



REPUBLIC OF KENYA



KENYA LAW
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**Kimori & another v Kwamboka (Civil Appeal E030 of 2022)
[2025] KEHC 5331 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E030 OF 2022**

WA OKWANY, J

APRIL 24, 2025

BETWEEN

SAMUEL NYAKUNDI KIMORI 1ST APPELLANT

DARSON TRADING LIMITED 2ND APPELLANT

AND

ESTHER KWAMBOKA RESPONDENT

(Being an Appeal from the Judgment and Decree at the Chief Magistrate's Court in Nyamira CMCC No. 1 of 2020 delivered by Hon. M.C. Nyigei on 25th May 2022)

JUDGMENT

1. The Appellants herein seek orders to set aside the decision of the trial court on both liability and quantum. They also pray for the costs of the appeal and of the court below.
2. The Respondent sued the Appellants before the trial court vide Plaintiff dated 9th December 2019 for general damages, special damages costs of the suit, and interest thereon arising from bodily injuries that she sustained in a road accident that occurred on 21st August 2019 along Kisii-Nyamira road.
3. The Respondent claimed that she was on the material day a lawful fare paying passenger travelling aboard the Appellants' motor vehicle Registration No. KCP 941N when at Moitunya area the said motor vehicle lost control and overturned thereby occasioning her serious bodily injuries. The Respondent attributed the accident to negligence and recklessness of the Appellants' driver and/or agent.
4. The Appellants filed a joint Defence through which they denied the particulars of negligence attributed to them. They further denied the Respondent's involvement in the accident and the that she sustained any injuries as a result thereof.



5. At the hearing, the Respondent called a total of 3 witnesses while the Appellants did not call any witness.
6. At the close of the trial, the learned trial magistrate found the Appellants wholly liable for the accident and proceeded to make the following orders: -
Liability at 100% against the Defendants
General Damages – Kshs. 250,000/=
Special Damages – Kshs. 6,120/=
Costs and Interest.

The Appeal

7. Aggrieved by the trial court's decision, the Appellants filed the instant appeal through a Memorandum of Appeal dated 15th June 2024 in which they listed the following grounds of appeal: -
 1. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's defence and evidence which confirmed on a balance of probability that the Plaintiff's injuries and treatment notes tendered as proof thereof had been fabricated.
 2. That the Learned Trial Magistrate erred in law and in fact in finding and holding that the Respondent/Plaintiff had proved her case and the injuries sustained on a balance of probability notwithstanding the treatment notes were fraudulent.
 3. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellants' defence and evidence which confirmed on a balance of probability that the Plaintiff's injuries were not as a result of the road traffic accident.
 4. That the Learned Trial Magistrate erred in law and in fact in finding in favour of the Respondent/Plaintiff notwithstanding that the Appellants/Defendants had established overwhelming evidence challenging the Respondent's case.
 5. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellants'/Defendants written submissions on the twin issue of liability and quantum awardable thereof.
 6. That the Learned Trial Magistrate erred in law and in fact in disregarding the Appellants'/Defendants' evidence on record disproving that the Plaintiff sustained head injury.
 7. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs. 250,000/= that was overly in excess in the circumstances of the case.
 8. That the Learned Trial Magistrate's exercise of discretion in assessment of quantum was injudicious.
8. The appeal was canvassed by way of written submissions which I have considered.
9. The duty of the first appellate court as discussed in the case of *Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999) thus:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

10. From the grounds of Appeal, it is discernible that the Appellants’ argument is that injuries allegedly suffered by the Respondent did not emanate from the accident. They further contend that the medical reports presented in support of the Respondent’s case were fraudulent. I find that the following issues fall for my determination: -
- i. Whether the Respondent proved her case on a balance of probabilities and whether trial court arrived at the correct findings on liability and quantum.

Analysis and Determination

11. Sections 107-109 of the [Evidence Act](#) Cap 80 outline the burden of proof in civil cases as follows: -

107. Burden of proof.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

12. In the present case, the Respondent was required to prove her involvement in the accident in question and the nature of injuries, if any, that she sustained in the said accident.

13. In a bid to establish her involvement in the accident and the Appellant’s liability, the Respondent produced the Police Abstract, a copy of the records of motor vehicle search and P3 Form. I am satisfied that the said documents confirmed the Appellants’ owned the suit motor vehicle, the Respondent’s involvement in the accident and the nature of the injuries that she sustained in the said accident. I therefore uphold the trial court’s finding on liability at 100% in favour of the Respondent as she established, on a balance of probabilities that she was a passenger in the Respondents’ motor vehicle. It is trite that a passengers cannot be held liable for an accident since they have no control over the motor vehicle they are travelling in. This is the position that was taken in [Ndatbo vs. Chebet \(Civil Appeal 8 of 2020\)](#) [2022] KEHC 346 (KLR) [16 March 2022]) where it was held thus:-

“ 19. There is no dispute that the respondent was a pillion passenger.

20 As pillion passenger, the respondent had no control of the motorcycle and could not have done anything to cause or avoid the accident.”

