



REPUBLIC OF KENYA



**Panaroma Park Hotel Limited v Njuguna (Civil Appeal E045 of 2023)
[2025] KEHC 14267 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E045 OF 2023
GL NZIOKA, J
SEPTEMBER 18, 2025**

BETWEEN

PANAROMA PARK HOTEL LIMITED APPELLANT

AND

ALEX KAHORO NJUGUNA RESPONDENT

*(Being an appeal from the decision of Hon. Esther W. Mburu (PM) delivered
on 18th day of April 2023 vide Naivasha in PMCC No. 680 of 2019)*

JUDGMENT

1. By a plaint dated 16th September 2019, the plaintiff (herein “the respondent”) sued defendant (herein “the appellant”) seeking for judgment against the appellant for:
 - a. Special damages of Kshs 150,702
 - b. General damages
 - c. Interest on (a) and (b) above
 - d. Costs of this suit
2. The respondent’s case is that on the 26th day of December 2018, he paid to use a water slide entertainment facility within the appellant’s premises. That as he was using the machine, a displaced, loose or detached metal sheet violently lacerated his left lower limb as a consequence of which he suffered great bodily harm, pain, loss and damage.
3. The respondent averred that he was injured as a result of the negligence or carelessness of the appellant’s servants or agents, and tabulates the particulars of negligence on the part of the appellant as follows, verbatim reproduced: -



- a. Failing to provide a safe environment for its customers and in particular the plaintiff.
 - b. Exposing the plaintiff to the danger of being lacerated by a loose or displaced metal sheet at its said water slide facility.
 - c. Failing to warn or give any adequate advance warning to the plaintiff.
 - d. Causing the subject accident to happen.
 - e. Failing to discharge the duty of care to the plaintiff.
 - f. Causing the plaintiff to suffer severe injuries
4. The respondent pleads that as a result of the accident, he sustained the following injuries: -
- a. Severe laceration to the left lower limb.
 - b. Emotional trauma
 - c. Blood loss
5. However, the respondent's claim was opposed by the appellant vide a statement of defence dated; 24th October 2019. The appellant denied the particulars of negligence attributed to and/or its agents or servant as set out at paragraph 4 of the plaint and the particulars of injuries and special damages as set out at paragraph 5 of the plaint.
6. However, the appellant pleaded in the alternative and without prejudice basis that if at all the said accident occurred (which is denied) then the same was wholly or substantially caused and/or contributed to by the negligence on the part of the respondent.
7. The particulars of negligence attributed to the respondent are as follows: -
- a. Failure to exercise due care and attention.
 - b. Failure to keep proper look out.
 - c. That the plaintiff exposed himself to danger he knew or ought to have known and the defendant shall rely on the doctrine of Voluntati Non-fit injuria.
8. The case proceeded to full hearing. The respondent's case was supported by the evidence of (PW1) Dr. George Kungu Mwaura who examined the respondent on 26th August 2019, and produced a medical report as plaintiff exhibit (1). The report indicates that the respondent has a healing scar on the left leg due to a deep cut wound. Further that he has weakness in the left leg and cannot walk or stand for a long time. That diagnosis was fair.
9. The respondent supported his case by adopting his witness statement dated 16th September 2019 as his evidence in chief. He reiterated the averments in the plaint and stated that there was a mabati (iron sheet) on the machine that cut him.
10. He denied the appellant's averment that he was warned against using the waterslide and that he also failed to follow instructions given by the instructor. He blamed the appellant for the accident.
11. The respondent's case was further supported by the evidence of (PW3) Danson Njuguna Gatumu the respondent's father. He stated that the respondent was injured on the left leg and rushed to Naivasha Women's Hospital where first aid was administered. That he was thereafter taken to Aga Khan Hospital and subsequently transferred to Nairobi Hospital. That he paid a total of Kshs. 105,350 for the treatment.



