



**Gukua-Ku Investments Limited & another v Njenga (Civil Appeal  
E036 of 2023) [2024] KEHC 12316 (KLR) (Civ) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 12316 (KLR)

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

**CIVIL**

**CIVIL APPEAL E036 OF 2023**

**MA OTIENO, J**

**AUGUST 6, 2024**

**BETWEEN**

**GUKUA-KU INVESTMENTS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JOHN MWAURA KARIUKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARY NJAMBI NJENGA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Hon. M.W. Murage  
delivered on 16th December 2022 in MILIMANI CMCC NO.3177 OF 2017)*

**JUDGMENT**

**Background**

1. This is an Appeal from the decision of the magistrate's court delivered on 16<sup>th</sup> December 2022 in the Milimani CMCC No. 3177 of 2017 in which the Respondent, then a Plaintiff, sued the Appellant seeking compensation for injuries suffered in a road accident that occurred on 19<sup>th</sup> December 2016 involving the Appellants' motor vehicle registration No. KCA 205X.
2. In the plaint, the Respondent stated that she was a fare paying passenger aboard motor vehicle registration number KCA 205X when it collided with another motor vehicle registration number KAQ 531U thereby causing her the injuries.
3. The Appellant, then a defendant, entered appearance on 1<sup>st</sup> August 2017 and later filed their Statement of Defence denying liability and asked the court to dismiss with costs the claim.
4. On 16<sup>th</sup> December 2022, the trial magistrate rendered its judgment in the dispute and found the Appellant 100% liable for the accident. The Court also gave the following awards in damages; -



- a. General damages at Kshs. 900,000/=
  - b. Special damages at Kshs. 319,546/=
5. Aggrieved by the decision of the trial court, the Appellant vide his memorandum appeal dated 11<sup>th</sup> January 2023 lodged an appeal to this court, raising six grounds of appeal. A perusal of the grounds reveals that the appeal is basically against the trial court's findings on both liability and quantum.
  6. The appeal was canvassed by way of written submissions. The Appellant's filed their submissions dated 19<sup>th</sup> March 2024 whilst the Respondents filed theirs dated 15<sup>th</sup> April 2024.

### **Appellant's submissions**

7. On liability, the Appellants submitted that contrary to the evidence in the police abstract as tendered by PW2 at trial which blamed the driver of motor vehicle registration number KAQ 531U for the accident, the trial court still proceeded and entered judgment against the Appellants.
8. The Appellants further submitted that the Respondent failed at trial to adduce any evidence illustrating any negligence on the part of the Appellants. Citing the case of *Frida Kimotho vs Ernest Maina* [2002] eKLR, the Appellant asserted that the mere fact that the accident happened was not of itself proof that the Appellants were negligent. That the Respondent still had duty to give affirmative evidence of any negligence on the Respondent, a duty the Respondents failed to discharge in this case.
9. On quantum of damages, the Appellants submitted that the trial committed an error of law and of fact by awarding an inordinately high excessive sum of Kshs. 900,000/= for pain and suffering.
10. According to the Appellants, the award by the trial court did not take into account the nature of the injuries suffered by the Respondent as a result of the accident and was far beyond the past awards in cases with comparable injuries contrary to the holding in the case of *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR.
11. The Appellants closed their submissions on quantum by proposing that an award of between Kshs. 100,000 and Kshs. 200,000 would be sufficient to compensate the Respondent for the injuries suffered in the accident.

### **Respondent's submissions**

12. On his part, the Respondent's submissions on liability were that trial court was right in its finding on liability notwithstanding the evidence of PW2 which blamed the other vehicle, motor vehicle registration number KAQ 531U. That the finding by the trial court was based on the court's evaluation and appreciation of the evidence tendered at trial.
13. The Respondent further submitted that the evidence of an investigation officer, in this case PW2, was mere opinion of the officer and not conclusive as to who is to blame for the accident neither is such an opinion binding on the court. The Respondent cited the case of *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) in support of this position.
14. It was further the Respondent's submissions that the Appellant having failed to call any witness or produce any evidence at trial, there defence remained a mere denial thereby leaving the Respondent's case uncontroverted.
15. On quantum, the Respondent submitted that the damages as awarded by the trial took into account the nature of the injuries and awards in cases with comparable injuries. Citing the case of *Lawrence*



Wairimu Wainyoike & another v Joseph Letting [2021] eKLR, the Respondent surged this court to maintain the Kshs. 900,00 awarded by the trial court.

