

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. E310 OF 2024**

**STEPHEN WANJAU GACHEGE.....**  
**.....APPELLANT**

**VERSUS**

**DOMINIC KING'OLA.....**  
**RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon. M. W. Kamau (RM/Adjudicator) delivered on 24<sup>th</sup> October 2024 in Thika Small Claims Court SCCC No. E167 of 2023)**

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E167 of 2023 arising from a road traffic accident. The trial court found the appellant 100% liable and awarded the respondent general damages for pain, suffering and loss of amenities at Kshs. 170,000/-, future medical expenses at Kshs. 80,000/- and special damages at Kshs. 22,350/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal 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 failing to find that the driver of the motor vehicle was charged in Thika CM Traffic Case No. E113 of 2021 was acquitted of all charges of reckless/negligent driving on 28/8/2024 under Section 202 of the Criminal Procedure Code.

c) The learned trial magistrate erred in law and in fact by awarding the damages that were not commensurate with the injuries allegedly sustained by the respondent and in any event the respondent was not entitled to damages.

3. Parties put in written submissions.

### **The Appellant's Submissions**

4. The appellant submits that if any accident occurred, the same was caused solely by the negligence of the respondent. The appellant submits that the accident was solely caused by the respondent as the officer who had stopped his motor vehicle on Thika Highway hit his rear

window using his hand causing the window to break into parts which resulted in him having cut injuries on his right hand. The appellant thus argues that the respondent was the author of his own misfortune.

5. The appellant submits that he tried to avoid the accident by braking, hooting and flashing his lights. He further submits that he rushed the respondent and his two pillion passengers to hospital and thereafter reported the matter to Konoin Police Station. The appellant further submits that his driver testified that he was charged in Thika CM Traffic Case No. E1113 of 2021 and was acquitted of all charges of reckless/negligent driving, thus exonerating him from blame.
6. The appellant relies on the case of **David Ogol Alwar vs Mary Atieno Adwera & Another (2021) eKLR** and submits that the respondent had a duty to verify the particulars of negligence in the claim and failure to do so left his claim without feet to stand on.
7. The appellant submits that the respondent admitted that he has healed and fully recovered. Further he did not tender any evidence to show that he was still undergoing treatment for an injury resulting from the accident. Thus the appellant submits that the award on damages was so inordinately high and not proportionate to the injuries sustained by the respondent.

## **The Respondent's Submissions**

8. The respondent submits that he was a lawful pedestrian performing his traffic police duties along Nyeri Thika Road at High level when the driver, owner, beneficial user, agent, and/or servant drove motor vehicle registration number KCE 125V so carelessly, recklessly and negligently without due care or attention to other

road users and thereby caused the suit vehicle to hit him seriously injuring him. The respondent further submits that he and the police officer, who was the investigating officer testified on liability and confirmed that the appellant was to blame for the said accident. The appellant did not avail evidence to contradict him on how the accident occurred and did not avail any evidence to prove his allegations that he hit the suit motor vehicle with his hand hence sustaining the injuries as alleged. To support his contentions, the respondent relies on the case of **Joyce Mumbi Mugi vs The Co-operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004.**

9. Relying on the cases of **Isabella Wanjiru Karanga vs Washington Malele CA No. 50 of 1981, Berkley Steward vs Waiyaki Vol 1 KAR 1118 {1986-1989}** and **Baker vs Market Harborough** (no citation given), the respondent argues that courts have found that a driver who is in control of a lethal machine, a motor cycle in this instance, ought to drive at a speed and in a manner

that he would apply brakes and stop in the event something emerges on his path. Thus the appellant was 100% to blame for the accident.

10. The respondent relies on the case of **Harjeet Singh Pandal vs Aloyce Oloo Randa [2019] eKLR** and submits that the trial court did not violate the principles taken into consideration when awarding damages and therefore the general damages awarded should not be disturbed. The respondent refers to the decisions in **Kosombei & Another vs Atieno [2024] KEHC 6386 (KLR)** where

the court awarded Kshs. 170,000/- for comparable injuries and **Catherine Wanjiru Kingori & 3 Others vs Gibson Theuri Gichubi [2005] eKLR** the court awarded Kshs. 350,000/- for multiple soft tissue injuries, injury on the left elbow joint and injuries on both ankles.

### **Issues for determination**

11. The main issues for determination are:-
- a) Whether the appeal is properly before the court.
  - b) Whether the respondent proved his case on a balance of probabilities.
  - c) Whether the award was excessive.

### **The Law**

12. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under **Section 38 of the Small Claims Court Act**, set out the duty of the second appellate court in the case of **Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR** as follows:-

**I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.**

13. In distinguishing between matters of law and fact the Court of Appeal stated in **Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR** as follows:-

**I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See**

**Selle and Another vs Associated Motor Boat Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.**

14. **Section 38 of the Act** provides:-

**A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.**

15. I have perused the grounds in the memorandum of appeal and noted that the grounds relate primarily to questions of fact. The appellant is aggrieved that the learned adjudicator found him 100% liable for the road traffic accident which occurred on 26<sup>th</sup> July 2021 along Nyeri Thika Road at High Point Area. The learned adjudicator in finding the appellant 100% liable considered evidence by both parties and their witnesses and evaluated the evidence thus coming to the conclusion that the appellant was 100% vicariously liable for the accident caused by his driver. The grounds as raised by the appellant are on matters of fact. **Section 38 of the**

**Small Claims Court Act** provides for appeals only on matters of law but not matters of fact.

16. The only matter of law raised by the appellant is on the award of general damages which the appellant has argued is excessively high.

17. 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.”**

18. 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.”**

19. According to the statement of claim, the respondent suffered the following injuries:-

- a) Cut wound on the left forearm on the mid anterior aspect.
- b) Multiple bruises on the same forearm.

20. The learned adjudicator awarded a sum of Kshs. 170,000/- 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.

21. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr. G. G. Maingi in his medical report dated 17<sup>th</sup> January 2023. The doctor assessed the respondent's injuries and found that his left forearm had healed with a permanent disfigured scar however some pieces of glass particles were still left on his left forearm which would need removal through an operation.
22. The appellant did not cite any authorities both in the lower court and the present court proposing an award or supporting his contention that the award was excessive. Looking at the decisions relied on by the respondent, the injuries cited in the cases are more severe than those he sustained.
23. The learned magistrate in arriving at the award of Kshs. 170,000/- took into account inflation and the nature of injuries. The trial court was guided by the case of **Lillian Anyango Otieno vs Philip Mugoya Ogila [2022] eKLR** where the High Court substituted the award of Kshs. 100,000/- with Kshs. 150,000/- to the appellant who sustained a head injury with dislocation of cervical spine of the neck; chest injury with damage of the rib cage and blunt abdominal injury, tissue injuries of both upper limbs with dislocated wrist and

elbow joint and dislocated pelvic frame involving hip joints and damage of the right lower limb, with dislocation at the ankle joint.

24. Taking into consideration the severity of the respondent's injuries, it is my considered view that the award of Kshs. 170,000/- was reasonable compensation as general damages for pain, suffering and loss of amenities. The appellant has failed to satisfy this court that the award was inordinately excessive.

25. I find no merit in this appeal and I hereby dismiss it with costs.

26. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND  
SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF APRIL 2026.***

**F. MUCHEMI  
JUDGE**