



REPUBLIC OF KENYA



Gekari v Nyaberi (Civil Appeal E033 of 2021) [2025] KEHC 9682 (KLR) (7 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E033 OF 2021
JK NG'ARNG'AR, J
JULY 7, 2025**

BETWEEN

DUKE NYAMBATI GEKARI APPELLANT

AND

HENRY ORANGO NYABERI RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate, Kiniale L. at the Principal Magistrate's Court at Bomet, Civil Suit Number 65 of 2010)

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for general and damages arising from a road traffic accident on 8th November 2009. The Respondent stated that he was a passenger on motor vehicle registration number KAZ xxxR when it was involved in a road traffic accident along Bomet-Narok road. The Respondent blamed the Appellant's driver for causing the accident.
2. The trial court conducted a hearing where the Respondent called two (2) witnesses in aid of his case and the Respondent called one witness before closing their respective cases.
3. In its Judgement dated 24th September 2021, the trial court awarded the Respondent general damages of Kshs 2,000,000/= and special damages of Kshs 14,990/=
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 4th October 2021 appealing against the quantum which he termed as excessive.
5. My work as the 1st appellate court is to re-evaluate the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of *Kiilu & Another v Republic* (2005)1 KLR 174.



6. I now proceed to summarise the respective parties' cases in the trial court and their submissions in the present Appeal.

The Plaintiff's/Respondent's case.

7. Through his Amended Plaintiff, the Respondent stated that he was a passenger aboard motor vehicle registration number KAZ xxxR.

8. The Respondent stated that the Appellant was the owner of motor vehicle registration number KAZ xxxR and his driver was negligent in causing the accident. The particulars of the negligence were listed in paragraph 4 of the Plaintiff.

9. That as a result of the accident, the Respondent suffered the following injuries: -

- i. Depressed skull fracture of the frontal bone.
- ii. Head injury 2-degree brain contusion.
- iii. Deep disfiguring cut on the forehead.
- iv. Multiple lacerations on the face, nose, lips and cheeks.
- v. Multiple cuts on the hand.
- vi. Cut tendons at the wrist.
- vii. Deep cut on the knee.

10. It was the Respondent's case that at the time of the accident, he was a businessman and a driver who earned Kshs 10,000/= per month. It was his further case that his marketability in the labour field was affected as a result of the accident and he sought relief under loss of earning capacity.

11. Through his submissions dated 16th April 2025, the Respondent submitted that he suffered severe injuries as a result of the accident and he suffered permanent disability. That his injuries could not be classified as soft tissue injuries. The Respondent further submitted that the award of Kshs 2,000,000/= as general damages was commensurate to the injuries he suffered. He relied on *Joseph Musee Mua vs Julius Mbogo Mugi & 3 others* (2013) eKLR and *Charles Mathenge Wabome vs Mark Mboya Likanga & 2 others* [2011] KEHC 1383 (KLR).

The Defendant's/Appellant's case

12. Through his Further Amended Statement of Defence, the Appellant denied that he was the registered owner of motor vehicle registration number KAZ xxxR and further denied the Respondent was a passenger in the said motor vehicle.

13. The Appellant denied the particulars of negligence levelled against him. That if any accident happened, it was caused solely by the negligence of the Respondent. He particularized the negligence in paragraph 5 of his Further Amended Defence.

14. It was the Appellant's case that the Respondent's claim was fraudulent and particularized the particulars of the fraud in paragraph 5A of his Further Amended Defence. It was his further case that without prejudice, the tyre of motor vehicle registration number KAZ xxxR burst without any warning and the driver of the said motor vehicle, despite exercising reasonable care was unable to avert the occurrence.



15. At the time of writing this Judgement, the Appellant had not filed his submissions despite informing the court that he had done so. I shall thus rely on his grounds of Appeal.
16. I have gone through and carefully considered the Record of Appeal and Respondent's written submissions dated 16th April 2025. The singular issue for my determination was whether the award of general damages was excessive.

Quantum

17. The Appellant (PW1) testified that he was involved in a road traffic accident and suffered several cuts on his face, a leg injury, serious knee injury and the loss of three teeth. The Appellant was later recalled and testified that he also suffered a dislocation of the knee joint, dislocation of the wrist and a depressed skull fracture.
18. Dr. Ogando Zoga (PW2) testified that he examined the Appellant on 29th December 2009 and stated that the Appellant had suffered a depressed skull fracture of the frontal bone which contributed to a head injury second degree, deep disfiguring cut on the forehead, multiple lacerations on the face, nose, lips and cheeks, loss of two teeth, a degloving injury along the upper arm and multiple cuts on the hand, cut tendons at the wrist and deep cut on the knee. PW2 further testified that the Appellant was in the process of healing and that the loss of teeth and injury to his knee were permanent. PW2 assessed permanent disability at 65%. PW2 produced the Discharge Summary and his Medical Report as P. Exh 2 and P. Exh 6 respectively.
19. When PW2 was cross examined, he testified that the Discharge Summary showed that the Appellant soft tissue injuries and multiple cut wounds and further that the Discharge Summary did not contain the prognosis of a fracture.
20. On the other hand, the Appellant called Dr. Jennifer Kamotho as DW1. She testified that the Appellant was examined on 20th June 2016. She further testified that upon examination, it was noted that the Appellant had a scar on his forehead, mild restriction of his wrist, healed scars on his forearm and reduced grip on his left forearm. She testified that no skull fracture was noted and his permanent disability was assessed at 15%. DW1 produced a Medical Report as D. Exh 1.
21. When DW1 was cross examined, she testified that the Appellant had deep cut wounds on his forehead, cut wounds on both legs and both hands, stiffness on his leg and that the Appellant had a permanent disability.
22. I have looked at the Discharge Summary (P. Exh 2) from Kisii Level Five Hospital and it indicated that the Appellant was admitted on 9th November 2009, a day after the occurrence of the accident. The Discharge Summary indicated that the Appellant that upon provisional diagnosis, the Appellant had a depressed skull and multiple cut wounds. The Medical Report (P. Exh 6) produced by PW2 indicated that PW2 examined on 9th December 2009, approximately a month after the accident occurred. The contents of the Medical Report mirror the testimony of PW2 regarding the injuries sustained by the Appellant.
23. I have considered the Medical Report (D. Exh 1) by Dr. Leah Wainaina. The findings contained in the Medical Report mirrored the testimony of DW1.
24. On the contention whether the Appellant suffered a skull fracture, parties agreed in the trial court to produce an X-ray Report as D. Exh 1b. However, the trial court noted that the X-ray report was not filed in the trial court. I have gone through the Record of Appeal and I have noted that an X-ray Report dated 20th June 2016 was sneaked in the Record of Appeal in an attempt to make it look



