



REPUBLIC OF KENYA



**Kongoni River Farm Ltd v Gakii (Civil Appeal E164 of 2021)
[2023] KEHC 2264 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E164 OF 2021
EM MURIITHI, J
MARCH 23, 2023**

BETWEEN

KONGONI RIVER FARM LTD APPELLANT

AND

PURITY GAKII RESPONDENT

*(Being an appeal from the Judgment of Hon. MRS. L. NJuma
(SRM) delivered on 9/11/2021 in Meru CMCC No. E106 of 2020)*

JUDGMENT

1. By a plaint dated 18/5/2020, the Respondent sued the Appellant seeking general damages for pain, suffering and loss of amenities, special damages and costs of the suit plus interest. The Respondent pleaded that on or about 26/5/2018 at around 4.00 pm, she was a lawful pedestrian along Meru-Nanyuki road near Kisima, when the Appellant's driver drove Motor Vehicle Registration No KCL 095 A Mitsubishi Pick-up so negligently, carelessly and recklessly that it veered off the road and hit her, thereby occasioning her serious bodily injuries, loss and damage.
2. The Appellant denied the claim vide its statement of defence dated 10/6/2020 and prayed for the Respondent's suit to be dismissed with costs.
3. Upon full hearing of the case, the trial court apportioned liability at 90:10 and awarded general damages of Kshs 2,050,000, special damages of Kshs 140,312 together with costs and interest.



The appeal

4. On appeal, the Appellant vide its memorandum of appeal filed on 6/12/2021 set out 7 grounds as follows:
 1. The learned trial magistrate erred in law and fact in relying on the wrong principles in making a lump sum award for loss of dependency.
 2. The learned trial magistrate erred in law and fact by awarding Kshs 2,050,000 in general damages which were excessive in the circumstances of the case.
 3. The learned trial magistrate erred in law and fact by awarding inordinately high general damages to the Respondent.
 4. The learned trial magistrate erred in law and fact in awarding Kshs 140,312 special damages by failing to consider that the receipts produced by the Respondent did not bear the mandatory stamp duty revenue stamp.
 5. The learned trial magistrate erred in law and fact by failing to consider the Appellant's submissions and authorities on quantum hence arriving at an erroneous decision.
 6. The learned trial magistrate erred in law and fact by awarding damages that were inordinately high to constitute a miscarriage of justice in the circumstances of the case.
 7. The learned trial magistrate's judgment on quantum was wholly not supported in law by evidence tendered in court by the parties.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123).

Evidence

6. PW1 Dr John Kimani Macharia produced the Respondent's medical report, receipts, P3 form and discharge summary as exhibits in court. He testified that:

"I have a report for one Purity Gakii who examined on the 19th of January 2021. The history was that she had sustained injuries in a traffic accident on 26/5/2018. She was admitted at St Teresa hospital in Kiirua and she furnished me with a discharge summary a copy of P3 and X-ray films. The injuries were that she lost consciousness for 3 hours after accident. She was admitted in a composed state and remained so for about 2 weeks. She had a bruise on the back of her head fracture of the superior pubic rami and a fracture of the inferior pubic rami dystatis or separation of pubic symphysis. The fractures and injuries were managed with bed reset. Analgesics and physiotherapy. She was discharged on 25/6/2018. She was still under follow up as an outpatient at the time of examination. She had difficulties in walking with pains axer the pelvic area. She complained of knee pain and headache. I found she was oriented in person place and time. Her memory was intact. She was walking unaided with a



normal gait. Hip movement had normal range but it produced pain at the pubic symphysis. She was still under physiotherapy. I confirmed she sustained a head injury soft tissue injuries to the head and right lower limb and fracture of the pelvis with pubic symphysis diastasis. Head injuries resolved with no neurological deficits. Fractures healed some for pain on the pubic region due to diastasis. I formed opinion that pain would be consistent and would escalate during pregnancy and labour. I opined that she continue with physiotherapy and pain therapy. I issue a receipts for report.”

7. On cross examination, he stated that:

“I used discharged summary P3 and x-ray. I did not look at the treatment notes i.e follow up treatment notes. The fracture had healed save for the pains from the diastasis at the pubic area. The pain is embraced by movement like walking or turning around. The pain would be persistent for a long time. It would last for a life time.”

