Kimani v Nderitu (Civil Appeal E105 of 2025)
[2026] KEHC 2778 (KLR) (27 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2778 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E105 OF 2025

FN MUCHEMI, J

FEBRUARY 27, 2026

BETWEEN

MICHAEL KAMAU KIMANI ..... APPELLANT

AND

SAMUEL MUCHIRI NDERITU ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. D. Milimu (SRM) delivered on 14th April 2025 in Thika CMCC No. E139 of 2024)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No. E139 of 2024 in a claim that arose from a traffic accident whereas the trial court found the appellant fully liable and awarded the respondent general damages for pain, suffering and loss of amenities of Kshs. 300,000/- and special damages of Kshs. 6,550/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds summarized as follows:-

    a. The learned trial magistrate erred in law and in fact in finding the appellant 100% liable for the accident.

    b. The learned trial magistrate erred in law and in fact in awarding the respondent Kshs. 300,000/- as general damages for soft tissue injuries.

3. Parties put in written submissions.

The Appellant's Submissions

4. The appellant submits that the respondent relied on the police abstract dated 3/1/2024 as its primary and only document which Cpl Francis Kisavi PW1 produced in court. The appellant further submits that the abstract did not blame him and neither did the police officer thus no evidence was adduced linking his driving to negligence or recklessness. The appellant argues that the respondent confirmed under cross examination that he had paid and was cleared to leave the petrol station which is an indication that he did not conduct himself negligently.

5. The appellant relies on the case of Nairobi Civil Appeal No. 119 of 2020 Midans Services Limited & Another vs Ronald Kapute [2022] eKLR and submits that liability apportioned to him was unsupported by evidence and thus the learned magistrate ought to have dismissed the respondent's claim with costs.

6. The appellant submits that the respondent ought to have been found liable of contributory negligence as he confuted himself negligently and recklessly by failing to do his work and by giving the appellant a clear go ahead to exit the station while knowing too well that he had not removed the fuel nozzle. Thus the appellant argues that the learned magistrate ought to have shared liability at 50%:50% between him and the respondent.

7. The appellant further submits that the respondent admitted during his testimony in court that he was not at the pump while fuelling contrary to standard safety procedure. He further admitted that he had cleared the driver to leave showing that he was negligent and reckless in failing to ensure that the nozzle was detached. Further, his own employer, Shell Juja, dismissed him for negligence which is clear corroboration of his contributory role.

8. The appellant argues that the injuries sustained by the respondent are soft tissue in nature and as such, the award of Kshs. 300,000/- was excessive in the circumstances. The learned magistrate did not in her ruling base the amount on any comparable award since the two cases submitted by the respondent were of more serious injuries including fractures of multiple ribs where awards were between Kshs. 450,000/- and Kshs. 500,000/- for fracture to six ribs amongst other injuries. The appellant further argues that an award of Kshs. 100,000/- is reasonable and refers to the cases of Kakamega HCCA 78 of 2014 West Keya Sugar Company Ltd vs David Luka Shirandula where the court awarded Kshs. 180,000/- for a plaintiff who sustained fractures of two ribs on the right side, blunt injury to the right thigh, blunt injury to the right ankle, bruises to both elbows and blunt injury to the right knee. In Kisii HCCA 19 of 2021 Bolpak Trading Co Ltd & Another vs Gilbert Onyango Odie the appellate court reviewed an award of Kshs. 400,000/- to Kshs. 250,000/-

   where the plaintiff sustained a 7th right rib fracture, 8th right rib fracture, chest contusion, bruises on the face, blunt trauma to the lower back, right knee and left hand. Further in Kisumu HCCA E002 of 2020 Moses Oduol vs Rachael Mweru Gitaru the plaintiff sustained a cut would on the head with bruises, injury on the back with resultant lumbar spondylosis, injury on the chest, fractures on the 5th, 6th, 7th and 8th ribs, cut wound on the left arm with tenderness, cut wound on the left ankle joint and injury on the pelvic equity with tenderness and the appellate court reviewed an award of general damages from Kshs. 800,000/- to Kshs. 350,000/-.

The Respondent's Submissions

9. The respondent submits that on the material day, he was in the ordinary cause of his lawful duties as a pump attendant at Shell High Point Juja when the appellant's motor vehicle registration number KCU 498G was recklessly, negligently and carelessly driven and managed by the appellant that it was driven

off from the petrol station with the fuel pump still within the fuel tank and as a result of the nozzle being in the fuel tank and the vehicle being driven off at a high speed, the fuel pump was violently brought down and in the process fell on him thereby occasioning him serious bodily injuries.

10. The respondent further submits that he called the investigating officer as a witness who produced a police abstract detailing the accident and concluding that indeed an accident had occurred and the appellant's motor vehicle registration number KCU 498G was to blame for the accident. The respondent submits that although the initial report showed that the matter was still pending under investigation, the follow up report fully blamed the driver of motor vehicle registration number KCU 498G.

11. Relying on the cases of Kanyungu Njugu vs Daniel Kimanui Maingi (2000) eKLR; Kenya Bus Services Limited vs Humphrey (2003) KLR 665 and Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007, the respondent argues that he proved his case to the required standard as the evidence he adduced on liability was not controverted.

