



REPUBLIC OF KENYA



**Kusa v Mama Lucy Kibaki Hospital (Civil Appeal E167 of 2023)  
[2025] KEHC 8593 (KLR) (Civ) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E167 OF 2023**

**TW OUYA, J**

**JUNE 19, 2025**

**BETWEEN**

**GABRIEL KISINGA KUSA ..... APPELLANT**

**AND**

**MAMA LUCY KIBAKI HOSPITAL ..... RESPONDENT**

*(Being an appeal from the judgement of Hon. N Ruguru (PM) in Milimani Chief Magistrate Court Civil case no. E13134 of 2021, delivered on 17th February, 2023)*

**JUDGMENT**

1. This appeal emanates from the judgement of the Hon. N Ruguru (PM) in MCC No. E13134 of 2021, where lower court dismissed the appellant's suit on grounds that the appellant did not prove liability on the part of the respondent for the injuries he sustained to his dental structure.
2. As per the plaint dated 6<sup>th</sup> December, 2021, the appellant, Gabriel Kisinga Kusa, was admitted at the respondent's hospital, Mama Lucy Kibaki Hospital, following personal injuries that he sustained in a road traffic accident that occurred on 12<sup>th</sup> July, 2019. The appellant alleges that following the accident, he sustained fracture of the body mandible on both the left and right side; as a result of which, the respondent administered treatment to him as part of their service.
3. The appellant alleges that the respondent owed him a duty of care in relation to his dental treatment, which duty the respondent breached by negligently managing his injuries, and as a result, his dental structure was destroyed irreparably. The particulars of the respondent's negligence were pleaded at paragraph 7 of the plaint.
4. In its statement of defence, the respondent denied that the appellant was admitted in their facility for treatment following a road traffic accident that occurred on the 12<sup>th</sup> of July, 2019, and put the appellant



- to strict proof. The respondent also denied any negligence on its part and denied that the appellant suffered any loss or damages as a result of any negligence on their part.
5. After considering the evidence placed before the court, as well as the written submissions filed on behalf of the parties, the learned trial magistrate found that liability on the part of the respondent was not proved as the appellant failed to demonstrate what the respondent did or did not do to manage his injuries, resulting in his dental structure being damaged irreparably. The learned trial magistrate then proceeded to dismiss the suit for failure by the appellant to prove negligence on the part of the respondent.
  6. The appellant was aggrieved by the trial court's decision hence he proffered an appeal to this court vide a Memorandum of Appeal dated the 6<sup>th</sup> of March, 2023. In the Memorandum of Appeal, the appellant faulted the learned trial magistrate for failing to appreciate the relevant principles, case law and submissions on record, and for failing to give any proper consideration to the pleadings and evidence on record as a result of which the learned trial magistrate made an erroneous judgement.
  7. On the above grounds, the appellant urged this court to allow his appeal, set aside the trial court's judgement and re-assess judgement on liability and quantum based on the evidence on record.
  8. The appeal was canvassed by way of written submissions following the directions issued by this court on 7<sup>th</sup> May, 2024. The appellant's submissions dated 1st July, 2024, was filed on his behalf by his learned counsel, Kulecho & Co. Advocates while those by the respondent dated 1<sup>st</sup> August, 2024, was filed on its behalf by Ms. Rita Musyoki, Senior State Counsel.
  9. The appellant in his written submissions contended that the defendant owed him a duty of care in relation to his dental treatment, to ensure that they undertake treatment according to the required standard which duty the respondent breached leading to his dental structure being irreparably destroyed. It was the respondent's submission that as a result of negligence on the part of the respondent, he has continued to suffer damage.
  10. It was the appellant's submission that the respondent did not avail any evidence to contradict his testimony that they were to blame for the damage he sustained, as such, this court should wholly rely on the evidence he tendered before the trial court, and find the respondent 100% liable for medical negligence.
  11. The appellant submitted that as a result of the respondent's negligence, he suffered a lot of pain and discomfort; and that he has also completely lost his self-esteem, hence he is unable to socialise with people, engage in meaningful vocation as before as well as chew food. The appellant submitted that he should therefore be awarded Kshs. 1,500,000 as general damages, Kshs. 5,550 as special damages together with costs of the suit plus interest.
  12. The appellant in his submissions urged this court to set aside the judgement by the trial court, and find the respondent solely liable for the initial and resultant injuries he sustained.
  13. On the other hand, the respondent submitted that the appellant did not adduce any evidence to show that the respondent failed to act to the required standard of care while handling him; and as a direct result of such negligence, the appellant suffered harm.
  14. It was the respondent's submission that the appellant's condition was unavoidable and wholly inevitable owing to the prolonged damage of the dental tissues he had already suffered prior to seeking proper medical attention, and that by the time the appellant was approaching the facility, the irreparable damage had already been done.



