**Wambe Merchants Limited & 2 others v Gathoni (Civil Appeal E066 of 2023) [2025] KEHC 10659 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10659 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL E066 OF 2023**

**SM MOHOCHI, J**

**JULY 15, 2025**

**BETWEEN**

**WAMBE MERCHANTS LIMITED ..... 1ST APPELLANT**

**NJUGUNA STEPEHEN ..... 2ND APPELLANT**

**JOSEPH MAINA ..... 3RD APPELLANT**

**AND**

**TABITHA GATHONI IRUNGU A.K.A TABITHA GATHONI ..... RESPONDENT**

***(Being an appeal from the judgement /decree of Hon Priscah Nyotah (SRM) delivered on 21st December, 2022 in Nakuru CMCC No. E403 of 2021)***

## JUDGMENT

1. The Respondent in the Plaint dated 28th April, 2021 claimed that on 7th December, 2020 as a lawful pedestrian along the Nakuru-Ravine Road was injured when the Appellants' Motor Vehicle Registration Number KAK 605T hit her causing her to sustain serious bodily injuries. The claim was denied by the Appellants who blame the Respondent for the occurrence of the accident.

2. The Trial Court in the impugned judgment apportioned liability at the ratio of 90:10 in favour of the Respondent as against the 1st and 2nd Appellants and awarded her Kshs 1,530,0000 as general damages for pain, suffering and loss of amenities, Kshs 70,182 in special damages, Kshs. 405,000 for future medical expenses, Kshs. 56,352.15 as lost earnings as well as 90% on costs of the suit and interests.

3. Being dissatisfied with both liability and quantum, the Appellants brought this appeal seeking that the judgement of the Trial Court be reviewed and/or set aside with the Court making a finding on both liability and quantum. The Appellants also prayed for the costs. The grounds for the appeal are set in the Memorandum of Appeal dated 6th April, 2023 as follows: -

i. That the Learned Trial Magistrate erred in law and in fact in failing to critically consider and analyse the evidence tendered thus arrived at a finding on liability that was unsupportable by the evidence.

ii. That the Learned Trial Magistrate erred in law and in fact in finding that the Appellant's driver ought to have warned the Respondent of his approach contrary to the Highway Coded which enjoined the Respondent to ensure the road was clear of vehicular traffic before crossing

iii. That the Learned Trial Magistrate erred in law and in fact in apportioning a higher degree of liability against the Appellants whereas the evidence on record pointed to the Respondent as the chief cause pf the accident

iv. That the Learned Trial Magistrate erred in fact and in law by awarding damages the various heads that were manifestly excessive in the circumstances

v. That the Learned Trial Magistrate misdirected herself in law and in fact by failing to appreciate and apply the principles applicable in the assessment of damages and thus awarded an excessive award under the limb of general damages

vi. That the Learned Trial Magistrate erred in law and in fact in awarding the damages for future medical expenses without cogent evidence and total disregard of the fact that they are futuristic in nature.

vii. That the learned Magistrate erred in law and in fact in making the award for loss of earnings which was not supported by any evidence

viii. That the Learned Trial Magistrate erred in law and in fact to critically analyze and consider the submissions made on behalf of the Appellants

**Appellants' Submissions**

4. On the issue of liability, the Appellants submitted that the police officer was not the investigating officer, never visited the scene and did not participate in the investigations. That in reliance to the case of ZOS & CAO (Suing as the legal Representatives of the Estate of SAO (Deceased) v Amollo Stephen [2019] eKLR.

5. The Appellants also submitted that a Police Abstract cannot be proof of Negligence. It was further argued that in such circumstances the evidence of the police officer amounts to hearsay and relied on Benjamin Mwenda Muketha (Suing as the legal representative of Mercy Nkirote Abdikadir Sheik & 2 Others [2018] eKLR

6. Further that there were two conflicting versions regarding how the accident occurred as between the testimony of the Respondent and that of the Appellants and since there was no independent witness to corroborate either version. That there is no negligence without fault and relied on the case of Wangongu v Kithinji & 2 Others [2024] KEHC 6272 (KLR).

