



**Guardian Bus Services Limited v Njwe (Civil Appeal E112 of 2021 & E027 of 2022
(Consolidated)) [2025] KEHC 2481 (KLR) (3 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E112 OF 2021 & E027 OF 2022 (CONSOLIDATED)**

AB MWAMUYE, J

FEBRUARY 3, 2025

BETWEEN

GUARDIAN BUS SERVICES LIMITED APPELLANT

AND

RISPER AGUTU NJWE RESPONDENT

*(Being an appeal from the Judgment/ Order of Honourable M.I. Shimenga
(RM) delivered on 9th September, 2021 in Kisumu CMCC No. 282 of 2018)*

JUDGMENT

1. The Appellant herein has approached this court aggrieved by the Judgment of the Trial Court delivered on 9th September, 2021 in Kisumu Civil Suit No. 282 of 2022. The Memorandum of Appeal dated 17th September, 2021 has two Grounds of Appeal namely:
 - i. That the Learned Trial Magistrate erred in fact and in law by apportioning 100% liability on the Appellant (Defendant)
 - ii. That the Learned Trial Magistrate erred in law and in fact in awarding general damages of Kshs. 2,000,000/= which award was excessive and not commensurate to the nature of injuries sustained by the plaintiff.
2. The Appellant filed written submissions in support of the appeal dated 6th November 2023. The Appellant submitted that the Respondent did not produce initial treatment notes of her injuries thus failed to prove her injuries. In support of this, the Appellant relied on the case of Eldoret Civil Appeal NO. 126 OF 2013, Fadna Issa Omar vs Malne Sirengo Chipo & amp; 3 others and the case of Timsales Limited v Patrick King'ori Mwangi [2015] eKLR. The Appellant further submitted that the court erred by failing to compare compensation in comparable awards on the issue of quantum. It stated that the Trial Court placed reliance on the case of Patrick Mwangi Irungu v Charles Macharia and



Anor, Nakuru HCCA No. 188 of 2005 [2008] eKLR where the Plaintiff sustained very serious injuries including a paraplegia secondary to fracture of the T-12 and L1 vertebra as compared to the injuries sustained by the Respondent which are minor. The Appellant then proposed a maximum award of Kshs. 500,000/=

3. The Respondent on the other hand filed submissions dated 20th November, 2023 where she stated that the award was not so unreasonable as the Trial Court exercised its discretion after considering expert opinion on the injuries, prevailing case law, primary documents including hospital discharge notes and indeed comparative injuries and awards.
4. This Appeal was however consolidated with Civil Appeal No. E027 of 2022, where the Appellant raised two issues,
 - i. That the Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's Application dated 20th September 2021 to set aside judgment delivered on 9th September 2021 and to order the matter to start de-novo on grounds that it lacks merit despite giving sufficient reasons to warrant it to be allowed;
 - ii. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's Application dated 20th September 2021 despite the Appellant having paid throw away costs of Kshs.30,000/= to the Respondent as condition set for setting aside the same.
5. I will start by determining the appeal on the Ruling dated 7th April 2022.
6. It is not disputed that the Appellant made a similar application dated 6th November 2020 where the court allowed the application setting side orders given on 14th September 2020 and the Appellant was directed to pay the Respondent throw away costs of Kes. 30,000.00 for the inconvenience caused and the delay in prosecuting the matter within 45 days or else the order would be vacated.
7. The 45 days granted to the Appellant lapsed in the month of May 2021 however when the matter was mentioned on 10th June, 2021 the Appellant had not yet complied and proceeded to seek 14 more days to comply with the court order given on 14th September 2020. A further mention date was set for 8th July 2021 by consent to confirm compliance. 14 days lapsed on 24th June 2021 and the Appellant herein had still not complied with the court orders. On 8th July 2021, since the Appellant had not complied with the orders granted on 14th September 2021, a judgment date was set for 9th September 2021.
8. The Appellant finally complied with the orders and deposited throw away costs with the Respondent's Advocate on 3rd July 2021 nine days after time lapsed for compliance. I note that during the mention to confirm compliance on 8th July 2021 there was non- attendance by the Appellant. During the course of the trial, there was unreasonable delay by the Appellant and even after the matter was referred to mediation, the Appellants failed to participate. There was no appearance by the Defendant on different mention dates as seen in the court proceedings which resulted to delay.
9. The court in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR held:

“It's an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the court is obligated to promote the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done.



...In the same vein the provisions of Section 1A and 1B of the Civil Procedure Act obligates the parties to assist the Court in the expeditious disposal of cases.”

10. My finding is that the reasons for failure to comply with court orders by the Trial Court dated 14th September 2020 has not been explained by the Appellants. They have equally not demonstrated that they took concrete steps to ensure that they pay the throw away costs within the stipulated time even after the court granted them 14 more days to do so.
11. I am not persuaded that the Appellant has made out a case for the granting of the discretionary orders to set aside the interlocutory judgment entered herein by the Trial Court. My considered opinion is that the reasons advanced by the Appellant for the delay are not plausible and have no merit considering they made a similar application prior but ignored to adhere to the orders given.
12. I hereby uphold the Ruling by the Trial Court.
13. In the main Appeal, I have considered the Respondent’s submissions on record alongside the relevant authorities cited. As is the legal requirement for a court sitting on a first appeal, I have re-evaluated the material and evidence which was placed before the Trial Court. It is clear that the appeal revolves around two issues for determination namely;
 - i. Whether the learned magistrate erred in holding the Appellant 100% liable in negligence;
 - ii. Whether the learned trial magistrate erred in using the wrong principles on assessment of damages thereby arriving at an erroneous decision.
14. On the first issue, issue, the Appellant claims that the Respondent did not produce any treatment notes from Kisumu District Hospital aka Kisumu County hospital where she allegedly received treatment after the accident. It further claimed that the P3 form relied upon by the Respondent was filled on 1st March, 2018, 3 months and 16 days after the occurrence of the accident. The Appellant equally stated that there was no radiation report, x-rays or further treatment notes produced by the Respondent in support of their case.
15. On this I would wish to relay on the case of Comply Industries Limited v Mburu Simon Mburu , Civil Appeal No. 121 of 2005 Justice D.K Maraga(as he then was observed that failure to produce a treatment card does not always lead to dismissal of injury claims. The learned Judge held that:

