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Kihara & another v Ngunyi (Civil Appeal E001 of 2024) [2026] KEHC 3558 (KLR) (12 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3558 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E001 OF 2024

FN MUCHEMI, J

MARCH 12, 2026

BETWEEN

MWANGI KIHARA .... 1ST APPELLANT

CHARLES NJUNGE MUIRURI .... 2ND APPELLANT

AND

NAOMI WAMUCII NGUNYI .... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. D. Musyoka (SPM) delivered on 27th September 2023 in Gatundu SPMCC No. 37 of 2020)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Gatundu Senior Principal Magistrate in SPMCC No. 37 of 2020 in a claim arising from a motor vehicle accident whereby the trial court found the appellants 100% liable and awarded the respondent general damages for pain, suffering and loss of amenities at Kshs. 600,000/- and special damages at Kshs. 130,507/-.

2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 9 grounds summarized as follows:-

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

    b. The learned trial magistrate erred in law and in fact in awarding the respondent Kshs. 600,000/- as general damages for pain suffering and loss of amenities and Kshs. 130,507/- as special damages.

3. Directions were issued that parties put in written submissions and the record shows that the respondent complied by filing her submissions however the appellants had not filed their submissions despite being given two chances to do so.

The Respondent's Submissions

4. The respondent submits that the appellants did not tender any credible evidence to rebut her evidence or the police abstract blaming the driver of KBK 591S. The respondent submits that she was a fare paying passenger and no negligence was pleaded or proved against her.

5. The respondent submits that medical reports by various doctors Dr. Vincent, Dr. Wekesa and Dr. Mulingwa confirmed her injuries and Dr. Karanja explained the meaning of the injuries as she suffered an abortion due to the accident. The appellants did call their witness who failed to prove that the receipts were forged or that the stamps were forged. The appellants only alleged that the hospital she attended did not have a physiotherapy department however Dr. Anthony, the therapist came on record and stated that the clinic she attended, outsourced his services and since he had worked he had to be paid and when paid he had to issue receipts.

6. The respondent submits that she suffered multiple soft tissue injuries including cervical spondylosis with root compression, which is not a minor injury and has long term implications. The respondent submits that the award of Kshs. 600,000/- was fair and reasonable considering inflation and the year of judgment. The respondent relies on the cases of Mwangi vs S. W. (2018) eKLR where the appellant suffered soft tissue injuries and spinal complications and was awarded Kshs. 800,000/-. Further in Martha Karuu Kobia vs China Zhongxing Construction Co. Ltd & 2 Others (2018) eKLR where the court awarded the plaintiff Kshs. 500,000/-. In John Kamore & Another vs Simon Irungu Ngugi (2014) eKLR the plaintiff sustained a blunt injury to the posterior part of the neck which resulted to a fracture of the cervical spine and consequently weakness and partial paralysis. The plaintiff was awarded Kshs. 500,000/-. Further in Purity Wambui Muriithi vs Highlands Mineral Water Co. Ltd [2015] eKLR an award of Kshs. 700,000/- was upheld for soft tissue injuries to the neck, back and limbs. In Gabriel Kariuki Kigathi & Another vs Monica Wangui Wangechi (2016) eKLR the plaintiff suffered a fracture of the neck, bilateral rib fractures, bilateral lung contusion, injuries on both hands, injuries to both legs and fracture of the right ankle. The plaintiff was awarded Kshs. 800,000/-.

7. Relying on the case of Hahn vs Singh [1985] KLR 716, the respondent argues that special damages must be specifically pleaded and strictly proved. The respondent submits that she pleaded and proved special damages at the sum of Kshs. 130,507/- which was admitted into evidence without objection. The appellants did not controvert the receipts or challenge their authenticity during the trial.

8. The respondent refers to the case of Republic vs Public Procurement Administrative Review Board & Another ex parte Pelt Security Services Ltd [2018] eKLR and submits that a court is not bound to reproduce parties' submissions verbatim so long as it considers the issues and evidence on record. The trial judgment demonstrates clear evaluation of evidence and application of the law.

Issues for determination

9. The main issues for determination are:-

    a. Whether liability apportioned by the trial court was against the weight of the evidence.

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

    c. Whether the award on special damages was specifically pleaded and proved.

The Law

10. 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.”

11. 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.

12. It is, therefore, clear that 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 apportioned by the trial court was against the weight of the evidence adduced

13. 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.

