



REPUBLIC OF KENYA



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**Gathu v Kibugu (Civil Appeal E074 of 2022)
[2025] KEHC 9875 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E074 OF 2022**

**GL NZIOKA, J
JUNE 11, 2025**

BETWEEN

MICHAEL KAMAU GATHU APPELLANT

AND

JULIET MUKINA KIBUGU RESPONDENT

(Being an appeal against the decision in CMCC No. 44 of 2018 by Hon. E. Cherop (RM) delivered on 29th September 2022 at the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. By a memorandum of appeal dated 24th October 2022, the appellant has appealed against the decisions delivered vide CMCC No. 44 of 2019 on 29th September 2022 on the following grounds:
 - a. The learned magistrate erred in law and in fact in finding the appellants 100% liable which finding is against the height of evidence presented in court by the appellants through their evident on record.
 - b. The learned trial magistrate erred in law and in fact in failing to pay regard to the evidence given in court by the appellants and their witnesses that was guiding on liability in this case.
 - c. The learned magistrate erred in fact and in law in holding that the respondent had proved here case on a balance of probabilities which finding was against the height of the evidence on record
 - d. The learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong, principles of law and has occasioned a miscarriage of justice
 - e. The learned magistrate erred in law and in fact when he failed to consider the appellant's evidence on points of law and facts with regard to liability



- f. The learned magistrate erred in fact and in law in failing to consider the appellants' submissions and authorities on the issue of liability
 - g. The learned trial magistrate erred in law and in fact in failing to pay regard to submissions and decisions filed alongside the appellant's submissions that were guiding on liability that are appropriate and applicable on similar circumstances as the case he was deciding
 - h. The learned magistrate erred in fact and law in finding that the appellants were 100% liable for the said accident which is against the evidence on record.
 - i. The learned magistrate erred in law and in fact when he failed to consider the appellant's evidence on points of law and facts with regard to quantum based on the injured sustained by the respondent
2. As a consequence thereof the appellant prays for the following orders:
 - a. That this appeal be allowed with costs.
 - b. That the appellate court do set aside the learned trial magistrate's judgment delivered on 29th September 2022 on liability and quantum and re-place with its own assessment.
 - c. That the costs of this appeal be borne by the respondents.
 - d. That such further orders may be made by this Honourable Court may deem fit to grant.
 3. The plaintiff's (herein "the respondent") case is that, she was a lawful passenger travelling in motor vehicle registration No. KCE 858U driven by the 1st defendant along the Nairobi - Naivasha road. That the subject motor vehicle was involved in a road traffic accident with another motor vehicle registration No KBJ 393Z, driven by the 2nd defendant and/or his agent in the Chief Magistrate case.
 4. The plaintiff avers that, the drivers of both vehicles were negligent in driving the vehicles and tabulated their respective particulars of negligence at paragraph 7 of the plaint.
 5. As against the driver of motor vehicle registration No. KCE 858Z, the particulars are: -
 - a. Driving the said motor vehicle in excessive high speed in the circumstances
 - b. Driving the said motor vehicle without due care and attention
 - c. Driving the said motor vehicle so dangerously and/or negligently and without regard to the passengers on board and particularly the plaintiff
 - d. Driving the said motor vehicle recklessly and in total violation of the Traffic Rules
 - e. Failure to slow down, stop, brake, swerve and/or take any other reasonable step to avoid the said accident
 - f. Driving a defective motor vehicle
 - g. Causing the accident
 6. The particulars of negligence attributed to the driver of motor vehicle registration No KBJ 3933Z are: -
 7. That as a result she suffered the following injuries:
 - a. Deep cuts on both lower leg
 - b. Blunt head injury with a loss of consciousness for sometime