7. On the issue quantum, The Appellants submitted that the amount of general damages of Kshs. 1,530,000 awarded were inordinately high and based on erroneous principles, was unaccompanied by reason and the principles applicable were not adhered to and proposed the sum of Kshs. 700,000 to Kshs 800,000 as a substitute.

8. It was also submitted that no cogent evidence was provided to warrant the awards of loss of earnings. That this was a special damage claim and one has to specifically prove to Court that indeed they had suffered loss.

**Respondent's Submissions**

9. The Respondent in opposing the Appeal on liability submitted that, the evidence of the Police Officer as the Appellants witness equally amounted to hearsay, and that since the Appellants did not avail an eye witness or even the driver, the evidence of the Respondent which was direct, remained uncontroverted and was enough to establish liability on a balance of probability.

10. On quantum, the Respondent supported the Trial Court's decision on quantum and submitted that the Appellants downplayed the severity of the injuries of the Respondent and thus misapprehended the nature and extent of the injuries. Further that the Appellants relied on authorities to challenge the decision of the Court that were not presented at the time of making the award. Reference was placed in the case of Sila Teren & another v Simon Ombati Omiambo [2014] eKLR.

11. Pertaining loss of earning/income, the Respondent submitted that the Court did not err in applying the minimum wage regulations to arrive at the Respondent's income. Reliance was placed in Virani t/a Kisumu Beach Resort v Phenix of East Africa Assurance Company Ltd [2004] eKLR and Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 to submit that documents are not the only way to prove income occupation or profession.

**Analysis and Determination**

12. Having carefully considered the grounds of appeal and the parties' submissions together with all the authorities cited, I find that the issues arising for determination are: -

    i. Whether the trial court erred in the finding of liability

    ii. Whether the award for general damages was manifestly excessive as compared the injuries sustained

    iii. Whether the Court should have awarded cost of future expenses and loss of earning/income Liability

13. Starting with the issue of liability, from the evidence on record, it is not in dispute that an accident occurred at the material time and date involving the Respondent who was a pedestrian and the Appellants motor vehicle which was being driven by their authorized driver.

14. PW2, the Respondent herein testified that she was off the road and had not yet started crossing the road neither did the driver warn her when he was approaching. That the police did not find her at the scene as she had already been taken to the hospital.

15. PW1 testified that the Respondent was crossing the road when she was hit but was not at the scene. PW1 and DW1 were police officers who both admitted to not being the Investigating officers and only produced the Police Abstract whose contents only confirmed occurrence of the accident. The Police Abstract dated 30th November, 2020 does not blame anyone for the accident and only states "matter referred to insurance" and makes no finding on who was to blame for the accident.

16. The record is clear that the only eye witnesses who gave material evidence on the issue of accounts of the accident was only the Respondent.

17. Every road user has duty of care to other road users. As the Trial Court rightly noted, the Respondent too must have been too close to the road and there needed to be no warning or signal if she was not too close to the road. Further, while on the road she needed to be on the lookout too for her safety and

not just blame the driver of the road for failure to give her a warning signal. For that reason, the Court found reason to apportion some level of blame upon the Respondent.

18. The Trial Court was correct to find that the accident was caused as a result of negligence of the Respondent and the 3rd Appellant, the driver but the evidence of PW1 and DW1 was not sufficient to apportion liability equally.

19. In the absence of the driver to give his side of events, the evidence of the Respondent remained weightier. The evidence of the Police Officers who were neither eye witnesses, investigating officers nor visited the scene cannot trump that of an eyewitness. The Court was right to apportion a higher blame on the part of the driver and hold the 1st and 2nd Appellants vicariously liable.

20. I therefore find no merit on the ground the Trial Court erred in apportioning liability.

**On quantum of General Damages,**

21. The Appellants challenged the award of Kshs. 1,700,000 less 10 % contribution totaling 1,530,000 being damages for pain, suffering and loss of amenities. The Appellants argued that the amount was excessive and the Trial Court in making the award failed to appreciate and apply the principles applicable in the assessment of damages.

