



REPUBLIC OF KENYA



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Oigoro v Matunda (Fruits) Bus Services Ltd & another (Civil Appeal E069 of 2022) [2025] KEHC 188 (KLR) (20 January 2025) (Judgment)

Neutral citation: [2025] KEHC 188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E069 OF 2022
PN GICHOHI, J
JANUARY 20, 2025**

BETWEEN

EVANS ABUGA OIGORO APPELLANT

AND

MATUNDA (FRUITS) BUS SERVICES LTD 1ST RESPONDENT

TITUS MATHEWS MBUI 2ND RESPONDENT

(Being an Appeal from the whole Judgement of Hon. Soita (SRM) at Molo delivered on the 23rd May, 2022)

JUDGMENT

1. The background of this Appeal is that Appellant sued the Respondents vide a plaint dated 10th February 2016 seeking judgment against them for:-
 - a) General damages.
 - b) Special damages of Kshs. 10,800/= plus 16% VAT.
 - c) Costs of the suit.
 - d) Interest on (a) and (b) above at court rates.
 - e) Any other relief that the court shall find fit and just to grant.
2. His claim was that the 1st Respondent was the registered owner of motor vehicle registration number KCC 010A being driven by the 2nd Respondent when on or about 14th January 2016, the Appellant was lawfully travelling in the said vehicle as a fare paying passenger when the 2nd Respondent so carelessly and negligently drove and/controlled the said vesicle at Migaa area along Nakuru -Eldoret Road that it overturned and the Appellant sustained very serious injuries as a result of which the Appellant suffered



- loss and damage. The Appellant particularised the negligence by the said driver, the injuries and special damages suffered.
3. The Respondents filed their joint defence dated 16th March 2016 particularly denying that 1st Respondent was the registered owner of motor vehicle registration number KCC 010A and that the 2nd Respondent was the driver of the said motor vehicle. They also denied occurrence of the accident as well as the alleged negligence on their part and stated that accident was solely caused by the negligence of the Appellant.
 4. They pleaded that in the alternative and without prejudice, any such occurrence as the Appellant may prove, was solely and/or substantially contributed by the Appellant's own negligence. They particularised the said negligence and further denied the alleged injuries, loss and damage. Ultimately they prayed for dismissal of the suit with costs to them. A reply to that defence was made and the Respondents put to strict proof.
 5. Vide a Notice of Motion dated 20th September 2016, the Respondents sought leave to file an Amended Defence. That application was allowed by consent of parties on 10th November 2016 and the Amended Defence dated 15th February 2017 was duly filed.
 6. The Respondents pleaded that the Appellant's claim was fraudulent and based on misrepresentations that he had been involved in an accident and injured thus unlawful, improper and an abuse of court process. Those averments are particularised.
 7. On 22nd February 2017, the Appellant filed a Reply to the Amended Defence putting the Respondent to strict proof.
 8. The case finally proceeded for hearing and the trial court rendered its judgment on 23rd May 2022.
 9. On liability, the trial court found the Respondents liable as there was no dispute as to the occurrence of the accident and that the accident was self-involving. However, the court dismissed the suit with costs to the Respondents on the grounds that the treatment notes relied upon in by the doctor who prepared the medical report was revoked and therefore, no damages were awardable as the injuries were not proved.
 10. On whether quantum was awardable, the trial court held : "...since the primary medical documents used by PW2 was revoked by the records officer who as PW3 and DW1 , in essence the Court will disregard the medical report produced by PW3 Dr. Obed Omuyoma on the basis that the primary documents he relied upon have been revoked by the hospital the Plaintiff alleges to have been treated . In conclusion, the Court finds that the Plaintiff has not proved his injuries he sustained from the accident on a balance of probability and therefore dismiss the suit with cost. If the plaintiff had proved injuries, the Court would have awarded Kshs. 120,000 for general damages."
 11. Aggrieved, the Appellant preferred this Appeal vide the Memorandum of Appeal dated 24th May 2024 and on the following grounds:-
 - a. That the Learned Trial Magistrate erred in law and fact in failing to analyse the evidence adduced by the Appellant and his witnesses.
 - b. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit against the overwhelming evidence on record.
 - c. That the Learned Trial Magistrate erred in law and fact in failing to comprehend that the standard of proof in civil cases is on a balance of probability and not beyond reasonable doubt.



