



REPUBLIC OF KENYA



**Ayugi alias Richard Opado Ayugi v Mbai (Civil Appeal E065 of 2023)
[2025] KEHC 14233 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E065 OF 2023
GL NZIOKA, J
SEPTEMBER 17, 2025**

BETWEEN

RICHARD OPUDO AYUGI ALIAS RICHARD OPADO AYUGI APPELLANT

AND

CHRISTINE NZILANI MBAI RESPONDENT

(Being an appeal from the decision of Hon. Y. M. Barasa (PM) delivered on 30th June, 2023 vide Chief Magistrate Civil Case No. E405 of 2021 at Naivasha)

JUDGMENT

1. By a plaint dated 5th July 2021 and amended on 21st October 2021, the plaintiff (herein “the respondent”) sued defendant (herein “the appellant”) seeking for judgment against the appellant for:
 - a. General damages for pain and suffering;
 - b. General damages for loss of earnings due to the paralyzed projects;
 - c. Special damages for medical expenses amounting to Kshs. 2,211,088.
 - d. Special damages for loss of earnings amounting to Kshs. 500,000
 - e. Costs of the suit;
 - f. Interest on (a), (b), (c) above;
 - g. Such other reliefs this Honourable court may deem fit to grant.
2. The respondent’s case is that on or about 7th July, 2018, she was travelling as a lawful passenger in motor vehicle registration number KCE 110E Mercedes Benz along Nairobi – Nakuru Highway. That the vehicle was being driven by the appellant who is also registered owner.



3. That when they reached at Kinungi area, the appellant drove the vehicle negligently, recklessly and/or carelessly that he caused it to swerve from its lawful lane and rammed into another motor vehicle registration number KCM 691T.
4. The respondent tabulated the particulars of negligence on the part of the appellant as follows:
 - a. Driving motor vehicle registration number KCE 110E at an excessive speed in the circumstance.
 - b. Failing to exercise proper control of the motor vehicle registration number KCE 110E.
 - c. Driving without any care and attention.
 - d. Driving a defective motor vehicle.
 - e. Failing to have any sufficient regard for other road users.
 - f. Failing to break, stop, swerve, slow down or in any other manner manage and/or control motor vehicle registration number KCE 110E so as to avoid the accident herein.
 - g. Failing to obey the Highway Code and traffic rules.
5. That as a result of the accident, the respondent sustained the following injuries: -
 - a. Displaced fracture of the left mid shaft humerus.
 - b. Fracture of the left lamina papyracea and roof of the left maxillary sinus (blowout fracture) with associated herniation of extra conal fat and maxillary haemosinus.
 - c. Bruises on the left arm and face.
 - d. Severe bleeding.
6. The respondent averred that as a result of the accident, she incurred costs in terms of special damages as follows: -
 - a. Police abstract ----- Kshs 200
 - b. Motor vehicle search ----- Kshs 600
 - c. Medical expenses ----- Kshs 2,006,383
 - Total ----- Ksh 2,007,183
 - d. Caesarian costs ----- Ksh203,905.
 - e. The amount payable to the plaintiff under the contract for service being Ksh 500,000.
7. However, the respondent's claim was opposed by the appellant vide a statement of defence dated 11th February 2022. The appellant averred that save for the fact that an accident occurred on 7th July, 2018, along Nairobi – Nakuru Highway at Kinungi area involving motor vehicle registration KCE 110E and motor vehicle registration KCM 691T, it was not caused and/or in any way contributed to by any negligence on his part. The appellant denied all the particulars of negligence at paragraph 4 of the plaint attributed to him.
8. The appellant further pleaded that the accident was wholly caused and/or substantially contributed to by the negligence of the driver of motor vehicle registration number KCM 691T. The particulars of



negligence attributed to the driver of subject motor vehicle registration number KCM 691T are stated as follows: -