22. The Respondent as a result of the accident suffered:

    a. Fractures of the pelvis both left superior and inferior acetabula

    b. Fractures of the column vertebral L4, S1 and S2

    c. Rapture of the spleen and intraperitoneal hemorrhage due to blunt abdominal injury

    d. Displacement of both sacra-iliac joints

    e. Deep lacerations on the left side of the forehead

    f. Friction burns on the left forearm

    g. Deep lacerations on the wrist

    h. Lacerations on the wrist

23. The injuries were confirmed by the medical records on record. Neither of the doctors who authored the medical reports were called in to testify though the medical records were produced by consent.

24. The Trial Court relied on the second medical report by Dr. Kiamba and one by Dr. Malik. She noted that the point of departure was the degree of permanent disability. I have perused the whole record of appeal and the Appellants have failed to include those reports.

25. The Appellants submitted that besides the fracture to the pelvis, the Respondent only had soft tissue injuries. In analyzing the medical records attached in the record of appeal I will with respect disagree with the submissions by the Appellants that the Respondent's injuries were not severe. The Respondent did not just have on isolated fracture but Fractures of the pelvis both left superior and inferior acetabula and Fractures of the column vertebral L4, S1 and S2. She also had a rapture of the spleen with subsequent surgery in no way is a soft tissue injury.

26. The discharge summary shows that the Respondent was admitted on 7th December, 2020 and discharged on 16th December, 2020. She underwent surgery and had to have a drain. She had followed up outpatient clinics.

27. In Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo [2005] KEHC 372(KLR) the Court stated as follows: -

> " I must state from the outset that the award of general damages is a discretion of a trial court and an appellate court will be slow to interfere with such discretion unless that discretion is exercised on wrong principles of law. There are several case authorities on this position. It will suffice if I cite what was stated by the Court of Appeal in the case of Catholic Diocess of Kisumu –vs- Sophia Achieng Tete - Kisumu Civil Appeal No. 284 of 2001 in which the Court of Appeal reiterated what it had earlier held in the case of Kemfro vs Lubia [1982-88] that:-
>
> > "it is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate".

28. It is therefore manifest that the task of assessing damages for personal injuries is not an easy one and involves a lot of considerations. The Appellate Court must also be very slow interfere with such a decision as it is a matter of discretion.

29. I have perused the impugned judgement and the Trial Court did consider all the parties' submissions and was of the view that the awards made in the cited authorities by the Appellants were too low in the circumstances and made the award based on the authorities cited by the Respondent, inflation and the circumstances of the case.

30. The Appellants were tasked with the duty to demonstrate that award by the Trial Court was too high to amount to an error in assessment of damages, or that in coming to that assessment the court took into account an irrelevant matter or that it failed to take into account a relevant matter. These principles have been reiterated by the Court of Appeal in Ken Odondi & two others vs James Okoth Omburah T/A Okoth Omburah & Company Advocates [2013] KECA 252 (KLR) where it was held: -

> " We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled... This principle was adopted with approval by this Court in Butt v Khan [1981] KLR 349 where it was held per Law, JA:
>
> > "... 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..."

31. Based on the injuries sustained and the Trial Court's considerations, I find no basis upon which to interfere with the Trial Court's award.

**Future Medical Expenses**

32. The Respondent pleaded future medical treatment but did not put a figure. The Appellants' grievance is that the Court awarded an amount that was excessive without cogent evidence and total disregard of the fact that they are futuristic in nature.

33. Costs of future treatment are special damages and at large are awarded for anticipated expenses for medical needs over an un-anticipated period. In personal injury claims costs of future treatment are not proved by receipts but by expert opinion and also based on the circumstances presented to the Court. The Court then makes its own assessment if the expert fails to give a specific figure.

