



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kimuyu v Githua & 2 others (Civil Appeal 47 of 2022)  
[2023] KEHC 24916 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24916 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 47 OF 2022  
JM CHIGITI, J  
OCTOBER 26, 2023**

**BETWEEN**

**PETER KIMUYU ..... APPELLANT**

**AND**

**PAULINE WAMBUI GITHUA ..... 1<sup>ST</sup> RESPONDENT**

**NILGATA MOTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**KIMCINDY SERVICE LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Judgment of the Learned Chief Magistrate Hon. Dr Julie Oseko delivered on 12th April 2022 at Malindi in Civil Case No. E50 of 2020 Pauline Wambui Githau Versus Nigita Motors Limited and Two Others)*

**JUDGMENT**

1. The 1<sup>st</sup> Respondent's filed a claim for damages arising from a road traffic accident that occurred on or about 6<sup>th</sup> February, 2020 along Malindi-Kilifi road Mtondia. At the time of the accident the 1<sup>st</sup> Respondent was lawfully travelling as a passenger in motor vehicle reg. no. KCX 901P, when the Appellant so negligently drove the said motor vehicle that the same lost control, veered off the tarmac road and overturned as a result whereof the 1<sup>st</sup> Respondent sustained severe injuries.
2. Being dissatisfied with the Court's judgment that was delivered on 12<sup>th</sup> April,2022, the Appellant lodged the appeal that is before this court wherein the following grounds are raised;
  1. That the learned Chief Magistrate erred in finding and holding the Appellant 100% Liable for the Accident the subject of the Suit.
  2. That the learned Chief Magistrate erred in awarding a sum of Kshs 350,000/ = to the 1<sup>st</sup> Respondent as general damages.



3. That the said award of Kshs 350,000 is in the circumstances of this case ordinarily high that it amounts to a wholly erroneous estimate of damages awarded to the 1<sup>st</sup> Respondent considering the injuries suffered by her as per the Medical report from Tawfiq Hospital, Malindi dated 2/3/2020.
  4. That the said award of Kshs 350,000/= is disproportionate of the injuries sustained by the 1<sup>st</sup> Respondent and is not in keeping with other comparable awards made in respect of similar injuries.
  5. Her learned Chief Magistrate failed to give any or any adequate or credible reasons of how she arrived at the figure of Kshs 350,000/= general damages which she awarded the 1<sup>st</sup> Respondent on the basis of 100% liability.
  6. That the learned Chief Magistrate erred in failing;
    - a. To appreciate the significance of the various facts that emerged from the medical documents produced by the 1<sup>st</sup> Respondent in support of her case.
    - b. To consider or properly consider all the evidence before her and or
    - c. To make any or any proper finding on the aspect of liability of the Appellant and the Quantum of Damages payable on the evidence before her.
  7. That the learned Chief Magistrate erred in failing to adequately consider the written submissions filed by the Counsel for the Appellant.
3. The Appellant prays to this Honorable Court for the following Orders;
    - a. That the appeal herein be allowed and Judgment of the Trial Court delivered on 12<sup>th</sup> April 2022 be and is hereby set aside and /or overturned.
    - b. That the 1<sup>st</sup> Respondent's Suit before the Trial Court (being MCCC NO. E50 OF 2020 Pauline Wambui Githua-vs- Niigata Motors Ltd & Two Others) be dismissed with Cost to the Appellant.
    - c. That the Costs of this Appeal be awarded to the Appellant.
  4. The Appellant is concerned that the 1<sup>st</sup> Respondent blamed the accident on the carelessly driven boda-boda. However, in the plaint and witness statement both dated 14<sup>th</sup> September, 2020 seven (7) months after the incident, the 1<sup>st</sup> Respondent changed her account and blamed the Appellant for the accident which blame the Appellant denied in his Statement of Defence and Witness Statement.
  5. The Appellant gave an account very similar to the one the 1<sup>st</sup> Respondent gave to Tawfiq Hospital on 12<sup>th</sup> February, 2020 six (6) days after the accident.
  6. The Appellant argues that from the evidence available in the Trial Court, the accident was caused by a careless ridden boda-boda which unfortunately did not stop at the accident scene and could not be traced to be brought to Court.



