



**Kagira & another v Rimberia (Civil Appeal E024 of 2023)  
[2024] KEHC 15760 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15760 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E024 OF 2023  
EM MURIITHI, J  
DECEMBER 11, 2024**

**BETWEEN**

**SAMSON KAGIRA ..... 1<sup>ST</sup> APPELLANT**

**PATRICK MURUNGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSHUA M'GAITI RIMBERIA ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of the Hon. E. Ngigi (PM) delivered on 16/7/2019 in Isiolo CMCC No. 37 of 2013)*

**JUDGMENT**

1. By a plaint dated 572013, the Respondent sued the Appellants seeking general damages for pain, suffering and loss of amenities, special damages of Ksh. 7,750 and costs of the suit plus interest. He pleaded that on or about 4122010, he was lawfully travelling aboard Motor Vehicle Registration No. KAT 74 P Toyota Hiace Matatu along Tenges-Eldama Ravine Road when the 2<sup>nd</sup> Appellant so carelessly and negligently drove and/or mismanaged it that it lost control thereby causing a serious self-involving accident, which occasioned him serious injuries.
2. The Appellants denied the claim by their statement of defence dated 30112016 and prayed for the Respondent's suit to be dismissed.
3. The parties recorded a consent on liability at the ratio of 90:10 in favour of the Respondent against the Appellants and upon full hearing on quantum, the trial court awarded general damages of Ksh. 450,000, special damages of Ksh. 6,700 less 10% contribution = Ksh. 456,700.

**The Appeal**

4. On appeal, the Appellants filed their memorandum of appeal on 1022023 raising 7 grounds as follows:



1. The learned magistrate erred in law and fact when he failed to consider the appellants' evidence on points of law and facts on finding the appellant fully liable or the accident which is the subject matter of this suit.
2. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
3. The learned magistrate erred in law and fact in awarding in favour of the Respondent as against the Appellants, Kshs. 450,000= or general damages, which amount was exorbitantly high in the circumstances.
4. The learned magistrate erred in law and fact in holding that the Respondent had proved his case on a balance of probabilities which finding was against the height of the evidence on record.
5. The learned magistrate erred in law and fact when he failed to consider the appellants' evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondent.
6. The learned magistrate erred in law and fact in failing to pay regard to submissions and decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable on similar injuries as the case he was deciding.
7. The learned magistrate erred in law and fact in unduly disregarding the Appellant's evidence and facts produced in assessing liability and quantum to the Respondent.

### **Duty of the Court**

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

### **Evidence**

6. PW1 Joshua M'Gaiti, the Respondent herein adopted his statement as his evidence in chief. He testified that, "I live in Maili tano. I am a farmer. We were travelling when accident occurred. It was self-involving accident. I had filed my document in court and I pray that this court look at them. I had the police abstract (police abstract PMFI-1). I was also given doctors medical report (M.R PMFI-2) was also given a p-3 form (Pex 3). I have treatment note and receipts (showing witness statement). The car was driven fast. I was sited behind the driver. I was in the second row after the driver. I could not see the speedometer on the car. However, I could feel it was moving fast and we warned the driver. We had hired the motor but the driver would choose his road. We were not controlling the driver (showing receipts) This my receipts. As a farmer you need to be in good health. I am not fully healed."
7. The witness was not cross examined.
8. PW2 Stella Kanyiri Kiugo adopted her statement as her evidence in chief. She testified that, "I live in Mombasa. I am a business woman. I was travelling with Joshua and Saitoti among others. The accident was self-involving Joshua was inside the motor vehicle and was injured."
9. On cross examination, she stated that, "The motor vehicle was being driven fast. I could not see inside the driver cabin. I was asleep and I did not see the speedometer. We had hired the speedometer. We



- did not tell the driver what time we wanted to reach our destination. We were in control of the motor vehicle and driver.”
10. In re-examination, she stated that, “We did not tell the driver to speed up. We even wanted to go slow so that we get to this place.”
  11. PW3 Dr John Macharia testified that, “I hold a bachelor of Medicine from University of Nairobi. I examined Joshua M’Gaiti on 15/10/2011. It was on 4/12/2010 obtained injuries on a R.T.A. Attended a Tenges Health Centre on Isiolo Teaching and Referral Hospital furnished me with T.C.X-ray and P-3. He had obtained soft tissue injuries on scalp, right ore shoulder and left knee. Had a fracture on left thumb. Plaster cast applied on the fractured thumb. It was followed up upon 8/2/11. He raised complains on right thumb, shoulder and also headaches. On exam he has a dislocation on the left thumb due to malunion of the thumb. He sustained fracture on the left thumb which healed with difficulty. He sustained S.T.B will reduce pain which were hours to heal. I charged 4,000 and I issued a receipt to produce but (M.R Pex 2a and receipt Pex 2b).”
  12. On cross examination, he stated that, “The fracture will take 6 months to reunite and S.T.B some days. Report she should have be healed.”
  13. The Appellants closed their case without calling any witnesses.