34. The absence of a defined figure or the fact that they are futuristic and not yet expended does not negate need for future medical expenses. They are futuristic for the reason that the injured party may still require further treatment which he/she should not be condemned to pay especially if he/she was not to blame for the injuries. They only have to plead. Respondent did in deed plead the future medical expenses.

35. In Forwarding Company Limited & Another v Kisilu; Gladwell (Third Party) [2022] KECA 96 (KLR), the Court stated as follows: -

> " In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

36. The Trial Court in making the award considered the view of Dr. Kiamba who opined that the Respondent need Kshs. 300 per week for malaria drugs and Dr. Malik was of the view that the Respondent was exposed to immunological deficit. Further, that the Respondent pleaded that she would be taking the drugs for 30 years up to the age of 60.

37. The Trial Court felt that Dr. Malik's view was more objective as Dr. Kiamba was only concerned with malaria and his proposal lacked a reasonable basis. Dr. Kiamba's and the Respondent proposal of 30 years would have given a figure of about Kshs 468,000 (300 per week X 52 weeks X 30 years).

38. The Trial Court in its view opined it would be hard to predict how long the Respondent would live and questioned what would happen if she lives beyond 60. the Court therefore gave a global sum of Kshs. 450,000 which was not far off from the doctors' proposal.

39. The Respondent having had her spleen removed was likely going to be on medication for the rest of her life and as stated at risk of immunological deficit. It is the assessment of the various aspects presented that the Court made its findings which I find no err in. The award for future medical expenses therefore remains. Being in the realm of special damages, the award shall not be subjected to contribution.

**Loss of Earnings/Income**

40. On whether the Trial Court should have made an award on lost earnings, the Respondent pleaded that before the accident she was working as a house help earning Kshs. 15,000 per month. That as a result of the accident she had never resumed her normal duties.

41. On the loss of earnings, the Trial Court found that the case relied on by the Appellants was delivered before the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 came into force.

42. Loss of earnings is the real actual loss and in nature a claim for special damages which is real assessable loss that is proved by evidence. The award for loss of earnings is made when the injured as a result of the injury was not able to work. The justification for the award is to compensate the injured for the risk encountered during the incapacitation period depending on the circumstances of each case.

43. It was undisputed that the Respondent suffered temporary incapacitation, what is questioned is the Respondent's lack of proof of profession or income made or proof of salary payment by way of mpesa statement. Section 2 of the Insurance (Motor Vehicle Third Party Risks) Act provides for the use of Minimum Wage Regulation in the absence of any documentary evidence. Which the Trial Court rightly noted.

44. The Court of Appeal in Jacob Ayiga Maruja & Another vs. Simeone Obayo [2005] eKLR observed that: -

> 'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.'

45. Further pursuant to Section 59 of the *Evidence Act*, the Court does take judicial Notice of the fact that employment in the nature of unskilled labour lacks documentation and individuals are paid per work done and mostly in cash. That is not to say that one was not working or that since the nature their work has no record, then they cannot claim under this head. The record shows that the Respondent pleaded she was a domestic worker and due to the nature of her injuries was not able to resume work.

46. Nevertheless, correct principles and relevant factors are to be taken into account to ascertain the real or approximate financial loss suffered as a result of injuries.

47. The Trial Court in determining how long the Respondent was not able to work relied on the medical reports of the Doctors where she noted Dr. Kiamba indicated 6 months whereas Dr. Malik indicated 4 months. The Trial Court took an average period of 5 months multiplied by Minimum Wage Regulation 2018 which was applicable at the time for a house servant at the scale of Kshs. 12,522,70 per month to award Kshs. 62,613.50.

48. I find no error in principle or law in this assessment and as such the ground of appeal fails.

49. As the award on special damages is uncontested, I will not delve into it and the same will remain as is.

50. This appeal is therefore found to be devoid of merit and is dismissed with costs to the Respondent.

It so ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU**

**ON THIS 15TH OF JULY, 2025**

**MOHOCHI S.M**

**JUDGE**