



REPUBLIC OF KENYA



**Thuo & another v Nanzala (Civil Appeal E075 of 2022)  
[2024] KEHC 2978 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2978 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E075 OF 2022  
GL NZIOKA, J  
MARCH 21, 2024**

**BETWEEN**

**JOHN WAITHAKA THUO ..... 1<sup>ST</sup> APPELLANT**

**GREENLINE BUS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FAITH NANZALA ..... RESPONDENT**

*(Being an appeal against the decision by Hon. J. Karanja Senior Principal Magistrate (SPM) dated on 2nd September 2022, delivered vide Civil Case No. 170 of 2020 at the Chief Magistrate’s Court at Naivasha)*

**JUDGMENT**

1. By a plaint dated 21<sup>st</sup> May, 2020 the plaintiff (herein “the respondent”) sued the defendants (herein “the appellants”) seeking for judgment for:
  - a. General damages.
  - b. Special damages of Kshs. 13,000
  - c. Costs of the suit.
2. The respondent’s case is that, on 24<sup>th</sup> October, 2019 she was travelling as a lawful fare paying passenger on motor vehicle registration No. KCJ 134U driven by the 1<sup>st</sup> appellant and registered in the name of the 2<sup>nd</sup> appellant.
3. That on reaching Kayole area along the Naivasha – Nairobi Road, the 1<sup>st</sup> appellant negligently and/or carelessly drove the vehicle excessively fast, failed to; slow down, swerve or brake to avoid an accident, keep proper look out for other road users, drove in a zigzag manner and on the wrong side of the road.



As a result, he lost control of the vehicle and it to collide with motor vehicle registration number KCA 885G.

4. That as a result of the accident the appellant sustained bodily injuries as stated here below:
  - a. Fracture of the distal end of right humerus
  - b. Dislocation of the right elbow joint
  - c. Blunt injury to the anterior chest wall leading to soft tissue injuries.
5. Consequently, the respondent sought for compensation for the injuries as pleaded and stated herein.
6. However, the appellants filed a joint statement of defence dated, 8<sup>th</sup> July, 2020 and denied the averments in the plaint that the; respondent was a lawful paying passenger in the vehicle on the material date, accident occurred, 2<sup>nd</sup> appellant is the registered and/or beneficial owner or insured of the vehicle and particulars of negligence attributed to them.
7. However, on a without prejudice basis, the appellants pleaded that, if the accident ever occurred at all, it was caused solely and/or substantially contributed to by the respondent. That, the respondent failed to take adequate precaution to protect herself, or heed the safety precautions, or traffic rules or use the safety belt provided by the appellants.
8. The Appellants sought for the dismissal of the suit.
9. The case proceeded to full hearing, wherein the respondent adopted her witness statement dated, 24<sup>th</sup> October, 2019 as her evidence in chief and testified that she boarded the bus registration number KCJ 134U at Malanya to Nairobi.
10. That, at around 3:00am while at Naivasha the bus collided with a lorry and she was injured on the right elbow. That, she went to the hospital at Masai Mara University and was referred to Narok County Referral Hospital. That a POP was placed on her right ankle joint. She testified that she had not fully healed as she had pains in her arms.
11. The respondent called (PW2), No. 62680 Police Constable Martim Mwenda based at Naivasha Police Station, as her witness. He produced the police abstract relating to the accident and stated that the accident was reported and the report entered in the OB No. 9/24/2019.
12. That police officers visited the accident scene, conducted preliminary investigations and found that, the 1<sup>st</sup> appellant's vehicle rammed into the rear of the Isuzu canter registration number KCA 085Q and was blamed for the accident.
13. PW3 Dr. Obed Omuyoma who examined the respondent produced the medical report reflecting that she suffered the bodily injuries stated in the plaint. He classified the injuries as grievous harm with permanent disability at 10%.
14. The appellants on their part did not adduce any evidence at the trial but relied on the evidence of Dr. Jennipher Kahuthu who examined the respondent and produced a medical wherein she noted that she was in fair general condition and that she did not sustain any fracture or dislocation but suffered soft tissue injuries.
15. At the conclusion of the trial the court delivered a judgment dated, 2<sup>nd</sup> September 2020, and found the appellants jointly and severally liable at 100% and awarded quantum as follows:
  - a. General damages----- Kshs. 600,000