12. The appellant's case was supported by its General Manager (DW1) Sammy Kamau Mugo. He adopted his witness statement as his evidence in chief and averred that on 26th December 2018, at around 3:00pm he was called by Lucas Muchai, the manager on duty, and informed that one of their clients had been injured while using the water slide. That he rushed to the hotel and took the respondent who had been injured to Nairobi Women's Hospital. However, it was recommended that he be transferred to a more equipped hospital in Nairobi and he was transferred to Nairobi Hospital.
13. The appellant's case was further supported by the evidence of (DW2) Jacob Chatanga Njema who adopted his witness statement dated; 27th June 2019 as his evidence in chief. He averred that he was the lifeguard at the appellant's premises overseeing the safety of clients at the swimming pool. That on the material date rain was drizzling and that the waterslide was slippery so he closed the same for the safety of clients.
14. However, about six (6) men came and demand that he opens the waterslide. That he tried to warn them of the dangers of using the waterslide while it was raining but they demanded that it be opened as they had paid to use the facility. That he gave them instructions on how to use the waterslide. That some of the men followed the instructions and reached the pool.
15. However, the respondent did not follow the instructions and moved his legs up when on the slide and was hit and got cut. That he administered first aid and the general manager came and took the respondent to the hospital. The witness blamed the respondent for failing to follow instructions leading to the injuries.
16. At the close of the case, parties filed their respective submissions and by a judgment dated 18th April 2023, judgement was entered in favour of the respondent a follows:

Liability-----20:80 in favour of the respondent

General damages-----Kshs 350,000

Special damages-----Kshs 63,035

Less 20%-----Kshs 82,607

Balance-----Kshs 330,428

The plaintiff shall get the costs of this suit plus interest from the date of judgment till payment in full.
17. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds verbatim reproduced: -
 - a. That, the learned magistrate erred in law and in fact in failing to find that, the respondent had not proved his case on a balance of probabilities
 - b. That, the learned magistrate erred in law and in fact in finding that, the appellant was to blame for the cause of the accident subject matter of the primary suit.
 - c. That the learned trial magistrate erred in law and in fact in failing to hold respondent liable for the accident.
 - d. That, the learned magistrate erred in law and in fact in failing to fairly and/or properly analyse the evidence.
 - e. That, the learned magistrate erred in law and in awarding excessive general damages to the respondent in the sum of Kshs 350,000.00.



- f. That, the learned magistrate erred in law and in awarding excessive special damages to the respondent.
 - g. That, the learned magistrate erred in law and in fact in evaluating the circumstances of the accident and evidence adduced.
 - h. That, the learned magistrate erred in law and in fact in condemning the appellant to bear the costs of the suit.
18. By reasons of the aforesaid the appellant prays for the following orders that: -
- a. The appeal be allowed.
 - b. The judgment of the lower court be set aside and be submitted with an order dismissing the respondent's suit with costs.
 - c. In the alternative, liability be apportioned in the ratio at 20:80 percent between the appellant, respondent.
 - d. The Honourable court award general damages in the sum of Kshs 110,000.
 - e. The costs of this appeal be provided for.
19. The appeal was canvassed through filing of written submissions. The appellant in submissions dated 20th March 2024, blamed the trial Magistrate for apportioning liability in the ratio of 80:20% as against it despite making a finding that the waterslide had been closed due to bad weather but the respondent and his friends had demanded it to be opened, and that the appellant's lifeguard had cautioned the respondent from using the waterslide in bad weather. The appellant submitted that the principle of *volenti non fit injuria* is applicable.
20. The appellant cited the case of *United Millers Limited & another v John Mangoro Njogu* [2016] eKLR relied on by the trial Magistrate where the Court held that in order to successfully rely on the maxim of *volenti non fit injuria* a defendant is required prove that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk impliedly agreed to incur the risk.
21. The appellant further submitted that the respondent voluntarily with full knowledge of the risk involved used the waterslide in bad weather despite clear warning against doing so. That in the circumstances the respondent should be found wholly liable for causing the accident.
22. However, in the alternative and without prejudice, if the court is inclined to apportion liability it should be in the ratio of 20:80% in favour of the appellant.
23. On the issue of general damages, the appellant submitted that the trial Magistrate relied on wrong precedent in arriving at the award of Kshs. 350,000 which was excessive. That the trial court relied on the case of *Sospeter Kimutai & another v Isaac Kipleting Boit HCCA No. 68 of 2019* where the plaintiff suffered; a head injury with deep cut wound on the right temporal region extending to the right parietal region, contusion of the right eye, fracture dislocation of right acromioclavicular joint, soft tissue injuries to the chest and right shoulder joint. The appellant argued that the injuries in the authorities relied on were more severe than the injuries the respondent sustained by in the instant matter.
24. The appellant proposed an award of Kshs. 100,000 as general damages and relied on the case of; *Francis Omari Ogaro v JAO (minor suing through next friend and father G.O.D)* [2021] eKLR where the plaintiff sustained a cut wound with bruises on the temporal region, laceration with inflammation of



