



**Ngugi & 2 others v JGN (A minor through her next friend Grace Waithera Kamau)
(Civil Appeal 148 of 2021) [2024] KEHC 7336 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 148 OF 2021**

JM OMIDO, J

JUNE 19, 2024

BETWEEN

JOSEPH MUNGAI NGUGI 1ST APPELLANT

HANNAH RUIRU 2ND APPELLANT

ELIUD NGUGI MUNGAI 3RD APPELLANT

AND

JGN RESPONDENT

A MINOR THROUGH HER NEXT FRIEND GRACE WAIHERA KAMAU

*(Being an Appeal from the Judgement and Decree of Hon. D. N. Musyoka, Senior
Principal Magistrate delivered on 27th July, 2021 in Kikuyu SPMCC No. 294 of 2017)*

JUDGMENT

1. This appeal is on both liability and quantum, preferred by Joseph Mungai Ngugi, Hannah Ruiru and Eliud Ngugi Mungai (hereinafter referred to as “the Appellants”), against the judgement and decree of Hon. D. N. Musyoka, Senior Principal Magistrate rendered on 27th July, 2021 awarding Joyce Gathoni Nyokabi (hereinafter “the Respondent”) general damages for pain, suffering and loss of amenities in the sum of Ksh.900,000/-, special damages of Ksh.3,350/-, costs of the suit and interest.
2. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] EA 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate’s Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.



3. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

4. Going back to the evidence before the trial court, the Respondent (the Plaintiff in the lower court matter), presented the suit through her mother and next friend Grace Waithera Kamau. The Respondent testified as PW1.

5. In her testimony, the Respondent adopted the contents of the witness statement dated 7th September, 2017. She stated that on 22nd August, 2017 she was involved in a road traffic accident along Kikuyu – Wangige Road, whereby she was knocked down by motor vehicle registration number KCF 925Y, as a result of which she sustained the following injuries (as per Dr. G.K. Mwaura’s medical report dated 18th September, 2017):

Compound (open) fracture left tibia and fibula, lower 1/3 with a permanent degree of incapacity assessed at 5% and the degree of the injuries assessed as “grievous harm.

6. The accident was reported to Kikuyu Police Station Traffic Base and police action followed. A police abstract and a P3 form were issued to the Plaintiff. As per the police abstract, the driver of the vehicle – the first Appellant herein – was charged with the traffic offence of driving without due care and attention, convicted and sentenced on 22nd August, 2016.

7. The Respondent blamed the said driver for the accident, stating that he drove the said vehicle at a high speed whereby the same lost control and hit the Respondent, off the road.

8. The following documents were produced in support of the Respondent’s case:

- Respondent’s Statement.
- Copy of the Respondent’s national identity card.
- Treatment summary and medical records from St. Teresa Nursing Home and Gatundu District Hospital.
- Medical report prepared by Dr. D.K. Mwaura and a receipt for the report for Ksh.3,000/-.
- P3 form.
- Police abstract.
- Motor Vehicle Copy of Records and receipt for Ksh.550/-.
- Demand letter.

9. The Respondent recovered from the injuries albeit with the resulting effect rendering her unable to run.



10. Although the Appellants did not call any witness, it is instructive from the record that after closing the defence case, Ms. Wambugu, learned counsel for the Appellants stated thus:

“Ms. Wambugu: We will put the Doctor’s Report together with our submissions”.

11. I have looked through the record and note that no such medical report was annexed to the Appellants’ submissions. I will proceed to state that even if such a document had been attached to the submissions, the same would have been of no probative evidentiary value. I say so because documents that parties intend to rely on can only be produced by witnesses during a trial or by the consent of the parties. Such documents cannot be produced by attaching them to submissions, for the simple reason that submissions do not form part of the evidence.

12. Further, although the medical report dated 20th April, 2018 prepared by Dr. Wambugu P M was in the list of documents filed by the Appellants, the same was not produced as an exhibit and was therefore not available for consideration by the learned trial Magistrate.

13. The parties filed their respective written submissions pursuant to the directions that the court gave on 8th June, 2021. On the basis of the material on record, the lower court pronounced itself and rendered its judgement on 27th July, 2021.

