



**Gatwiri & another v Irungu (Civil Appeal E1458 of 2024)  
[2025] KEHC 12849 (KLR) (Civ) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12849 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1458 OF 2024**

**AC MRIMA, J**

**SEPTEMBER 18, 2025**

**BETWEEN**

**BETTY GATWIRI ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH NDUNGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DUNCAN IRUNGU ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Becky Cheloti Mulemia (PM) in Nairobi Chief Magistrates Court Civil Suit No. E908 of 2022 delivered on 15th November 2024)*

**JUDGMENT**

**Background:**

1. Through an Amended Plaintiff dated 20<sup>th</sup> February 2022, Duncan Irungu, the Respondent herein, sought compensation for various bodily injuries he sustained as a result of a road traffic accident. He claimed that on 26<sup>th</sup> February 2021, at around 12:30 hrs he was lawfully walking along the pedestrian path on Dr. Griffins Road near Pangani within Nairobi County when motor vehicle registration number KCV 431 make Toyota Passo which was driven by Joseph Ndungu, the 2<sup>nd</sup> Appellant herein, and which motor vehicle was owned by Betty Gatwiri, the 1<sup>st</sup> Appellant herein was so negligently driven and/or managed that it veered off the road and knocked him. He wholly blamed the Appellants for the accident. That was in Nairobi Chief Magistrates Court Civil Suit No. E908 of 2022 [hereinafter referred to as 'the suit'].
2. The Respondent isolated the particulars of negligence on the Appellants as; failing to keep proper lookout, failing to swerve to avoid the accident, failure to apply brakes as to stop the vehicle, driving the vehicle into the pedestrian path and failure to control the vehicle. He pleaded that the accident



- caused him a fracture of the humerus, soft tissue injuries and degloving wound-right upper arm and sustained a 5% permanent disability. He sought compensation of Kshs. 18,335/= in special damages and general damages.
3. The Appellants challenged the suit through an Amended Statement of Defence dated 28<sup>th</sup> February 2023. They denied the claims in the Plaint and averred that if any accident occurred it was as a result of the Respondent's negligence. They put the Respondent into strict proof thereof.
  4. The suit was heard by way of viva voce evidence where the Respondent testified and produced the documents he filed in the List of Documents. He also called a Police officer who produced a police abstract. The 2<sup>nd</sup> Appellant testified on behalf of the Appellants. He also produced the documents the Appellants filed in their List of Documents.
  5. Upon considering the evidence and the law, the Learned Trial Magistrate apportioned liability jointly and severally between the Appellants. The Court also awarded Special damages of Kshs. 18,335/-, General damages of Kshs. 1,200,000/- and future medical expense of Kshs. 200,000/- together with costs and interest.
  6. It was that decision that yielded to the instant appeal subject of this judgment.

### **The Appeal:**

7. Dissatisfied with the findings of the trial Court, the Appellants through the Memorandum of Appeal dated 10<sup>th</sup> December 2024, asserted the following grounds of appeal: -

#### SUBPARA 1.

That the learned trial magistrate misdirected herself in analysing the evidence and the submissions on liability and, consequently, coming to a wrong conclusion on the same.

#### SUBPARA 2.

That the learned trial magistrate misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented by the Appellants, and failed to totally consider the Appellants' submissions and authorities.

#### SUBPARA 3.

That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the Respondent, if any, and failed to apply precedents and tenets of the law applicable.

#### SUBPARA 4.

That the learned trial magistrate erred in awarding a sum of Ksh. 1,200,000/= in respect of general damages for pain and suffering in view of the injuries suffered by the Respondent which was inordinately high in the circumstance occasioning miscarriage of justice.

#### SUBPARA 5.

That the learned trial magistrate erred in awarding a sum of Ksh. 200,000 as future medical expenses without considering the Appellants' written submissions on the same hence coming to a wrong conclusion on the same.

#### SUBPARA 6.

That the learned trial magistrate erred in awarding a sum of Ksh. 18,335/= in respect of special damages given that the Respondent was to blame for the accident hence greatly prejudicing the Appellant.



#### SUBPARA 7.

That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law

8. In their written submissions dated 9<sup>th</sup> May 2025, the Appellants wholly attributed the accident to the Respondent for jumping over a concrete barrier and attempting to cross the road without care. They referred to several decisions buttressing the fact the Respondent was to fully shoulder the blame and that the suit be dismissed. On the issue of quantum of damages, the Appellants submitted that the award on general damages was inordinately high and that the cost of future treatment was wrongly awarded since it was not pleaded for. Several decisions were also referred to.
9. In the end, the Appellants urged this Court to allow the appeal and dismiss the suit with costs and alternatively, to find the Respondent equally liable for the accident and to review the awards downwards.

#### **The Respondent's case:**

10. Through written submissions dated 22<sup>nd</sup> May 2025, the Respondent opposed the appeal and supported the impugned judgment. He asserted that the liability was proper in the circumstances as well as the awards on damages. Relying on several decisions the Respondent urged this Court to dismiss the appeal with costs.

