

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT CIVIL APPEAL NO. 73 OF 2023**

VETRA FARM ENTERPRISES.....

1<sup>ST</sup> APPELLANT

VALLEY'S LILY SCHOOL.....

2<sup>ND</sup> APPELLANT

VERSUS

MARY

NGENDO

MUTURI

..... RESPONDENT

*(Being an appeal against the decision of Hon E. Cherop (Adjudicator) delivered on 17<sup>th</sup> August 2023, in Naivasha Small Claims Court Claim No. E235 of 2023)*

**JUDGMENT**

1. By a statement of claim dated 13<sup>th</sup> June, 2023, the claimant (herein “the respondent”) sued the

appellants seeking judgment for against the appellants' for orders: -

*a) Special damages in the sum of Ksh 16,497.00*

*b) Compensation: general damages for injuries sustained.*

*c) Costs of the claim.*

*d) Interest on general and special damages from the date of judgment and from date of filing suit respectively.*

2. The claim is based on the averment that on or about 22<sup>nd</sup> day of March, 2023, the claimant was a passenger in motor vehicle registration number KBD 047K near Tower Sacco driven along Kenyatta Avenue within Naivasha town when the defendants' driver, agent, servant and/or employee so negligently drove, managed and/or controlled motor vehicle registration number KBD 323W, that it caused an accident and as

a consequence the claimant sustained serious injuries.

3. It is averred that the 1<sup>st</sup> respondent was the insured of motor vehicle registration number KBD 323W while the 2<sup>nd</sup> respondent was the registered owner at the time of the accident. The respondents are held vicariously liable for the actions of their driver, agent, servant and/or employee.
4. However, the claim was opposed vide the respondents' response dated 30<sup>th</sup> June, 2023 where all the averments in the claim were denied. However, on a without prejudice basis, the respondent pleaded that the claimant's claim is incomplete, bad in law and otherwise an abuse of the court process. The respondent averred that it would seek at the earliest opportunity to have it struck out on a preliminary point of law. Further, on a without prejudice basis, it is

pleaded that the respondents are wrongfully sued as the subject matter does not relate to them.

5. The respondents pleaded further on a without prejudice basis, that if the accident occurred, then it was caused or substantially contributed to by the driver of the motor vehicle registration No. KBD 047K. The particulars of negligence attributed to that driver are tabulated at paragraph 8 of the response.
6. The averments that the 2<sup>nd</sup> respondent is the insured of motor vehicle KBD 323W was denied. Further, on without prejudice, it was pleaded that the injuries the claimant sustained were contributed to by the claimant.
7. At the hearing of the case, the claimant's case the claimant relied on her statement dated 13<sup>th</sup> June, 2023, in support of the claim, and stated that the accident occurred when motor vehicle registration No.

KBD 323W hit the motor vehicle registration number KBD 047K in which she was lawfully travelling. That the motor vehicle registration number KBD 047K overturned and she was seriously injured. That she was taken to Naivasha Sub-County Referral hospital where an X-ray was done. That she received treatment and was admitted for two days and later issued with P3 form and which was filled by the doctor. She produced the same as an exhibit.

8. That she blames the driver of the motor vehicle registration No. KBD 323W for losing control of the vehicle, failing to keep proper look out and have regard to other road users and failing to brake, swerve or in any way control the vehicle to avoid the accident.
9. That she suffered blunt injuries on the scalp, neck, shoulder, forearm, chest, abdomen, laceration and

bruises on buttocks and fracture of the pelvic. She further claims for a sum of Kshs 16,497 as special damages tabulated as follows;

*a) Medical expenses-----Kshs 12,947*

*b) Medical report----- Kshs 3,000*

*c) Motor vehicle search----- Kshs 550*

*Total ----- Kshs 16,497*

*That she still experiences pains on the pelvic and shoulders on exertion.*

10. The plaintiff produced the following documents in support of her claim;

*a) Medical report from Naivasha County Referral hospital.*

*b) A police abstract dated 24<sup>th</sup> March, 2023.*

*c) Incomplete P3 form "last page showing 'injuries sustained classified as 'grievous harm'".*

