



REPUBLIC OF KENYA



**Janet v Murithi (Civil Appeal E009 of 2023) [2025] KEHC 9826 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9826 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA**

**CIVIL APPEAL E009 OF 2023**

**LW GITARI, J**

**JULY 4, 2025**

**BETWEEN**

**DENIS MUTUGI JANET ..... APPELLANT**

**AND**

**SICILY KAGWIRIA MURITHI ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgment delivered by the Chief Magistrate's Court at Chuka on 31/05/2022 in Chuka Magistrate's Court Civil Case (MCCC) No. E018/2022. The appellant who was the plaintiff in the case was dissatisfied with the Judgment and filed a memorandum of Appeal dated 27/06/2025. The appeal is based on the following grounds on the memorandum of Appeal:
  1. The trial court erred in law and in fact in presuming that Dr. Njiru was less educated and less experienced than Dr. Wambugu, thus, his medical opinion dated 21<sup>st</sup> August 2020 was a sham and unreliable.
  2. The trial court erred in law and in fact in disregarding the medical report by Dr. Njiru dated 21<sup>st</sup> August 2020 and initial treatment notes from Chuka District Hospital, in their veracity.
  3. The trial court erred in law and in fact in presuming that since the treatment notes from Chuka Hospital and P3 form were filled by Clinical Officers they were erratic, thus clouding the Judgment of Dr. Njiru, who was unable to pick out the defects in the treatment notes (sic).
  4. The trial court erred in law and in fact in misapprehending the facts of the case and in the process misdirected itself by taking into account such considerations that were not for trial and thus reaching a plainly wrong finding on general damages due to the appellant.
2. The appellant prays that the trial courts finding on general damages be reviewed from Kshs. 120,000/= to Kshs. 800,000/=. The appellant's case is that on 10/8/2020 he was a board a motor cycle whose rider was one Martin Mwiathi Njoka traveling along Kambandi – Chera road when it was at Chera



area when it was hit by a motor vehicle which was owned by the respondent and as a result he sustained injuries.

3. The appellant averred that the accident occurred due to the negligent manner of driving of the vehicle by the defendant, her agent or assignee. At the same time the motor vehicle knocked down a pedestrian who was well off the road.
4. The appellant alleged that the accident occurred due to the negligent manner of driving by the defendant or her agent by failing to keep a proper look out and failing to control the said motor vehicle to avoid causing the accident. The appellant relied on the doctrine of Res Ipsa Logotur, the Highway Code and the provisions of the Traffic Act.
5. The appellant pleaded that as a result of the accident he sustained fracture of the left distal, radial ulna bones with associated wrist joint contusion, contusion left foot and contusion and laceration left zygomatic region for which he claimed general damages. He also incurred expenses and claimed special damages. The respondent denied the claim and prayed that it be dismissed with costs.
6. The appellant adduced evidence at the trial and adopted his witness statement where he had stated that on 10/8/2020 he was a pillion passenger on a motor cycle when the motor cycle was hit by a motor vehicle registration number KLC 8XOB which was coming from a feeder road on the left side as you face Kwa Mati. The vehicle joined the road suddenly without ensuring that the road was safe and as a result it crashed with motor cycle.
7. He sustained injuries and was treated at Chuka Level 4 Hospital. He reported the matter at Chuka Police Station and was issued with a P3 form and a police abstract. A medical report was filled by Doctor Njiru. He paid the doctor Kshs. 5,000/= for medical report and Kshs. 6,000/= for court attendance. Liability was determined at 100% in a test suit as there were other cases.
8. The respondent called Doctor Wambugu as its witness. His testimony was that the appellant had sustained soft tissue injuries. There were no fractures. He produced the medical report as Exhibit D1. In cross-examination he testified the X-rays did not reveal any fractures. The learned magistrate rendered her Judgment on both quantum and general damages. She relied on the medical report by Doctor Wambugu who on examining the appellant found that he only sustained soft tissue injuries without any fractures. She awarded Kshs. 120,000/= as general damages and Kshs. 11,000/= special damages which were pleaded and proved. The appeal was canvassed by way of written submissions.

### **Appellants Submissions.**

9. The counsel for the appellant submits that the medical records and medical report by doctor Njiru indicated that the appellant has sustained a fracture to the left distal radial ulna bones. The appellant submits that the medical report by Doctor Wambugu was filled one year after the accident.
10. He submits that there was no evidence that the medical report was filled by a Clinical Officer. He also submits that the learned magistrate was out of order to claim that Doctor Wambugu was more educated or more experienced than Doctor Njiru. He submits that the learned magistrate misapprehended facts and took into account considerations of which it was not to take account, considerations which it was not to take into account of, therefore making its decisions plainly wrong albeit discretionary.
11. He plays that the award of general damages be set aside and be substituted with an award of Kshs. 80,000/=. He relies on *Mrao Limited -vs- First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125 referred to in *Rosemary Mwasya -vs- Sleva Tito Mwasya and Another* (2018) eKLR where it was



held that an appellate court may only interfere with exercise of judicial discretion of a trial court if it is satisfied either:

- a. The court misdirected itself on law (sic)
- b. Misapprehended the facts, or
- c. The court took into considerations of which he should not have taken into account.
- d. The court failed to take into account of considerations of which he should have taken account of.
- e. The court's decisions were plainly wrong.