- d. That the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's Submissions and hence arriving at a wrong decision and/or judgement.
 - e. That the Learned Trial Magistrate erred in law and fact in failing to appreciate the Appellant's case and evidence adduced.
12. He therefore prayed that:-
- a. The judgment and/or decree of 23rd May 2022 be set aside.
 - b. The Appeal be allowed with costs.
 - c. Judgment be delivered in favour of the Appellant.
 - d. Costs and interest be awarded.
 - e. Any other relief that this Court may deem fit and just to grant considering the circumstances of this case and for the interest of justice.
13. Directions issued by the Court were that the Appeal be canvassed by way of written submissions. However, the Respondent who was represented by the firm of Kimondo Gachoka & Co. Advocates never complied even after severally being given a chance to do so.
14. On his part, and through the firm of E.M.Juma & Ombui Advocates, the Appellant framed two issues for determination as follows:-
1. Whether Learned Magistrate considered the Plaintiff's evidence on record in determining the case.
 2. Whether Learned Magistrate applied the correct principles in dismissing the Appellant's case.
15. On the first issue, the Appellant submitted that before the trial court, he testified that he was injured on the head, abdomen and both knees, after which he was rushed to PGH Nakuru Hospital for treatment. Further, it was submitted that the Appellant testified that he was issued with a treatment note from the said hospital which was produced as exhibit by the records officer at Nakuru PGH at the time (PW3), who was the records officer at Nakuru PGH at the time and who confirmed on oath that the said treatment cards originated from their hospital.
16. He further submitted that the Appellant produced an Abstract which was marked and later produced by a Police Officer from Salgaa Police Station (PW4) who also confirmed that the Abstract originated from their station; that everything captured thereon, including the date of the occurrence of the accident, and the fact that the Plaintiff was injured in the said accident.
17. The Appellant further submitted that he referred to his list of documents which contained documents he produced in support of his case being: demand notice, National Identity Card, treatment card from Provincial General Hospital, bus fare receipt, P3 form and receipt thereof, Police Abstract, Certificate of ownership and receipt thereof, medical report by Dr. Omuyoma and receipt thereof.
18. On liability, he submitted that court erred in finding that the Plaintiff did not prove his injuries from the allegations that medical cards from PGH hospital were revoked. In support of that argument, the Appellant submitted that the trial court failed to appreciate the fact that PW3 had testified on oath and acknowledged that all the medical cards from PGH Hospital produced in court by the Appellant as emanating from their hospital and even allowed the same to be used as evidence in court.



19. Further, the Appellant submitted that the trial court failed to appreciate the fact the Records Officer was under oath which was binding on him and therefore, he could not retract it after making it. It was therefore submitted that PW3 was barred from appearing in the same court as DW1 and contradict his earlier evidence in court as that amounted to perjury.
20. It was further submitted that the trial court failed to consider the fact that no evidence was produced to show that at the time of the accident, PGH hospital was using system generated medical reports and only relied on the evidence that the Plaintiff's Medical cards were revoked.
21. It was his submissions that no hospital files were checked and/or produced to show or disapprove the fact that the Plaintiff was treated in the said hospital on the stated date and time of the accident. Further, he submitted that the revocation letter relied on by the trial court was not produced in court and defended by its author and therefore, its validity could not be verified thus greatly questionable.
22. Regarding the police abstract impugned by the trial court, it was submitted that the said abstract clearly contained the details of the occurrence of the accident. He argued that an error in an abstract and/or its duplicity should not be attributed to an innocent party who was not the maker of the said documents.
23. He therefore submitted that the injuries sustained by the Appellant were proved and also verified by Dr. Omuyoma who carried out physically examination on the Appellant.
24. Flowing from the above, the Appellant moved to the second issue and while placing reliance on the High Court decision in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526, the Appellant submitted that by basing all his decision on the revoked medical report, the trial court set the standard of proof higher than that of probability required in civil cases.
25. He therefore submitted that the evidence in this case was enough proof of the injuries sustained by the Appellant and considering that the occurrence of the accident was not question and that the medical report was corroborated by Dr. Omuyoma, the Appellant proved his case on a balance probability. He therefore urged the Court to allow that Appeal by granting prayers sought.
26. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
27. In carrying out its duty, this Court finds it critical to highlight the reasons the trial court dismissed the suit despite finding of liability in favour of the Appellant in regard to the occurrence of the accident. To be specific, the trial court held: -