- a. Drove motor vehicle registration number KCM 691T at a speed that was excessive in the circumstances.
 - b. Failed to keep a proper look out for vehicular traffic on the road and in particular, motor vehicle registration number KCE 110E.
 - c. Failed to heed the presence of motor vehicle registration number KCE 110E on the said road.
 - d. Failed to have due regard to his own safety and the safety of his passengers.
 - e. Drove motor vehicle registration KCM 691T without due care and attention.
9. The alleged applicability of the doctrine of res ipsa loquitur was denied.
10. The case proceeded to full hearing. The respondent's case was supported by the evidence of (PW1) No. 67214 Sergeant James Gatitu who produced the police abstract (Pexh 1) which confirmed the occurrence of the accident and that the appellant was blamed for causing the same, charged and fined.
11. The respondent testified as PW2 and adopted her witness statement as her evidence in chief where she reiterated the averments in the plaint. She further produced documents filed in court dated 5th July 2021; and further documents filed and dated 24th January 2024.
12. Subsequently, the parties recorded a consent on liability in the ratio of 80%:20% in favour of the respondent as against the appellant. Further, the respondent's documents marked 10 to 19 were produced by consent while document number 5 on the further list of documents was to be produced together with the submissions.
13. The appellant closed his case without calling any witnesses.
14. By a judgment dated 30th June 2023, judgement was entered in favour of the respondent a follows:
- a. Liability is entered at 80:20 in favor of the plaintiff as per the consent.
 - b. The plaintiff is awarded general damages of Ksh 1,300,000
 - c. The plaintiff is awarded special damages of Ksh 1,839,484
- | | |
|----------------|---------------|
| Sub-total..... | Ksh 3,139,484 |
| less 20%..... | Ksh 627,896 |
| Total | Ksh 2,511,588 |
- The plaintiff is awarded costs of the suit plus interest.
15. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds verbatim reproduced: -
- a. The learned trial Magistrate's award of general damages for pain and suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the respondent.
 - b. The learned trial Magistrate erred in fact and in law by failing to appreciate that receipts/ documents produced respecting special damages did not add up to the amount claimed and presuming they did.



- c. The learned trial Magistrate erred in fact and in law by awarding an unproved amount as special damages.
 - d. The learned trial Magistrate erred in fact and in law by failing to appreciate that some of the produced receipts/documents related to the same payment and should not have been added twice.
 - e. The learned trial Magistrate erred in fact and in law by awarding as special damages amounts allegedly paid by entities whose nexus to the respondent was not established.
 - f. The learned trial Magistrate erred in fact and in law by allowing as special damages medical expenses incurred long after the subject incident whose nexus to the accident injuries was not established.
 - g. The learned trial Magistrate erred in fact and in law by ignoring the appellant's submissions in determining special damages.
16. By reasons of the aforesaid the appellant prays for the following orders that: -
- a. The trial Magistrate's award of general damages for pain, suffering and loss of amenities be set aside as a whole and substituted with an assessment thereof at a much lower amount commensurate with the respondent's injuries and range of available authorities.
 - b. The trial Magistrate's award of special damages be set aside as a whole and substituted with an award of Kshs 631,854 less 20% contribution.
 - c. The appellant be awarded costs of this appeal.
17. The appeal was canvassed through filing of submissions considered herein.
18. In considering the appeal, it is noted that the role of the first appellant court is to re-evaluate the evidence adduced afresh and arrive at its own conclusion as stated by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
19. The court stated as follows: -
- “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 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 demeanour of a witness is inconsistent with the evidence in the case generally.”
20. Pursuant to the aforesaid I note the appellant argues that the amount awarded as general damages are high in that the injuries at paragraph 5(b) of the amended plaint were not proved by the medical evidence produced. That he had proposed an award of Kshs. 350,000 and relied on the following comparable authorities: -
- a. *Maina Onesmus v Charles Wanjohi Githome* [2019] eKLR where the respondent sustained a fracture of the mid-shaft humerus, fracture of the condyles, fracture of the shoulder gird, pain



and psychological trauma and the High Court set aside the trial court award of Kshs. 600,000 and substituted it with an award of Kshs. 350,000 for general damages.