11. It was also supported by the evidence of (PW1) No. 96714 PC Josephat Makau produced the police abstract which confirmed that the and respondent's vehicle were involved in the accident. However, the abstract does not indicate who was to blame for the accident, as the results of investigation is indicated as; "case referred to insurance".
12. The respondents' case was supported by the evidence of Seith Ongaya Mbaya who stated he was driving the subject motor vehicle registration No. KBD 323W on the material date. That the claimant's vehicle was being driven at a high speed and encroached on his lane. That he swerved and flashed lights to avoid the occurrence of the accident but due to proximity, the driver of the claimant's vehicle rammed onto the front right hand side of his vehicle damaging it extensively. That he has never been charged with any traffic

offence. However, his evidence was not considered as he was not cross-examined and was expunged from the record.

13. The respondents produced a second medical report in relation to the claimant prepared by Dr M. S. Malik dated, 11<sup>th</sup> July, 2023.

14. In the said report, the doctor indicates that the claimant could not recall having sustained any injuries to the head, neck or abdomen. That the claimant did not have an X-ray of the pelvis.

15. In conclusion, Dr Malik states that the claimant sustained soft tissue injuries and her documents seem to have falsified the injuries in a rather dramatic and unconvincing way. That she suffered total incapacity of a temporary nature for a period of one (1) week followed by partial incapacitation of temporary nature

for a further period of one (1) week. That she has not suffered any physical disability.

16. By a judgment dated 17<sup>th</sup> August, 2023, the respondents were held 100% liable and quantum awarded as follows;

*a) General damages----- Ksh750,000*

*b) Special damages-----Kshs 16,497*

*Total-----Kshs 766,497.00*

*Plus, costs and interest.*

17. However, the respondents are aggrieved by that decision and appeal against it on the following grounds;

*a) That the learned trial Magistrate erred and misdirected herself in fact and law by awarding damages to the respondent that were manifestly excessive.*

- b) That the learned trial Magistrate erred in law and in fact in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries.*
- c) That the learned Magistrate erred in finding that the plaintiff/respondent suffered a pelvic fracture in the absence of a radiological X ray report and more so when the defendants doctor Dr M. S. Malik had categorically ruled out any such fracture.*
- d) That the learned Magistrate was in error of law and fact in finding that a fracture of the pelvis had been proved in the absence of the primary document in proof of such a fracture i.e. radiological X ray report.*
- e) That the learned Magistrate award on damages was so inordinately high.*

- f) That the learned Magistrate was in error of law and fact in failing to find that the plaintiff failed to plead her injuries and dismiss her claim.*
- g) That the learned trial Magistrate erred in law and in fact in awarding damages that were neither properly pleaded nor sufficiently proved as by law required.*
- h) That the learned trial Magistrate was in error of law and fact in awarding damages that were not proportionate to the injuries sustained by the respondent.*
- i) That the learned trial Magistrate failed to consider that the plaintiff had fully or substantially healed while assessing the award on damages.*
- j) That the learned trial Magistrate was in error of law and fact in failing to consider the medical opinion of Dr Malik in awarding of damages.*

- k) *That the learned Magistrate erred in law and in fact in finding the appellant 100% liable for the accident.*
- l) *That the learned Magistrate's findings on liability went against the weight of evidence.*
- m) *That the learned Magistrate erred in law and fact in failing to find that the plaintiff/respondent had failed to make out his case and hence dismiss the same.*
- n) *That the learned Magistrate was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.*

18. By reason of which the appellant for orders that: -

- a) *That the judgment/decreed of the Honourable Court dated 17th August 2023 be quashed and/or set aside.*

*b) That this Honourable Court do find that the respondent failed to sufficiently prove that he suffered a fracture to the pelvis and reduce the award on damages.*

*c) That this Honourable Court be pleased to reassess and reduce the award general and special damages under the heads of damages awarded.*

*d) That cost of this appeal be borne by the respondent.*

19. The appeal was dispensed of vide filing of submissions. The appellants in submissions dated 22<sup>nd</sup> April 2024 argued that the trial court erred in finding them 100% liable for the accident despite the respondent failing to prove negligence on their part on a balance of probabilities. That the respondent did not witness the accident as she was sat behind the

driver of the vehicle and only realized that an accident had occurred after she heard people screaming.

