



REPUBLIC OF KENYA



**Batti v Katana (Civil Appeal 20 of 2021) [2023] KEHC 21300 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 21300 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL 20 OF 2021**

**SM GITHINJI, J**

**MAY 10, 2023**

**BETWEEN**

**JANET RIZIKI BATTI ..... APPELLANT**

**AND**

**DAVIS KATANA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Hon. J.M Kituku  
delivered on 16th March 2021 in Kilifi SPMCC No. 15 of 2017)*

**JUDGMENT**

CORAM: Hon. Justice S. M. Githinji

Mr Nyachiro Advocates for the Appellant

Firm of Mogaka Omwenga Advocate for the Respondents

1. This appeal emanates from the judgment and decree of Hon J M Kituku (SPM) in SPMCC No 15 of 2017 wherein he awarded the sum of KShs 1,163, 941 as general and special damages to the appellant.
2. Dissatisfied with the judgment, the appellant brought the instant appeal founded on the following grounds;
  1. That the learned magistrate erred in law and fact by failing to consider the evidence tendered by the appellant.
  2. That the learned magistrate erred in law and fact by failing to apply the principles applicable in a claim for general damages.
  3. That the learned magistrate erred in law and fact by awarding general damages which were not commensurate with the severe injuries sustained by the appellant such as compound fracture of the right tibia and right fibula leg bone, compound fracture of the left tibia and fibula leg bone, fracture of the left humerus arm bone etc.



4. That the learned magistrate erred in law and fact by not considering the uncontroverted medical reports filed by the appellant and the respondent which confirmed that the appellant suffered severe injuries leading to permanent incapacity of 19%.
3. The appellant herein had sued the respondent for damages arising out of a road traffic accident that occurred on 13/04/2017 along Mombasa- Malindi road at Shauri Moyo area.

### **Evidence at Trial**

4. Pw1 Janet Riziki Batti the plaintiff adopted her witness statement filed on February 8, 2017 as her evidence in chief. She produced as PEX 3-7 a bundle of documents as per the list of documents dated January 19, 2017. She testified that on the material day of the accident she was seated behind the driver when she heard the vehicle apply brakes, a loud bang and she lost consciousness. That she was admitted at Kilifi Hospital until August 20, 2016. She told the court that as a result of the accident she sustained a fracture on the right leg, fracture of the left hand, cut wound on the face and blunt injury at the back. In addition, upon discharge she was confined to a wheel chair and on crutches.
5. On August 26, 2020, the parties agreed to have the plaintiff produce documents as they appear on the list of document. They each closed their cases and filed written submissions.

### **Submissions, Analysis and Determination**

6. I have perused and weighed the contents of the pleadings, judgment, grounds of appeal, submissions and decisions referred to by the parties.
7. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and should therefore make an allowance for that. This duty was well stated in *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

8. The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O’Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.



But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

9. On the issue of an appellate court interfering with a lower court’s assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows: -

“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.”

11. The issue arising for determination is whether the award of Kshs 1,000,000 as general damages was inordinately low.

12. The appellant submitted that the award for damages in the sum of Kshs 1,000,000 was inordinately low compared to the injuries sustained by the appellant. Their view is that a global sum of Kshs 5,000,000 would adequately compensate the appellant. This was suggested while relying on the authorities of ; *Bayusuf Freighters Limited v Patrick Mbatha Kyengo* [2014] eKLR where the Court of Appeal made an award of Kshs 1,600,000 for similar injuries, *Kurawa industries Limited v Dama Kiti & Another* [2017] eKLR where the appellate court declined to interfere with an award of Kshs 2,000,000 general damages for crush injury left leg, fracture shaft left radius, compound comminuted fracture left femur, fracture of left ribs and soft tissue injury of abdomen and lastly the authority of *Regina Wilson V Stephen M Gichubi & Others* where the plaintiff was awarded Kshs 2,500,000 for pain and suffering for multiple fractures of the right side 3<sup>rd</sup> - 6<sup>th</sup> ribs, comminuted fracture soft right radius bone, fracture of the femur involving the neck, fractures of the right tibia/fibula bones of same legs and soft tissue injuries.

13. On his part, the respondent submitted that the award of Kshs 1,000,000 was reasonable and fair and ought not be disturbed. Counsel for the respondent relied on *Jiran Nagra v Abdinego Nyandusi Oigo* [2018] eKLR where the high court reduced an award of Kshs 1,000,000 as general damages to Kshs 450,000 where the respondent therein had suffered compound fracture of the right tibia fibula, segmental distal fracture of the right femur, deep cut wound on the back and right knee, blunt trauma to the chest, lacerations on the occipital area and *Savco stores Ltd V David Mwangi Kimotho* [2008] eKLR where the High Court upheld an award of Kshs 800,000 for general damages inclusive of future medical expenses wherein the plaintiff had suffered fracture of the left tibia fibula, fracture of the left elbow, deep cut wound on the left and disability was assessed at 20%.

14. I have evaluated the authorities relied upon by all the parties in the lower court to acquaint myself with what guided the learned trial magistrate in arriving at the award of Kshs 1,000,000. Further, I have considered authorities cited to me by the parties in the instant appeal. Appellate courts have reviewed awards where they are convinced that there is need to interfere with the awards by the trial court in order to meet ends of justice.

15. I acknowledge that authorities are a guide to the amount of damages to be awarded but caution must also be exercised as was stated in *Kigaraari v Aya* (1982-88)1KAR 768 that: -

“Damages must be within the limits set out by the decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”



16. The guiding principle in the award of damages is that whereas no two injuries are exactly alike, comparable injuries should, as far as possible, be compensated by comparable awards. The evidence on the nature and extent of claimant’s injuries normally forms the basis upon which an award of damages is founded. I note that the respondent did not subject the appellant to a 2<sup>nd</sup> medical examination by a doctor of his choice and therefore PW1 presented the only medical opinion that the court could rely on.
17. I have also perused the treatment notes that were produced as exhibits together with the P3 form. I note that the said exhibits confirm the contents of the doctor’s medical report. The P3 form classified/assessed the respondent’s degree of injury as “maim.”
18. In my view, I do not find reason to interfere with the award made by the trial court. In so finding, I’m in concurrence with the holding in *Reuben Mongare Keba v L P N* [2016] eKLR where the court set aside the award of Kshs 1, 200, 000/= and substituted with an award of Kshs 800,000 where the respondent therein had sustained the following injuries; Fracture of the tibia-fibula bones of right leg, Dislocation of the right hip joint, Bruises on the chin, Fracture of the right femur and degloving injury of the right leg. In arriving at this decision I have taken into account that this was the prevailing rate of awards at the time the appellant sustained the injuries. Further, my decision is based on the principles laid down in the case of *West (H) & Son Ltd v Stephard* [1964] AC 345 that;

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated, by comparable awards when all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

19. The upshot is that, I find no merit in the appeal and and is hereby dismissed with costs to the respondent.

**JUDGEMENT PASSED IN THE OPEN COURT AT MALINDI THIS 10<sup>TH</sup> DAY OF MAY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Mr Nyachiro for the Appellant (Absent)
2. Mayieka holding brief for Ms Monari for the Respondent