8. PW2 Purity Gakii, the Respondent herein, adopted her statement recorded on 18/5/2020 as her evidence in chief. She also produced the P3 form, discharge summary treatment, receipts for 71162, 840, copy of records, payments, statutory notice and postage, physiotherapy card and receipt as exhibits in court.

9. On cross examination, she stated that:

“When I was hit by the vehicle. I had come for Kisima farm heading home. I was outside the road. The P3 said I was crossing road. The other case I have testified. I have pains on my legs I cannot walk or stand for a long time. I was alone. My colleagues were far but I cannot recall them.”

10. PW3 Inspector Kennedy Olaka produced the police abstract and OB as exhibits in court. He testified that:

“I am in charge traffic at Timau police station. I have a police abstract dated 22/1/2019 issued to Purity Gakii concerning an accident which she was knocked down by motor vehicle registration No KCR 095 Mitsubishi driver Elijah Maina Kinyua. The accident occurred at Kisima junction Timau-Nanyuki road. Driver was for Meru heading to Timau the pedestrian Purity Gakii and another were crossing form left to right towards Timau. While pedestrian was almost at the middle of the road motorist Elijah Maina alleged a vehicle overtaking and blocked his visibility. He knocked the plaintiff she sustained serious injuries. Scene attended by PC Karani. Pedestrian issued with P3. Kongoni river farm is the owner of the motor vehicle. The driver of motor vehicle was blamed for the accident as the location of accident is junction in which he ought to have slowed down due to movement of people as a normal highway code. There are many motorist at the junction. He did not slow down he said motor vehicle blocked his visibility as he was overtaken. He should have waited for his visibility to be clear. Driver should have been moderate. I would have charged him with careless driving but he was not charged.”

11. On cross examination, he stated that:

“I have stayed at Timau for 2 years. When accident occurred I was not present. I am based at the traffic section. I am in-charge of traffic at Timau. From abstract accident occurred at 15.50 hours. I was not the investigating officer. The officers at scene are not in court today.



Driver was never charged. Matter referred to the insurance pedestrian was crossing the road. Both pedestrian and driver owe each other a duty of care. The section at Kisima three are 14 lanes. Pedestrian can only cross if there is clarity on both sides. There were 2 pedestrians only one was injured. I do not know if the pedestrians confused there. I did not witness accident. The right to know and ought to know should apply in crossing. No indication that driver was speeding. There was another vehicle. It is a busy junction. Driver not charged. Report captured on OB indicated driver was to blame for accident. From the facts in the OB it is clear who is to blame for the accident. Statement state alleged. No eye witness statement.”

12. On re-examination, he stated that:

“From OB facts I deducted driver was on the wrong and S to says visibility was poor. He ought to have moved at a lower speed. The officer who investigated case was transferred. I.P Corporal Kaari.”

13. DW1 Elijah Maina Kinyua, adopted his statement dated 20/1/2021 as his evidence in chief. He testified that:

“I was not charged after the accident. I blame the plaintiff as she was not careful while crossing the road.”

14. On cross-examination, he stated that:

“I was the driver for KCL 095 A Mistubishi Pickup. I had passed the junction at Kisima farm. The junction leads to Kisima Kibirichia Kisima market and another Meru-Nanyuki. At the junction I ought to be careful and not drive with speed. I should drive slowly and be alert. There was no fog visibility was clear I could see clearly if police said there was fog it’s a lie. I was driving at a speed of 50-6- KMPH at the junction. It did not swerve. I swerved to the extreme left so as to avoid hitting her. The speed I was driving at could not allow me to stop. The members of the public almost lynched me I run away as I was assaulted by members of the public. They assaulted me because of the accident. I ran from the scene and went towards Nanyuki. I went to the police and reported that people were crossing road without checking. There was a lorry on the road that had parked I ought to have been careful having seen the stationed vehicle. As the driver and motor vehicle could move. I was on the high way lorry was slightly ahead of the junction. I ought to have been careful.”

15. On re-examination, he stated that:

“Accident occurred slightly ahead of the junction. The lorry has been parked on the road. Near the road I saw 2 women including the plaintiff. I saw them and hit emergency breaks. The plaintiff was walking with force and slept on the bonnet she walked behind the vehicle and slept. I wanted to help the girl but the people wanted to lynch me. At the junction the boda boda riders were near. I have been a driver for 16 years. It was my first accident.”

