



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 49 OF 2012**

**1. KENYA FARMERS ASSOCIATION LTD**

**2. SAMUEL CHEPYEGON.....APPELLANTS**

**VERSUS**

**ZIPPORAH KOBILO KANGOGO.....RESPONDENT**

*(Appeal from the original judgment and decree of Hon. Mr. S.N. Riechi in Milimani CMCC No. EJ 608 of 1999 delivered on 20th January, 2012)*

**JUDGMENT**

1. The Respondent sued the Appellants seeking general damages, special damages costs and interest following a traffic road accident. It was the Respondent's claim that on 3<sup>rd</sup> August, 1996 she was travelling aboard the 1st Appellant's motor vehicle registration number KXQ 976 (*'the vehicle'*) which was negligently driven by the 2nd Appellant that the vehicle veered off the road and overturned as a result of which she sustained open communitated fracture of the left tibia upper third, ragged lacerated wound anterio on the left leg and shock. That the resulting disabilities include mal-union of the tibia upper third deformed left leg, shortening of the left leg. suffered loss and damages. She alleged that the 2nd Appellant drove at an unreasonable speed; failed to have due regard for other road users; failed to exercise or maintain any or any effective control over the vehicle; lost control over the vehicle; drove without due care and or attention; failed to swerve slow down or in any other way to take reasonable avoiding action and pleaded res ipsa loquitor.
2. In her testimony the Respondent stated that she was treated at Valley Hospital Nakuru where she was operated on. That she spent a day at the said hospital then she was referred to War Memorial Hospital where she was admitted for about two (2) weeks. She stated that a metal implant was fixed in her leg and that after being discharged from hospital she still visited hospital for dressing. She used crutches for six (6) months. That she still had metal implants which are uncomfortable since they itch. She stated that Dr. Oketch who operated on her recommended the removal of the implants and estimated the cost at KShs. 120,000/=. She stated that she incurred a cost of KShs. 93,320/= for treatment at Valley Hospital and KShs. 119,625/= at War Memorial Hospital. That she paid KShs. 9,170/= for x-ray and drugs. She stated that her employer Kenya Post and Telecommunication Corporation paid the said bills and recovered the same from her salary. She stated that her employer received a discount which she could not recall. She stated that her employer recovered KShs. 469/= monthly. She denied having instructed the firm of Gitau and Company Advocates to handle the claim on her behalf and that the signature on the discharge voucher was her's. The Respondent stated that she paid KShs. 10,322/= at Valley Hospital from her salary and that the bill at War Memorial was paid at KShs. 14, 077/=.
3. PW1, Emanuel Kenga who was an assistant commissioner of police and document examiner

testified that in examining the questioned signature, the known signature and specimen signature he considered individual characteristics on the signatures like speed, pen-lift and strokes, quality on the signatures, character formation, from the start to end and formed an opinion that the signatures were not authored by the same person.

4. PW3, Dr. Wambugu Mwangi testified that he examined the Respondent on 17<sup>th</sup> November, 2000 who had suffered compound comminuted fracture on upper part of the legs tibia bone and sprained leg ankle joint. That the Respondent's fracture was managed by open reduction and metal fixation. That the Respondent complained of swollen tender left ankle joint and pains on the fracture site especially on long distance walking and limping. He stated that the Respondent walked with a limping gait. That the leg was shortened by 1.5 cm and had scars and laceration. That the surgical knee joint flexion movement was restricted by about 5%. Her ankle joint was swollen and tender but movements were within normal limits. He stated that the Respondent would need heel of her shoe to be raised. That she was predisposed to osteoarthritis of the knee and ankle joints and may never be able to fully exert herself. He stated that he prepared a medical report (P. Exhibit 6 for KShs. 1,500/= and was paid KShs. 5,000/= for court attendance.
5. PW4, Dr. Moses Oketch who worked at Valley Hospital in his testimony confirmed that the Respondent was treated at the hospital on 3<sup>rd</sup> August, 1996 of the alleged injuries. He stated that since the Respondent was in shock she could not be taken to theatre immediately rather she was operated on on 4<sup>th</sup> August, 1996 when metal implants were put to hold the broken pieces together. He stated that her employer requested that she be transferred to War Memorial Hospital and such was done on 6<sup>th</sup> August, 1996 where she stayed till 12<sup>th</sup> September, 1996. He stated that an x-ray was done on her on 30<sup>th</sup> July, 1998 which revealed that she had a mal-union of left tibia on the upper end and there was deformity shortening of the leg as a result of which she cannot walk normally. He stated that the Respondent attended Valley Hospital as an out-patient between 12<sup>th</sup> September, 1996 to 14<sup>th</sup> February, 1997. That she was out of work between 3<sup>rd</sup> August, 1996 to 4<sup>th</sup> December, 1997 and could not carry her domestic duties until 4<sup>th</sup> December, 1997. He confirmed that the Respondent paid KShs. 93,320/= and KShs. 128,795/= at War Memorial Hospital. He stated that the initial payment was made by the Respondent's employer. He stated that the Respondent developed an infection at the operation site and would go for surgery for the infection. That it would involve opening up the bone and removing infected part of the bone material at an estimated cost of KShs. 120,000/=. He stated that if the surgery is not done the Respondent would be at a risk of infection spreading to the rest of the bone.
6. The Appellants denied the claim. DW1 Stephen Kihara Muchui an advocate at Muchui and Company Advocates stated that he was at the material time representing Royal Insurance Company of East Africa Limited (***the Client***) in settlement of claim subject of this suit. He stated that the Respondent's claim was settled by the client in March, 1998. That the said settlement arose out of negotiations by DW1's firm and Joseph Gitau advocate. He stated that Dr. D'Cuhna's bill were paid on invoices forwarded by Mr. Gitau. He stated that he had no copies of the cheques used to make payments.
7. The trial magistrate heard the matter and entered judgment against the Appellants for KShs. 823,215 plus costs and interest at court rates made as hereunder:-