- c. Lower lip laceration
 - d. Loose upper left incisors
 - e. Recurrent headaches
8. Consequently, the respondent sought for the following prayers:
- a. General damages
 - b. Special damages as per paragraph 8
 - c. Costs of the suit
 - d. Interest from the date of filing this suit
9. However, the claim was opposed vide the filing of a statement of defence dated 14th June 2018. The defendants denied the occurrence of the accident and/or the injury to the respondent allegedly suffered as a result of the negligence of the defendants and/or its their agents, servants or driver.
10. However, on a without prejudice basis, that if the accident ever occurred then it was caused solely or substantially contributed to by the plaintiff based on the particulars of negligence at paragraph 4, attributed to the plaintiff.
11. Similarly, on a without prejudice basis, the defendants pleaded that if the accident occurred then it was solely or substantially contributed to by the negligence of the driver of motor vehicle registration No. KBJ 393Z as stated in the particulars of negligence at paragraph 5 of the plaint.
12. The case proceeded to full hearing. The respondent's case was supported by her evidence to the effect that the motor vehicle KCE 858U caused the accident as its driver was driving recklessly and went off his lane and hit an on-coming vehicle. That he was overtaking dangerously. In cross-examination she stated that the driver of KCE 858U was over-speeding.
13. In addition PW2 No. 80088 PC Meshack Ngugi testified that, David Otieno Odhiambo the driver of the motor vehicle registration No. KBJ 393z Toyota Fielder swerved to the right lane and collided with motor vehicle registration No. KCE 858U Toyota matatu driven by Sammy Njenga Mwangi wherein several people including the respondent herein was injured. He produced the police abstract and stated that the driver of KBJ 393Z was held to blame.
14. The respondent's case was also supported by the evidence of (PW3) Dr. Cypranus Okoth Okere, who produced a medical report dated 13th December 2017 which he prepared after examining the respondent.
15. The defence case was supported by the evidence of (DW1) No. 88419 PC Peter Ruso. He testified that the driver of the motor vehicle registration No. KBJ 393Z Toyota Fielder lost control and went to the lane of the motor vehicle registration No. KCE 887T wherein an accident occurred and several passengers including the respondent was injured. He produced a police OB extract. That the driver of the vehicle KBJ 393Z was to blame.
16. At the conclusion of the hearing the parties filed their respective submissions and subsequently the trial court delivered a judgment dated 4th September 2022 and entered judgment in favour of the respondent in the following terms:
- a. Liability-----100%
 - b. General damages-----Kshs. 200,000



c. Special damages-----Kshs. 18,510

Total-----Kshs 218,510

d. Costs and interest thereon from the date of this judgment

It is against the afore decision that, the appeal herein is based.

17. Be that as it were, the appeal was disposed of vide filing of submissions. The appellant in submissions dated 6th October 2023 relied on section 107 of the Evidence Act (Cap 80) Laws of Kenya which provides that a party desiring to have judgment entered in its favour has a duty to prove the existence of any such facts.
18. The appellant argued that while the respondent blamed the drivers of both motor vehicles for causing the accident, the respondent's witness, (PW2) PC Ngugi and the appellant's witness, (DW1) PC Ruso, blamed the driver of motor vehicle registration No. KBJ 393Z, for causing the accident. That based on the foregoing evidence, the respondent failed to prove the appellant's negligence on a balance of probability and urged the court to dismiss the trial court's finding of liability.
19. On the issue of quantam, the respondent cited the case of; Power Lighting Company Limited & another vs Zakayo Saitoti Naingola & another (2008) eKLR quoting Jennifer Mathenge vs Patrick Muiruki Maina [2020] eKLR where the court discussed the principles to be considered before the appellate court can interfere with an award of damages.
20. That the subject principles are; that the damages awarded should not be inordinately too high or low as they are meant to compensate a party for loss suffered but not to enrich a party and should be commensurate to injuries suffered. Further, where past decisions are taken into consideration, they should be taken as mere guides as each case depends on its own facts. Furthermore, inflation should be taken into account as well as the purchasing power of the Kenyan shilling at the time of judgment.
21. The appellants submitted that an award of Kshs. 200,000 as general damages is sufficient compensation and relied on the case of Ndungu Dennis vs Ann Wangari Ndirangu & another [2018] eKLR where the High Court held that the actual injuries sustained by the respondent were soft tissue injuries to the lower leg and back and therefore the sum of Kshs. 300,000 awarded by the trial court was manifestly excessive and substituted it with a sum of Kshs. 100,000.
22. The appellant placed further reliance on the case of, Eva Karemi & 5 others vs Koskei Kieng & another [2020] eKLR where the High Court awarded the 1st appellant Kshs. 70,000 who sustained injuries to her right thigh and bruises on her lower and upper limbs, the sum of Kshs. 40,000 to the 2nd appellant who sustained injuries to the right shoulder and a cut wound on her mouth. Kshs. 45,000 to the 3rd appellant who suffered pain on her right shoulder and back; and to the 4th appellant who sustained cuts on the chin and right shoulder tenderness and awarded Kshs. 40,000. Further, Kshs. 60,000 to the 5th appellant for a 2cm cut on the forehead, a cut wound on the right elbow and right leg and ankle joint. Lastly, Kshs. 65,000 to the 6th appellant was awarded for a bruising on the forehead, hip and left ankle.
23. Finally, the appellant submitted that costs follow the event and cited section 27 of the Civil Procedure Act (Cap 21) Laws of Kenya and urged the court to allow the appeal as prayed and award them costs of the appeal.
24. However, the respondent in response submissions dated 26th January 2024 argued that she had proved her case on a balance of probability and that the trial court did not err in applying the law while apportioning liability at 100%.



