



**Kibuchi & another v Ndiritu (Civil Appeal 30 of 2019)
[2025] KEHC 5303 (KLR) (Civ) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5303 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 30 OF 2019

HI ONG'UDI, J

APRIL 29, 2025

BETWEEN

SIMON GITHUI KIBUCHI 1ST APPELLANT

JOSEPH THEURI NDIRITU 2ND APPELLANT

AND

JULIA NYAGUTHI NDIRITU RESPONDENT

*(Being an appeal from the Judgment and decree of Honourable W.K. Kitur
(RM) in Nakuru CMCC No. 438 of 2012, delivered on 22nd January 2019)*

JUDGMENT

1. The appellants herein were the defendants in the lower court while the respondent was the plaintiff. The respondent vide the plaint dated 5th April 2012 sued the appellants claiming general damages, special damages and costs of the suit plus interest at court rates. The claim was based on the injuries she sustained as a lawful passenger in motor vehicle registration number KBH 647S which the 2nd appellant so negligently drove, resulting in an accident. The appellants denied the claim.
2. The matter was fully heard with both parties adducing evidence. As the matter proceeded the parties did enter into a consent on liability in the ratio of 5:95 against the appellants. This was on 5th December, 2017.
3. In its judgment delivered on 22nd January, 2019 the trial court awarded the respondent general and special damages of Kshs. 800,000/= and Kshs. 146, 890/= respectively subject to the 5% contributory negligence. The respondent was also awarded costs of the suit plus interest.



4. The appellants being aggrieved by the whole judgment lodged this appeal dated 20th February, 2019 setting out the following grounds: -
 - i. The learned trial magistrate erred in fact and in law, in awarding the respondent general damages of Kshs. 800,000/= and special damages of Kshs.146,890/= less 5% liability making it an award of Kshs, 899, 545/= which was too excessive in the circumstances.
 - ii. The learned magistrate erred in law and in fact in failing to consider the appellants' witnesses testimony on the injuries sustained by the respondent hence reaching an erroneous decision.
 - iii. The trial magistrate erred in law and in fact in falling to accord due regard to the appellants submissions on quantum on applicable principles for assessment of damages.
5. The Appeal was canvassed through written submissions. The appellants did not file any submissions despite them being accorded several chances to do so. The same are not in the court file nor the CTS portal.
6. The respondent's submissions were filed by Gekonga & company advocates and are dated 16th October, 2024. Counsel submitted that the appeal by the appellants was on quantum only. He submitted that the record of appeal was incomplete since the decree, judgment, proceedings and the respondent's submissions to the main suit were not filed. He cited Order 42 rule 13 (4) of Civil Procedure Rules, the decisions in Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others [2016] eKLR and Trans Mara Sugar Company Limited v Jas Omondi Obudho [2020] eKLR and urged the court to dismiss the appeal on that ground.
7. He further submitted that the medical documents produced proved the injuries suffered by the respondent. That the award of Kshs. 800,000/= was sufficient to compensate the respondent as general damages. He urged the court to uphold the said award. He placed reliance on the decision in Easy Coach Limited v Emily Nyangasi [2017] eKLR.

Analysis and determination

8. This is a first appeal and this court has a duty to re-consider and re-evaluate the evidence on record and arrive at its own independent conclusion. It has to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This has been stated in several decisions among them being Gitobu Imanyara & 2 others V Attorney General [2016] eKLR where the Court of Appeal stated:

“An Appeal to this court from a trial court 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 allowances in this respect”.
9. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respondent, I opine that the issue for determination is whether the award on general damages was inordinately high in the circumstances of the case.
10. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2) (1987)* KLR 30 stated that:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court



of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly, erroneous estimate of the damage”

11. Further, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated as follows: -

“comparable injuries should attract comparable awards”.

