



**Kimathi alias Kimathi Murithi v KWK (Minor suing through FKR) (Civil Appeal E037 of 2022) [2024] KEHC 776 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 776 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E037 OF 2022  
EM MURIITHI, J  
JANUARY 31, 2024**

**BETWEEN**

**BONIFACE KIMATHI ALIAS KIMATHI MURITHI ..... APPELLANT**

**AND**

**KWK (MINOR SUING THROUGH FKR) ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. P.M Wechuli (SRM)  
delivered on 19/10/2021 in Tigania PMCC No. 55 of 2016)*

**RULING**

1. The Respondent herein, the Plaintiff in the trial court, sued the Appellant and another vide a plaint dated 18/6/2016 seeking Special damages in the sum of Kshs. 46,035/=, General damages for pain, suffering and loss of amenities and costs of the suit plus interests. The Respondent pleaded that on 13/3/2016, the minor was lawfully traveling as a fare paying passenger in motor vehicle Registration No. KBW 590 E along Meru-Maua road when the Appellant, his driver, agent, servant and/or employee so negligently and recklessly drove, managed and/or controlled it that it rammed and/or collided into motor vehicle Registration No. KCB 995 B thereby occasioning the minor severe body injuries, loss and damage.
2. The Appellant denied the claim through his statement of defence dated 5/8/2020, and prayed for its dismissal with costs.
3. Upon full hearing, the trial court found the Appellant to have been 100% liable for the accident and awarded general damages of Ksh. 1,350,000, special damages of Ksh. 46,035 = Ksh. 1,396,035 together with costs and interest.



## The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 14/3/2022 set out 6 grounds of appeal as follows:
  1. The Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 1,350,000= as general damages and Kshs. 346,035/= for special damages which amount was exorbitantly high in the circumstances and injuries suffered by the respondent.
  2. 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.
  3. The learned magistrate erred in law and fact when he failed to consider the appellant's evidence on points of law and facts with regard to quantum based on the injuries sustained by the respondent.
  4. 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.
  5. 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.
  6. The learned magistrate erred in law and fact in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.

## Duty of the Court

5. On first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

## Evidence

6. PW1, Karen Wanja Kainyera who had since attained the age of majority, testified that she was a medical lab technologist at Kangeta and adopted her witness statement dated 18/6/2016 as her evidence in chief together with the documents filed therewith as exhibits.
7. On cross examination, she testified that, "My ID is xxxx. I was a fare paying passenger in KBW 590 E. I knew of the number plate when I boarded the vehicle. My brother took me to board the vehicle and also saw it. I was injured on mouth, chest, legs and arms. I was seated right behind the driver. After accident I became unconscious. I found myself in hospital. I was from Karama to Kangeta. I got the accident at Mukara which isn't far. The vehicle was at high speed. We even complained to the driver. After I left hospital as inpatient, I continued as an outpatient. I still have aches in my teeth and chest. I went to St. Teresa's Kiirua mission hospital. I didn't visit another doctor. I usually go to see the doctor since my teeth since ache."
8. On re-examination, she stated that, "The injury in my mouth made mad loose 4 teeth, 3 upper, one come and one got broken. I got refilled."



9. PW2 Dr. Kihumba of Meru Teaching hospital testified that, “I have report of Karen Wanja. On 13.3.2021 she was involved in road traffic accident along Meru – Maua road. She was treated at Muthara hospital and transfer to Kiirua hospital for admission. There were injuries on her incisors. Right foot and one lip had laceration. Right cheek had laceration chest had blunt from trauma. Bruises on upper and lower limbs. Cracked tooth was filed. She attend several clinics. She had suffered two suffered two episodes of nose bleeding and pain on left jaw. Cracked tooth is hype sensitive she sustained serious injuries to the teeth. (Report – Pex 3).”
10. On cross examination, he stated that, “I examined the Plaintiff physically. The wounds had healed with scar and darkening pigment. I relied on initial treatment notes. A time of examination four teeth were missing. One was cracked. This is from blunt trauma. The injuries were as a result of the accident. From the medication evidence four teeth were to be replaced. I don’t know if she followed up on that. All of these emanates from the accident.”
11. The 5<sup>th</sup> October, 2021 was the date slated for defence hearing and since the Appellant and his counsel were absent, despite the date having been taken by consent, the court proceeded to mark the defence case as closed.