“Where a doctor who examines him (complainant) several days or months later makes reference to the treatment card, unless otherwise proved, that would suffice and the production of the treatment card is not necessary. Failure to produce treatment cards is fatal only when the plaintiff fails to prove by other evidence that he was indeed injured and doubt is cast on his injury claim.”
16. Non production of treatment notes is not fatal to the Respondent’s case and the court will take account into the evidence adduced together with the oral evidence in addition to other medical documents produced in support of the Respondent’s case. The medical report by Dr. Manasseh Onyimbi, the Radiology Request Report form, the Discharge summary form which shows that the Respondent was admitted to Moi Teaching and referral Hospital on 18th November 2017 and Discharged in 23rd November 2017 together with the P3 Form are sufficient evidence of proof on a balance of probability that the Respondent sustained the injuries in her plaint.
17. I am satisfied that in absence of evidence in rebuttal from the Appellant that the accident did not occur in the manner described by the Respondent, the Respondent proved on a balance of probabilities that



the Appellant's driver was liable for the accident. It is the Appellant's driver who was in control of the vehicle during the accident and who owed the Respondent the duty of care to drive safely within the permissible limits and being on proper look out. The Appellant adduced no evidence in rebuttal of the fact. There is nothing that the respondent could have done or failed to do in the circumstances to avoid the accident and/ or mitigate the injuries sustained.

18. For the foregoing reasons, I find that the Trial Court did not err in finding the Appellants 100% liable.
19. On the second issue of quantum, assessment of damages are matters that are within the discretion of the Trial Court and the appellate court ought to respect that discretion if properly exercised. This was expressed in the Court of Appeal in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenya) v Kiarie Shore Stores Limited* [2015] eKLR where the court stated,

“As a general principle, assessment of damages lies in the discretion of the Trial Court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent erroneous estimate. It must be shown that the Judge proceeded on wrong principles that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The court must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages”
20. In the present case, the Medical Report dated 19th July 18 outlines the injuries sustained by the Respondent to include:
 - a. Burst Vertebral Fracture of the Thoracic Spine @ T12 position;
 - b. Blunt head injury which involved the following:
 - i. Damage of the base of the skull which involved the eardrums,
 - c. Dislocated Cervical Spine of the neck;
 - d. Dislocated both shoulder joints;
 - e. Dislocated Lumbar-Sacral Spine of the neck;
 - f. Blunt abdominal injury which involved the visceral organs of the kidneys, intestines and liver;
 - g. Bilateral dislocation of both hip joints.
21. The doctor observed that the Respondent is permanently dependent on Orthopedic Corset Spinal Back support, experiences excruciating pain, cannot move without assistance and has developed paralysis and numbness of the lower limb following the spinal damage. He further observed that the Respondent suffered grievous harm at 85% state of permanent incapacitation.
22. I respectfully agree with the principle of award of damages that comparable injuries should be compensated by comparable awards as stated by the Court of Appeal in the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR.
23. I equally agree with the sentiments of Majanja J in the case of *Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015* [2015] eKLR where he expressed himself thus:-

“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the



court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”

24. I have considered the awards in the following cases. In *Nichodemus Osoro & another vs Jane Gatwiri* [2019] eKLR where the Respondent sustained multiple bruises with loss of two premolar teeth on the left side lower jaw; bilateral fractures-segmental fracture involving right femur and fractured midshaft left femur; and fractured left lateral malleolus with multiple bruises on the anterior aspect of the leg and the court upheld an award of Kes. 2,000,000.00 in General damages.

In *Board of Trustees of the Catholic Church of Kenya Diocese of Marsabit v Diba* (Civil Appeal E004 of 2022) [2022] KEHC 14986 (KLR) (3 November 2022) (Judgment) where the Respondent sustained Bilateral shaft femur fractures, serious abdominal injury with splenic rapture, massive blood loss, deep cut wound at the right lower limb, left chest injury that caused fracture to the rib, Gross contusion to the shoulder and injury to the right eye. The court substituted an award of Kes.3 million with Kes. 2,500,000.00.

In the case of *Bonafide Clearing and Forwarding Company Limited & another v Alicheli* (Civil Appeal 9 of 2020) [2022] KEHC 3232 (KLR) (26th May 2022) (Judgment) where the court granted an award of Kes. 1,500,000.00 to the Respondent who suffered 30% - 60% disability.

25. Noting the extent of disability suffered by the Respondent, I am not convinced that the award of the Trial Court was so inordinately high as to amount to an entirely erroneous estimate or a demonstration that the Trial Court proceeded on wrong principles or misapprehended the evidence. I accordingly resolve this in favour of the Respondent.
26. Having pleaded and proved special damages, I find no reason to alter the decision of the Trial Court on the same.
27. Consequently, I find that this appeal lacks merit and hereby dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE

JUDGE

