



REPUBLIC OF KENYA



**Kisau Girls Secondary School v Musau (Civil Appeal 106 of 2019)
[2022] KEHC 13090 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 106 OF 2019
GMA DULU, J
SEPTEMBER 21, 2022**

BETWEEN

KISAU GIRLS SECONDARY SCHOOL APPELLANT

AND

**ALIAS ZIPPORAH MWAU ALIAS ZIPPORAH KANINI ALIAS ZIPPORAH
MWAU RESPONDENT**

*((Being an Appeal from the Judgment of Hon. L.K Mwendwa (SRM) in Makueni Senior
Principal Magistrate's Court Civil Case No.250 of 2018, delivered on 10th December 2019))*

JUDGMENT

1. In a judgment delivered on the December 10, 2019 the learned magistrate entered judgment for the respondent on 100% liability against the appellant herein, and awarded the respondent general damages of Kshs 350,000/= for pain, suffering, costs and interest.
2. The appellant, who was the defendant in the trial court, being aggrieved by the decision of the trial court, has come to this court on appeal on the following grounds –
 1. The learned magistrate erred in law and fact in apportioning liability at 100% against the appellant/ defendant whereas the plaintiff chose not to use the safety belt provided as required.
 2. The learned magistrate erred in law in awarding the plaintiff general damages of Kshs 350,000/= which is too high contrary to established precedent.
 3. The learned magistrate erred and misdirected himself in law and fact by applying wrong principles relating to the injury sustained by the plaintiff.
 4. The learned magistrate erred in law and fact by taking irrelevant matters and not taking the relevant matters/evidence into consideration.



3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant's counsel Mwangangi Nzisa & Associates, as well as the submissions filed by Anne M Kiusya & company for the respondents. Both counsel relied on decided court cases.
4. This being a first appeal, I am expected to re-examine the evidence on record and come to my own independent findings – see *Selle v Associated Motor Boat Co Ltd* (1968) E.A.
5. Secondly, the major contest on appeal herein being on quantum of damages, I am required to be guided by the well-established principles enumerated in several cases including the case of *Butt v Khan* (1982 88) KAR 1, in which the Court of Appeal stated 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 ...”
6. The appellant's counsel has argued on appeal that the magistrate erred in finding the appellant 100% liable in negligence. He has suggested that the respondent did not use the safety belt, and also stated that the accident was caused due to a third party vehicle parked on or along the road.
7. From the evidence on record, the respondent Pw1 stated very clearly that she buckled the safety belt. That evidence was not challenged in cross examination. Thus it is not correct to say that the respondent chose not to use the safety belt.
8. With regard to the other vehicle allegedly packed along the road, no particulars of that vehicle were given by the driver of the appellant, Dw1 Muema Mili, and the owner or driver of that third party vehicle were not made parties nor disclosed to the trial court.
9. I find that from the evidence on record, the driver of the defendant Pw1 being in full control of the bus was 100% to blame for the accident as against the respondent herein, as the respondent was not in a position to do anything to avoid or mitigate the accident.
10. I will thus uphold the finding of the trial magistrate that the appellant's driver was 100% liable in negligence for the accident. The appellant is thus vicariously liable in negligence on 100% basis.
11. With regard to quantum of damages, the appellant's counsel asked the trial court for 100,000/= as general damages. The respondents counsel on the other hand asked for Kshs 450,000/= as general damages. The court awarded general damages of Kshs 350,000/=.
12. I have considered the case authorities on award of damages cited in the trial court and also on appeal. I note that there was no claim for award of special damages, and the doctor's report did not establish visible physical injuries suffered by the respondent. What was established was physical pains suffered by the respondent as a result of the accident.
13. Thus in my view, the case of *Catherine Wanjiru Kingori v Gibson Theuri Githubi* (2005) e KLR relied upon by the trial court in assessing general damages, wherein the plaintiff suffered multiple soft tissue injuries, injury to the left elbow and injuries on both ankles, was not an appropriate case authority for determining general damages herein as the respondent suffered much more mild injuries.
14. I will thus interfere with the award for general damages herein, and instead award a figure of Kshs 250,000/= as general damages.



15. Consequently and for the above reasons, I allow the appeal in part. I uphold the finding of the magistrate on 100% liability. As for the award of general damages, I set aside the amount of Kshs 350,000/= awarded, and substitute it with an amount of Kshs 250,000/= as general damages. General damages on 100% liability in negligence is therefore Kshs 250,000/= which I hereby award.
16. The appellant will pay 50% of the costs of appeal to the respondent. Interest will accrue till payment in full.

It is so ordered.

DELIVERED, SIGNED & DATED THIS 21ST DAY OF SEPTEMBER 2022, IN OPEN COURT AT MAKUENI.

.....

George Dulu

Judge