“...it is not in dispute that the accident occurred which is self-involving, this in essence means that the Defendants are liable for the accident. The most fundamental question is if the Plaintiff injured due to the accident? Doctor Omuyama herein testified that he relied on treatment notes dated 4th July 2016 to have medical report. Records Officer who was PW3 and DW1 came back again to produce revocation letter revoking the treatment notes, with the letter dated 25th August 2016. The letter herein stated that the facility, Nakuru PGH was not using handwritten treatment notes. Dr. Wycliffe Nyabodo and Dr. Mariga are unknown to the hospital. The P3 Form herein produced dated 26th January 2016 is signed by Dr. Mariga and treatment sheet produced earlier as P EXB- 8a is handwritten to which the PGH facility stated that they have revoked and Dr. Mariga worked in the facility last in year 2012. Ironically again, DW2 the police officer who again is from Salgaa Police Station same as PW4



stated that from the police file , the Plaintiff wrote his statement on 14th January 2021 five years after the accident earlier.”

28. Guided by the case of *Timsales Limited v Joseph Njenga Gathiga* [2015]eKLR and Section 107 and 108 of the *Evidence Act* the trial court held:-

“...since the primary medical documents used by PW2 was revoked by the records officer who as PW3 and DW1, in essence the Court will disregard the medical report produced by PW3 Dr. Obed Omuyoma on the basis that the primary documents he relied upon have been revoked by the hospital the Plaintiff alleges to have been treated. In conclusion, the Court finds that the Plaintiff has not proved his injuries he sustained from the accident on a balance of probability and therefore dismiss the suit with cost. If the plaintiff had proved injuries, the Court would have awarded Kshs. 120,000 for general damages.”

29. To start with, this is a civil case and what was required of the Appellant was to proof his case on a balance of probabilities as was held in *William Kabogo Gitau* (supra) thus:-

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

30. On the other hand, and having pleaded fraud on the part of the Appellant, the Respondent had the duty to prove it though the standard is different as stated by the Court of Appeal in the case of *Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others* [2015] eKLR where it held:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above balance of probabilities but not beyond reasonable doubt.”

31. In regard to liability, there is no doubt that motor vehicle registration number KCC 010A was involved in accident and that at the time it had several passengers. The accident was self-involving in that the driver lost control, veered off the road and the bus overturned. In essence then, the passengers therein had no control in the manner the vehicle was driven.

32. There is no doubt also that the accident motor vehicle is registered in the name of the 1st Respondent and was being driven by the 2nd Respondent. What the Respondents tried to challenge was the Police Abstract (Pexh. 3)

showing that the Plaintiff was passenger No. 8 in the bus and that he was injured. In cross – examination by counsel for the Respondents, PW4 stated:-

“Victim is No. 8 from our police records. This is a list of victims. I do not have his statement in the police file. List is a duplicate of original one, stamp is original. I have a list of DCI list of Documents which are under investigations dated 26/10/2016. Abunga is 29 in number. I cannot tell if they have a letter head of DCI ...Driver was not charged in traffic case. From police file there is no charge sheet. Also, when a person is in fault he is charged.”



33. In re- examination, the witness stated: -

“From the list of documents DMFI ...does not show any document forged. It came from DCI Nakuru not Salga. I confirm police abstract came from police station. The list is duplicate. If we have so many victims and witnesses, we write on a carbon copy, we sign and stamp.”

34. From the line of cross -examination of PW4 who produced the same, it is noted that the Respondents were trying to bring in the issue of forgery. That document was produced by PW4 who confirmed that it originated from Salga Police Station, bore the original signature from the said station and was issued to the Appellant who was one of passengers injured in the accident.

35. There was no evidence adduced that the police abstract was forged. There was no evidence or proof that the Appellant made the document or that he was charged in regard to the same. The issue as to whether the driver was charged for the accident or not is not material at all in the circumstances of the case before the trial court.

36. It is also noted that from the Respondents’ submissions dated 25th April 2022 filed before the trial court, there was no mention of fraud or forgery at all. His submissions in regard to the Police abstract were on its general purpose. He submitted that:-

“The Police Abstract Report Form of the material accident was produced as Plaintiff exhibit 3 herein.. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that that following the accident, the accident thereof was reported to police who took cognisance of that accident It is therefore the police, having received information or a report of occurrence of the accident , that would investigate and establish circumstances under which such accident occurred.