20. Further, CW1, the police officer, did not lead evidence on the circumstances of the accident as he was not the investigating officer and did not have the police file. That he testified that the accident involved five (5) motor vehicles and two (2) motorcycles, but he was not able to tell the court the position of the vehicles nor did he provide a sketch map of the scene.

21. Furthermore, that despite the police officer blaming the driver of vehicle registration No. KBD 323W for causing the accident he could not confirm whether the driver was ever charged with a traffic offence arising from the accident

22. The appellants further faulted the trial Magistrate holding that the respondent had proved her case and finding them 100% liable by the mere fact that they

did not adduce any evidence. That the respondent bore the duty of proving her case on a balance of probabilities even where the appellants did not adduce any evidence as held in the case of Chaterhouse Bank Limited (Under Statutory Management vs Frank N. Kamanu (2016) eKLR where the Court stated that a plaintiff must adduce evidence which in absence of rebuttal evidence convinces the court that it has proved its claim but that without such evidence the plaintiff is not entitled to judgment merely because the defendant has not testified.

23. That the respondent having failed to prove on a balance of probability that the appellants were negligent and/or liable for the accident, the respondent's case ought to be dismissed with costs or contributory negligence apportioned in the ratio of 50%:50% between the appellants and the respondent.

24. The appellants argued that the respondent did not plead her injuries she sustained due to the accident in her statement of claim, nor did she seek to amend it to reflect the injuries and therefore the claim ought to have been dismissed. Reliance was placed on the case of John G. Mbutia & Another vs Stephen Muiruri Njenga [2008] eKLR where the Court held that the trial court erred in considering injuries that were not pleaded as parties are bound by their pleadings.

25. That be that as it may, the appellants further argued that the trial Magistrate erred in finding that the respondent suffered a pelvic fracture as tabulated in her witness statement. That the respondent did not provide treatment notes from Naivasha County and Referral Hospital where she was first treated after the accident. That in the case of Peter Migiro vs Valley Bakery Limited [2015] eKLR the Court held that initial

treatment notes are important and that without their production it would be difficult to ascertain if a claimant was indeed injured.

26. Further, the respondent never provided the x-rays she alleges that were done on her pelvic region to the court or to Dr. Malik as alleged. That X-rays and radiology reports are crucial evidence that enable the court to rule out or confirm the presence of a structure as held in the case of *Dhiraj Manji vs Tyson Ouma [2021] eKLR*.

27. That in the circumstances, the appellants can only rely on the medical report by Dr. Malik dated 11<sup>th</sup> July 2023 which indicates that the respondent did not suffer a fracture of the pelvic but only sustained soft tissue injuries.

28. On quantum, the appellants referred the court to the case of *Butt vs Khan (1977) 1 KAR* and the book

“Measures of Damages for Bodily Injuries” by Justice Kuloba which set out the duty of an appellate court in assessing damages on appeal.

29. The appellants argued that the award of Kshs. 750,000 as general damages was inordinately high compared to the injuries sustained by the respondent. That it is trite law that awards must be within consistent limits and must be made after taking into account comparable injuries and awards as held in the case of Denshire Muteti Wambus vs Kenya Power & lighting Co. Ltd [2013] eKLR.

30. The appellants argued that the respondent only suffered soft tissue injuries and proposed an award of Kshs. 100,000 as general damages and relied on the case of Edward Mutevu Maithya & another vs Edwin Nyamweya [2022] eKLR where the respondent sustained cut wounds on the scalp, bruises on the

back, right upper limb and left lower limb and the court substituted the trial court award of Kshs. 550,000 with an award of Kshs. 100,000 as general damages.

