



**Nkirote v Kamathi (Civil Appeal E105 of 2023)  
[2024] KEHC 11580 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11580 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E105 OF 2023  
LW GITARI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**PURITY NKIROTE ..... APPELLANT**

**AND**

**DOUGLAS KAMATHI ..... RESPONDENT**

**JUDGMENT**

1. The Appellant filed this suit vide a plaint dated 26<sup>th</sup> May, 2021 against the respondent seeking general damages for pain suffering and loss of amenities, special damages as pleaded in paragraph 4 and costs of the suit and interest at court rates.
2. The Appellant pleaded that at all material times the respondent was the registered, beneficial and possessory owner of motor vehicle registration number KCW 826B Toyota Hiace van. That on or about 8<sup>th</sup> March 2021 the Appellant was lawfully travelling along the Meru-Nkubu Road as a passenger in motor vehicle registration number KCW 826B Toyota Hiace Van when the respondent's authorized driver so negligently drove motor vehicle registration number KCW 826B Toyota Hiace Van that it rolled as a result of which she was seriously injured.
3. The Appellant particularized the particulars of negligence against the respondent as driving without due care and attention, driving at a speed that was excessive given the circumstances, driving on the wrong side of the road, driving a defective motor vehicle, losing control of motor vehicle registration number KCW 826B Toyota Hiace Van, failing to take any steps to avoid the accident, failing to have regard for the safety of his passengers particularly the Appellant, failing to stop, slow down, swerve or in any other manner avoid the accident, allowing motor vehicle registration number KCW 826B Toyota Hiace Van to roll, overtaking when it was unsafe to do so and overtaking at a sharp corner.
4. The Appellant enumerated particulars of the Appellant's injuries as injury to the chest and injury to the right knee.



5. The Appellant avers that his claim against the respondent is for both general and special damages. The particulars of special damages are medical report Kshs. 6000 and motor vehicle copy of records 550.
6. The respondent filed a defence dated 13<sup>th</sup> July 2021 and denied the Appellants claim. The particulars of negligence and injuries are denied and strictly without prejudice and in the alternative to the foregoing the respondent avers that any such occurrence as the Appellant may prove was caused solely substantially contributed to by the Appellant's own negligence.
7. The respondent particularized the particulars of negligence as failing to take any or any adequate precaution for her own safety, failing to heed the instructions on safety precautions when travelling, failing to heed the traffic rules and regulation when travelling and failing to buckle up.
8. The respondent pleaded that in the alternative and without prejudice the occurrence of the accident as the Appellant may prove occurred without any negligence on his part and the same was due to an inevitable accident. That the particulars of special damages as set out are denied.
9. After considering the evidence adduced, the learned trial magistrate dismissed the Appellant's claim because he failed to prove her case to the required standards.
10. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;
  1. The learned Trial Magistrate erred in Law and fact in finding that the Appellant had not proved her case on liability when the issue had already been settled in Githongo SPMCC No E017 of 2021 (*Purity Nkirote v Douglas Kamathi* which had been agreed by the parties as the test suit.
  2. That the learned trial magistrate erred in law and fact in dismissing the Appellant's case on the basis that her injuries were sustained in a bar accident when no such evidence had been tendered by any of the parties.
  3. That the learned trial magistrate erred in law and in fact in misreading the Appellant's P3 Form with the sole aim of denying her compensation.
  4. That the learned trial Magistrate erred in law and in fact in finding that the Appellant had not proved her case on liability.
  5. That the learned trial magistrate erred in law in failing to assess the quantum of damages that the Appellant would have been entitled to had she proved her case.
11. The appellant prays that the appeal be allowed, the court proceeds and set aside the trial court's judgement on liability, adopt the liability agreed by the parties in the test suit and also award the Appellant general damages for pain, suffering and loss of amenities and special damages and costs of the appeal and the lower court be awarded to the Appellant.
12. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 20<sup>th</sup> November 2023 through the firm of Nkunja & Company Advocates while the respondent filed his dated 18<sup>th</sup> April 2024 through the firm of Kimondo Gachoka & Company Advocates.