b. Special damages----- Kshs. 11,550

Total -----Kshs. 611,550

The plaintiff was awarded costs of the suit and interest at court rates

16. However, the appellant is aggrieved by the decision of the court based on the following grounds that: -
- a. The learned trial Magistrate erred in law and misdirected- himself when he failed to consider the appellants' submissions on both points of law and facts.
  - b. The learned trial Magistrate erred in fact and in law in finding that the respondent was entitled to damages of Kshs. 600,000 and special damages of Kshs. 11,550 plus costs and interest of the suit for injuries suffered which award is exorbitantly high based on the injuries sustained.
  - c. The learned Magistrate erred in fact and in law in failing to consider the defendant evidence on injuries sustained submissions and authorities on the award for such injuries.
  - d. The learned Magistrate erred in fact and in law in unduly disregarding the judicial authorities cited by the appellants which are related to the injuries and the evidence adduced in trial.
17. The appeal was disposed of vide filing of submission. The appellants in their undated submissions relied on the case of *Power Lighting Company limited & another v Zakayo Saitoti Naingola & another* (2008) eKLR cited in *Jennifer Mathenge v Patrick Muriuki Maina* [2020] eKLR where the court set out the principles that guide an appellate court in considering whether to interfere with an award of damages.
18. That the court stated the factors to consider are whether the damages were inordinately too high or too low. Further, damages are meant to compensate a party for the loss suffered and should be commensurate with the injuries sustained and where past decisions are considered, they act as a guide and inflation should be taken into account.
19. The appellants submitted that, the injuries in the P3 and the medical report of Dr. Obed Omuyoma, which are similar to those in the plaint, differed substantially from the treatment notes from Masaai Mara University that indicated the respondent only sustained a dislocated shoulder.
20. Further, the medical report of Dr. Jenipher Kahuthu showed that the respondent sustained soft tissue injuries only. As such since the respondent suffered only soft tissue injuries, the award of Kshs. 600,000 as general damages is inordinately high and that a sum Kshs. 200,000 should be reasonable and sufficient compensation.
21. The appellants relied on the case of *Pitalis Opiyo Ager v Daniel Otieno Owino & another* [2020] eKLR where the appellant sustained a cut on the head, dislocation of the neck, injuries on the shoulder, injuries on the left arm, chest injuries and dislocation on the small toe of the left leg. The appellate court upheld the sum of Ksh. 200,000 awarded as general damages by the trial court.
22. Further, in the case of; *Mara Tea Factory Limited v Lilian Bosibori Nyandika* [2021] eKLR the court set aside the award of Kshs. 400,000 and substituted it with an award of Kshs 300,000 where the plaintiff sustained a head injury, deep cut wound on the head, bruises on the frontal part of the head, tenderness on the chest, dislocation of the left wrist joint, and multiple cut wounds on the upper and lower limbs.
23. That further, in the case of; *Richard Gituku Gakinya v Anthony Kibirii Waithaka* [2021] eKLR the respondent sustained deep cut wounds on the supra-orbital region, right ankle joint dislocation and soft



tissue injuries and was awarded Kshs. 400,000. But the High Court set aside the award and substituted it with an award of Kshs. 300,000.

24. The appellants urged the court to allow the appeal and award them the costs of the appeal on the ground that costs follow the event and relied on section 27 of the *Civil Procedure Act*.
25. However, the respondent in submissions dated, 13<sup>th</sup> June, 2023 argued that, the appellants failed to produce the report by Ranalo, the Radiologist who carried out an x-ray on the respondent on the request of Dr. Kahuthu, on behalf of the appellants. Further, the treatment notes from Narok County Hospital confirmed the fracture.
26. The respondent relied on the case of; *Henry Binya Oyal v Sabera O. Itira* (2011) eKLR where the court held that the primary source of information on injuries sustained was the victim and that the evidence of the medical officer was not mandatory. Further, the victim's statement on injuries should not be dismissed for failing to match the initial treatment from the hospital.
27. The respondent further submitted that, there were two divergent opinions by the doctors which evidence the trial magistrate analysed and found that the disparity was caused by the passing of time as the doctor of the appellants examined the respondent almost a year after the accident by which time the fracture would have healed. Further, Dr, Kahuthu agreed in cross-examination that the treatment the respondent received was in line with treatment for a fracture.
28. The respondent relied on the case of; *Stephen Kinini Wang'ondu v The Ark limited* (2016) eKLR where the court stated that expert evidence must be given appropriate weight as part of evidence and must be not considered in a vacuum. Further, the court stated that where there is conflicting expert evidence, the court should test it against all other evidence so as to decide which of the expert evidence is preferable.
29. On the issue of quantum, the respondent relied on the case of *Kemfro Africa Limited T/A Meru Express Services & Another v A. M. Lubia and Olive Lubia (No.2)* (1985) eKLR where the court laid out the basis on which an appellate court can interfere with the finding on quantum by the trial court.
30. The respondent submitted that, Dr. Obed Omuyoma classified the injury as grievous harm and indicated that she suffered a permanent disability of 100%.
31. That, the respondent sought for general damages of Kshs. 800,000 and relied on the case of; *Roy Mackenzie v Cartrack Kenya Ltd & Another* HCC 86 of 2012 where the plaintiff was awarded Kshs. 700,000 for similar injuries.
32. On their part the appellants submitted in the trial court Kshs. 40,000 was adequate compensation but reviewed the figure to Kshs. 200,000 on the appeal.
33. The respondent argued that, the injuries she suffered were more serious than those in the authorities relied on by the appellants which related to mere dislocations and not fractures nor any permanent disability.
34. That, in the circumstances, the award of Kshs. 600,000 is reasonable as supported by the authority relied on by the trial court and thus the appeal should be dismissed with costs.
35. I have considered the appeal in the light material before the court and the submissions of the parties, I note that, first and foremost, the law is settled that, the role of the first appellate court is to evaluate the



evidence adduced afresh and arrive at its own decision as held in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, where the Court of Appeal stated that: -

“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.”