14. According to the respondent PW1, she testified that on 1st April 2017 she boarded matatu KBK 591S at Igegania when the 2nd appellant, the driver of the said matatu decided to race after the matatu registration number KAZ 397W after it had overtaken him. The respondent testified that matatu registration number KAZ 397W suddenly applied brakes and the matatu she was travelling in hit matatu registration number KAZ 397W on the rear. She testified that she blamed the matatu she was travelling in as the 2nd appellant is the one who hit the former matatu. PW3, the police officer testified that on 1st April 2017 an accident occurred on Mangu Kamwangi Road at Kamuyu area between motor vehicle registration number KAZ 397W Toyota Hiace matatu and KBK 591S Toyota Hiace

matatau. He further testified that both matatus were coming from Mangu heading to Kamwangi and on reaching Kamwangi area matatu KAZ 397W overtook matatu KBK 591S and stopped and matatu KBK 591S hit it from behind. The police officer testified that matatu KBK 591S was to blame for the occurrence of the accident. The appellants did not call any witnesses to give an account of how the accident occurred.

15. It is evident from the record that the respondent was a fare paying passenger and therefore no negligence could be attributed to her. It is noted that the appellants did not call any witnesses in particular the 2nd appellant as the driver to give an account of how the accident occurred. The appellants herein did not controvert the evidence of the respondent as to how the accident occurred. It is my view that the 2nd appellant failed to exercise due care and was therefore, careless in his driving. The 1st appellant being the owner of motor vehicle KBK 591S was vicariously liable for the actions of the 2nd appellant. I therefore find that the appellants were 100% liable for the occurrence of the accident.

Whether the award of general damages was inordinately high

16. 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."

17. 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."

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

    a. Soft tissue injury left shoulder

    b. Soft tissue injury both legs

    c. Soft tissue injury lower back

    d. Soft tissue injury neck

    e. Early cervical and spondylosis with mild root compression.

19. The trial magistrate awarded a sum of Kshs. 600,000/- for general damages for pain and suffering. The appellants did not file submissions in the current court or the lower court. The respondent submits that the award is justifiable and comparable to the injuries she sustained.

20. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr. Karanja in his medical report dated 28th February 2018 and Dr. Vincent Wekesa in his medical report dated 21st February 2018. Dr. Karanja classified the injuries as harm and noted that the trauma caused her multiple soft tissue injuries. He further testified that spondylosis was a generative change to the back and it worsened with time and the recommended treatment was physiotherapy. Dr. Wekesa indicated in his report that the respondent's MRI of the spine revealed that she experienced early cervical and spondylosis with mild root compression.

21. Looking at the decisions relied on by the respondent, they contain injuries that are more severe than the injuries she sustained.

22. The learned trial magistrate stated that in arriving at the award of Kshs. 600,000/- she took into account the severity of the injuries sustained by the respondent as evidenced by the medical records, submissions by both counsels and the authorities relied upon.

23. I have taken into consideration the severity of the respondent's injuries, the pain, anguish, terror and mental suffering and the inflationary trends. It is my considered view that Kshs. 600,000/- is a bit on the higher side as Dr. Karanja testified that spondolysis is a generative change to the back and was most likely there before the accident. It could have been provoked by the trauma from the accident. It is therefore my considered view that the injuries sustained from the accident were multiple soft tissue injuries. Accordingly, it is my view that a sum of Kshs. 400,000/- is sufficient and reasonable compensation as general damages for pain, suffering and loss of amenities.

Whether the award on special damages was specifically pleaded and proved

24. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

> Special damages must not only be specifically claimed (pleaded) but also strictly proved...... for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

25. The respondent pleaded a sum of Kshs. 130,507/- in her plaint dated 30th January 2020 which consisted of medical report for the sum of Kshs. 3,000/-, treatment notes at Kshs. 126,957/- and copy of records at Kshs. 550/-. On perusal of the record, the respondent produced the receipts totaling to Kshs. 130,507/-, thus proving the said sum pleaded in the plaint. The special damage award of Ksh.130,507 is here upheld.

26. It is, therefore, my considered view that this appeal is partly successful.

27. The award of general damages of Ksh.600,000/= is hereby set aside and substituted with Ksh.400,000/ =.

28. Each party shall meet their costs of this appeal.

29. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 12TH DAY OF MARCH 2026.

F. MUCHEMI

JUDGE