- the frontal part of the head, right umbilical region tenderness, left iliac region cut wound, bruises on the posterior aspect of the elbow jointly bilaterally, and right lower limb (lateral ankle joint), cut wound with bruises and inflammation. That the High Court awarded Kshs. 180,000 as general damages.
25. However, the respondent in response submissions dated 8th February 2024, argued that the appellant was fully liable for the accident. Further that the appellant failed to produce any evidence that he had been cautioned by a lifeguard against using the waterslide. Furthermore, at the time he paid to use the pool and waterslide he was not stopped and/or warned against using the facility.
26. The respondent further submitted that the lifeguard failed to estimate the risk of injury to the respondent when he allowed him to access the pool. Additionally, the injury he sustained was caused by a displaced or loose or detached metal sheet and not as a result of bad weather. That in the circumstances the maxim of *volenti non fit injuria* was not applicable.
27. The respondent relied on section 3 of the Occupiers Liability Act which states that: -
- (1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
 - (2) For the purposes of this Act, “the common duty of care” is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
28. That the appellant owed him a duty of care which it breached and was therefore 100% liable for the accident.
29. On quantum, the respondent submitted that the award of Kshs 350,000 as general damages was inordinately low and proposed an award of Kshs. 500,00 and relied on the cases of:
- a. *Abukar Arow Ahmed v Abdia Mohammed* [2018] eKLR where the plaintiff suffered serious deformation and fracture of the left arm stretching from the arm to the elbow and the High Court awarded Kshs. 400,000 for pain, suffering and loss of amenities.
 - b. *Kenya Power & Lighting Co. Ltd v Mary Akinyi* HCCA 72 of 2007 where the High Court upheld an award of Kshs. 350,000 as general damages where the claimant sustained a deep cut wound on the calf muscles of the left leg and laceration on the right knee and right shoulder.
 - c. *Poa Link Services Co. Ltd & another v Sindano Boaz Bonzemo* [2021] eKLR where the claimant sustained blunt injury to the chest, bruises to the lower abdomen, bruises on the right hip joint, thigh, knee and right hip joint and the High Court upheld the award of Kshs. 350,000 as general damages.
30. The respondent submitted that considering the age of the authorities and factoring in inflation, an award of Kshs. 500,000 as general damages is justifiable.
31. Lastly, the respondent submitted that the trial Magistrate erred in awarding special damages of Kshs. 63,035. That he had pleaded and proved through production of receipts found at pages 16 to 34 of the record of appeal special damages of Kshs. 150,702, and urged the court to award the same.
32. In considering the appeal, the court notes 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.



33. 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.”

34. On the issue of liability, I note that the respondent averred at paragraph 4 of the plaint, that he sustained bodily injuries as a result of the negligence on the part of the appellant and/or its servants. In proof thereof, he relied on a statement he recorded dated 16th September 2019, and called his father Danson Njuguna Watunu who testified in support of his case.
35. An analysis of the evidence of these two witnesses reveals that, it is the respondent evidence that while using the slide entertainment facility, a displaced metal sheet lacerated his left lower limb. His father also stated that, as the respondent was using the facility a displaced metal sheet cut his left leg.
36. Based on the evidence of the two witnesses, it is evident that the respondent sustained injuries as a result of the malfunctioning of the slide entertainment facility.
37. The appellant on its part pleads at paragraph 5 of the statement of defence that, the respondent caused the accident by exposing himself to the risk as stated under the doctrine of Volenti non fit Injuria.
38. In support of its defence, the defendant filed statements of two witnesses; Sammy Mugo’s statement dated 27th June 2019 in which he states that, he was informed of the accident after it occurred. Consequently, he did not witness the same.
39. The 2nd statement is by Jacob Chatanga Njema who authorized the respondent to use the subject facility and was in charge of the machine. He stated that, the respondent was injured because, he did not follow instructions on how to use the facility. That, he was injured when his leg was hit by a slide cover.
40. Notably the statement of this witness does not support the defence filed. The statement of defence relies on the doctrine of Volenti non-fit Injuria. It does not state explicitly that, the respondent failed to adhere to the instructions given. It also merely states that, he failed to exercise due care and attention, without stating in the particulars of negligence, the failure to follow instructions.
41. Consequently, the evidence adduced by the appellant at the hearing departs from its pleadings and/or fails to support or substantiate the allegation of negligence on the part of the respondent.
42. Furthermore, it suffices to note that, the appellant was providing a service to its clients at a fee. It was therefore duty bound to exercise a high degree of care and skill to ensure that, the facility offered at a fee was safe for the purpose of its use.
43. The respondent pleaded that a metal fell off the slides. The appellant has not denied the same. If indeed a metal sheet detached itself from the machine, how does the respondent’s failure to follow instruction (if at all) cause the same. It is not pleaded that he detached the metal.