- b. Said Abdullahi & Another v Alice Wanjira [2016] eKLR where the respondent sustained a fracture of the right humerus bone and spinal fracture with permanent incapacity assessed at 10% and the High Court substituted the trial court award of Kshs. 600,000 with an award of Kshs. 300,000 as general damages.
21. The appellant further submitted that the authorities relied on by the respondent relate to more severe injuries and that the amount awarded by the court in those authorities is lower than the amount proposed by the respondent. Furthermore, that the trial court failed to consider his submission and authorities and only mentioned in the judgment. Consequently, the trial court erred in awarding general damages of Kshs. 1,300,000 which are excessive in the circumstances.
 22. However, the respondent in her submissions dated 1st October 2024 argued that the injuries pleaded at paragraph 5 of the amended plaint are similar to the injuries in the original plaint and that there are no additional injuries in the amended plaint. Further the injuries sustained on 7th July 2018, the day of the accident and pleaded are reflected in doctor's reports from Aga Khan University Hospital found at pages 2, 3, 5 and 7 of the supplementary record of appeal and the medical report dated 25th June 2021 from the same Hospital at page 99 and 100 of the Record of Appeal.
 23. The respondent submitted that, the medical reports and treatment notes were produced by consent of the parties without calling the makers. Additionally, the appellant did not challenge the injuries sustained as he did not subject the respondent to a second medical examination and therefore the evidence remained uncontroverted.
 24. The respondent further argued she proved that she is a person living with disability under Registration No. NCPWD/P/475594. Furthermore, that six (6) months after her surgery, she suffered a mal-union of the screws and plate due to implant failure and had to undergo a second surgery sometime in May 2019. That it is not therefore true that she only sustained a fracture of left mid shaft humerus but actually sustained three (3) fractures leading to disability.
 25. On whether the court ought to interfere with the award of Kshs. 1,300,000 as general damages, the respondent referred to the case of Bhutt v Khan (1981) KLR and Robert Msioko Kitavi v Coastal Bottlers Limited (1982-88) 1 KAR 891 where the Court of Appeal set out the circumstances under which an appellate court ought to consider when deciding whether to interfere with an award of damages by the trial court, which including the fact that the trial court acted on the wrong principles or misapprehended the evidence thereby arriving at an erroneous estimate of the damages.
 26. The respondent further submitted that the award by the trial court was justified taking into consideration the severity of the injuries, further that she is now a person living with disability, the current inflation rate, high costs of living and the fact that she cannot do her work as an architect owing to the injuries on her hand.
 27. The respondent referred the court to the following decision she relied on in the trial court: -
 - a. Mwaura Muiruri v Surera Flowers Limited & Another [2014] eKLR where the claimant suffered multiple soft tissue injuries, communitated fracture of the right humerus and upper compound fractures of the right leg and was awarded Kshs. 1,900,000 as general damages.
 - b. Ben Mwita Matinde v Salina Koskey {2020} eKLR where the appellant sustained soft tissue injures and fracture of the right humerus and was awarded Kshs. 1,000,000 by the High Court.



- c. *Loise Njoki Kariuki v Bendriacon Wamboka Waswa & Another* [2013] eKLR where the claimant sustained compound fractures of the humerus right upper arm and fractures of bones on the right forearm and the High Court awarded Kshs. 1,500,000.
28. In the instant matter, the injuries the respondent sustained are pleaded at paragraph 5 of the amended plaint as follows: -
- a. Displaced fracture of the left mid shaft humerus
 - b. Fracture of the left lamina papyracea and roof of the left maxillary sinus (blowout fracture) with associated herniation of extra conal fat and maxillary haemosinus
 - c. Bruises of the left arm and face
 - d. Severe bleeding
29. A consideration of the contents on the P3 form produced, the injuries reflected are as follows: -
- a. Head – Loss of consciousness for 10 minutes after impact; A lot of bleeding; STI on the left zygomatic region
 - b. Throat and abdomen – soft tissue injuries on the left side of the chest
 - c. Upper limbs – scar on the left longitudinal hypertrophic sustained after ORIF measuring 15cm and reduced left arm extension to the elbow; left arm shortened; developed peripheral neuropathy of the same arm; left medial humerus fracture
 - d. Classified as grievous harm.
30. Further, the medical report from Aga Khan Hospital dated; 25th June, 2021 states as follows in relation to the respondent’s medical condition: -
- a. Musculo-skeletal examination revealed deformity and swelling at the humeral region; x-ray revealed left humeral mid-shaft fracture with posterior displacement; shielded CT head/ cervical spine demonstrated left orbital fracture.
 - b. That the respondent underwent open reduction and internal fixation (ORIF) of the humerus on 8th July 2018 and brachial plexus block administered for pain management; 2nd post-operative day, wrist drop and post-operative elbow stiffness noted for which occupational therapy started
 - c. That seven (7) months post ORIF, palpable firm swelling of mid humeral region and crepitus at fracture site with diagnosis of mal-union with plate failure made.
 - d. Further two (2) months post-delivery ORIF repeated for mal-united humerus.
 - e. That as at 18th November 2019 she had improved elbow range movement of 5-150 degrees but complained of difficulty extending thumb and mallet finger splint prescribed
31. As a result of the findings in the P3 form and the medical report it is notable that the difference between the subject findings and the injuries as pleaded is that there is no evidence in the P3 form and/or in the medical report from Aga Khan Hospital of the injury in paragraph 5 of the plaint being; the fracture of the left lamina papyracea and roof of the left maxillary sinus (blow-out fracture) with associated herniation of extraconal fat and maxillary hematosinus, which research reveal are fractures of thin bones in the eye socket causing fat from the same to protrude into maxillary sinus and blood to collect in the maxillary sinus, below the eye socket.