#### **Analysis:**

11. On consideration of the record, the parties' written submissions and the decisions referred to, two issues arise for determination, which are: -
  - i. Whether the trial Court rightfully found the Appellants wholly liable.
  - ii. Depending on (i) above, whether the trial Court properly directed itself on quantum, of damages.
12. Before venturing into the consideration of the above issues, I will first look at the role of this Court as a first appellate Court; which is by now well settled. This Court is to re-consider the evidence afresh with a view to arriving at its own conclusions. In *Selle -vs- Associated Motor Boat Co.* [1968] EA 123, the Court of Appeal for East Africa discussed the foregoing as follows: -

... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

13. Next, is a consideration of the issues.
  - (a) Liability:
14. The Respondent testified as PW2 and called one Sergeant Waria Mwaema [PW1] as a witness. The evidence of PW1 was at variance with that of PW2. Whereas PW2 testified that he was knocked while



walking along a pedestrian walkway, PW1 stated that indeed PW1 had wrongly jumped over barriers at a fly over and dangerously entered into the road without any care and attention where he was hit. PW1 blamed the Respondent for the accident and stated that although the investigations were still on-going, the driver was not at fault and had not been charged.

15. PW1's evidence was corroborated by that of the 2<sup>nd</sup> Appellant who testified as DW1. It is, therefore, apparent that the Respondent presented a wrong version on how the accident occurred. Therefore, this Court believes the form by PW1 and as validated by DW1. As the Respondent was obviously the one to blame, I will, nevertheless, not apportion the entire blame to him since a driver of a vehicle is always under a duty of care to ensure that he/she drives the vehicle at such a speed as to manage any emergency occurrence and to appropriately engage the vehicle including stopping abruptly [See Isabella Wanjiru Karangu vs. Washington Malele [1983] KLR 142 among many others].

16. Having perused the impugned judgment, this Court finds that since the liability was wholly apportioned to the Appellants, there are valid reasons [discussed above] as to interfere with that apportionment. The Respondent will, hence, shoulder 70% liability and the Appellants shall jointly and severally shoulder 30%.

(b) Quantum:

17. The Appellants decried general damages awarded as excessive and outside the limits for decided cases. It also was their case that the award on future medical costs was contrary to the evidence on record.

18. As the appeal on quantum of damages is on two fronts, this Court reiterates that assessment of general damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277).

19. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, 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 the damage.

20. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR. It is the above legal threshold that will guide this Court in determining this appeal.

21. The guiding principles in the award of general damages were further discussed by the East African Court of Appeal in *Woodruff -vs- Dupont* [1964] EA 404 as follows: -

.... The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court



must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.

22. In this matter, the Respondent sustained a fracture of the humerus, soft tissue injuries and degloving wound on the right upper arm. He suffered a 5% permanent disability. The parties presented several decisions on this head which I have keenly considered. This Court has also been guided by the following cases which relate to fracture of bones in the limbs: -
- (i) *Civicon Limited vs. Richard Njomo Omwancha & 2 Others* [2019] eKLR where the Court awarded Kshs.450,000/= for a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint.
  - (ii) *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR where the award of Kshs.800,000 by the trial Court was substituted with an award of Kshs.500,000 on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.
  - (iii) *Joseph Mwangi Thuita v Joyce Mwole* [2018] eKLR, where the Plaintiff suffered fractured femur, compound fracture of the right tibia and fibula, shortening of the right leg and episodic pain in the right thigh and inability to walk without support. The Court awarded Kshs. 700,000 general damages.
  - (iv) *Tirus Mburu Chege & Another v JKN & Another* [2018] eKLR, where the Respondent suffered fracture of the tibia and fibula of both legs blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness. On appeal the award of Kshs. 800,000 was reduced to Kshs. 500,000.
23. By taking into account the above trends coupled with the decisions tendered by the parties, it is apparent that the award of Kshs. 1,200,000/= on general damages for the injuries sustained by the Respondent was inordinately high. Such an award, therefore and respectfully, ought to be interfered with. This Court reviews the sum of Kshs. 1,200,000/= to Kshs. 700,000/=.
24. The Appellants also challenged the award of Kshs. 200,000/= on future medical expenses and proposed the sum of Kshs. 75,000/= as recommended by Dr. Wambugu. The standing rule on this head is that it is generally considered as part of general damages unless a party specifically pleads and proves it. In this case, since the Appellants did not take any serious objection to the award save on the amount, I will review the amount granted to a figure of Kshs. 150,000/= which is the average of the amounts proposed by the parties.
25. As the special damages were correctly awarded by the trial Court, having been specifically pleaded and strictly proved and since the Appellants have no issue thereto, the same are allowed as granted.



**Disposition:**

26. Having carefully considered the grounds of appeal and in view of the foregoing discussion, this Court now makes the following final orders: -

- (a) The appeal is allowed.
- (b) The judgment in Nairobi Chief Magistrates Court Civil Suit No. E908 of 2022 delivered on 15<sup>th</sup> November 2024 is hereby reviewed as follows: -
  - (i) Liability is assessed at 30% and 70% in favour of the Appellants as against the Respondent.
  - (ii) General Damages assessed at Kshs. 700,000/=.
  - (iii) Cost of future medical costs assessed at Kshs. 150,000/=.
  - (iv) Special damages retained at Kshs. 18,335/=.
  - (v) The Respondent shall have costs of the suit and interest as awarded.
- (c) Since the awards in this appeal have been significantly reduced, each party shall bear its own costs of the appeal.

27. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Miss. Miano, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