25. That in her evidence she stated that she was a passenger in motor vehicle KCE 858U when the accident occurred and therefore she did not have control in the manner the appellant's driver was drove the motor vehicle and could not therefore have contributed to the occurrence of the accident. She relied on the case of, *Boniface Waiti & Another vs Michael Kariuki Kamau* [2007] KEHC 2609 (KLR) where the High Court observed that passengers do not dictate the manner a driver drives and cannot be denied relief where the driver is found 100% liable.
26. Further, that the appellant's driver had the responsibility to ferry the respondent as a passenger safely to her destination as held in the case of *Rose Makombo Msanju vs Night Flora alias Nightie Flora & another* [2016] eKLR where the High Court stated that passengers had a legitimate expectation the driver of a motor vehicle will manage, control and/or drive it and in case of an accident such a driver ought to be held wholly liable for any loss, damage or injury to the passengers.
27. The respondent faulted the appellant for abandoning and/or ignoring to serve a third party notice despite initially having decided to bring a suit against the driver of motor vehicle registration No. KBJ 393Z.
28. The respondent relied on the case of *James Gikonyo Mwangi vs D M (minor suing through his mother and next friend I M O)* [2016] eKLR where the High Court stated that the appellant having felt that someone else was responsible and/or contributed to his predicament, he was under an obligation to enjoin that other person so that he could claim any loss or award against in the event the case is determined in favour of the respondent. That furthermore, the court can only determine issues of parties before it and not those parties who should have been there or are yet to appear.
29. On assessment of damages, the respondent submitted that considering the injuries sustained, she had proposed in the trial an award of Kshs. 600,000 as general damages court and relied on the case of; *Patrick Murithi Mukuha vs Edwin Warui Munene & 5 Others* [2005] eKLR where the plaintiff sustained loss of the right upper premolar, loosening of the left upper incisor, cut on the occipital, chest injuries with haemoptysis and blunt abdominal injuries and he High Court awarded him Kshs. 500,000 for pain, suffering and loss of amenities
30. The respondent further relied on the case of; *Gusii Deluxe Limited & 2 others vs Janet Atieno* [2012] eKLR where the respondent sustained; deep cut wound frontal head exposing the skull bone, bang to the right – upper and lower jaw loosening the right-lower incisors teeth, injury to the right shoulder with bruises over it, deep cut wound in right upper limbs just below right elbow, injury to the right big toe with bruises over it, blunt injury to the anterior part of the chest and she was unconscious for about 8 hours with brain concussion and the Court of Appeal upheld the trial court award of Kshs. 500,000 as general damages.
31. That, in the case of *Ahmed Mzee Famau t/a Najaa Coach Ltd & another vs Veronica Ngii Muia aka Veronica Muiya aka Veronica Ngui Muiya* [2017] eKLR where the respondent suffered a fracture of the lower jaw (right mandible) deep cut on the left forearm, blunt object injury to the right ear (per-auricular region) and blunt object injury to the chest (sternum) with the High Court upheld the trial court award of Ksh. 500,000 as general damages.
32. The respondent submitted that, a trial court gives judgment in line with the pleadings and law, and is not bound by the parties submissions as it has discretion to use the relevant ones and where there is none, to rely on any other authority that may be appropriate. That, taking into account the injuries sustained, pleadings and authorities cited the award of Kshs. 200,000 for general damages is reasonable. The respondent urged the court to uphold the trial court's award.