7. It is the Appellant's case that the 1<sup>st</sup> Respondent did not prove that the Appellant caused the accident on a balance of probability. He urges the Honourable Court to re-evaluate and reconsider the quantum of damages payable.
8. The medical report from Tawfiq Hospital Malindi where the 1<sup>st</sup> Respondent sought further treatment on 12<sup>th</sup> February, 2020, six (6) days after the accident clearly shows that the x-ray was taken and it showed no fracture but soft tissues injury on the foot and hand. The P3 form from Malindi District Hospital shows the degree of injury as harm but which was later changed to grievous harm.
9. He submits that the evidence in the Medical Report from Tawfiq Hospital Malindi, the 1<sup>st</sup> Respondent sustained soft tissue injury and not a fracture as pleaded in her plaint. He urges this Honourable Court to re-evaluate and re-consider the evidence contained in the Medical Report from the Tawfiq Hospital Malindi and come to its own conclusion as to the nature of injuries sustained by the 1<sup>st</sup> Respondent.
10. He believes that the Trial Court erred in its finding on the injuries sustained by the 1<sup>st</sup> Respondent and the general damages awarded to the 1<sup>st</sup> Respondent as a result.
11. It is the Appellants case that the learned Chief Magistrate erred in awarding a sum of Kshs 350,000/= to the 1<sup>st</sup> Respondent as general damages and that the amount is ordinarily high and further that it amounts to a wholly erroneous estimate of damages awarded to the 1<sup>st</sup> Respondent considering the injuries suffered by her as per the Medical report from Tawfiq Hospital, Malindi dated 2<sup>nd</sup> March, 2020.
12. According to the Appellant, the said award of Kshs 350,000/= is disproportionate of the injuries sustained by the 1<sup>st</sup> Respondent and is not in keeping with other comparable awards made in respect of similar injuries.
13. The Appellant wants the appeal to be allowed and Judgment of the Trial Court delivered on 11<sup>th</sup> April 2022 be hereby set aside and /or overturned and that the 1<sup>st</sup> Respondent's Suit before the Trial Court (being MCCC NO. E50 OF 2020 Pauline Wambui Githua-vs- Niigata Motors Ltd & Two Others) be dismissed with Cost to the Appellant.

#### **1<sup>st</sup> Respondent's Case:**

14. According to the 1<sup>st</sup> Respondent, this suit has been fully settled by the Appellant's insurer and the Appeal is nothing but an academic exercise and a waste of judicial time.
15. The 1<sup>st</sup> Respondent's claim was for damages arising from a road traffic accident that occurred on or about 6<sup>th</sup> February, 2020 along Malindi-Kilifi road, Mtondia. He was lawfully travelling as a passenger in motor vehicle Reg. no. KCX 901P, when the Appellant so negligently drove the said motor vehicle that the same lost control, veered off the tarmac road and overturned as a result of which the 1<sup>st</sup> Respondent sustained severe injuries.

#### **Liability**

16. The 1<sup>st</sup> Respondent pleaded particulars of negligence of the driver of motor vehicle Reg no. KCX 901P who was in control and management of the said motor vehicle and holds the Appellant liable for the accident and the personal injuries which she sustained as a result of the accident.
17. The 1<sup>st</sup> Respondent testified in the trial court and adopted her statement dated 14/9/2020 as her evidence in chief. According to the 1<sup>st</sup> Respondent the driver of the motor vehicle was to blame for the accident. He drove recklessly and did not mind the safety of the passengers. This was further brought



out in the Police Abstract produced by the 1<sup>st</sup> Respondent which placed the blame squarely on the 3<sup>rd</sup> Defendant who was found to be driving without due care and attention as evidenced.

18. Reliance is placed in the case of Robert Gichuchu Maina - Vs- John Kamau (2004) and Ben Mangesa - Vs- Edith Makungu Lande (201 3) eKLR where the court could not find how a passenger could be blamed upon occurrence of an accident unless something that the passenger did is demonstrated.
19. It is his case that the evidence is very clear that the accident was caused by the negligence of the driver who was in control and management of the said vehicle. Section 47 (1) of the *Traffic Act* provides that if any person who drives a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably have expected to be on the road is guilty of an offence.

### **General damages for pain and suffering**

20. The Medical report and its contents thereof were admitted as evidence it was therefore proper for the trial magistrate to rely on the said document to determine the injuries sustained.
21. Justice Isaac Lenaola as he then was pronounced himself on the issue of the medical report in the case of Kanampiu Mlibua V Jacob M'abuanga & 2 others [2006] eKLR where he held that;

