



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**John v Nethcom Containers Solutions Limited & another (Civil Appeal E246 of 2023) [2025] KEHC 12141 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 12141 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E246 OF 2023**

**F WANGARI, J  
JUNE 16, 2025**

**BETWEEN**

**MARY VIVI JOHN ..... APPELLANT**

**AND**

**NETHCOM CONTAINERS SOLUTIONS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MOSES OTIENO NGIELA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgement and Decree of Hon. J. Nyariki, SRM in Mombasa SRMCC No. E395 of 2022 delivered on 22nd August, 2023)*

**JUDGMENT**

1. Through the Complaint dated 14/05/2022, the Appellant claimed General and Special Damages as a result of injuries sustained in an accident that occurred on 30/10/2021 involving the Plaintiff/ Appellant who was a pedestrian and motor vehicle registration no. KTCC 5586 ZC 0919, owned by the 1<sup>st</sup> Defendant/ Respondent, and driven by the 2<sup>nd</sup> Defendant/ Respondent.
2. It was averred that the 2<sup>nd</sup> Defendant/ Respondent carelessly drove the said motor vehicle by over speeding and causing the vehicle to lose control and hitting the Plaintiff/ Appellant who was walking on the pedestrian lane, whereby the Appellant sustained serious injuries. The 1<sup>st</sup> Defendant/ Respondent was to be held vicariously liable.
3. The Defendants/ Respondents filed their Statement of Defence dated 22/04/2022, the Respondents blamed the Appellant for the accident due to her negligence by failing to have a proper lookout or to have any sufficient regard for her own safety, thus exposing herself to the risk of injury. The Respondents prayed that the claim be dismissed with cost.



4. The matter proceeded for hearing. In the Judgment delivered on 22/08/2023 found the Plaintiff/Appellant to have failed to prove her case on a balance of probabilities, and proceeded to dismiss the suit with no orders as to costs.
5. Aggrieved by the finding of the Trial Court, the Plaintiff/Appellant lodged a Memorandum of Appeal dated 06/09/2023 hence this Appeal. The appeal was on quantum and liability.
6. The appeal was canvassed by way of written submissions. Both parties complied by filing their rival submissions in support of their positions.

### **Submissions**

7. The Appellant filed submissions dated 16/10/2024 submitted that the Respondent's vehicle was involved in the accident and relied on the Police Abstract. She relied on the copy of records as proof that the vehicle was owned by the 1<sup>st</sup> Respondent. She also blamed the 2<sup>nd</sup> Respondent for the negligence for he was speeding before losing control hence knocking down the Appellant.
8. On quantum, she proposed an award of Kshs. 350,000 as General Damages for pain and suffering, and she relied on several authorities in support of her position. On special Damages, she prayed for Kshs. 16,300/= being medical expenses, medical report expenses and fee for copy of records from the Registrar of motor vehicle. The Appellant prayed that the appeal be allowed with costs.
9. The Respondent filed the submissions dated 02/05/2025. It was submitted that the Appellant had failed to prove her case on a balance of probabilities as there were inconsistencies on how the accident occurred. The Police Officer stated that the Appellant was hit by the vehicle while she was attempting to cross the road but on cross examination, he said he was on the middle of the road. On the other hand, the Appellant stated that she was on the pedestrian lane. The court was urged to dismiss the appeal with costs.

### **Analysis**

10. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see *Peters vs Sunday Post Limited* [1958] EA 424 and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)

### **Liability**

11. The Appellant who testified as PW3 gave evidence that she was walking along the pedestrian lane when the Respondent's driver negligently drove his vehicle veering off the road thus causing the vehicle to knock down the Appellant. The Police Officer, Constable Abdullahi Didut produced the Police Abstract. He confirmed that the Appellant and the Respondent's vehicle were involved in the same accident. He said that the Appellant was knocked down while trying to cross the road. The investigations were still ongoing as at the time of the hearing.
12. On the other hand, the 2<sup>nd</sup> Respondent who testified as DW1 gave evidence that he was the driver of the motor vehicle subject to this suit. He denied being involved in an accident on the material date as alleged. He said he disagreed with the Police Abstract but he did not challenge it.



13. I have perused through the Statement of Defence in paragraph 4 and 5. Even though the Respondents deny that there was an accident, they still go ahead to state that;  

“if there was an accident which is denied, the same was solely caused and/ or substantially contributed to by the negligence of the Plaintiff.”
14. The Respondent proceeded to give particulars of negligence on the part of the Appellant. Further, the 2<sup>nd</sup> Respondent admitted that even though he disagreed with the Police Abstract, he did not challenge the same. The 2<sup>nd</sup> Respondent also gave evidence that he went to the police station the record his statement with the police. In the absence of the Witness Statement by the 2<sup>nd</sup> Respondent, it is unclear under what circumstances the 2<sup>nd</sup> Respondent went to the police station to make a statement, yet he allegedly was not involved in an accident.
15. I find that there is sufficient evidence on record that the Respondent’s vehicle was involved in the accident as alleged. As for who was liable for the accident, the Police officer stated that the Appellant was knocked down while attempting to cross the road. The evidence that she was hit while she was walking on the pedestrian lane was contradicted by that of the police officer. In the absence of an eye witness, I find that the Appellant contributed to the accident as she ought to have made sure that it was safe to cross the road.
16. On the part of the Respondent, the driver ought to have driven in a manner in which that he would ensure the safety of the other road users. I find both parties liable for the accident and liability is shared on 50:50 basis.

### **Quantum**

17. The Appellant submitted that an award of Kshs. 350,000 would be adequate compensation in the circumstances of this case. On the other hand, the Respondent submitted that an award of Kshs. 110,000/= would be sufficient.
18. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -  

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”
19. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.
20. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another* Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.
21. There is no dispute that the Respondent suffered the following injuries as pleaded;



- a. Mild head injury with loss of consciousness
  - b. Blunt trauma to the chest, abdomen and pelvis
  - c. Bruises and abrasions on both knees
22. In assessing injuries, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages.
  23. The Court of Appeal in *Odinga Jacktone Ouma V Maureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
  24. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
    1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
    2. The award should be commensurable with the injuries sustained.
    3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
    4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
    5. The awards should not be inordinately low or high.
  25. In the case *Joseph Njeru Luke & 3 others v Stellah Muki Kioko* [2020] eKLR, the Plaintiff sustained pelvic fractures and soft tissue injuries, the High Court reduced the Lower Court’s award of Kshs. 1,700,000 to Kshs. 750,000. In this case, the Appellant did not suffer fracture injuries. I find Kshs. 300,000/= would be sufficient as General Damages.
  26. As for Special Damages, Kshs. 4,300 was pleaded and proved. The same shall be awarded.
  27. The issue of costs, the award is discretionary. The appeal being partially successful, each party to bear its own costs.

### **Determination**

28. In the upshot, I make the following orders: -
  - a. The Appeal has got merits and is allowed on the following terms; Judgment dated 22/08/2023 is hereby set aside substitute with judgment by this court as hereunder;
    - i. liability apportioned at 50:50 basis in favour of the Appellant against the Respondents.
    - ii. General damages awarded at Kshs. 300,000/=
    - iii. Special Damages awarded at Kshs. 4,300/=
  - b. Each party to bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 16<sup>TH</sup> DAY OF JUNE, 2025.**



.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Appellant

N/A by the Respondent

Ms. Getrude, Court Assistant