14. Turning to the issue of quantum, I note that the Respondent listed the following injuries at paragraph 5 of the Plaint: -



- i. Blunt injury to the lower jaw
 - ii. Head injury
 - iii. Loose right lower teeth
15. The Appellants' case was that the Respondent's injuries were fabricated and did not emanate from the accident. The Appellants' highlighted a discrepancy in the Respondent's Discharge Summary (P.Exh2[a]) which indicated that she had fallen off a roof and sustained injuries on her left lower limbs. According to the Appellants, the injuries that the Respondent pleaded on the Plaintiff were totally at variance with the injuries listed in the Discharge Summary thereby discrediting the Respondent's entire claim.
16. The Respondent, on the other hand, testified that she was indeed involved in the said accident that resulted in her hospitalisation for about one month. She reiterated that she sustained a head injury and lost one tooth as a result of the accident.
17. PW2, Dr. Morebu, confirmed the Respondent's injuries as stated in the Plaintiff and opined that the head injury was serious. He produced the medical report as P Exh. 7. On cross examination, he stated that the Respondent had not lost any tooth at the time he examined her but that the teeth were loose. He stated that the Respondent was to be reviewed by a dentist.
18. On re-examination, PW2 stated that the information contained in the Discharge Summary to the effect that the Respondent fell from a roof could have been occasioned by a system error and that it may have been information in respect of another patient.
19. I have also considered the Respondent's testimony in respect to the injuries that she sustained in the accident and I find that her evidence was not very consistent as on examination-in- chief, she stated that she lost four of her teeth while the doctor who prepared her medical report (PW2) testified that: -
- “She had not lost any tooth. They were loose.”
20. I find that while it is not in doubt that the Respondent was injured in the accident in question, the degree or extent of her injuries were not established with certainty. I say so because the Respondent's P3 Form (P. Exh. 3) which was filled about one week after the accident shows that she only had swollen tender right lower jaw.
21. My analysis of the above evidence is that in the absence of any medical evidence to prove that the Respondent lost teeth in the accident, I find that the only notable injury she suffered was blunt trauma to the jaw. I find guidance in the decision in *Ramjibhai vs. Rattan Singh S/O Nagina Singh* [1953] 1 EACA 71 where the principles that must be considered by an appellate court in disturbing the findings of a trial court were outlined thus: -
- “This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision.”
22. I therefore find that the trial court erred in finding that the Respondent suffered the injuries listed in the Plaintiff and proceeding to assess quantum on that basis. I say so because the burden rested on the Respondent to prove that she sustained the injuries listed in the Plaintiff. As I have already stated in this judgment, the evidence presented by the Respondent only proved a single injury to the right lower jaw.
23. The Appellants took issue with the award of general damages of Kshs. 250,000 on the basis that the said award was overly excess considering the circumstance of the case. In the case of *Butt vs. Khan* [1981]



KLR 349 the court laid out the principles that should govern an appellate court when considering whether or not to disturb the trial court's award of damages thus: -

“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.”

24. It is also trite that court are guided by comparable past awards when considering the kind of award to make for general damages. As I have already noted in this judgment, the Respondent suffered an injury to the right lower jaw which was swollen. She therefore only suffered a soft tissue injury. I will refer to the following past related awards: -

- a. In Ahmed Mzee Famau T/A Najaa Coach Limited & Another vs. Veronicah Ngii Muia [2017] eKLR the court awarded Kshs. 500,000/= to a claimant who had sustained a fracture of the lower jaw (right mandible), deep cut on left forearm, blunt injuries on right ear and blunt injury on chest.
- b. In Kweri Peter & 2 others vs. Ann Wanjiku Maina [2017] eKLR, the plaintiff who suffered skeletal injuries and loss of two teeth (upper incisor) and was awarded Kshs. 600,000/=.
- c. In the case of Matunda (Fruits) Bus Services Ltd vs. Agnes Chemngeno Tuiya [2021] eKLR, the Respondent sustained a deep cut wound on the scalp, cut wound on the right temporal region of the scalp, deep cut wound on the right shin, blunt injuries to the neck, loose two upper incisor teeth, loose two lower incisor teeth and cut wound on the lower lip. On appeal, the court substituted an award of Kshs 390,000/= for general damages with Kshs 250,000/=
- d. In Justine Nyamweya Ochoki & Another vs. Prudence Anna Mwambu [2020] eKLR the Respondent suffered loss of the upper front incisor tooth, deep cut on the chin, cut on the lip, loosening of the upper teeth, injury to the right forearm and loss of consciousness. The Court reduced the award of Kshs 650,000/= to Kshs 300,000/=.
- e. Lastly, in Patel vs. Mose & another (*Civil Appeal 45 of 2019*) [2022] KEHC 11109 (KLR) (29 July 2022) (Judgment), the 1st Respondent sustained a deep cut wound on the occipital region of the scalp & mandibular region, had three loose lower teeth, blunt injury to the neck & chest and soft tissue injuries on both knee and wrist joints. The High Court at Naivasha reduced the award of Kshs. 700,000/= to Kshs. 320,000/=.

25. I note that the injuries in the above cases were far more severe than the injuries sustained by the Respondent in this case. Thus, I find that the trial court's award for pain and suffering was excessive and not commensurate with her injuries. I therefore set aside the trial court's findings on quantum and substitute the award of Kshs. 250,000 with an award of Kshs. 80,000.

26. The trial court's award for special damages was not challenged on appeal and I therefore uphold it.

27. In conclusion, I find that the instant appeal is merited and I therefore allow it in the following terms: -

Liability at 100% against the Appellants

General Damages – Kshs. 80,000/=

Special Damages – Kshs. 6,120/=

TotalKshs. 86,120/=



28. Each party shall bear its own costs in the Appeal.

29. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA
MICROSOFT TEAMS THIS 24TH DAY OF APRIL 2025.**

W. A. OKWANY

JUDGE