### **Respondents Submissions.**

12. The respondent submits that the appeal is on quantum of damages. It is submitted that the treatment notes and the P3 form being public documents were rightly produced in evidence and the medical reports by the doctors. It is submitted that the trial magistrate had to make a determination since the reports were substantially different in terms of the injuries sustained by the appellant. It is further submitted that the courts have emphasized on the need to call the doctors to court where doctors gave divergent views. See *Bakari & Another -vs- Hadija Olesi*, Court of Appeal No. 70/1985 the court stated that:

“It is desirable to call a doctor to explain the discrepancy in a medical report.”

13. See *Shadrack Mathias & Another -vs- Agnes Muluki Wambua* (2021) eKLR where the court of Appeal held that:

“There was need to call doctors to court where the doctors held divergent views”

That Doctor Wambugu gave his credentials and the court did not error when she stated that he was more experienced. The respondent submits that it was incumbent on the appellant to adduce evidence to prove that he sustained fractures. In *Thuo & Another -vs- Nzalala* (Civil Appeal E075 of 2011 (2024) KEHC 2978(KLR) where the court was faced with two divergent medical reports the court stated that:

“The argument by the respondent that the victims evidence supersedes the medical documents is not tenable. Further it is the plaintiff to prove the case and should have produced the radiologist report to confirm the fracture.”

14. That it was the appellant's duty to prove that he sustained a fracture. He relies on *Butt -vs- Khan* (1981) KLR 349 the court held that:

“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.”

15. The respondent submits that the learned magistrate properly exercised her discretion in giving the award of general damages and the award made was not low as to attract disturbance by the appellate court and prays that the court should uphold it. He relies on *Nyota Tissue Products -vs- Lawrence Lawi Kuboka & 4 Others* (2020) eKLR where the court upheld an award of Kshs. 70,000/= in general



damages for similar injuries as the ones sustained by the appellant herein. That the court did not misapprehend the evidence and the award of Kshs. 120,000 in general damages should be upheld.

### **Analysis and Determination.**

16. I have considered the grounds of appeal, the proceedings and the Judgment before the trial court and the submission. The issues which arise for determination are:

1. Whether the appellant sustained a fracture.
2. Whether the court should interfere with the quantum of damages awarded by the learned magistrate.

17. This is the first appellate court. The duties of this court have been laid down in various authorities of this court and the court of Appeal. In *Selle & Another -vs- Associated Motor Boat Co. Limited* (1986) E.A 123. The court held a first appellate court is empowered to subject the whole evidence to a fresh and exhaustive scrutiny and come up with its own conclusion, bearing in mind that it did not have an opportunity of seeing and hearing witnesses first hand and leave room for that.

18. The appellant is challenging the judgment on quantum of damages. The principles in awarding the quantum of damages are that damages are awarded to compensate the injuries suffered and comparable injuries are compensated with comparable awards. That damages should not be so inordinately low. That it represents an entirely erroneous estimate. See *Sheikh Mustag Hassan -vs- Nathan Mwangi Kamau Transporters & 5 Others* (1986) KLR.

19. The 1<sup>st</sup> issue is whether the appellant sustained a fracture.

The law requires that he who alleges must prove. Section 107 of the *Evidence Act* provides that:

“(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.”

20. The appellant had the burden to prove that he sustained a fracture and not just soft tissue injuries. The burden of proof is a legal doctrine which principally deals with the duty of a party or parties to adduce evidence in a matter in proof of a certain fact. The standard of proof relates to the evidential threshold required for the claim to be considered as having been proved. The burden of proof has two facets. That is the legal burden of proof and the evidential burden of proof. Evidential burden is under Section 107 of the *Evidence Act* (supra). Section 109 of the *Evidence Act* provides:

“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.”

21. 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. This constitutes the legal burden of proof. The legal burden remains on the claimant throughout the trial. There is also the evidential burden of proof which is anchored on rebuttable presumption and keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced. Thus, the legal burden of proof is static and rests on the



claimant throughout the trial but the evidential burden may shift to the other party depending on the nature of the evidence adduced by the claimant. The standard of proof in Civil Cases is on a balance of probabilities. The question is whether the appellant discharged the burden of proof that he had sustained a fracture.