### **Appellant's Submissions**

13. The Appellant submitted on the brief facts of the Appeal and submitted that the Appeal is on quantum and liability. The Appellant relied in the case of *Selle & Another v Associated Motor Boat Company Ltd & Others* (1968) EA 123 to outline the duty of an Appellate court.



14. The Appellant submitted on the issue of liability that during the continuance of the matter at the trial court, the matter formed part of a series of claims arising out of an accident that occurred on the same date involving different parties who were all passengers in the same motor vehicle. That thus their cases arose from the same accident and same set of facts. That the suits were Githongo SPMCC No. E015 of 2021 *Oscar Kadofi vs Douglas Kamathi* , SPMCC No. E016 of 2021 [*Purity Nkirote vs Douglas Kamathi*] and SPMCC No. E017 of 2021 *Rachel Mwelu vs Douglas Kamathi*.
15. The Appellant submitted that SPMCC No. E017 of 2021 was on the 23<sup>rd</sup> February 2022 selected as the suit for purposes of determining liability as per the provisions of Order 38 rule 1 of the [Civil Procedure Rules](#).
16. It is the Appellant's submission that on the 7<sup>th</sup> day of December 2022, liability in the test suit was determined at 100% against the Defendant. That the judgement in the test suit having determined liability, it was not open for the trial court to revisit the issue. The Appellant relied in the case of [Amos Muchiri Ndung'u v Chinga Tea Factory & David Muthumbi Mathenge](#) [2016] eKLR.
17. The Appellant submitted that the learned magistrate erred in finding that the Appellant had not proven her case on liability when Liability had already been decided in the test suit. Further, the learned magistrate dismissed the case on the basis that the injuries were sustained in a bar accident. That no evidence to that effect was rendered before the court save for an error in Part II of the P3 form that reads, " reports to have been involved in a car accident." Letter "c" in car seems to look like a letter "b" making it look like the word bar. That error is however not relevant as Cpl Salim, who testified as PW2 confirmed the Appellant as one of the people involved in the accident. Further, the Police Abstract which was produced as Plaintiff Exhibit 7 lists the Appellant as one of the passengers in motor vehicle registration number KCW 826B Toyota Hiace *matatu*. Hence, there was no reason for the trial magistrate to dismiss the Appellant's case on a flimsy ground when there was overwhelming evidence that had proven that she was a passenger in the said motor vehicle.
18. It is the Appellant's submission that the court to set aside the decision of the trial court on liability and adopt the liability of 100% as determined in the test suit.
19. The Appellant submitted on the issue of quantum of damages that the appellant would have been entitled to. That the trial after finding that liability had not been proved, proceeded to dismiss the suit without assessing damages. That this is an error as the trial court is bound to assess damages even where it decides that liability has not been proved. The Appellant relied in the case of [Joseph Muthuri v Nicholas Kinoti Kibera](#) [2022] eKLR.
20. It is the Appellant's submission that no amount of money can sufficiently compensate a person who has sustained injuries and all that the courts do in assessment of damages is to strive to issue awards based on fairness and the nature of injuries sustained.
21. The Appellant relied in the case of Mc Gregor on damages 15<sup>th</sup> Edition Paragraph 153 which defines pain and suffering and loss of amenity. That according to the medical report by Dr.Macharia dated 2<sup>nd</sup> April 2021 the plaintiff had sustained soft tissue injuries.
22. The Appellant submitted that it is trite law that comparable injuries should be compensated by comparable award and relied in the case of Justine Nyamweya Ochoki & another v Jumaa Karisa Kipingwa (2020) eKLR and the case of [Francis Omari Ogaro v Jao \(minor suing through the next friend and father God](#) (2021) eKLR.
23. The Appellant submitted that considering the passage of time and inflation they urged the court to award the appellant Kshs 200,000 in general damages for pain, suffering and loss of amenities.