“Granted, medical or expert evidence for that matter ought to be tendered by those well versed in those matters but where a document is produced without the maker thereof being called and the opposing party does not object to its production, I cannot see how it can be challenged on Appeal when no argument arose as to its validity at the time of production.”
22. The medical report by Dr. Adede admitted as evidence confirmed that the Respondent sustained the following injuries after an RTA with 2% permanent disability:
  - a) Fracture of the left 5<sup>th</sup> proximal phalanx toe bone
  - b) Blunt injury to the left lower limb
  - c) Blunt injury to the left hand
23. The treatment notes, P3 form and medical report and the evidence by the 1<sup>st</sup> Respondent confirms that the 1<sup>st</sup> Respondent sustained the above injury as a result of the said accident.
24. The 1<sup>st</sup> Respondent herein confirmed that she indeed suffered the injuries. She testified that immediately after the accident she visited Upendo Medical Clinic but the pain subsisted causing her to visit Tawfiq Hospital on 12<sup>th</sup> February, 2020. The pain got even worse on her foot and she was forced to report to Memphis Health Services where she was diagnosed to have a sesamoid fracture within the 5<sup>th</sup> metatarsal at the proximal phalix of the small toe and provided with crutches and a phil cast boot as evidenced in the 1<sup>st</sup> Respondent's list of documents.
25. The 1<sup>st</sup> Respondent's evidence that she sustained the fracture is therefore corroborated. The 1<sup>st</sup> Respondent confirmed in her testimony that she cannot lie to the court about the injuries so that she can get money. The degree of injury suffered is grievous harm as evidenced in the P3 form.
26. The claims by the Appellant that the 1<sup>st</sup> Respondent did not suffer a fracture are nothing but mere claims that are unfounded. The Appellant did not produce any medical report stating otherwise. He urges that this court ought not to rely on the Medical Report produced by the 1<sup>st</sup> Respondent.



27. As a result of the accident and the disability the 1<sup>st</sup> Respondent's working capacity has since diminished. She is the breadwinner of the family and the low and slow income is proving to be a great challenge to her family.
28. In respect of the injuries the 1<sup>st</sup> Respondent submitted that an award of Kshs. 800,000/= would adequately compensate her as general damages for pain and suffering.

### **Analysis and determination**

29. The 1<sup>st</sup> Respondent has informed this court that the decretal sum is already settled.
30. This court has that notwithstanding proceeded to determine the appeal. This being a first appeal the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.
31. In the case of *Selle & another vs Associated Motor Boat Co. Ltd* [1968] EA the court held as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

### **Liability**

32. The 1<sup>st</sup> Respondent pleaded particulars of negligence of the driver of m/v Reg no. KCX 901P who was in control and management of the said m/v and holds the Appellant liable for the accident and the personal injuries which she sustained as a result of the accident.
33. According to the 1<sup>st</sup> Respondent, the driver of the m/v was to blame for the accident. He drove recklessly and did not mind the safety of the passengers. This was corroborated by the Police Abstract produced by the 1<sup>st</sup> Respondent which placed the blame squarely on the 3<sup>rd</sup> Defendant who was found to be driving without due care and attention as evidenced.
34. It is my finding and I so hold that the 1<sup>st</sup> Respondent proved her case on a balance of probabilities that the accident was caused by the negligence of the Appellant who was in control and management of the said vehicle.

### **Quantum of damages:**

35. The Respondent pleaded the following particulars of injuries:
  - a) Fracture of the left 5<sup>th</sup> proximal phalanx toe bone.
  - b) Blunt injury to the left lower limb.
  - c) Blunt injury to the left hand.
36. The medical report from Tawfique Hospital showed no fracture but soft tissue injury on the foot and hand.
37. Gama medical hospital showed that the 1<sup>st</sup> Respondent had sustained a fracture of the left 5<sup>th</sup> proximal phalanx toe bone. Blunt object injury to the left lower limb and left hand. The P3 showed that there was a fracture. At cross examination, the Respondent testified that there was a fracture.



38. I am satisfied that she proved that she sustained the injuries as pleaded in the Plaintiff.
39. I have also considered the age of the authorities that parties relied on at the hearing as well as the inflationary trend of the Kenya Shillings and I am of the view that the trial court award was not inordinately high as compensation for general damages in the circumstances.
40. The principles guiding an appellate court in determining whether to interfere with an award of general damages have also been enunciated in the case of Butt vs Khan [1981] KLR 349, wherein Law, J.A. observed that:

“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.”

41. The Court of Appeal the case of Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No.284 of 2001 (2004) 2KLR 55 as quoted in Mumbi Ngumbi Kasamu (Suing as the legal representative of the Estate of Boniface Mulinge Mbithe deceased) v Mutua Mulaa & Another (2019) eKLR stated as follows:

“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 or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate”

42. I am satisfied that the sum awarded is a reasonable compensation for the Respondent and I do not see any justification to interfere with the judgment.

**Orders:**

The Appeal lacks merits and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

.....

**JOHN CHIGITI (SC)**

**JUDGE**