16. DW2 Dr Wambugu Mwangi testified that:

“I examined Purity Gakii she had been involved in a road traffic accident on 26/5/15. She had been knocked down by a motor vehicle along the Meru Nanyuki road. Taken to hospital in Kiirua. She had a blood trauma to the head with bruising’s. she had pelvic fractures she had x-rays that confirmed the pelvic fractures. The plaintiff was treated of the injuries. She



complained of occasioned pains. I took her history no abnormalities on the pelvic or upper limbi. Injuries consistent with blunt trauma. She had made adequate recovery. I was of the view no permanent incapacitation occurred. I signed the report the same day. I asked her about any fits she had prior to and she said she didn't have any I confirm those were the only injuries sustained. In my opinion the only injuries suffered are the ones indicated in my report. The injuries in the plaintiff report by her doctor some of them were not sustained. I confirm plaintiff had fully recovered and will be able to continue with her day to day activity. I wish to produce the report as Dexh-1”

17. On cross examination, he stated that:

“I was not the first doctor who examines plaintiff at onset of the accident. I cannot tell the state she was admitted in. I have listed the pelvic injuries. The plaintiff had x-rays with her. I do not recall off head if I looked at the P3. I saw the bruise part and I have captured it in my report. I have listed it as blunt trauma on the head with bruises. I did not capture bruises on the right fore arm and bruises on the left thigh as per the P3 form as may be at the time of examination the bruises had healed. I saw the issue of disruption of the pelvic on the P3. The x-ray by the plaintiff did not reveal any diastasis or separation of the pubic area. The plaintiff said she had occasioned pain on the right side of the pelvis. She did not tell me that she was attending physiotherapy. The fracture had united and I do not purport any problem during pregnancy at child birth. The fracture united and the pelvis have gone back to normal. The pelvis does not contract and become smaller.”

18. On re-examination, he stated that:

“I confirm that by the time I was cross examining plaintiff the other soft tissues injuries were healed. I only used the documents provided by the plaintiff. The pregnancy is not carried by pelvis just by the abdomen. The delivery if at all would be normal as pelvis fully healed. In my opinion no need for plaintiff to attend physiotherapy.”

Submissions

19. The Appellant urges that the trial court's award was erroneous and inordinately high. It faults the trial court for failing to juxtapose the 2 medical reports on record and address the glaring issue of disputed diastasis of pubic symphysis. It urges the court to set aside the impugned judgment and proceed to re-evaluate the evidence on record and make its own determination, and cites the Court of Appeal cases of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates* (2013) eKLR and *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) (2021) KECA 242 (KLR). It urges that the entire medical report by Dr Macharia ought to be rejected because it is tainted with incoherence and contradiction. It urges the court to award general damages of Kshs 400,000 based on the medical report by Dr Wambugu, and cites *Muthamiah Isaac v Leah Wangui Kanyingi* (2006) eKLR, *Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & another* (2010) eKLR and *Lilian Wanja v Cyprian Mugendi Igonga & 2 Others* (2016) eKLR. It urges the court to dismiss the entire award for special damages as the receipts produced were faded, ineligible and invalid for failure to bear a revenue stamp as determined in *Leornard Nyongesa v Derrick Ngula Righa* (2013) eKLR. It submits that the award of interest on general damages should be rejected in total and urges the court to allow its Appeal with costs.
20. The Respondent submits that the trial court's decision was sound and proper in assessing the quantum of damages, and cites *Peter Wanderi Mwangi & 3 Others v Kenya Bus Service Ltd & Anor* (2015)



eKLR. She persuades the court not to interfere as the trial court awarded the damages by comparing the injuries she sustained with comparable awards set by precedent, and cites *Millicent Atieno Ochuonyo v Katola Richard* (2015) eKLR. She urges that she proved through her unchallenged evidence that she sustained more serious injuries being fractures of right and left pubic rami among other injuries. She urges that since the production of the receipts for special damages was not challenged by the Appellant, the contention that the same did not bear the mandatory revenue stamp is clearly without basis, and cites *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* (2006) eKLR. She submits that the trial court considered the Appellant's submissions on record and arrived at a fair finding. She urges the court to dismiss the appeal with costs as the Appellant's contention that the trial court's judgment on quantum was not supported in law or evidence is without foundation.