24. The Appellant further submitted that they had pleaded for special damages amounting to Kshs.6,550 which was proven by production of receipts and urged the court to award it.
25. The Appellant submitted that they urged the court to allow the appeal with costs to the Appellant for both the appeal and the trial court and consequently enter judgement for the Appellant as against the respondent as follows:
  - a. Liability:100%
  - b. General damages for pain, suffering and loss of amenities kshs 200,000
  - c. Special damages: Kshs.6,550
  - d. Cost of the appeal
  - e. Cost of the suit in the trial court
  - f. Interest on (b) and (c)above.
26. The respondent submitted on brief facts of the case and proceeded to further submit on the issue of liability.
27. The respondent submitted that the Appellants in their memorandum of appeal alleges that the learned magistrate erred in law and fact by finding that the Appellant had not proven her case on liability when paragraph three of the lower court judgment the trial magistrate clearly indicated that the case was part of the series of matters in which Githongo Civil Suit No. E017/2021 was selected as a test suit where the issue on liability had already been settled.
28. The respondent submitted on the issue of quantum that the Plaintiff pleaded the following injuries injury to the chest and Injury to the right knee. That the plaintiff adopted her witness statement which she had indicated that she sustained injuries on the chest, both elbows, left shoulder and left leg but when she testified, she contradicted herself and indicated that she sustained injuries on the right hand, right leg and chest. That the medical report by Dr. John K. Macharia indicated that she sustained blunt soft tissue injuries of the head, chest and neck.
29. The respondent submitted that the plaint, statement, medical report and evidence produced in court were not clear on the exact injuries she had sustained. That he who alleges must prove, that the plaintiff failed to prove her case on a balance of probability as the nature of injuries sustained were not brought out clearly to the court for proper determination.
30. The respondent further submitted that parties are bound by their pleadings and if it cannot be clearly demonstrated on what injuries sustained, then the Appellant should not expect the court to decide for her on what injuries she might have sustained. That they ultimately urged the court to uphold the entire finding of the lower court. That the instant appeal is a misguided and is an attempt by the Appellant to obtain extortionate amounts of money for a mere cut wound which sums up to a soft tissue injury and the appeal must fail. That the appeal is a blatant abuse of this Court's process.
31. The respondent relied on Section 107 (1) of the *Evidence Act* Cap 80. That burden of proof was on the plaintiff who sought the relief of the court that she tendered her evidence and blamed the Respondent for the accident. That a re-evaluation of the quantum herein would not be prudent as it is not clear what the Appellant suffered. That the Appellant proceeded to produce a P3 form that stated under paragraph two of section A that she was involved in a bar accident.



32. The respondent avers that he was not privy to any bar accident and they did not owe the Appellant any duty of care. That the discretion in assessing the amount of general damages payable will be disturbed if the trial court:
- i. Considered an irrelevant factor or,
  - ii. Left out of account a relevant factor or, short of this
  - iii. The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.
33. The respondent submitted that it is well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. The respondent relied in the cases of *Selle & another vs Associated Motor Boat Co. Ltd* [1968] EA 123, *Mwanasokoni vs Kenya Bus Service Ltd* (1982-88) 1 KAR 278, *Kiruga and anor* (1988) KLR 348.
34. It is the respondent's submission that in line with the above decisions vis a vis the injuries sustained by the Appellant the award rendered was totally justified and should not be revised at all. They submitted further that the appeal be dismissed and uphold the judgement of the trial court.
35. This being a first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its conclusion. This position was taken in *Selle & Another Vs Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the Court of Appeal held as follows:
- “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 demeanor of a witness is inconsistent with the evidence in the case generally.”
36. The issues for determination as I can deduce are:
- i. Whether the trial magistrate erred in finding that the Appellant had not proved her case on liability when the issue had already been settled in Githongo SPMCC No E017 of 2021 which had been agreed by the parties as the test suit.
  - ii. Whether the trial court erred in law and fact in dismissing the Appellant's case on the basis that her injuries were sustained in a bar accident when no such evidence was tendered by any of the parties.
  - iii. Whether the trial magistrate erred in law in failing to assess the quantum of damages that the Appellant would be entitled to.
- Whether the trial magistrate erred in finding that the Appellant had not proved her case on liability when the issue had already been settled in Githongo SPMCC No E017 of 2021 which had been agreed by the parties as the test suit.



