



**Gitari & 3 others v Attorney General (Civil Appeal E002 of 2023)  
[2023] KEHC 22896 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22896 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E002 OF 2023  
LM NJUGUNA, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**EVANS GITARI ..... 1<sup>ST</sup> APPELLANT  
ERIC MUKUNDI ..... 2<sup>ND</sup> APPELLANT  
WALTER NDWIGA ..... 3<sup>RD</sup> APPELLANT  
ANTHONY KARIUKI NJERU ..... 4<sup>TH</sup> APPELLANT**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

*(Appeal arising from the Judgment of Hon. H. Nyakweba SPM in Chief Magistrate's Court at Embu Civil Cases No. 134,135,137 & 138 of 2019 delivered on 08 th December 2022)*

**JUDGMENT**

1. The appeal herein has been filed vide memorandum of appeal dated January 14, 2023 wherein the appellant being dissatisfied with the above-mentioned decision, now seeks orders that the appeal be allowed, judgment set aside, judgment on quantum be entered in favour of the appellants as submitted or as the court shall assess and costs for the appeal.
2. This appeal is premised on the grounds that the trial magistrate erred in law and fact in:
  - a. Finding that the appellants did not prove the injuries they sustained;
  - b. Allowing the appellants to close their case without stating that in his understanding the testimony of the appellants was mandatory;
  - c. Disregarding the consent order as in civil case no 136 of 2012 was applicable in all the 4 cases;
  - d. Participating in litigating the case and offering a defence to the respondent;



- e. Disregarding the submissions of the appellants on quantum;
  - f. Failing to state issues for determination and the findings on each issue; and
  - g. Emphasizing on technicalities at the expense of justice contrary to the constitution.
3. The brief facts are that vide their respective complaints, the appellants brought tortious claims against the respondent, all of them claiming special damages of Ksh 4,000/= each, general damages, costs of the suit and interests on monetary awards. The particulars were that on or about July 10, 2011, the appellants were lawfully walking along Manyatta-Kirigi road in Embu county when the respondent by himself or his servant/ driver voluntarily offered a lift to them and so recklessly and negligently drove and/or controlled motor vehicle registration number GKA474G at a very high speed that it lost control and rolled several times, causing the appellants to sustain serious injuries for which the respondent is fully liable. The particulars of injuries are as follows:
- i. 1<sup>st</sup> appellant- deep head trauma causing confusion and shock, cut wounds on the face, nose bleeding, headache and pain in right upper limb;
  - ii. 2<sup>nd</sup> appellant: deep cut on the face, nose bleeding, deep trauma on the head causing serious headache, pain on the right upper limb and trauma all over the body;
  - iii. 3<sup>rd</sup> appellant- Numerous bruises all over the face, fracture of the right clavicle bone, fracture of the left wrist joint and traumatic head injury;
  - iv. 4<sup>th</sup> appellant- multiple deep cuts on the scalp, split cut right ear lobe, deep trauma on the chest causing chest pain and trauma all over the body.
4. In civil Case no 136 of 2012, liability was consented at 100% against the respondent and the court directed that the same do apply to the other 3 cases. The parties agreed to dispose of the suit through written submissions. However, the court ordered that the parties file a consent to admit medical documents without calling the makers thereof, before filing their submissions. The respondent failed to consent to production of the medical evidence without the maker of the documents. The court gave a hearing date and on the said date, PW1 who was the examining doctor produced the medical reports and testified on the particulars of the injuries. After this, the appellant's counsel closed their case and the respondent chose not to call any witnesses. The court gave its judgment dismissing the suit stating that there was no evidence in support of the appellant's case as they did not testify.
5. In this appeal, the parties were directed by the court to file their written submissions. Only the respondent complied.
6. The respondent submitted that the appellants dealt a fatal blow to their cases by failing to testify on the extent of the injuries. That the testimony of the doctor was only an opinion. They relied on the case of Kit Smile Mugisha Vs Uganda Criminal Appeal no 78 of 1976. That the court was not bound to warn the appellants that failure to testify in the case would be detrimental to their case. That this being an adversarial system, the court must not interfere in the litigation of a case and that he who alleges must prove. They relied on the case of Nur Olow Farah Aka Olow Farah Aka Diriye Mohamed Olow Vs Muda Arale Farah & Another (2021) eKLR. They argued that once liability had been apportioned for all the 4 cases, the court was right in not making its findings on damages in each individual case because there was no sufficient evidence.
7. The issue for determination is whether the trial court ought to have considered awarding damages to the appellants based on the evidence presented before it.



8. The trial court rightly noted that liability had been settled at 100% against the defendant in all the 4 cases. With that issue being settled through a consent, the court did not have to determine on liability. As to the issue of quantum, the injuries that the appellants actually sustained ought to have been proved.
9. The trial magistrate rightly noted that the injuries were not proved as the appellants did not testify as to the extent of injuries. Further, the doctor who testified was the only witness and therefore an expert witness in the 4 cases. He gave his expert opinion but his testimony was not enough. The appellants ought to have testified and be cross examined on the injuries, extent of recovery and if there are any anticipated complications. This evidence is important in assisting the court in awarding the damages. In the case of *Shah and Another vs Shah and Others* (2003) 1 EA 290 wherein it was held thus:

“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct.....The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion.”

10. Consequently, having considered the arguments made, and the relevant caselaw, I am constrained to find that the appeal lacks merit and is hereby dismissed with no order as to costs.
11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