32. Noting that the P3 form and the medical report referred to are the only documents produced, the finding of the court is that not all injuries pleaded were supported by the evidence produced.
33. As regards quantum the law is settled that the appellate court will not interfere with the same unless in exercising that discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another v Shah* (1968) EA and *Mkube -v- Nyamuro* 1983 KLR 403.
34. Further the Court of Appeal in the case of: *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 (unreported) stated as follows: -
- “We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257).”
35. Furthermore, money cannot replace the human frame that has been battered and shattered. In that regard the Court of Appeal in the case of; *Coastal Kenya Enterprises Limited v Muchiri* (Civil Appeal 84 of 2017) [2023] KECA 897 (KLR) (24 July 2023) (Judgment) stated as follows: -
- “In making these awards we identify ourselves with the words of Potter, JA in *Rahima Tayab & Others v Anna Mary Kinanu* [1983] KLR 114; where it was held while relying on the oft-cited case of *H West and Son Ltd v Shephard* [1964] AC 326 at 345 that:
- ‘Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.’”
36. In the instant matter the parties submitted on several amounts awarded as general and/or special damages that are in dispute. The first amount is of Kshs. 472,378. On this amount the appellant submits that it was paid for by his brother. Further that, it has been supported by a receipt duplicated at pages 74 and 75 of the record of appeal and therefore should not have been awarded twice.
37. However, the respondent submits that, the subject documents at pages 74 and 75 are merely credit card payment acknowledgments and not receipts and in any case they were not awarded twice.
38. The court’s perusal of the same indeed shows that the documents in page 74 and 75 of the record of appeal are similar and therefore duplicates. Further, that they are not receipts but acknowledgement of credit card payments. Furthermore, the receipt in support of the subject amount is found at was produced at page 61 of the record of appeal.
39. The next amount is of Kshs. 80,000. The appellant submits that the receipts in support of that amount at pages 68 and 71 of the record of appeal are duplicates and it was an error to award and/or compute them twice.



40. However, the respondent submitted that the document at page 68 of the record of appeal is a credit card acknowledgement while document at page 71 is the actual receipt and that in any case that sum of money was not awarded by trial court as it related to maternity expenses.
41. The court perusal of the subject documents reveal one is an acknowledgment of payment while the other is the actual receipt. Furthermore, the payments relate to maternity expenses and as per the judgment of the trial court maternity payments were not considered. Consequently, the subject amount cannot be a subject of appeal.
42. The further dispute is on a sum of Kshs 69,000, which the appellant argues that the receipts at pages 79 and 80 are similar and hence a duplicate and should not have been computed twice. However, the respondent on her part submits that the receipts are for the sum of Kshs. 68,000 and of two different serial numbers being IDE11264/19 and IDE11250/19, respectively.
43. Upon perusal of the receipts the court finds that each of the two receipts has different number and an award of both is not an error as argued.
44. The appellant further challenged receipts at pages 49 to 58, 61, 73 and 76 of the record of appeal totalling a sum of Kshs. 96,215 on the grounds that the expenses were incurred almost one (1) year after the accident and that there are no medical or treatment notes nor other documents linking the expenses therein to the accident.
45. However, the respondent submitted that the injuries she sustained were so severe that she underwent a surgery and there was mal-union of the screw and plate and she had to undergo a second surgery to fix the same. That, at the time of the accident she was heavily pregnant and was advised to go for surgery after birth.
Further that she gave birth in the month of March 2019 and underwent the second surgery in the month of May 2019.
46. In considering the impugned receipts and it is noted that the payments were made between the date of the accident and five (5) months after the accident. The receipts clearly indicate that the payments were for inter alia; physical occupational therapy sessions, orthopaedic consultation and X-ray and clearly relate to injuries sustained in the accident.
47. The court also noted that the respondent erroneously indicate that the receipt found at page 61 of the record of appeal is for the amount of Kshs. 10,200 while correct amount is Kshs. 16,200 bringing up the total of the disputed receipts to 102, 215.00
48. Pursuant to the afore finding the argument by the appellant that the said sum should not have been awarded is not tenable.
49. The other sums of money challenged is a sum of Kshs. 200 for the police abstract which the appellant argues that no receipt was produced to prove the same. The respondent did not submit on the same. The evidence on record prove that no receipt was produced therefore same cannot be not awarded.
50. The appellant also raised an issue with the sum of Kshs. 600 claimed for the motor vehicle search arguing that the invoice produced was for the amount of Kshs. 550. The respondent on her part submitted that the amount of Kshs. 50 was Mpesa transaction cost.
51. It is notable that the receipt produced is for Kshs. 550 there is no evidence produced for the transactional cost. Hence the only amount that can be awarded is Kshs. 550.