### **Submissions**

14. The Appellants urge that the award of general damages of Ksh. 450,000 was inordinately high considering the Respondent only sustained soft tissue injuries. They urge that the sum of Ksh. 200,000 would be reasonable and sufficient compensation, and cite Kenya Lighting Company Limited & another v Zakayo Saitoti Naingola & another (2008) eKLR, Kenya Steel Fabricators Ltd v Tom Moki (2018) eKLR, Oluoch Eric Gogo v Universal Corporation Ltd (2015) eKLR and Emmanuel Ithau Nyamai & another v Paul Kipsang Samoei (2021) eKLR.
15. The Respondent urges that the award of Ksh. 450,000 was appropriate in light of the pleaded and proved injuries, and cites Mbaka Nguru and another v ames George Rakwar (1998) eKLR, China Road and Bridge Construction v James Ponda (2020) eKLR, Kenya Power & Lighting Company Limited v Margaret Wanjiku Njunge (2019) eKLR and Otieno v General Motors East Africa Ltd & 2 others (2021) eKLR. He urges the court to find the appeal to be without merit and dismiss it with costs.

### **Analysis and determination**

16. Before delving into the merits of the appeal, the court notes that the trial court has been faulted for failing to consider the Appellants’ evidence. That fault is manifestly unfounded because the record bears witness that the Appellants closed their case without calling any witnesses. How then could the trial court conceivably consider evidence which was not led?
17. The Appellants further fault the trial court for finding them wholly to blame for the accident. The record shows that judgment on liability was entered by consent on 23/3/2019.
18. Mr. Kariuki for the Plaintiff told the court that, “We consent that judgment be entered on liability at 90:10 in favour of the plaintiff.”
19. Mr. Muhoro for the Defendants stated that, “I confirm that is the position.”
20. That consent on liability was by its nature a contract, which duly bound the parties thereto.



21. It is clear that the sole issue for determination is whether the general damages of Ksh. 450,000 were excessive.
22. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470)”

23. The trial court awarded the Respondent general damages of Ksh. 450,000, which the Appellants term as exorbitantly high. The injuries sustained by the Respondent are particularized in the plaint and reproduced in the medical report dated 15102011 as a fracture to the proxima phalanx, left thumb and soft tissues injuries over the scalp, right shoulder and left ankle.
24. The Respondent herein recorded in his written statement dated 572013, which was adopted as his evidence in chief that, “I suffered a fracture to the proxima phalanx, left thumb, soft tissues injuries over the scalp, soft tissue injuries to the right shoulder, soft tissue injuries to the left ankle. To date I have not recovered.”
25. His evidence was corroborated by PW3 Dr John Macharia who testified that, “I examined Joshua M’Gaiti on 15102011. He had obtained soft tissue injuries on scalp, right ore shoulder and left knee. Had a fracture on left thumb. Plaster cast applied on the fractured thumb. It was followed up upon 8211. He raised complains on right thumb, shoulder and also headaches. On exam he has a dislocation on the left thumb due to malunion of the thumb. He sustained fracture on the left thumb which healed with difficulty. He sustained S.T.B will reduce pain which were hours to heal.”
26. When the good doctor was cross examined, he reiterated that, “The fracture will take 6 months to reunite and S.T.B some days.”
27. There is no contestation from the evidence on record that the Respondent’s injuries were substantially soft tissue in nature save for a single fracture of the proximal phalanx, left thumb.
28. In keeping with the principle that comparable injuries should, as far as possible, attract comparable awards, the court is counselled by Chesoni, Ag JA as he then was, in *Mariga v Musila* (1984) eKLR that;

“No two cases of motor accident are exactly the same for one to form a suitable precedent of the other. The facts, the injuries or even degree of similar injuries and the effect of such injuries are usually so different that it is necessary to consider each case on its own merit and peculiar facts even where the country, venue and circumstances are the same. For this reason past decisions in this type of cases are of little assistance in determining the quantum of damages, especially the non-pecuniary damages on pain, suffering and loss of amenities.”



29. The court has considered the case of *Masinga Ndonga Ndonge v Kualam Limited* [2016] eKLR where the court (R.E. Aburili J) awarded Ksh. 150,000 for a claimant who sustained a crush injury of the left foot with a fracture of the 1<sup>st</sup> phalange- proximal end and pains, blood loss and soft tissue injuries.
30. Similarly in *Peter Benard Makau v Prime Steel Limited* [2018] eKLR the court (R. Nyakundi J) upheld the trial court's award of Ksh. 102,000 for a claimant who sustained a fracture to the right toe accompanied with soft tissue injuries.
31. More importantly, the court specifies that those awards were made in 2015 and 2018 respectively. This court finds that the award of general damages of Ksh. 450,000 made herein was commensurate to the pain suffered by the Respondent, taking into account the rate of inflation and other imponderables.
32. This court does not find on the facts of this case any error of law or principle by the trial court as would justify appellate interference with the exercise of discretion of the trial court.
33. It is not enough that if this court had sat as the trial court, it would have probably awarded a different figure. This court cannot substitute the discretion of the lower court with its discretion.

### **Orders**

34. Accordingly, for the reasons set out hereinabove, the Appellants' appeal is without merit and it is dismissed.
35. The appellants shall pay the costs of the appeal to the Respondent.

Order accordingly.

**DATED AND DELIVERED ON THIS 11<sup>TH</sup> DAY OF DECEMBER 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

Ms. Kimotho Gachoka for the Appellants

Ms. Mithenga & Kariuki for the Respondent