### **Analysis and determination**

16. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion on the issue of liability and on quantum. I am however aware to the fact that unlike the trial court, I did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. I will therefore give due allowance for this. See the Court of Appeal decision in *Peters vs Sunday Post Limited* [1958] EA where the court stated that; -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

17. At the same time, I will also bear in mind the fact that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that: -

“...I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial 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...”

18. I have perused the memorandum of appeal and submissions by the parties in this appeal and note that there are only two issues for determination in this appeal, that is, the issue of liability and that of quantum of damages.

### **Liability**

19. I have perused the pleadings, the evidence and proceedings in this matter. I note that in her plaint dated 5<sup>th</sup> May 2017, the Respondent stated that on 19<sup>th</sup> December 2017, as a fare paying passenger, she was aboard motor vehicle registration number KCA 205X travelling from Nairobi to Ruiru when the said vehicle collided with another motor vehicle registration number KAQ 531U thereby causing her the injuries.
20. It was the Respondent’s case in the lower court that it was the driver of motor vehicle registration No. KAQ 531U Mitsubishi van that negligently drove the said vehicle causing it to collide with motor vehicle registration number KCA 205X Isuzu Matatu Minibus the Respondent in which the Respondent was a passenger.
21. That as a result of the collision, the Respondent was injured and sustained a fracture of left clavicle, laceration of the left foot, multiple bruises on the face, right shoulder, both knees and upper right hand.
22. The Respondent consequently sued Peter Ngumi Kigumo, Rahab Njoki Muchemi (who were the driver and registered owner of motor vehicle registration No. KAQ 531U respectively), John Mwaura Kariuki (who was the driver and of motor vehicle registration No. KCA 205X), Gukua-KU



Investments Limited and Equity Bank Limited (who were the joint registered owner of motor vehicle registration No. KCA 205X) as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants respectively.

23. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants despite having been served with the pleadings never entered appearance and a default judgment was entered against them on 17<sup>th</sup> November 2021. The matter then proceeded for hearing against the rest of the defendants.
24. On 5<sup>th</sup> July 2022, the Respondent testified as PW1 and adopted her witness statement of 6<sup>th</sup> May 2017 together with the documents filed which were produces as P. Exhibits 1 to 16, save for P. Exh. 12, the police abstract which was produced by the police.
25. I have gone through the Respondent's witness statement dated 6<sup>th</sup> May 2017 and note that in that statement, just in her plaint, the blame is on the driver of motor vehicle registration number KAQ 531U. No negligence was pleaded against the driver of motor vehicle registration number KCA 205X in the plaint and none has been mentioned in the aforesaid witness statement by the Respondent.
26. In his testimony before the trial court, No. 88537 Police Constable Jeseo Mwalolo Kasioki who testified as PW2, produced a police abstract dated 29<sup>th</sup> March 2017 confirming that the accident happened involving the two vehicles.
27. PW2 told court that both motor vehicle registration no. KCA 205X and motor vehicle registration number KAQ 531U were being driven along Thika road and on reaching the location of the accident, the driver of motor vehicle KAQ 531U which was carrying iron sheets applied emergency brakes and in the process motor vehicle registration No. KCA 205X knocked its left side while trying to avoid the falling iron sheets. He told court that the driver of motor vehicle KAQ 531U was blamed for the accident.
28. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants closed their respective cases without calling any witness in support of their defence.
29. The trial court after analyzing the evidence on record proceeded to find the Appellants 100% liable for the accident. The magistrate dismissed the evidence by PW2 on liability for the accident.
30. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same Act on both parties. See Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal stated that: -  
  
“As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”
31. From the pleadings and proceedings, it is not disputed that an accident happened on 19<sup>th</sup> December 2016 involving the Appellants' motor vehicle registration No. KCA 205X and motor vehicle registration No. KAQ 531U along Thika Road in which the Respondent was injured. What however not clear to me, both from the pleadings and evidence tendered in court is the negligence on the part of the 2<sup>nd</sup> Appellant who was then the driver of motor vehicle registration number KCA 205X.
32. I have perused the Respondent's plaint dated 5<sup>th</sup> May 2017 and I have not seen anywhere in that plaint where the Respondent pleaded any negligence on the part of the 2<sup>nd</sup> Appellant (then the 3<sup>rd</sup> Defendant). Again, in the Respondent's evidence before the trial court, all blame was on the driver of motor vehicle



registration No. KAQ 531U (who was the 1<sup>st</sup> defendant in the lower court) and no evidence was led pointing towards negligence on the part of the 2<sup>nd</sup> Appellant.