44. It is the finding of this court that, the evidence of the respondent as to how the accident occurred was corroborated by his father's evidence.
45. In the given circumstance I find and hold that, if the respondent contributed to the cause of the accident, his contribution was minimal and therefore the apportionment of liability at 80:20% in favour of the plaintiff/respondent as against the defendant/appellant is reasonable, fair and just. I decline to interfere with the judgment on liability.
46. As regard quantum, the respondent pleaded to the injuries suffered at paragraph 5 of the plaint. He then produced a medical report dated 5th January 2019 by Dr. J.P Ogalo. It indicates that, he suffered a deep laceration to the lower limb posteriorly. That upon examination he was found to have a 8cm wide laceration deep to the subcutaneous fat with a degloved skin flap. He underwent surgical toilet and primary wound repair and splintage. That his recover has been successful and no long term disability is anticipated.
47. It suffices to note that the P3 form produced at page 12 of Record of Appeal is incomplete. It however indicates at page 1 that the respondent suffered injuries on the left leg. The discharge summary by Dr. J.P Ogalo Ombaka reflects what is stated in the medical report.
48. The respondent further, produced a medical report by Dr. G.K Mwaura dated 26th August 2019, which indicates that the respondent has a disfiguring scar on the left calf (leg). That he complains of weakness in the left leg, and cannot walk or stand for long.
49. An analysis of the medical reports by Dr. J.P Ogalo and Dr. G. Mwaura clearly reveal that the respondent has not suffered any permanent disability and as per Dr. J.P Ogalo report he was expected to have been healed by 15th January 2019. The subsequent report by Dr. Mwaura in August 2019, does not seem to be in tandem with Dr. Ogalo's report on the extent of respondent's recovery. Notably the appellant did not produce any medical evidence in relation to the injuries the respondent suffered.
50. Be that, as it may, it is noteworthy that, the respondent's submission filed in the trial court are not included in the record of appeal. However, he sought for Kshs 500,000 as general damages as indicated in the judgment. The appellants on their part proposed a sum of Kshs 110,000.
51. I have considered the authority cited by the respondent and I note that it was decided in the year 2021 and although the injuries therein may be comparable to the injuries herein, the respondent herein was admitted and had to undergo a surgical procedure and follow up with dressing, which indicates he suffered more severe injuries.
52. Even then, a sum of Kshs 180,000 awarded in that matter two years ago cannot have depreciate to Kshs 110,000 as argued by the appellant.
53. On the other part, the court relied on the case of; Sospeter Kimutai & Another (Supra) notably the injuries therein were more severe than in the present case, and a sum of Kshs 350,000 was awarded.
54. Pursuant to the aforesaid an award more than Kshs 180,000 and less than Kshs 350,000 would be reasonable. I consequently set aside the award of Kshs 350,000 as general damages and substituted it with an award of Kshs 275,000 taking into account, the respondent has an award on special damages. The award of special damages was made based on proof thereof.
55. Final judgment is thus entered herein as follows: -
 - a. Liability 80:20
 - b. General damages ----- Kshs 275,000



c. Special damages ----- Kshs 63,035
Total Kshs ----- Kshs 338,035
Less 20% ----- Kshs 67,607
Amount awarded ----- Kshs 270,428

56. The respondent will have costs of the case in the trial court and interest on the sum herein from date of judgment in the trial court until payment in full. Each party will meet costs of the appeal.

57. It is so ordered

DATED, DELIVERED AND SIGNED THIS 18TH DAY OF SEPTEMBER, 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

N/A for the appellant

Mr. Muturi for the respondent

Ms. Hannah: court assistant