General damages	KShs. 600,000/=
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Medical expenses	KShs. 223,215/=
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8. Being dissatisfied with the judgment the Appellants filed this appeal on grounds that:-
  - i. ***that the honourable trial magistrate misapprehended the law and facts and erred in coming to the conclusion that that Plaintiff had not instructed Joseph Gitau trading as Gitau & Co. Advocates and in finding that the Plaintiff had proved her case against the Defendants.***
  - ii. ***that the honourable trial magistrate misapprehended the law and erred in ignoring documentary evidence and relying on oral evidence.***
  - iii. ***that the honourable trial magistrate misapprehended the law and facts and erred in failing to find that the Plaintiff had through her duly instructed advocate and agent voluntarily executed***

- the discharge voucher compromising her claim against the Defendants.*
- iv. *that the honourable trial magistrate misapprehended the law and facts and erred in making findings of forgery as against the Defendants and relying on the same to grant the Plaintiff claim when the Plaintiff had withdrawn her case against Joseph Gitau trading as Gitau & Co. Advocates who was her advocate.*
  - v. *that the honourable trial magistrate misapprehended the law and facts and erred in failing to appreciate that if there was any fraud or forgery committed, the Defendants were not privy to it and thus could not be found culpable or liable to the Plaintiff by any extension.*
  - vi. *that the honourable trial magistrate misapprehended the law and facts and erred in shifting issues, standards and tenets of criminal law to a civil matter to arrive at wrong conclusion.*
  - vii. *that the honourable trial magistrate erred in law in failing to appreciate that the Plaintiff's case kept on shifting depending on the defence pleadings put across meaning that the Plaintiff case was merely speculative and full of mere afterthoughts.*
  - viii. *that the honourable trial magistrate erred in fact and in law in evaluating the Plaintiff's witnesses' evidence by ignoring the fact that none of the witnesses gave evidence that was against the Defendants in this suit.*
  - ix. *that the honourable trial magistrate erred in fact and in law in evaluating the Plaintiffs witnesses' evidence especially the evidence of PW2 the handwriting expert, by ignoring the fact that he relied on photocopies of the discharge voucher and the specimens he used to prepare his report were taken four years later and not in his presence.*
  - x. *that the honourable trial magistrate misdirected himself in his assessment of the probative value of the evidence presented and credibility of the witnesses who testified in support of the Plaintiff's case and as such came to the wrong findings that the Defendants were liable.*
  - xi. *that the honourable trial magistrate misapprehended the law and facts in failing to find that the Plaintiff had been compensated in respect of the subject accident.*
  - xii. *that the honourable trial magistrate misapprehended the law and facts in failing to appreciate that the Plaintiff had been duly examined by Doctor D'Cuhna and a proper medical report prepared which was used to assess the Plaintiff's injuries for compensation purposes.*
  - xiii. *that the honourable trial magistrate misapprehended the law and facts in awarding the Plaintiff an excessive sum of KShs. 600,000/= as general damages taking into account of the nature of the injuries sustained and the date of the accident.*
  - xiv. *that the honourable trial magistrate misapprehended the law and facts in awarding a sum of KShs. 223,215/= as special damages when the same was not proved.*
  - xv. *that the honourable trial magistrate misapprehended the law and facts in failing to find that the Plaintiffs remedy, if any, in this case lay against Joseph Gitau's estate.*
  - xvi. *that the honourable trial magistrate misdirected himself and erred in law and in fact in not taking into account and/or in disregarding the proper emerging issues for determination and the binding authorities and the legal issues raised by the Defendants submissions and eventually allowed the Plaintiff's claim against the totality and weight of the evidence and law.*
9. This being the first appeal this court is duty bound to re-evaluate the evidence on record and arrive at its own independent conclusion considering that it did not have the benefit of hearing the witnesses. See: **Peter v. Sunday Post (1958) at pg. 429**.
10. On the issue of whether the claim had been settled or not it was submitted that the effect of the Respondent's letter dated 15<sup>th</sup> May, 1998 was that she was aware that the firm of Gitau and Company Advocates existed and were handling the claim on her behalf but that the trial magistrate ignored this fact. That it was practically impossible to for the Appellants and their advocate to establish forgery since they were not in contact with the Respondent but her advocate. The Appellants argued that this appeal was not filed timeously since the judgment was delivered on 23<sup>rd</sup> November, 2011, the decree extracted on 20<sup>th</sup> January, 2012 and memorandum of appeal filed on 17<sup>th</sup> February, 2012. That Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya requires appeals to be filed within thirty (30) days of the decree appealed from therefore the instant appeal is in full compliance with the Civil Procedure.
11. The Respondent on the other hand submitted that Section 79G provides that an appeal should be filed thirty (30) days from the date of the decision, and this appeal having been filed fifty five (55) days after the date of delivery of judgment was filed out of time without leave of court and should