22. The appellant relied on treatment notes which says he was involved in a road traffic accident on 12/8/2020. The notes do not bear an outpatient number. It shows that P.O.P was applied. It however, has that one flow as it says the accident occurred on 12/8/2020 while the pleadings states that it occurred on 10/8/2020. The treatment notes are not signed and it is hard to tell who filed the details.
23. The 2<sup>nd</sup> document was P3 Form which says that the appellant sustained fracture of left Radial /Ulna Bones and he was to have P.O.P it was filled on 21/08/2020. Next was the medical report by Doctor Njiru which states that the appellant sustained injuries as follows:Fracture left distalRadial ulna bones associated with wrist joint contusionContusion, left footContusion and laceration, left zygomatic region
24. That there was X-ray of left upper limb including wrist joint. He suffers persistent pain left wrist joint, left foot and osteo arthritis wrist joint. The medical report talks of investigation but has not indicated whether he saw the X-rays and confirmed that the appellant had sustained a fracture.
25. In his evidence he confirmed that the X-ray confirmed the fracture. The learned magistrate doubled the treatment notes and the P3 form as the plaintiff was attended by clinical officer and that if they were defective there is a likelihood those might not have been picked up by the doctor. In this case, the initial document is usually the treatment notes which are filled on the first date and time of appearance. As I have already pointed this treatment note is doubtful for the reason that it bears no outpatient number on the place provided. It is not signed and states that accident occurred on 12/8/2020 two days after the date of the alleged accident. The document, other than the name of the appellant it has nothing to show it relates to him. It does not bear the name of the next of kin nor does have his mobile phone number or identify card.
26. I find that the learned magistrate had good reasons to doubt the authenticity of the treatment notes. The doctor relied on the treatment notes. The anomalies in the document failed the test of being sufficient to prove the allegation that he had sustained a fracture. Based on the treatment card a question would arise whether he has proved that he was involved in the accident on 10/8/2020 because the treatment card is at variance with the P3 form. When the appellant was cross-examined, he said his left leg was not injured, medical report says he was injured on the left leg. In Re- examination he said it was the right leg that was injured. "I think there is a typographical error on the report concerning the leg."
27. I find that the evidence by the appellant was wanting. If indeed he sustained a fracture, he should have called the radiologist who took the X-ray to produce the X-ray films and file a report. The report by Doctor Wambugu stated that the appellant sustained:Blunt trauma left hand and wristMultiple bruisesX-ray left forearm, wrist joint and hand taken then and availed to him does not reveal any fracture or joint lesions.
28. The learned magistrate held that being a consultant surgeon he was more experienced and more educated so she was persuaded by her finding. Doctor Wambugu is an expert. Section 48 of the Evidence Act provides as follows:

"(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons



specialized in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts.”

29. Doctor Wambugu gave his expert opinion based on the examination of the appellant, treatment notes and x-rays and stated that they did not reveal any fractures or joint lesion. The learned magistrate was faced with two divergent views. The two doctors testified. the learned magistrate heard the evidence and gave reasons for relying on doctor Wambugu’s report.
30. I find that the appellant failed to discharge the burden to prove that he sustained a fracture. The holding by the learned magistrate was based on the opinion by an expert and cannot be faulted. I find that the appellant did not prove that he had sustained a fracture.
31. Quantum of damages
- From the foregoing, it is clear that the appellant sustained soft tissue injuries as testified by doctor Wambugu. The injuries were soft tissue only. The appellant urged the court to be awarded Kshs. 800,000/=. The appellant failed to prove that he sustained a fracture. The learned magistrate exercised discretion and awarded Kshs. 120,000/=. The respondent has urged the court to uphold the award by the trial court. In *Bashir Ahamed Butt -vs- Uwais Ahamed Khan* (supra) the appellate court will not disturb an award of general damages unless it is so inordinately high or low so as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or misapprehended the evidence in some material respect.
32. It is also a principle in awarding damages that assessment of damages is more like an exercise of Judicial discretion and hence an appellate court should not interfere with an award damages unless it is satisfied that the Judge acted on wrong principles or misapprehended the facts or as for those other reasons made a wholly erroneous estimate of the damages suffered. See court of Appeal in *Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi* 142/2003. UR.
33. The appellant urged the lower court to award Kshs. 800,000/= based on the contention that the appellant had sustained a fracture with a possibility of developing osteo – arthritis of the right inter metatarsal Joint. This was ruled out by Doctor Wambugu. The respondent has urged the court not to interfere with the award of damages. I find that the damages awarded were commensurate with the injuries sustained. They were not so low nor were they excessive. I find no reasons to interfere with the exercise of discretion by the trial magistrate.
34. I therefore uphold the award of Kshs. 120,000/= general damages for pain and suffering. As for the special damages they were specifically pleaded and proved.

### **Conclusion.**

35. For the reasons stated, I find that the appeal is without merits. I order as follows:
1. The appeal is dismissed.
  2. Costs to the respondent.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 4<sup>TH</sup> DAY OF JULY 2025**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