### Submissions

12. The Appellant did not file any submissions.
13. The Respondent urges that she produced the requisite receipts to support her claim and the sum of Ksh. 1,350,000 was within range considering the severity of the injuries she suffered. She relies on *Azhar Ali v Sheikha Mohamed* (2020) eKLR, *John Njoroge Murigi v DMK* (2022)eKLR and *Alphonse Mwatsuma Mwangamchi v Joseph Mwanzia Mwanzu & Another* (2005) eKLR where Ksh.1,5000 and 1,200,000 respectively were awarded. She urges that she discharged her burden of proof at trial by proving her case on preponderance of evidence and cites Susan Kanini Mwangangi & another v Patrick Mbithi Kavita (2019) eKLR. She urges that since the Appellant did not call any witness or file any submissions, there was nothing for the court to consider, and prays for the dismissal of the appeal with costs.

### Analysis and Determination

14. The issues for determination from the grounds of appeal are whether awards of Ksh. 1,350,000 as general damages and Ksh. 46,035 were excessive and whether the Appellant’s submissions were considered.

### Excessive Damages

15. This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the *Privy Council in Nance v. British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge



sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v Lovell, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”

16. The injuries the Respondent sustained were enumerated by Dr. J. W. Kihumba, in his medical report dated 10/5/2016 to be three upper and lower incisor extracted, one lower incisor cracked, laceration on the lower lip and on the right foot dorsum, bruises on the right cheek with facial swelling, multiple bruises on the upper and lower limbs and blunt force trauma to the chest with attendant tenderness.
17. He reiterated those injuries in his testimony as follows, “...There were injuries on her incisors. Right foot and one lip had laceration. Right cheek had laceration chest had blunt from trauma. Bruises on upper and lower limbs. Cracked tooth was filed. She attend several clinics. She had suffered two suffered two episodes of nose bleeding and pain on left jaw. Cracked tooth is hype sensitive she sustained serious injuries to the teeth.”
20. He stated that at the time of examining the Respondent, “...four teeth were missing. One was cracked. This is from blunt trauma. The injuries were as a result of the accident.”
21. He noted in his medical report that, “The cracked tooth is hypersensitive especially to cold or hot beverages. Wounds have since healed with scarification and hyperpigmentation.”
22. PW1 stated on cross examination that, “I was injured on mouth, chest, legs and arms. I was seated right behind the driver. After accident I became unconscious. I found myself in hospital. I was from Karama to Kangeta...After I left hospital as inpatient, I continued as an outpatient. I still have aches in my teeth and chest. I went to St. Teresa’s Kiirua mission hospital. I didn’t visit another doctor. I usually go to see the doctor since my teeth since ache.” On re-examination, she stated that, “The injury in my mouth made mad loose 4 teeth, 3 upper, one come and one got broken. I got refilled.”
23. PW1 was admitted at St. Theresa Mission Hospital- Kiirua from 13/3/2016 to 22/3/2016. Whereas it is not disputed that the injuries the Respondent sustained were soft tissue in nature, this court feels that the award of Ksh.1,350,000 was excessive, notwithstanding the fact that she was admitted at St. Theresa Kiirua for 10 days, and has been on follow up treatment as an outpatient.
24. In *Simon Taveta v Mercy Mutitu Njeru* (2014) eKLR, the Court of Appeal expressed itself thus:

“On our part we note that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries.”
25. This court in *Boniface Kimathi alias Kimathi Murithi v Karen Wanja Kaiyera (Minor suing through Ferdinand Kaiyera Rithbuty)* (Meru Civil Appeal No. E093/2022) substituted the trial court’s award of Ksh.700,000 with Ksh.300,000 for a minor who sustained a large facial wound, soft tissue injury to the right shoulder, right leg, left thigh, left forearm and the chest.
26. Taking into account the steep depreciation of the Kenyan Shilling, this court finds that an award of Ksh.500,000 would be a fair compensation for the pain and suffering the Respondent underwent.
27. While it is admitted that the Respondent spent Ksh.46,035, the receipt from St. Theresa Hospital- Kiirua dated 22/3/2016 shows that Ksh. 18,000 was paid by NHIF leaving a balance of Ksh. 28,035. Therefore, the sum of Ksh. 46,035 is set aside and substituted with Ksh. 28,035.



### **Consideration of the Appellant's submissions and decisions**

28. The record is clear that the Appellant did not file any submissions and therefore, as aptly put by the Respondent, there was nothing for the trial court to consider.

### **Orders**

29. Accordingly, for the reasons set out above, this court finds the appeal to have partially succeeded on the following terms:

1. The award of general damages of Ksh.1,350,000 is hereby set aside and substituted with an award of Ksh.500,000.
2. The award of special damages of Ksh.46,035 is hereby set aside and substituted with an award of Ksh.28,035.

29. The Appellant shall have costs of the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

#### **Appearances:**

M/S Kimondo Gachoka & Co. Advocates for the Appellant.

M/S Kitheka & Ouma Advocates for the Respondent.