The police abstract only provides particulars of the reported accident. ; the owner of the subject motor vehicles involved , the injured person being the Plaintiff, the insurance company and particulars thereof. The accident was reported at Salgal police station and the status of the matter was that it was P.U.I -pending under investigations.

That being the case ,it was incumbent upon the Plaintiff at the time of hearing to either call an eye witness who saw the accident take place to prove any of the particulars of negligence attributed to the Defendant or to call police from Salgal Police Station who investigated the accident to shed light on the results of investigations ; and as to who was to blame for the accident wherein the Plaintiff sustained soft tissue injuries.

...It is our submissions that the plaintiff has not discharged his burden of proof on allegation of negligence on the part of defendants and therefore their liability to pay damages to him as a result of the accident. We strongly urge the court to dismiss the suit with costs to defendants.”[Emphasis added]

37. From the above submissions, the Respondents’ concern was on who was to blame for the accident not the police abstract or fraud. They acknowledged the contents of the details therein. Having rightly confirmed that liability was proved against the Respondents, the trial court only seemed to have an issue with the medical report.

38. The issue as to injuries sustained by the Appellant was based on the Respondents’ allegation of fraud. As earlier stated by this Court in the background to this Appeal, the Respondent had pleaded fraud in the amended Statement of Defence. It is trite law that fraud must be specifically pleaded and proved.



39. There was no evidence that the Appellant had a hand in the making of the said treatment notes or handling of the systems at PGH. He was not charged with any offence. Strangely, what swayed the trial court against treatment notes is evidence by two witnesses who had given evidence on oath in support of the Appellant in regard to the treatment notes and medical report.
40. It was not tenable for two witnesses to testify on oath in support of the Appellant and come back again in the same hearing to testify on oath in favour of the Respondents as against the Appellant by contradicting the same evidence.
41. Their spirited effort to testify in regard to the purported revocation letter was tainted. Their evidence in support of the Respondent cannot be used to contradict earlier statement in support of the Appellant. It ought not have been relied on by the trial court and further, the circumstances in the case.
42. Further, the evidence on record showed that the issue of forgery was still pending investigations before DCI and therefore, the fact that the Appellant recorded a statement five years later is neither here nor there. Effectively, the Respondents did not discharge their burden in regard to the alleged revocation of the Appellant's treatment notes so as to affect the medical report. Besides, those issues were not raised by any of the parties in their submissions before the trial court.
43. Further, the circumstances in the Timsales Limited case (supra) cited by the trial court did not apply in this case. This Court is satisfied that the Appellant's evidence proved that he was a passenger in the said vehicle and sustained injuries as a result of the accident and shown in the medical report and therefore, he was entitled to damages.
44. As to the issue of quantum, the medical report by Dr. Obed Omuyoma shows that the Appellant sustained:-Severe soft tissue injuries of the forehead.Soft Tissue injury of the right leg.Soft tissue injuries of the left leg.Blunt injury to the occipital region of the scalp leading to severe soft tissue injuries.Soft tissue injuries of the left hip joint.Soft tissue injuries of the left knee joint.
45. A look at the impugned judgment shows that no analysis was done by the trial court as to how it arrived at the award of Kshs. 120,000/= as general damages. The Court of Appeal in the case of Stanley Maore vs Geoffrey Mwenda (2004) eKLR had this to say: -
- “...Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
46. In its judgment, the trial court had this to say in paragraph 11 thereof:-
- “Parties were given an opportunity to file submissions and only the Plaintiff filed his submissions on 22nd April 2022. The Plaintiff submits that on liability same has been proved 100% and on quantum, Kshs. 350,000 would suffice.”
47. However, there is a copy of the Respondent's submissions dated 25th April 2022 bearing the stamp for Molo Law Courts dated 26th April 2022 and said to have been received by the trial court on 20/5/2022. That copy is actually at page 108 of the Record of Appeal.
48. The Respondents had proposed Kshs. 62,000/= as general damages while citing the case of Pius Wasike v Equitorial Nuts Processors [2020]eKLR where on appeal, High Court awarded Kshs. 60,000/= for closed injuries on the back-right shoulder and chest.