15. The respondent submitted that the appellant should be held entirely responsible for any negligence as he failed to provide critical information or disclose his medical history to the respondent, which would have further informed the medical procedure to be undertaken on him.
16. The respondent submitted that in claims for medical negligence, expert evidence from a medical profession must be adduced, to show a direct relationship between the cause of injuries and the perceived negligent acts. The respondent further submitted that in cases of medical negligence, it must be shown that the breach of duty directly caused harm or injury to the patient. It was the respondent's submissions that the appellant has not adduced any evidence to show that the duty of care owed to him by the respondent was breached and as such, the respondent is not liable for any medical negligence.
17. Regarding quantum of damages, the respondent submitted that the appellant failed to prove that she suffered damages, as such he cannot be awarded the general and special damages claimed.
18. This being a first appeal, it is the duty of this court as a first appellate court to re-analyze, re-consider and re-evaluate the evidence tendered before the trial court and to arrive at my own independent conclusion on whether or not the findings of the trial court should stand, although I should bear in mind that I neither heard nor saw the witnesses and to make due allowance in that respect.
19. This duty was reiterated in the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR; as follows: "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to reevaluate, re-assess and re-analyse 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. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."
20. Guided by the principle in the afore stated duty, I have carefully considered the grounds of appeal, the parties rival written submissions together with all the authorities cited therein. Having done so, I find that the main issue arising for determination in this appeal is whether the appellant proved his case against the respondent on a balance of probabilities.
21. In this case, the appellant alleges that his dental structure has been permanently destroyed, owing to the manner in which the respondent negligently managed his injuries.
22. It is not in dispute that the appellant was involved in a road traffic accident on 12<sup>th</sup> July, 2019. It has also not been disputed that as a result of the road traffic accident, the appellant sustained a fracture of the body mandible on both the left and right side.
23. To prove that he was admitted to the respondent hospital, following the road traffic accident, the appellant adduced before the trial court a referral/transfer form from Mama Lucy Kibaki Hospital dated 15<sup>th</sup> July, 2019, which showed that he had suffered a fracture to the left and right body mandible. The transfer form also indicated the treatment that had been administered to the appellant as well as the reason for his transfer to Kenyatta National Hospital, which was that the respondent hospital lacked equipment to possibly further treat the appellant.
24. The appellant has now alleged that due to the negligent manner in which the respondent handled his injuries, his dental structure was irreparably destroyed. It is therefore clear that the appellant's



- claim against the respondent is that he suffered irreparable damage to his dental structure due to the respondent's medical negligence.
25. The phrase medical negligence, was defined by the court in *JPS versus Aga Khan Health Service, Kenya t/a The Aga Khan Hospital & 2 others* [2006] KEHC 2134 (KLR); as follows: "When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death they commit medical negligence."
  26. In *Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) versus Attorney General & 2 others* [2015] KEHC 4929 (KLR); the court stated as follows regarding medical negligence by a medical practitioner: "A doctor can be held guilty of medical negligence only when he falls short of the standard of reasonable medical care and not because in a matter of opinion he made an error of judgment. For negligence to arise there must have been a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous chain, unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker."
  27. In this case, whereas the appellant alleges that the respondent's medical negligence caused irreparable damage to his dental structure, he did not demonstrate what the respondent did or omitted to do that aggravated his injuries.
  28. In my considered view, the appellant was expected to demonstrate a connection between the treatment he received at the respondent hospital and the permanent damage to his dental structure, for this court to determine whether the respondent was liable for his injuries or not. The appellant was to demonstrate that his fractures were treatable, in that, the fractures he sustained did not cause any permanent damage to his dental structure and would have been restored with proper treatment.
  29. The appellant was also to demonstrate, with the help of an expert witness, how the treatment of such fractures was to be handled for treatment to be effective and that the health workers in the respondent hospital, failed to treat him with quality care, leading to a permanent damage to his dental structure.
  30. Considering that the appellant failed to show any nexus between the treatment he received at the respondent hospital and the permanent damage to his dental structure, I find no basis to fault the learned trial magistrate for finding that the appellant has not demonstrated negligence on the part of the respondent.
  31. Flowing from the foregoing, I am of the considered view that the appellant did not establish liability on the part of the respondent, as such, the learned trial magistrate cannot be faulted for dismissing their suit. Given that this appeal relates only to the issue of liability, I will not consider the issue of quantum as assessed by the trial court.
  32. Based on the above, I am of the considered view that the appeal lacks merit and is hereby dismissed with no orders as costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF JUNE, 2025.**

**HON. T. W. OUYA**

**JUDGE**

For Appellant....Aluodo for Mr. Ochieng for Appellant

For Respondent.....No Appearance

Court Assistant.....Brian