be dismissed. It was submitted that the Appellant have not challenged the awards made by court and urged that this court should not interfere with the award. On whether the claim had been settled or not, it was the Respondent's contention that she did not instruct the firm of Gitau to handle her claim and that the discharge voucher was a forgery. It was argued that it is not clear how the issue of the Appellants' involvement was resolved before settlement of the claim. It was submitted that it is the practice in running down matters for the Defendant's advocate and/or insurer to be issued with the Plaintiff's national identity card, instruction letter authorising an advocate to handle the claim and claim supporting documents. That the documents in respect of the Respondent were never produced by DW1 to prove that Mr. Gitau submitted them for settlement of the claim. It was the Respondent's submission that even if it were to be taken that she instructed Mr. Gitau the alleged settlement was a forgery as she has proved in her case. It was submitted that a forgery cannot be ratified and a forged document or contract is null and void. The Respondent on this point relied on their submissions before the trial court where they cited Black's Law Dictionary, 8<sup>th</sup> Edition at page 677, Section 357 of the Penal Code, Chitty on Contracts 27<sup>th</sup> Edition page 197 and Halsbury's Laws of England Vol. 44(1) 4<sup>th</sup> Edition which exerts were to the effect that a forgery or fraudulently obtained signature could not be ratified i.e. no estoppel is created by an imperfect deed.

12. I have considered the evidence on record and the submissions tendered by the parties and I am of the considered view that the issues for determination are whether or not the claim was settled out of court, whether the award was excessive and whether special damages were proved. The Respondent's witness PW1 gave evidence to the effect that the signature in the discharge voucher was not the Respondent's and termed it as a forgery. The Appellants on their part failed to controvert the said evidence. Due to such failure, I find that the Respondent proved that she was not compensated as alleged by the Appellants. See: **Rose Kaiza -Vs- Angelo Mpanju Kaiza [2009]eKLR** where the Court of Appeal held as follows:-

***“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a Court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a Court is not only entitled but would be under a duty, to reject it.”***

13. In **Scott v Brown, Dooring, McNahu & Co. (3) (1893)2 QB 724 at page 728** relied on in case of **Mistry Amar Singh v Kulabuya (1963) EA 408 at page 414** it was held:-

***“no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the [party] proves the illegality the court ought not to assist him”***

14. In **Lazarus Estates Limited v. Beasley (1956) 1 ALL ER 340** the court held that :-

***“No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.”***

14. Further, it is in my view immaterial whether the Appellants were discharged of liability by the firm of Gitau or not. It is worth noting that they tendered no evidence to controvert liability. They are therefore found liable.

15. In **Jackline Syombua –vs- BOG & Ekalakala Secondary School Embu HCCC No. 118 of**

**2006 (UR)** the court held:-

*“The task of assessing damages in a case such as this is a difficult one. The court must nonetheless be guided by relevant precedents...In assessing compensatory damages the court will always bear in mind that the purpose of awarding damages is not to pay as it were for the loss or injury the plaintiff has suffered. Damages only assuage the pain or loss suffered by the Plaintiff because no amount of money can replace a lost limb.”*

16. The principles to be applied by this court in awarding damages are well known. In the case of **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** the Court held:-

*“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)*

17. Considering the above authorities, the authorities cited by the Respondent and the trial court's rendition, I see no need to interfere with the award. The upshot is that this appeal is dismissed with costs to the Respondent.

**Dated, Signed and Delivered in open court this 25<sup>th</sup> day of February, 2015.**

**J. K. SERGON**

**JUDGE**

In the presence of:

Ogutu h/b for Mbaabu for the Appellants

Kaburu for the Respondent