33. I have considered the appeal, and I note as the first appellate court that, the role of this court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
34. The Court of Appeal thus observed: -
- “I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
35. To revert back to this matter it is noteworthy that a plaintiff is bound by his or her pleadings as held by the Supreme Court of Kenya in the case of; *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] KESC 31 (KLR) where it quoted with approval the case of, *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr*, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR where the Supreme Court of India held:
- “In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party...”
36. The plaintiff’s case lays the cornerstone upon which all other players build their blocks. If the foundation is not strong, the entire structure collapses. Consequently, the burden of proof is laid upon the person who alleges.
37. In the instant matter the respondent blamed both drivers for the accident as per the pleadings at paragraph 7 of the plaint. Subsequently the respondent filed a notice to withdrawal the case against the 2nd and 3rd defendants who are the owner and/or driver of the vehicle registration No. KBJ 393Z.
38. On 12th June 2017 the 1st defendant issued a third party notice to rejoin the 2nd and 3rd defendants in the matter. However, the 1st defendant did not pursue the same, the despite leave granted on 17th July 2019.
39. Be that, as it were, the respondent testified that, the appellant’s motor vehicle was overtaking dangerously and collided with another motor vehicle. That it went off and hit an oncoming vehicle.
40. However, the plaintiff’s own witness (PW2) PC Meshack Ngugi testified that, the driver of the motor vehicle KBJ 393Z Toyota Fielder could not see the road properly and when he swerved to the right lane, he had a head on collision with oncoming motor vehicle KCE 858U Toyota Matatu. The officer stated that the motor vehicle KDJ 393Z (sic KBJ 393Z) was blamed for the accident and produced police abstract to that effect.



41. The defence witness DW1 No 88419 PC Ruso also produced an occurrence book abstract and told the court that, the accident involved two vehicles KBJ 393Z Toyota Fielder and KCE 858U and that the driver of KBJ 393Z, on reaching a point of the accident lost control of the vehicle swerved to the right and had a head on collision with motor vehicle KCE 858U. That the motor vehicle registration No. KBJ 393Z was to blame for the accident.
42. The question that arises is this, did the trial court arrive at the right decision in holding the appellant 100% liable for the accident.
43. To answer this question several issues must be considered. These issues are:
- a. Who owed the respondent a duty of care. Whom did the respondent have a contractual relationship (if any) with to safeguard her as a passenger?
 - b. What is the probative value of the evidence of PW2 and DW1.
 - c. When the respondent withdrew the suit against the 2nd and 3rd defendant, were these parties enjoined in the suit, and if they were not, could the court issue any orders against them.
 - d. Who had the responsibility to enjoin the 2nd and 3rd defendant in the matter.
38. In answer to the afore issues, it suffices to note that, the respondent was a fare paying passenger in the motor vehicle driven by the appellant. Therefore it is the appellant that owed her a duty of care in consideration of fare paid. Consequently, when the respondent withdrew the suit against the 2nd and 3rd defendant, it was the responsibility of the appellant to bring in the other driver whom they blame for the accident. They cannot blame the respondent who was not in control of the other vehicle. The appellant seems to have been aware of the same, sought for and was granted leave to file third party proceedings but squandered the opportunity to enjoin the 2nd and 3rd defendants.
44. As regards the evidence of PW2 and DW1, I have considered the same and it is evident therefrom that none of them was the investigating officer. The question is what is the probative value of their evidence. Secondly, although each one of them allege that the driver of the motor vehicle KBJ 393Z was to blame, the police abstract produced in the unpaginated Record of Appeal shows in the column of results of investigations or prosecution that, the matter is “pending under investigation” which then contradicts the evidence of the two officers. In that case, the same could not have been relied on and carry less (if any) evidential value.
45. Consequently, the evidence of the respondent against the appellant remained unchallenged and I uphold the finding of the court on liability. Be that as it were, the appellant can still sue the other driver if he so wish, for indemnity.
46. As regards quantum I find that the medical report from Kijabe Hospital dated 2nd November 2017 does not reflect the fact that the respondent suffered loss of consciousness as pleaded. Neither is the P3 form that classified the injuries she sustained as harm. The report of Dr. C.O Okere that concludes that she suffered loss of consciousness for some time is not supported by any documentary or any other form of evidence.
47. In awarding Kshs 200,000 the trial court relied on one of the cases cited by the defendant where a sum of Kshs 90,000 was awarded. That decision was rendered in the year 2018. The trial court’s decision herein was rendered on 29th September 2022, a period of four years thereafter. Obviously with inflation the figure of Kshs 90,000 to Kshs 200,000 four years down the line is not inordinately too high.



48. Furthermore, the accident herein occurred in the year 2017 and plaint filed on 22nd January 2018. The respondent has thus been waiting for justice all the while. I find no reason to interfere with the award on both general and special damages. The upshot is that, the appeal is dismissed in its entirety with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 11TH DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Musili for the appellant

Ms. Wanjira for the respondent

Ms. Hannah: court assistant