like it was part of the trial court record. This court condemns such behaviour from counsel. In the circumstances thereof, there was no evidence that the Appellant suffered a skull fracture. In any event, the X-ray Report indicated that the Appellant was x-rayed on 8th November 2009 (material day) and no skull fracture was seen.

25. On the issue of missing teeth, the Discharge Summary did not indicate that the Appellant suffered any loss of teeth. The Medical Report (P. Exh 6) by Dr. Ogando Zoga indicated that the Appellant had lost teeth. The Medical Report (D. Exh 1) by Dr. Leah Wainaina indicated that she relied on the Discharge Summary (P. Exh 2) which indicated that the Appellant did not suffer any loss of teeth.
26. This court is curious as to how the Discharge Summary (P. Exh 2) which emanated from an examination conducted on the material day could fail to indicate loss of teeth but the Medical Report (P. Exh 6) which emanated from an examination conducted on 9th December 2009, a month after the accident indicated the loss of two teeth. In my view, the treatment notes or a Discharge Summary is the primary document in personal injury cases as the present one as it is the first point of contact and examination between an injured person and medical personnel. Based on the foregoing, I am not convinced that the Appellant suffered the loss of teeth.
27. Flowing from the above, it is my finding that the Appellant suffered the following injuries: -
 - i. Deep disfiguring cut on the forehead.
 - ii. Multiple lacerations on the face, nose, lips and cheeks.
 - iii. Multiple cuts on the hand.
 - iv. Cut tendons at the wrist.
 - v. Deep cut on the knee.
28. As earlier stated, the trial court awarded Kshs 2,000,000/= as general damages, an amount which the Appellant stated was excessive and the Respondent stated was sufficient and commensurate to his injuries.
29. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice. See *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] KECA 130 (KLR).
30. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. In addition to the Respondent's authorities, I have found the following cases quite helpful in terms of comparison: -
 - I. In *Godwin Ileri v Franklin Gitonga* [2018] KEHC 6614 (KLR), the claimant sustained a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. An award of Kshs. 300,000/= was reduced to Kshs. 90,000/= on appeal.
 - II. In *Mburugu & another v Nyongesa* [2023] KEHC 24047 (KLR), the court upheld the award of Kshs 300,000/= for a degloving injury to the right knee joint and severe soft tissue injuries of the right leg.
 - III. In *Samwel Martin Njoroge Kamunyu v Mildred Okweya Barasa* [2020] KEHC 4339 (KLR), the plaintiff sustained; two deep cut wounds on the forehead horizontally, bruises and lacerations on the right cheek, blunt injury to the shoulder and chest, blunt injury to the pelvis,



deep cut wounds on right and left legs. The High Court awarded of Kshs 300,000/= as general damages.

IV. In *Marube & Another v Nyambogo* (civil Appeal E011 of 2023) [2024] KEHC 3395 (KLR) (12 March 2024) (Judgment), the court upheld the award of Kshs 350,000/= for the following injuries; blunt trauma to the neck, chest contusion, bruises on the right upper limb, bruises on the left upper limb, bruises on the left lower limb, bruises on the right lower limb and cut wounds on the right lower limb

31. I have considered the authorities above and the nature of the injury suffered by the Appellant and I find that the Kshs 2,000,000/= awarded as general damages by the trial court was excessive and not commensurate to the injuries sustained. I hereby vacate the award of Kshs 2,000,000/= as general damages and substitute it with an award of Kshs 500,000/=.

32. Regarding special damages, I uphold the trial court's award of Kshs 14,990/= being receipts for payment of treatment at Kisii Level Five Hospital, cost for the Medical Report, Police Abstract and Motor Vehicle Search

33. The final computation is as below: -

General Damages Kshs 500,000/=

Add special damages Kshs 14,990/=

Kshs 514,990/=

Less 35% Contribution Kshs 180,246.50/=

Total Kshs 334,743.50/=

34. In the end, the Memorandum of Appeal dated 4th October 2021 is allowed as the award of Kshs 1,309,743.50/= is reduced to Kshs 334,743.50/=. Each party shall bear their own costs in this Appeal while the costs in the original suit shall remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 7TH DAY OF JULY, 2025.

.....

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of Ogweno for Respondent No Appearance for the Appellant. Siele and Susan (Court Assistants)