12. On Mr. Gekonga’s submission that the record of appeal was incomplete, I wish to state that it is true that the first one was incomplete. The appellant’s counsel did file a supplementary record of appeal on 28th February, 2025. The same is dated 25th February, 2025. The only document missing therein is the decree, which is not fatal since the original file is before this court and it contains a copy of the original decree signed by the trial Magistrate on 7th August, 2019.
13. In awarding quantum, the trial magistrate noted that the injuries sustained by the respondent included; deep cut wound along the nasal bridge, soft tissues injuries of the lower back and that the severe soft tissue on the right leg was not disputed. However, on the knee replacement claim the appellants while before the lower court argued that the same was not pleaded. The trial Magistrate found that the amended plaint at paragraph 7 included injuries to the right knee joint. Further, that the evidence on record by PW1 and PW2 indicated that the respondent was treated for osteoarthritis leading to a knee replacement. She further noted that the assessment of disability was at 30% by Dr Kiamba who considered the treatment notes from St. Lukes Hospital which Dr Theuri who was the appellants’ doctor did not have a chance to look at.
14. While relying on the decision in *Easy Coach Limited v Emily Nyangasi*, Kisumu HCCA No. 20 of 2015, the trial Magistrate awarded general damages amounting to Kshs. 800,000/=. She indicated that she had considered the nature of injuries sustained by the respondent, the medical reports and/or documents.
15. Among the authorities cited by Appellants before the trial court in their submissions was the case of *Ndungu Dennis V Ann Wanagari & another* [2018] eKLR where the court substituted an award of Kshs 300,000/= with Kshs 100,000/= to a plaintiff who had suffered soft tissue injuries. The same is however not mentioned in the Judgment. This court has the duty to evaluate the injuries that were sustained by the respondent together with the documents produced to determine whether the award of damages made was indeed excessive.
16. In the present case, the respondent sustained a deep cut wound along the nasal bridge, soft tissues injuries on the lower back and severe soft tissue injury to the right leg leading to knee replacement. In my humble view the said injuries were more severe than the injuries sustained by the plaintiff in the decision relied on by the appellants in their submissions at the lower court. Further, the respondent herein also suffered permanent disability of 30% which is not the case in the decision relied on by the appellants. In the discharge summary from St. Lukes Hospital (PEXB 1) and the medical report by the respondent’s doctor (PEXB 6) it is indicated that the respondent underwent a knee replacement and an X-ray of the right knee joint was conducted on 27th March 2013.
17. The appellants contested the fact that the respondent underwent any knee replacement. PW3 Dr. Willington Kiamba who prepared the medical report (PEXB 6) in cross examination stated that the respondent suffered an injury to the right knee and the pains remained persistent. He examined her and



also saw her treatment documents from Moi Teaching and Referral Hospital and St. Lukes Hospital before doing the report (PEXB 6). The reports he saw are P. EXB 1 and 3 respectively.

18. On the other hand, the appellants presented their medical report on the respondent through Dr. Jeniffer Kahuthu who testified as DW1. She presented the report on behalf for Dr. Issac Theuri who had examined the respondent but had since left employment. In cross examination she confirmed that their office never took any X-rays.
19. Dr. Paul Kipkorir Rono from St. Lukes Hospital who testified as PW2 confirmed that the respondent had a knee injury and had previously been treated at Moi Teaching and Referral Hospital for the same. The injury had become severe leading to her sustaining osteoarthritis. The evidence of this witness was not challenged by the appellants since no contrary evidence was adduced. The mere fact that the operation was done about 12 months after the accident is not reason enough to dismiss it. The reason being that the respondent attended hospital since the occurrence of the accident, the operation for knee transplant and thereafter.
20. Upon my assessment of all the evidence, the respondent's condition, the finding by the trial Magistrate, the law and the authorities, I have referred to, I am satisfied that the award by the trial court was not inordinately high nor based on wrong principles. The respondent suffered serious injuries in particular the knee injury.
21. The proved special damages as per PEXB 4, 5 and 8 amounts to Ksh 146,890/=, which has not been contested. The same is not subject to the 5% contributory negligence. The award of Ksh 800,000/= for general damages less 5% comes to Kshs 760,000/=. Total is 760,000/= + Ksh 146,890/- = Ksh 906,890/=.
22. The error by the trial court on the net award is thus corrected to read Ksh 906,000/= instead of Ksh 899,545/=. Save for the correction above, the Appeal is found to lack merit and I hereby dismiss it with costs. The Judgment by the lower court is upheld.
23. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH APRIL, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

