



**Gakuo v Kiili & another (Civil Appeal E978 of 2022)
[2024] KEHC 1412 (KLR) (Civ) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1412 (KLR)

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

CIVIL

CIVIL APPEAL E978 OF 2022

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

SAMUEL NGUGI GAKUO APPELLANT

AND

MARGARET NDINDA KIILI 1ST RESPONDENT

LUCY WAIHIRA NGUGI 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. L. B. Koech (PM)
(CM) in Milimani CMCC No. E334 of 2021 delivered on 31/10/2022)*

JUDGMENT

1. The respondent herein Margaret Ndinda filed Milimani CMCC No. E334 of 2021 seeking general damages for pain and suffering, special damages and loss of and or diminished earnings for injuries she sustained on 27/10/2020 along Outering Road Nairobi while the respondent was alighting from motor vehicle registration no. KBA 990N owned by the 1st appellant while it was being driven by the 2nd appellant.
2. The trial court found the 1st defendant was the registered owner of the motor vehicle at the time of the accident.
3. She also found that the 2nd defendant was negligent by driving the motor vehicle while the respondent was alighting.
4. The trial court awarded damages as follows;
 - i. General damages for pain & suffering ksh.1,000,000



- ii. Special damages ksh. 12,050
Total ksh.1,012,050
5. The appellant has appealed on the following grounds;
- i. The learned magistrate erred in law and misdirected herself when she failed to consider the appellant's submissions on both points of law and fact.
 - ii. The learned magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - iii. The learned magistrate erred in law and in fact in awarding an award on liability inconsistent with facts pleaded and proved.
 - iv. The learned magistrate erred in law and in fact in finding the appellant 100% liable as she disregarded the evidence submitted by the appellant.
 - v. The learned magistrate misapprehended and misunderstood the points of fact and points of law erred in law and in fact in relying on authorities which were irrelevant and thus arrived at an award that is so manifestly high as to be erroneous.
 - vi. The learned magistrate erred in assessing an award which was inordinately high and as wholly erroneous estimate against damages suffered by the plaintiff, she erred in law and in fact in awarding under the head of general damages at ksh.1,000,000.00 the same based in the wrong principles of law was excessively high and unjust and not based on any logical justification.
 - vii. The learned magistrate erred in awarding an excessive sum of the injuries suffered in the face of the evidence adduced and submissions made by the appellant's counsel on quantum.
 - viii. The learned magistrate erred in awarding costs of the suit and interest to the claimant.
6. The parties filed written submissions as follows; the appellant submitted on liability that the 1st Respondent was a passenger in motor vehicle registration number KBA 990N Isuzu Bus which was involved in an accident along Outering Road Nairobi. As a result of the accident, the Respondent sustained the following injuries: Fracture of the right humerus and Complete fracture of midshaft of the right humerus.
7. The appellant argued that the sum of Kshs. 1,000,000 was unreasonable and proposed a sum of Kshs. 500,000. In support the appellant cited the following cases;
- a. *Logistics Solutions Ltd v Steere Mavu Mwambela* [2021] eKLR where the Appellate Court upheld the award of the Trial Court where the trial court had awarded Kshs.450, 000 for a fracture of the right humerus arm bone (mid 1/3), a deep cut on the right eye, abrasion on the head and a blunt injury to the right shoulder and chest. As per the Doctor's medical report the Respondent had sustained a 9% permanent partial disability due to the fracture of the right humerus arm bone (mid 1/3).
 - b. *Nguku Joseph & another v Gerald Kibiu Maina* [2020] eKLR The Court awarded the Plaintiff Kshs.500, 000 after sustaining soft tissue injuries and a fracture of the right humerus.
8. The 1st respondent submitted that she sustained injuries as a result of the appellants negligence. The Evidence was corroborated by the evidence of the police officer who produced the abstract confirmed that he was the investigation officer and that the driver of the suit motor vehicle was to blame for the



- accident. The appellant did not call any witnesses during the hearing and also did not file any evidence to show that the 1st respondent was negligent.
9. It was the 1st respondent's submission that she proved negligence against the appellant on a balance of probabilities and in the absence of evidence to attribute contributory negligence to the 1st respondent the appellant was wholly to blame.
 10. On quantum the 1st respondent submitted that the amount on quantum awarded to her are proportional to the injuries sustained by the Respondent. The 1st Respondent's medical report by Dr. Wokabi dated 17/12/2020 and the medical report filed by the Appellant and drawn by Dr. Jenipher Kahuthu dated 4/5/2022. Both doctors agree that the fracture sustained by the 1st Respondent may not unite. In support the 1st respondent cited the case of *Robert Gitau Kanyiri v Charles R. Kabiga 2 Others* [2010] eKLR the Court awarded Kshs. 1,000,000/= for general damages where the Plaintiff sustained injuries similar to those suffered by the Respondent herein.
 11. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
 12. The issues for determination in this appeal are as follows;
 - i. Whether the trial court was right in apportioning liability at 100% against the appellants.
 - ii. Whether the award of damages was inordinately high.
 13. On the issue as to whether the trial court was right in finding the appellants 100% liable for the accident, the respondent testified together with the investigating officer and the doctor who examined her.
 14. The appellants did not adduce evidence. I find that the respondent was in the process of alighting from the motor vehicle when the 2nd defendant drove off. The respondent sustained injuries on the upper arm.
 15. I find that the respondent proved her case to the required standard in civil cases which is on a balance of probabilities.
 16. On the issue as to whether the award of general damages was excessive, I have considered the following comparable cases where similar injuries were sustained.
 - a. In the case of *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1, 600, 000.00 had the same reduced on appeal to Kshs. 800, 000.00.
 - b. In *Njoki Kariuki vs Bendricon Wamboka Waswa & another* [2013]eKLR the plaintiff sustained compound fractures of humerus right upper arm and fractures of bones of the right forearm. The court awarded Kshs 1,500,000/= as general damages.
 - c. In *Mwaura Muiruri vs Suera Flowers Limited & another* [2014] eKLR, the plaintiff suffered multiple soft tissue injuries communicated fractures of the right humerus upper compound and compound fractures of the right upper leg. The court awarded kshs 1,900,000/= as general damages.
 17. The respondent sustained the following injuries
 - i. Fracture of the right humerous



- ii. Complete fracture of the midshaft of the right humerus
- 18. I find the award of general damages reasonable in the circumstances.
- 19. The only time the appellate court can interfere with an award of damage is when it is inordinately high or low as to warrant interference or where the trial court applied the wrong principles and arrived at an erroneous conclusion.
- 20. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal held that;

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A 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.”

- 21. In the circumstances of this case, I find no reason to interfere with the appeal.
- 22. I dismiss the appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