37. The Appellant raised the issue that during the continuance of the matter at the trial court, the matter formed part of a series of claims arising out of an accident that occurred on the same date involving different parties who were all passengers in the same motor vehicle. That thus their cases arose from the same accident and same set of facts. That the suits were Githongo SPMCC No. E015 of 2021 *Oscar Kadofi vs Douglas Kamathi*, SPMCC No. E016 of 2021 [*Purity Nkirote vs Douglas Kamathi*] and SPMCC No. E017 of 2021 *Rachel Mwelu vs Douglas Kamathi*.
38. The Appellant submitted further that SPMCC No. E017 of 2021 was on the 23<sup>rd</sup> February 2022 selected as the test suit for purposes of determining liability as per the provisions of Order 38 rule 1 of the [Civil Procedure Rules](#).
39. I have perused the record and I do note that the trial court held:
- “This case is part of a series of matters in which Githongo Civil Suit No. E017/2021 was selected as a test suit for purposes of determining liability wherein judgement was entered at 100 % in favour of the plaintiff as against the defendant. The issue on liability is thus settled.
40. I humbly opine that the trial court correctly applied the issue of the test suit.
- Whether the learned trial magistrate erred in law in failing to assess the quantum of damages
41. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Section 107 of the [Evidence Act](#) provide as follows:- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
42. In determining general damages, the court has to examine the extent and gravity of the injuries suffered by the Appellant. The Appellant stated that she had suffered the injuries listed in the Plaintiff. The Medical Report by Dr. John K Macharia stated that the Appellant was examined on April 2<sup>nd</sup>, 2021 and was found to have pains on the anterior aspect of her chest and Chest X-ray showed no fractures of internal injuries.
43. 2The treatment notes indicated that the Appellant was treated on the material day for injuries sustained in a road traffic accident. Flowing from the above, what is in contention here is whether the appellant sustained injuries in the said accident which the respondent was liable to compensate her. The finding by the learned trial magistrate is crucial in resolving this statement. The finding by the learned trial magistrate was as follows:-
- “The plaintiff in her witness statement dated 26/5/2021 which was adopted as her evidence in chief, stated that she sustained injuries on the chest, both elbows left shoulder and leg. When she testified in court, she stated that she sustained injuries on the right hand, right leg and chest. She tendered a medical report by Dr. John K. Macharia dated 22/4/2021 indicating the injuries sustained as pains on the anterior aspect of her chest. At the time of examination, she complained of pains on the chest and pains on the right knee. It was the plaintiff’s evidence that she was treated at Meru Teaching and Referral hospital on the material date of the accident and tendered an out patient encounter (sic) receipt from the facility being the same date. Treatment notes dated 10/2/2021 were tendered as plaintiff’s exhibit 8. Those treatment notes precede the date of the road traffic accident which allegedly took place on 8/3/2021. The plaintiff also tendered P Exhibit 6, a P3 form dated 23/3/2021 indicating that she sustained soft tissue injuries to the chest. It is quite obvious that the injuries which the



plaintiff alleged to have sustained in court while taking her evidence contradicts those she stated to have sustained in her witness statement. Surprising, on the general medical history on her P3 form, under paragraphs 2 of Section "A" which is filled by a medical appellant had the duty to prove the duty of care (liability) and the damage to the claimant. See *Clerk of Lindsell on Torts* 18<sup>th</sup> Edition on the requirements for the Tort of Negligence.

In this case, liability on the respondent flowed from the road traffic accident involving a motor vehicle which was he was a beneficial owner.

I have looked at the treatment notes and noted that the date is 10/2/2021. The appellant's statements is that the accident was on 8/8/2021. The documents which was marked as exhibit does not relate to the accident. Her statement was that she was treated at Meru Teaching and Referral Hospital as an officer or practitioner examining the patient, the same indicates that she the plaintiff, "reports to have been involved in a bar accident."

See page 45-46 of the Record of Appeal

After this analysis, the learned trial magistrate concluded that the injuries sustained were sustained in a 'bar' and the defendant did not owe the plaintiff who was injured in a bar a duty of care.

