries, left shoulder tenderness, superficial cut wound on the forehead, deep cut wound on the chin. On 25/1/22, he was attended to at St. Theresa hospital. That was on the 3rd day after the accident. The treatment chit indicates that the Respondent had suffered a cut wound on the lower lip, cut wound on the chin and dislocation of the left thumb. The final diagnosis was: “multiple soft tissue injuries with dislocation of the left thumb”.
22. Thus, none of the first two hospitals identified a fracture of the thumb. Considering that Dr. Muthure only examined the Respondent on the basis of the two notes, as he noted in his report, there is no basis upon which he arrived at the diagnosis of a fracture dislocation as opposed to a mere dislocation. On the other hand, there is consistency between Dr. Macharia's report and the treatment chit from St. Theresa's hospital.
23. In the circumstances, I find Dr. Macharia's report to be more plausible in this regard, it is my finding that the Respondent suffered a dislocation of the left thumb as opposed to a fracture dislocation.
24. On the injuries on the cervical spine, Dr. Muthuri states that the Respondent suffered posterior neck tenderness while Dr. Macharia's report is silent on such an injury. In the circumstances, I revert back to treatment chits. The chit from Catholic hospital Wamba does not make record any injury or tenderness on the posterior neck. The St. Theresa's report does not also contain any injury to the neck. Further Dr. Macharia in concluding the report, stated that the effects on the cervical spine had nothing to do with the accident but are age-related degenerative changes. By implication, Dr. Muthuri attributes the injuries to the accident
25. I have further looked at the MRI scan report done on 16/9/2022 on the cervical spine, and I cannot help but take note of several references to the word degenerative as the following portions of the report show: “Multilevel minor to moderate anterior and posterior degenerative disc osteophyte complexes are seen”, “Cervical intervertebral discs show T2W signal loss due to degenerative desiccation.” “C3/ C4 posterior disc osteophyte complex with marked degenerative left facet joint...”
26. Degenerative diseases is defined by the US National cancer institute as “ A disease in which the function or structure of the affected tissues or organs change for the worse over time’ and gives examples as osteoarthritis, osteoporosis and Alzheimer.(see : <https://www.cancer.gov>). while *Oxford*



- Dictionary defines it as decline or deterioration, , characterized by progressive deterioration and loss of function” (12th Edition) In the light of this definitions am inclined to accept Dr. Macharia conclusion that the degenerative changes on the cervical spine are age related and has no relation to the accident.
27. On permanent disability Dr. Muthuri assessed it at 25% and Dr. Macharia at 10%. Dr. Macharia was specific that his assessment on permanent disability is based on the injury to the shoulder and left thumb. For lack of specificity by Dr. Muthuri, it is safe to conclude that his assessment is inclusive of the alleged deterioration of the cervical spine. Taking into consideration the divergent assessment , evidently informed by the varied opinions on the cause and extent of, the injuries , I will place permanent disability at 15%
28. In view of the observations I have made in paragraphs 17 to 27 hereof , it is my finding that the Respondent sustained injuries as follows:Cut to the foreheadCut on the chinTenderness to the shoulderDislocation of the left thumb.Multiple bruisesPermanent disability of 15%
- Supraspinatus tendinopathy casing chronic shoulder pain and affecting range of motions ;
- supraspinatus tendinitis that will affect shoulder joint range of motion;
29. In view of the above, I find the award of Ksh.2,000,000 too excessive and constitutes an erroneous estimate of the injuries suffered. I believe this figure was arrived at based on the trial court’s failure to carefully study and consider, globally, the medical reports of the two doctors , the MRI reports and and the treatment chits from the two hospitals who attended to the respondent shortly after the accident. In the circumstances, the award is hereby set aside.
30. The Appellant has proposed an award of Ksh.800,000 which I consider reasonable. My assessment is based on the following past decisions with comparable injuries:
- a). Samuel Martin Njoroge Kamunyu v Mildred Okweya [2020] KEHC 439 (KLR), the court awarded Ksh. 300,000 in April 2020. The injuries were:Two deep cuts to the forehead.Bruises and lacerations on the cheek.Blunt injury to the shoulder and chest.Blunt injury to the pelvis andDeep cut wounds on the right and left legs.
- The above injuries were however less severe compared to the present and inflationary trends since then must be considered.
- b). In the case of Kariuki v Maina alias Peter Murimi suing through next friend Rosemary Muthoni [2025] KEHC 7831 (KLR) the High Court reduced an award of Ksh. 1,500,000 to Ksh.500,000 in respect of severe head injury, loss of consciousness, linear frontal fracture, swelling of the right orbital region bruises and cut wounds on the eye and upper lip, multiple bruises over posterior right shoulder and left upper arm.
31. Taking into account the above, fairly comparable injuries, the permanent effects of the shoulder, the degree of disability at 15% and inflation inflation factors , I consider the Appellant’s proposal of Ksh. 800,000 reasonable.
32. In conclusion, I hereby proceed to make orders as follows:
- a. The Lower Court award of Ksh. 2,000,000 is hereby set aside and substituted with Ksh. 800,000, subject to the agreed apportionment.
- b. The award will attract interest at court rates from the date of the judgement at the Lower Court.
- c. Costs of this Appeal is awarded to the Appellant.



DATED, SIGNED AND DELIVERED AT ISIOLO THIS 17TH DAY OF JULY 2025

S. CHIRCHIR

JUDGE

In the presence of:

Roba Katelo- Court Assistant

Mr. Kariuki for the Appellant

Mr. Muriithi for Mr. Mutinda for the Respondent.