31. Further, in the case of FM (minor suing through her mother and next friend MWM) vs JNM & another [2020] eKLR the High Court awarded general damages of Kshs. 100,000 where the claimant sustained blunt injuries to the head, neck, thorax and abdomen.

32. That if the Court is persuaded that the respondent sustained a pelvic fracture, the court do substitute the award of Kshs. 500,000 with an award of Kshs. 500,000 as guided by the cases of George Osewe Osawa vs Sukari Industires Limited [2015] eKLR, Lilian Wanja vs Cyprian Mugendi Igonga & 2 others [2016] eKLR and Peter Gakere Ndianguui vs Sarah Wangari

Maina [2022] eKLR where the Courts awarded damages between Kshs. 400,000 and Kshs. 500,000 as general damages where the claimants sustained soft tissue injuries and a pelvic fracture.

33. However, the respondent in response submissions dated 15<sup>th</sup> February 2024 cited that cases of Nadwa vs Kenya Kazi Ltd (1988) eKLR, Panalpina (K) Limited vs Elephant Soap Industries [2002] eKLR and Linus Nganga Kiongo & 3 others vs Town Council of Kikuyu [2012] eKLR where the Courts held that the plaintiff bears the burden of proving negligence and where in the course of trial a set of facts is proved which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, liability will be decided in the plaintiff's favour unless the defendant through evidence provides adequate answers to displace the inference.

34. The respondent argued that she adduced evidence on how the accident occurred, which evidence was corroborated by the police officer. However, the evidence of the appellants was expunged from the record after they failed to avail him in court. That in the circumstances the appellants did not call any evidence to substantiate their pleadings and to rebut her evidence and therefore their pleadings remained mere averments and her evidence was unchallenged.
35. Furthermore, that the appellant failed to take out third party proceedings against the driver of motor vehicle KBD 047K in order to shift the blame from them.
36. On the injuries sustained, the respondent argued that while Dr. Malik and Dr. Mwaura were in agreement that she was yet to heal Dr. Malik disputed that she did not sustain a pelvic fracture, but only sustained soft tissue injuries.

37. The respondent relied on the case of Thuge Caroline & 2 others vs Kimani Nganga Kago [2022] eKLR where the Court faced with conflicting medical reports, held that medical evidence should be taken together with all evidence on record; that the opinion of a witness expert is not binding on the court and the court will not accept such evidence if it finds good reason for doing so; that where there is conflicting expert evidence, expert evidence of scientific conclusion is more persuasive; and where there is conflicting medical report, the report of the doctor who personally attended to the patient is of high value, final and admissible.

38. The respondent submitted that she produced by the consent of the parties evidence in the form of the discharge summary, P3 form, and the medical report from both Naivasha County Referral Hospital and Dr.

Mwaura of Kinoo Medical Clinic. That the discharge summary confirmed the diagnosis of the treating doctor that she sustained a pelvic fracture stable.

39. The respondent argued that if Dr. Malik alleged that the x-rays were not produced, he had an obligation to adduce contrary evidence by performing an x-ray to prove whether there was a fracture or not. That the elementary principle of he who alleges must prove is firmly embedded in sections 107, 109 and 112 of the Evidence Act (Cap 80) Laws of Kenya. As such the allegations that she (respondent) falsified documents and the nature of injuries remains pure allegations.

40. On quantum, the respondent argued that it is trite law that damages should be commensurate to the nature of injuries sustained. That she relied on the case(s) of United Millers Limited vs Tom Maina Sarara [2020] eKLR and Joseph Njeru Luke & 3 others vs Stellah Muki

Koki [2020] eKLR where the Court awarded general damages of Kshs 900,000 and Kshs. 750,000 respectively for similar injuries to the injuries she sustained.

41. That taking into account the lapse of time, inflationary trends precedents and the evidence adduced, the trial court did not err in awarding damages of Kshs. 750,000 and the same should be upheld and the appellants' appeal dismissed in its entirety.

42. At the conclusion of the arguments, the court notes that its role as a first appellate as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion.