36. Further, it is trite that the 1st appellate court will not interfere with the trial court’s discretion in assessing damages unless in exercising that discretion, the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice (see *Mbogo & another v Shah (supra)* and *Mkuba v Nyamuro* 1983 KLR 403.)

37. In the same vein, the Court of Appeal in *Loice Wanjiku Kagunda v. Julius Gachau Mwangi* CA 142/2003 (unreported) stated that:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga V Musila* [1984] KLR 257).”

38. In the instant matter, I find that as regards liability the evidence adduced through the testimony of the plaintiff cum respondent and the police abstract produced by (PW2) Police Constable Martin Mwendu is that, the plaintiff was a lawful passenger in the motor vehicle driven by the 1<sup>st</sup> Appellant and owned by the 2<sup>nd</sup> appellant.

39. As such at no time did she drive and or control the appellants’ motor vehicle or the other motor vehicle involved in the accident. At most the appellants could only attribute blame on the driver of the other motor vehicle.

40. In addition, the police abstract indicates that the 1<sup>st</sup> appellant was held to blame for the accident. The respondent testified that the 1<sup>st</sup> appellant’s motor vehicle hit the other motor vehicle from the rear. That evidence was not rebutted by the appellants.

41. Therefore, it is the finding of this court that the trial court arrived at the right and/or correct decision when it held that the appellants are jointly and severally liable at 100% and I uphold that finding.

42. As regard quantum, I note that, the respondent relied on several documents to support the injuries sustained. She produced an outpatient medical document dated, 25<sup>th</sup> October, 2019, from Masai Mara where the respondent was treated after the accident. It indicates that, the doctor queried dislocation of right elbow and requested for an X-ray of the right elbow and recommended immobilization.



43. The respondent was thereafter referred to Narok County Referral Hospital and the X-ray requisition form dated 25<sup>th</sup> October, 2019 and sought for X-ray of right elbow and right knee. The treatment notes from that hospital of the even date indicates that the respondent was treated as an out-patient and the elbow seen to be swollen and impaired and reduction by application of P.O.P ordered.
44. Further still the P.3 form dated; 24<sup>th</sup> October 2019 show that the respondent suffered soft tissue injuries to the right ribs and there was tenderness on the same. That, she sustained a dislocation at the right elbow, which was healing albeit for stiffness and tenderness.
45. The afore documents do not make any reference to a fracture distal end of the right humerus which is indicated in the report of Dr Omuyoma. Furthermore, the indication therein that the respondent has 10% disability is inconsistent with the doctor's evidence in cross examination when he stated that:

“if you look at the 2<sup>nd</sup> page of my report, I indicated the X-ray showed fracture of the right elbow joint. The patient has healed.”
46. Pursuant to that response by the doctor, two questions arise, whether it was a fracture or dislocation of the right elbow joint and whether 10% disability is tenable where the patient has healed.
47. The report of Dr Jenipher Kahuthu on the other hand intentionally ignored the dislocation of the right elbow joint which was immobilized with P.O.P, but confirmed the respondent had fully healed.
48. It is the finding of the court that the injury in the pleadings relating to the fracture was not supported by evidence and the trial court erred in considering it.
49. The argument by the respondent that the victim's evidence supersedes the medical documents is not tenable. Further it is the plaintiff to prove the case and should have produced the radiologist report to confirm the fracture.
50. Furthermore, when the trial court stated that it had considered the injuries the respondent suffered vis-vis those in the authorities cited, the court did not expound on the comparison and how they compared.
51. It is important to tabulate the injuries in the comparable matter for the appellant court to have the benefit of whether indeed they are comparable. The trial court did not indicate which authority it relied on.
52. In the given circumstances, it is the finding of this court that the sum of Kshs 600,000 awarded as general damages was unsubstantiated and cannot be sustained.
53. Having considered the injury of dislocation and other soft tissue injuries sustained by the respondent, authorities of the parties referred to and in particular by the appellants where the victims suffered similar injury, the age of those authorities and inflation issues, I set aside the sum of Kshs 600,000 awarded as general damages and substitute it with a sum of Kshs 400,000 as general damages. The special damages were proved by receipts although not tabulated in the judgment but I shall not interfere with the same.
54. The upshot is that judgment is entered in favour of the respondent in the total sum of Kshs 411, 550.00 plus interest be calculated from the date of judgment in the trial court and costs of the suit in the trial court. No costs are awarded to the appellants as the appeal arose from the decision of the trial court not any act or omission by the respondent.
55. It is so ordered.



**DATED, DELIVERED AND SIGNED ON THIS 21<sup>ST</sup> DAY OF MARCH, 2024**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Njuguna for the Appellants

Mr. Owour for the Respondent

Ms Ogutu: Court Assistant