33. Further, the evidence of the PW2 also corroborated the Respondent's evidence that it was the driver of motor vehicle registration No. KAQ 531U (who was the 1<sup>st</sup> defendant in the lower court) who was to blame for the accident. As pointed out elsewhere in this judgment, a default judgment was entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 17<sup>th</sup> May 2021.
34. Having reviewed the evidence before the trial court, I find that the finding by the trial court on liability against the Appellants (3<sup>rd</sup> and 4<sup>th</sup> Defendants in the suit) was against both the pleadings and evidence on record.
35. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when it is clearly wrong and based on no evidence or on the application of wrong principle. This was the holding in *Khambi and Another vs. Mahithi and Another* [1968] EA 70, where the court stated that: -

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

36. In the circumstances and bearing in mind the applicable principles on apportionment of liability, I believe that this is a proper case where this court, exercising its appellate jurisdiction, can interfere with the trial court's discretion on the apportionment of liability.
37. Consequently, I set aside the trial court's finding on liability and find that no negligence against the Appellants was pleaded in the plaint neither was it proved in evidence by the Respondent.

### **Quantum**

38. Notwithstanding that liability not been established, it is the duty of this court, not being the last appellate court, to still proceed and assess quantum of damages. See the case of *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR where the court emphasized that it is the duty of the court of the first instance, and indeed any other court whose decision is not final, to assess damages even where liability has not been established.
39. On quantum, it is not contested that the Respondent was injured in a road traffic accident on 19<sup>th</sup> December 2016 in a road traffic accident involving the Appellant's motor vehicle registration No. KCA 205X in which the Respondent was a fare paying passenger and motor vehicle registration No. KAQ 531U, along Thika Road. The Respondent testified that he suffered the following injuries: fracture of left clavicle, laceration of the left foot, multiple bruises on the face, right shoulder, both knees and upper right hand.
40. The initial treatment notes from Aga Khan University Hospital (P. Exh. 5) confirmed that as a result of the injuries suffered in the accident, the Respondent was admitted in the hospital on 19<sup>th</sup> December 2016 and treated for the injuries before discharged on 22<sup>nd</sup> December 2016. Additionally, medical report by DR. Fred C. Sitati dated 6<sup>th</sup> March 2017 (P. Exh. 9) also confirmed the injuries by the Respondent as pleaded.



41. The general rule is that assessment of damages is within the discretion of the trial court and that an appellate court should only interfere in instances where the trial court, in assessing damages, erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see *Mbogo vs Shah* (1968) EA 93 and *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727).
42. In evaluating compensation for general damages, the Court has to evaluate the nature of the injuries and the awards given by other Courts. The Court of Appeal observed in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR that –
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
43. The Appellants proposed that in view of the nature of the injuries suffered by the Respondent an award of between Kshs. 100,000 and Kshs. 200,000 would be sufficient to compensate the Respondent for the injuries suffered in the accident. They relied in the case of *George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi* [2016] eKLR where a sum of Kshs. 450,000/= was awarded for two loose teeth; blunt trauma to the neck and chest; fracture of the left clavicle; fractures of the 4<sup>th</sup> and 5<sup>th</sup> left ribs; blunt trauma to the spinal column and right scapula area; and, dislocation of the left shoulder joint.
44. The Respondent on the other hand supported the award by the lower court to consider the comparable case of *Lawrence Wairimu Wainyoike & another v Joseph Letting* [2021] eKLR where an award of Kshs. 800,000 was made for Deep cut wound on the forehead, Fracture left clavicle, Blunt injury to the chest and Blunt injury to the shoulder.
45. Having reviewed the injuries suffered by the Respondent in this case, and the respective parties submissions and authorities cited, I find that the award by the injuries suffered by the Respondent in this case were more comparable to those suffered in the case of *Lawrence Wairimu Wainyoike & another v Joseph Letting* [2021] eKLR cited by the Respondent. In the circumstances, I will award Kshs. 800,000/- in this case as well since. The award of Kshs. 900,00/= is therefore set aside for being high and excessive in the circumstances.
46. No appeal was taken on the trial court’s award on special damages. The same is therefore retained.
47. In view of the foregoing, the appeal merited and I hereby allow the same with costs to the Appellant. The judgement of the lower court dated 16<sup>th</sup> December 2022 is therefore set aside and hereby substituted with a Judgment of this court in the following terms; -
- i. Liability – NIL
  - ii. General Damages – Kshs. 800,000/=
  - iii. Special damages – Kshs. 319,546/=
48. It so ordered.

**SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 6<sup>TH</sup> DAY OF AUGUST 2024**

**ADO MOSES**

**JUDGE**

Moses – Court Assistant