14. The Appellants now appeal against both the court’s finding on liability -that the Defendant was wholly to blame for the accident and the assessment made of Ksh.900,000 in general damages for pain, suffering and loss of amenities. There is no challenge presented on the award of special damages of Ksh.3,350/-.

15. I note from the Judgement of the lower court that although there were three Defendants (the present three Appellants), the learned trial magistrate was not clear on which of the three Defendants judgement was entered against. I will revisit this issue later in this judgement.

16. The Appellants pointed out in the submissions filed in the appeal that the person who testified as PW1 gave her name as Gathoni Nyokabi.

17. That PW1 adopted as her evidence the witness statement dated 7th September, 2017 which indicates at the top the names JGN, while bearing at the bottom the names of the person who signed the same as Grace Waithera Kamau (the next friend). It was pointed out further that from the body of the statement, particularly paragraph 2 thereof, the statement was authored by the next friend, who neither witnessed the accident nor testified on causation. That in actual fact, PW1 did not record any statement and the particulars of negligence were therefore not proved.

18. The Appellants further argued that the fact that the Appellants did not call any witnesses to testify before the trial court did not lessen the legal burden placed on the Respondent to prove her case and that the learned Magistrate erred in law by holding that the Respondent had proved her case to the required standard, merely on the basis that the Appellants did not call any evidence to controvert the Respondent’s evidence. That the Respondent, notwithstanding the fact that the Appellant did not call witnesses, still had a legal duty of proving her case.

19. In the present Appeal, the Appellants challenged the contents of the police abstract that the trial court relied on in determining liability. In particular, the Appellants stated in their submissions that although the abstract alluded to the existence of traffic proceedings in which the driver of the motor vehicle indicated to be Joseph Mungai Ngugi was convicted and sentenced on a charge of driving without due care and attention, the same remained unverified as the Respondent did not produce a copy of the charge sheet, proceedings or judgement.



20. In respect of quantum, the Appellants did not challenge the nature and extent of injuries in the medical report produced by the Respondent, prepared by Dr. G. K. Mwaura.
21. The Appellants however challenged the trial court's assessment of general damages for pain, suffering and loss of amenities at Ksh.900,000/-, urging that the same was inordinately high, considering the authorities that the trial court relied on, i.e. *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR in which for comparable injuries, the High Court reduced the award on appeal from Ksh.1,000,000/= to Ksh.450,000/=.
22. Further reliance was placed by the Appellants on the decisions of *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* [2020] eKLR; *Jitan Nagra v Abednego Nyandusi Oigo* [2018] eKLR; and *Wakim Supas Limited v Sammy Aritus* [2017] eKLR in which cases the High Court assessed injuries of similar or comparable nature, more or less, as those in the present appeal and made awards ranging between Ksh.400,000/- and Ksh.450,000/-.
23. The Respondent opposed the appeal in its entirety. As to the issue raised by the Appellants that PW1 did not record a statement and the discrepancies in the witness statement filed by the Respondent, the Respondent submitted that the parties herein agreed that the Plaintiff testifies and adopts the statement of the next friend as her evidence in chief, hence the testimony of PW1. With profound respect, I have perused the proceedings and I can certainly state that no such consent or agreement was recorded by the parties.
24. The Respondent, regarding the issue raised on the contents of the police abstract indicating that the driver of the motor vehicle was charged with the offence of driving without due care and attention, convicted and fined, was emphatic that the first Appellant was to blame for the accident and that this position was further supported by the fact that the Appellants did not call any evidence to controvert this position.
25. With regard to quantum, the Respondent urged that the amount of Ksh.900,000/- as assessed by the trial Magistrate under the head of pain, suffering and loss of amenities was apt and not excessive.
26. The Respondent relied on the authorities of *Francis Ndung'u Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR; *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another* [2015] eKLR; and *Daniel Oduor Shieunda v Chrispher Wambugu* [2021] eKLR.
27. The three authorities above are in my view not relevant to the matter at hand as they are all in respect of injuries that were much more severe than those sustained by the Respondent herein.
28. I have considered the record and the submissions by the parties. I will deal with the issues raised in the appeal seriatim.
29. The first issue raised in the appeal was that the person who testified as PW1 did not record and/or file a witness statement and that the only witness statement that was filed by the Respondent had unexplained discrepancies as noted above.
30. On this issue, my view is that the same is one that ought to have been raised during pre-trial directions whereby the Appellants had the opportunity of contesting any matters concerning the filed witness statements and/or list of witnesses.
31. A second opportunity for the Appellants to point out the issues arose when the PW1 was put in the witness stand. Notably, there was no objection raised to PW1 testifying.