43. 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.”*

44. Be that as it were, the grounds of appeal herein reveal the appeal is on both liability and quantum. In finding the respondents 100% liable, the trial court stated that the claimant's evidence was uncontroverted as the respondents' evidence was incomplete and expunged from record.

45. Further, that the claimant's evidence was corroborated by the evidence of CW1 as far as the parties and vehicles involved in the accident and finally due to the failure by the respondent to enjoin the driver of motor vehicle KBD 047K as a third party.

46. Based on the aforesaid, I find that based on the evidence adduced, the trial court finding on liability is sound, well supported and analyzed and decline to interfere with the same.

47. As regards the quantum, I find that the trial court relied on injuries pleaded but a perusal of the claim does not support that finding. The claimant did not plead to any specific injuries in the claim and all the claimant stated in the claim is that she sustained “serious injuries”. The injuries should have been tabulated in the claim but were tabulated in her statement in support of the claim. Notably, the respondents did not contest the same.

48. That said, both parties submitted on quantum and the trial court proceeded to assess the quantum. The claimant sought for Ksh. 900,000 as general damages while the respondents proposed a sum of Ksh. 130,000.

49. The controversial issue herein is whether the claimant sustained a fracture of the pelvis and/or the ribs. The trial court found fracture of pelvis was proved and

considered the same. The report of Dr. Malik found otherwise.

50. How does the court reconcile the same? The starting point is the medical report from Naivasha County Referral Hospital dated 20<sup>th</sup> April, 2023. It states that the claimant suffered a pelvic fracture. That she was admitted on 22<sup>nd</sup> and discharged on 24<sup>th</sup> March, 2023 a period of two (2) days. However, the report does not indicate that any X-ray of the pelvic was done. Instead it refers to the X-ray of chest done on supine position on 22<sup>nd</sup> March, 2023 and a repeat of the chest X-ray was done and it demonstrated 8<sup>th</sup> and 9<sup>th</sup> rib fractures.
51. Notably, the trial court found insufficient evidence to support injuries on the ribs. In conclusion, the report states that the claimant was “unable to walk unaided and complained of pelvic region tenderness”.

52. In addition, from the treatment given as evidenced on the discharge summary dated 24<sup>th</sup> March, 2023, the claimant was discharged on “paracetamol, brufen and floxapen”. The question is, if the claimant sustained a fracture of the pelvis, could it be detected without a n X-ray. Even if it was, could it be treated conservatively and in two days and/or with pain killers.

53. Similarly, the P3 form produced at page 21 of the record of appeal does not show any evidence of fracture of the pelvis. Instead almost all the injuries are stated as soft tissue injuries. To the contrary, the report of Dr. Malik indicates no evidence of fracture of the pelvis.

54. In that case, it is the claimant to prove. The argument that Dr. Malik should have subjected the claimant to an X-ray process does not lie as it was the claimant

who was alleging that she suffered a fracture of pelvic to prove. She needed to present evidence thereof. She did not present any. It was therefore improper to ignore the evidence of Dr. Malik and had the trial court critically considered the same, a sum of Ksh. 750,000 would not have been awarded.

55. Furthermore, Dr. Malik is an expert witness, his report is more reliable as he had a specific assignment to examine and/or evaluate the claimant. His examination results are in a detailed report filed on 11<sup>th</sup> July 2023, prepared within period of six (6) months after the accident. The respondents served the claimant with that report. If the claimant held that the report was not correct, then another report to counter the same would have been availed.

56. The upshot of the afore is that, the award on general damages of Kshs 750,000 is set aside and substituted

with a finding of general damages of Ksh. 400,000 together with interest from the date of judgment in the trial court. The award on the special damages is not contested and is well supported. The costs of suit in the trial court awarded to the claimant. Each party to bear its own costs of the suit on appeal. It is so ordered.

Dated, delivered and signed on this 9<sup>th</sup> day of March 2026.

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Karanja for the appellant

Ms. Omondi for the respondent

Ms. Hannah: Court Assistant