I have considered the finding by the learned magistrate. I agree with him entirely that although the defendant was held liable, that did not take away the duty of the appellant to prove her claim of damages against the respondent. The outpatient. The statement states she was injured on the chest, both elbows left shoulder and left leg. The treatment notes show that she was indeed involved in a road traffic accident on the material day. The contention by the learned magistrate that the accident was sustained in a bar accident is not borne out by the evidence. I have perused the P3 form and it shows that there is a slight error which the learned magistrate reads "bar" instead of car. The P3 form was issued after she was involved in a road Traffic Accident. The P3 form was therefore relevant to support the issue at hand.

I find that the learned magistrate erred by failing to assess the quantum of damages even after liability against the respondent was established. This court being the 1<sup>st</sup> appellate court has a duty to assess the damages.

It is trite that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards.

44. The injuries suffered by the Appellant were soft tissue injuries. I have found the following cases quite helpful in terms of comparison:- I. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* (2020) eKLR the respondent sustained a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs 350,000/- on general damages and substituted it with an award of Kshs 140,000/- II. In *Justine Nyamweya Ochoki & another v Juma Karisa Kipingwa* (2020) eKLR, the respondent suffered a blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist and was awarded Kshs 300,000/=. On appeal Nyakundi J. set aside that amount and awarded Kshs 150,000/=. III. In *John Wambua v Mathew Makau Mwololo & another* (2020) eKLR, the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. The trial court assessed general damages for pain and suffering in the sum of Kshs. 120,000/= and this was affirmed by the High Court. IV. In *Charles Gichuki v Emily Kawira Mbuba & another* (2018) eKLR, the respondent suffered a blunt injury (tender) on the right side of the face, a blunt injury (tender) on the shoulders, a blunt injury (tender) on the chest and a blunt injury (tender) to the left thigh. Seron J. substituted the trial court's award of Kshs 400,000/= with Kshs 300,000/=.



45. It is abundantly clear that the appellant was entitled to damages for pain and suffering. That the claimant to a road traffic accident is entitled to be compensated for the actual pain of which he or she suffered and also for amenities in relation to the injury. The appellant in this case went home empty handed in view of the dismissal order. It is helpful to remind the Learned trial Magistrate that procedural Law binds her to assess damages even if she is in doubt of proof of liability. As an appeal's Court the principles in *Mwana Sokoni v Kenya Bus Services & Others* {1982 – 1988} 1 KAR 870 are not applicable on account of the facts of this case where no assessment of damages was never undertaken by the Learned trial Magistrate.
46. Firstly, in *Mohamed Mahmoud Jabane v High Shine Butty Tongoi* CA No. 2 of {1986} KLR Vol. 1. The Court of Appeal stated as follows:
- “The correct approach in award of damages are:
- (1). Each case depends on its own facts.
  - (2). Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic).
  - (3). Compensable injuries should attract comparable awards.
  - (4). Inflation should be taken into account.
  - (5). Loss of future earnings has to be pleaded.
  - (6). Loss of earnings power is part of the general damages.
47. The Court of Appeal in *Ugenya Bus Service v Gachuki* CA No. 66 of {1981 – 1986} KLR 567 took this approach:
- “General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task and one cannot aim for precision.”
48. The other relevant principles were those articulated by the Court in *Southern Engineering Co. Ltd v Musinga Mubia* {1985} KLR 730:
- “It is trite Law that the measurement of the quantum of damages, is a matter for the discretion of the individual judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country (In *Butt v Khan* {1982 – 1988} 1 KAR “It is inevitable in any system of Law that there will be disparity in awards made by different Courts for similar injuries, since no two cases are precisely the same either in the nature of the injury or in age, circumstances of or other conditions.”
49. Given the essentials of this case, my assessment of damages remains in the scope of Kshs.150,000/= for pain and suffering in favor of the appellant. Consistent with the above is an award of Ksh.6,550/= under the limb of special damages. It is also important to award costs and interest of the appeal to the decretal sum payable to the Appellant.
50. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am not satisfied that the learned trial magistrate was justified in arriving at the decision she made. The findings and holdings of the learned trial magistrates were not well founded.



**In Conclusion:**

51. In the result, I find merit in the appellant's appeal and the same is allowed with costs. I award the appellant Ksh.150,000/- as general damages for pain and suffering and Ksh.6,500/- special damages.

**DATED, SIGNED AND DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. W. GITARI**

**JUDGE**