12. The respondent submits that he sustained blunt soft tissue injuries and abrasion frontal scalp leading to swelling and pain and fracture of the left 7th rib leading to chest pain and permanent disability was assessed at 20%. The respondent argues that the said injuries are not simple soft tissue injuries and further the incapacitation attached to the injuries. The respondent submits that he relied on the cases of K.B. Sanghani vs Lydia Wanjiku Njuguna & 2 Others [2016] where the court awarded general damages of Kshs. 450,000/- to the plaintiff who sustained fracture of the ribs (9 right rib as well as 5th, 6th, 7th, 8th and 9th ribs on the left side), bruised knee and developed chest problems. Further in Joseph Ndumia Murage vs David Kamande Ndungu HCCC No. 101 of 1996 where the plaintiff was awarded Kshs. 500,000/- as he suffered a fracture of six ribs.

13. The respondent argues that the award of damages is reasonable, justifiable and not excessive and urges the court not to interfere with the award.

Issues for determination

14. The main issues for determination are:-

    a. Whether liability as assessed by the court below was against the weight of the evidence.

    b. Whether the award of general damages was inordinately high.

The Law

15. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....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 into account of particular circumstances or probabilities materially to estimate the evidence."

16. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> 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.

17. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether liability assessed by the trial court was against the weight of the evidence

18. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held 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 circumstances, 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.

19. The respondent argued that PW1, the police officer testified that the respondent was fueling the appellant's motor vehicle registration number KCU 498G and that in the process he went to clean the front wind screen of the said motor vehicle. After cleaning, he went back to the fuel tank and the appellant drove his motor vehicle away pulling down the fuel pump machine which fell on the respondent thereby inflicting sustained injuries on him. The witness testified that the appellant was to blame for the accident. PW3, the respondent testified that on the material day he was working as a Pump attendant at Shell High Point Juja when the appellant's motor vehicle registration number KCU 498G was recklessly, carelessly and negligently driven away when the fuel pump was still within the fuel tank and as a result of the nozzle being in the fuel tank and the vehicle being driven off at a high speed, the fuel pump was violently brought down and fell on him thereby occasioning him serious injuries.

20. The appellant testified that he paid for the fuel after the respondent had completed cleaning the windscreen. However, the respondent refused to remove the nozzle.

21. I have considered the evidence of the parties and I find the evidence of PW3 credible in regard to how the accident occurred. The witness stated that he was fueling the appellant's motor vehicle when he went to clean the windscreen and after cleaning, he went back to the fuel tank when the appellant suddenly drove off pulling down the fuel pump which fell on the respondent. The testimony of PW3 is corroborated by that of PW1 who testified on behalf of CPL Omondi, the investigating officer. Further, from the injuries sustained by the respondent, it is clear that the appellant drove off the motor vehicle at a high speed before the pump attendant completed his work on the appellant's vehicle.

    The appellant must have driven at a high speed because the respondent sustained injuries that included a fracture of the rib. The appellant testified that the respondent gave him the green light to go but he

did not expound exactly what signal the respondent gave him. The appellant's evidence was so brief and hardly explained how the accident occurred. The evidence of being given a signal by the respondent to go, was not credible. It was the appellant who had the obligation to ensure that the respondent had completed attending to his vehicle before driving off. From the evidence of the appellant, the nozzle was yet to be removed from his car after fueling.

22. I am of the considered view that the court below was right in finding the appellant negligent on full liability.

Whether the award of general damages was inordinately high

23. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

24. Similarly, in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

25. According to the amended plaint, the respondent suffered the following injuries:-

    a. Blunt soft tissue injury and abrasion frontal scalp leading to swelling and pain.

    b. Fracture of the left 7th rib leading to chest pain.

26. The trial magistrate awarded a sum of Kshs. 300,000/- for general damages for pain and suffering. The appellant submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. The respondent submits that the award is justifiable and comparable to the injuries he sustained.

27. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr. Anthony Mubisi Swaro in his medical report. The doctor further found that the respondent was in pain and disable and further assessed permanent incapacity at 20%. Furthermore the doctor stated that because of the broken rib the respondent would not be able to breathe at 100% but at 80%.

28. I have perused the authorities of the respondent. The injuries in the decisions contain more severe than those sustained. The decisions cited by the appellant are equally more severe than those compared to the respondent but are more comparable as to those cited by the respondent.

29. The learned trial magistrate gave an award of Kshs. 300,000/- after taking into account the severity of the injuries sustained by the respondent which are supported by the medical records. The submissions of the parties and their authorites were duly considered in making the award.

30. Taking into consideration the severity of the respondent's injuries that included a fracture of the 7th rib, the pain, mental anguish and inflationary trends, it is my considered view that Kshs. 300,000/- is reasonable compensation as general damages and loss of amenities.

Conclusion

31. It is my consideration the analysis of the evidence, that the appeal lacks merit and is hereby dismissed with costs to the respondent.

32. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF FEBRUARY 2026.

F. MUCHEMI

JUDGE