52. The appellant further disputed the amount of Kshs. 248,368 arguing that it was paid for by Manchester Contractors Limited, a third party. That the respondent did not establish a nexus between her and the said company nor did she provide any evidence that she was required to reimburse the amount to the said company.
53. The respondent on her part submitted that the said company was owned by her husband. Further, the appellant did not object to the production of the receipt produced by consent nor did the appellant cross examine her on the same and therefore the receipt was uncontroverted.
54. On whether a party can challenge the receipts produced by consent, it is trite law that once a document is produced it forms part of the record of the court but it must be proved as held by the Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR that:
- “Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, when the Court would look not at the document alone but it would take into consideration all facts and evidence on record.” (emphasis added)
55. Pursuant to the aforesaid, it was incumbent upon the trial court to examine the impugned documents and determine whether they were proved or not.
56. In that regard the payment by the company in favour of the respondent had to be proved. Further there was need to establish the circumstances under which it was made and whether it was recoverable by the payee. There is no evidence to that effect. As such the sum cannot be awarded simply because a receipt to that effect has been produced by the respondent.
57. In summation, I find that although the respondent’s evidence did not support all the injuries but the report from Aga Khan Hospital indicates respondent’s prolonged period of recovery, complication of fixation of the humerus fracture, wrist drop, the she attended orthopaedic clinic for seven (7) months after surgery and by 19th August 2019, the respondent was still complaining of inability to extend left elbow joint.
58. In my considered opinion the award of Kshs. 1,300,000 would have been appropriate if all those injuries had been supported by evidence but they have not. I have been forced to set aside the finding of general damages of Kshs. 1,300,000 and substitute it with an award of Kshs. 800,000.
59. As regard special damages I find that a sum of Kshs 631, 854 is not in dispute. A sum of Kshs 68,000 is proved by two receipts of produced in support thereof and therefore it is awarded twice accordingly. Similarly, a sum of Kshs 102, 215 for 13 receipts, and Kshs 550 for the search proved is awarded, giving rise to a total sum of Kshs 870, 619 as special damages.
60. For clarity a sum of Kshs 472, 378 and Kshs 248, 368 paid by third parties is not awarded.
61. Consequently, judgment is entered in favour of the respondent in as follows: -



- a. General damages-----Kshs 800,000
- b. Special damages-----Kshs 870,619
- Total Kshs -----Kshs 1, 670, 619
- Less 20%-----Kshs 334, 123.80
- Total-----Kshs. 1, 336,495.20

62. The respondent shall have costs of the suit in the trial court and interest on the awarded sum from date of judgment in the lower court until payment in full. Costs of appeal be met by each party

63. That is the order of the court

DATED, DELIVERED AND SIGNED ON THIS 17TH DAY OF SEPTEMBER 2025.

GRACE L NZIOKA

JUDGE

In the presence of: -

Mr. Mega for the appellant

Ms. Moindi for the respondent

Ms. Hannah: court assistant