49. They also cited the case of *South Nyanza Sugar Co. Ltd v Michael Jitoto* [2009] eKLR where the trial court's award of Kshs. 75,000/= was substituted with Kshs. 50,000/= for the Plaintiff who had sustained blunt head injury; cerebral concussion; bruises and lacerations on the back and chest; and contusion and bruises on the right elbow.
50. On their part, the Appellant had proposed an award of Kshs. 400,000/= putting inflation into consideration and while citing the case of *Kitale Hauliers Ltd v Winston Wanyonyi Lugulu Bungoma HCCA NO. 106 OF 2011* where Appellant therein had sustained soft tissue injuries being neck pains, chest contusion, low back pains, painful swelling on the right shoulder, cut wound over the right leg and laceration over the right leg and was awarded Kshs. 600,000 /= but High Court substituted it with an award of Kshs. 300,000/=.
51. He also cited the case of *Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi* [2005] eKLR where the 3rd Plaintiff sustained multiple soft tissue injuries, injury on the left elbow joint, and injuries on both ankles and was awarded general damages at Kshs. 350,000/=.
52. It is settled that an award of damages is within the discretion of the trial court and indeed, the Court of Appeal in *Catholic Diocese of Kisumu v Tete* [2004] eKLR, had this to say:-
- “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.” [Emphasis added]
53. Even if the trial court did not show what comparable injuries and awards guided it to the sum of Kshs. 120,000/= it would have awarded under this head, the issue is whether that award was so inordinately low or high so as to call for interference by this Court.
54. There is no doubt that the injuries sustained by the Appellant were less severe than those sustained by the Plaintiff in *Kitale Hauliers Ltd* (supra) and in *Catherine Wanjiru Kingori & 3 others* (supra).
55. In *Michael Okello v Prisca Atieno* [2021 eKLR, the Responded had pleaded in the plaint that he had sustained blunt injury to the head, forehead, neck, chest with fracture of the 1st anterior rib; bruises and blunt injury to the left shoulder, left upper limb, right upper limb and cut wound and blunt injury to the right lower limb. High Court set aside the trial court's award of Kshs. 500,000/= general damages and substituted it with an award of Kshs. 250,000/=.
56. This Court finds that the injuries sustained by the Appellant in this case are comparable to the injuries sustained in with *South Nyanza Sugar Co. Ltd* (supra). However, that case was decided in year 2009 but even when inflation is taken into account, there is no justification for interfering with the trial court's award just because it would have awarded a different sum if it had heard the case in the first instance. In the circumstances, the award of Kshs. 120,000/= is reasonable.
57. It is noted that the trial court's judgment does not contain any reference to or finding on special damages. The Appellant had submitted that they had pleaded and strictly proved Kshs. 10,800/=.
58. On the other hand, the Respondents had submitted:- The Plaint dated 10th February 2016 shows that the Plaintiff pleaded for a total of Kshs. 10,800/= only on special damages. At the hearing of this matter,



the Plaintiff produced receipts amounting to Kshs. 10,800/= only. The said receipts though produced, they were not stamped for revenue save for receipt being for medical report produced.

59. While urging the trial court to find that the special damages were not specifically pleaded and strictly proved, the Respondents prayed that the “court to only award the specifically pleaded and strictly proved specials of Kshs. 10, 000/= subject to strict compliance with requirements of Section 19 and 20 of the *Stamp Duty Act*.”
60. This Court notes that from the material herein, the only sum not proved in the special damages is Kshs. 200/= for the Police Abstract.
61. As regards receipts, except for medical report, not being stamped in compliance with *Stamp Duty Act*, M. J. Anyara Emukule J had this to say in *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR:-

“In my view it is the duty of the receiver of the revenue and not the payer to affix the revenue to receipt of all the prescribed amounts. It is the receiver of such payments who should be interrogated and not the poor widow who would be mourning her husband and cannot be penalised for failing to ascertain whether the receipt she was receiving in acknowledgment of the payments she was making had a revenue stamp affixed them.”

62. Indeed, this Court is persuaded that it was not the Appellant’s duty to affix them but the receiver of the payment and therefore, it does not affect the sum above on special damages.
63. In conclusion therefore, the judgment of the trial court dismissing the Appellants suit is hereby set aside and substituted with judgment in favour of the Appellant against the Respondents as follows:-
1. Liability - 100% .
 2. General damages - Kshs. 120,000/= together with interest at court rates from the date of this judgment.
 3. Special damages- Kshs. 10,600/= plus interest at court rates from the date of filing the suit.
 4. Costs of the suit and this Appeal and interest.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY JANUARY, 2025.

PATRICIA GICHOHI

JUDGE

Mr Wafula for Appellant

N/A for Respondent

Ruto, Court Assistant