32. A third chance was presented to the Appellants to cross examine PW1 on her capacity and the contents of the statement but it is instructive from the record that the Appellants were contented to have the evidence of PW1 on record as was presented.
33. Having failed to address the matters above during the course of the pre-trial or main trial, my view is that those are not issues which can now be presented by way of an appeal.
34. I now turn to the challenge presented by the Appellant to the contents of the police abstract.
35. In civil proceedings, the standard of proof is on a balance of probabilities. The Respondent presented evidence through a police abstract that indicated that the first Appellant was charged and convicted on the offence of driving without due care and attention. The abstract provided the traffic case number.
36. It is satisfactory, in my view, in the absence of evidence to the contrary that the contents of the abstract prove on a balance of probabilities that indeed there existed such a traffic case and that the first Defendant was convicted on the charge. I cannot, in the premises fault the learned Magistrate's findings on the same.
37. On the issue of quantum, I take guidance from the case of *Kemfro Africa Ltd & Another v A M Lubia & Another* [1982-1988] KAR, where the Court of Appeal held:

“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”

38. There is also the case of *Kigaraari v Aya* [1982-1988] 1KAR 768 where the court held as follows:

“Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

39. In *Charles Oriwo Odeyo vs Apollo Justus Andabwa & Another* [2017] eKLR the court held:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are;

- (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded, or
- (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler vs Butler* [1984] KLR 225).

The assessment of damages in personal injury cases by court is guided by the following principles: -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.



- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 - 5) The awards should not be inordinately low or high (*See Boniface Waiti & another Vs Michael Kariuki Kamau* (2007) eKLR.”
40. The jurisprudence provided by the decisions above, is that although the award of damages is within the discretion of the trial court, one of the grounds on which an appellate court can interfere with the assessment of the trial court is where the award is inordinately high.
41. The authority that the trial court based its assessment on was that of *Civicon* (*supra*) in which an award of Ksh.450,000/- for comparable injuries was made.
42. The learned trial magistrate did not give reasons for drastically departing from the amount awarded in *Civicon*. The award of Ksh.900,000/- was in the premises clearly inordinately high, considering that *Civicon* was at the time a recent decision. My view then is that considering lapse of time, an award of Ksh.500,000/- would have been reasonable and adequate in the circumstances of this case.
43. Going back to the issue I have pointed above that the learned trial magistrate did not state the Defendant against whom the judgement was entered, I note that whereas the first Appellant (first Defendant) was in the police abstract indicated to be the driver of the motor vehicle, the second and third Appellants (second and third Defendants) were in the police abstract and copy of records respectively indicated to be the owners thereof. No evidence to the contrary was presented.
44. The three Appellants did not dispute that the 1st Appellant was driving the vehicle with the authority of the 2nd and 3rd Appellants. The 2nd and 3rd Appellants were therefore vicariously liable to the same extent of their driver's (1st Appellant's) liability. The three were therefore jointly and severally liable.
45. In the result, I allow the appeal and set aside the lower court's finding on liability and quantum and substitute therefore with the following:
- a). Judgement on liability: At 100% against the three Appellants jointly and severally.
 - b). General damages for pain, suffering and loss of amenities: Ksh.500,000/-.
 - c). Special damages: Ksh.3,350/-.
 - d). Costs of the suit in the lower Court are awarded to the Respondent.
 - e). Costs of the appeal are awarded to the Appellants, which I assess at Ksh.45,000/-.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 19TH DAY OF JUNE, 2024.

JOE M. OMIDO

JUDGE

For Appellants: Mr. Mege.

For Respondent: No appearance.

Court Assistant: Ms. Njoroge.