Analysis and Determination

21. Before delving into the merits of this appeal, the court wishes to point out that the allegation that the receipts produced by the Respondent are invalid for want of the revenue stamp, is manifestly unfounded because those receipts indeed have revenue stamps. Needless to state, section 19 of the *Stamp Duty Act* does not forbid production of unstamped receipts but postpones such production until the date the duty shall have been paid.
22. From the grounds of appeal as framed, the issues for determination are (a) whether the award of general damages was inordinately high, and (b) whether the trial court considered the Appellant's submissions and authorities.

Excessive Award of General Damages

23. this court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v. British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”



24. The Respondent recorded in her statement which was adopted as her evidence in chief that:
- “I was admitted for 1 month at St. Theresa Mission Hospital-Kiirua. I am still attending clinic at Meru Level 5 Hospital for physiotherapy. Am having recurrent pains on the left leg and thigh. My life has radically changed since the accident. I cannot walk for long distances nor stand for long. I am now attending light duties at my work place. I am unable to carry heavy objects and am unable to perform my chores as I used to.”
25. She restated on cross examination that she had pains on her legs and could neither walk nor stand for a long time.
26. According to the P3 form filled by Dr Winnie, the Respondent sustained a bruise over the occipital region - 3 cm in diameter, bruises over the right forearm, bruises over the right leg and thigh, and an X-Ray of the Pelvis revealed a disruption of the Pubic Symphysis - 3 cm wide.
27. When Dr Nicholas Koome Guantai examined the Respondent on 20/9/2019, he noted that the Respondent, in addition to the injuries listed in the P3 form, also sustained moderate traumatic brain injury with loss of consciousness for 3 hours and disorientation for 2 weeks, right pubic ramii fracture and left pubic ramii fracture. He noted that although the Respondent had recovered, she experienced residual pain on the right lower limb, occasional headaches, global in nature and noticeable limp to the right. He opined that the Respondent had noticeable limp to the right, occasional severe pain in the pelvic region and the pelvic fracture put her at a high risk of developing osteoarthritis of the hip joint.
28. When DW2 Dr Wambugu Mwangi examined the Respondent on 12/1/2021, he noted that she sustained a fracture right and left inferior pubic ramii of the pelvis and blunt trauma to the head with bruises. He further noted that the said fractures were confirmed by the X-rays taken of the pelvis. He however maintained that there was no pelvic pubic symphysis diastasis or hip joint involvement. He noted the current complaints by the Respondent to be occasional pains right side of the pelvis worse on exertion. In his opinion, the Respondent sustained skeletal and soft tissue injuries from which she had since made adequate recovery and the pelvic fractures had united.
29. On 20/1/2021, PW1 Dr John K. Macharia examined the Respondent where he noted that she lost consciousness for about 3 hours, she had a bruise on the back of the head, bruises on the right lower limb, fracture of the superior pubic ramus, fracture of the inferior pubic rami and diastasis (separation) of pubic symphysis. The current complaints by the Respondent were difficulties in walking with pains over the pelvic area and pains over the knees and headaches. He opined that although the head injury resolved with no neurological deficits and the fractures had healed, the Respondent still had pains over the pubic region due to the diastasis, which pain would be persistent and exacerbate during pregnancy/labour. He advised that the Respondent continues with physiotherapy and drugs to alleviate the pains.
30. The 2 medical reports by PW1 and DW2 seem to be at a variance with each other. Whilst PW1 noted in his report that the Respondent sustained symphysis diastasis, DW2 does not agree with that position.
31. The Court of Appeal in Philip Nzaka Watu v Republic [2016] eKLR, in addressing the issue of discrepancies, respectfully adopted the view of the Court of Appeal of Tanzania in *Dickson Elia Nsamba Shapwata & Another v The Republic*, Cr. App. No 92 of 2007 as follows:
- “In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”



32. This court has considered the discordant medical reports within the complete context of the evidence on record and finds that the Respondent sustained symphysis diastasis, because it had initially been noted by Dr Winnie who filled the P3 form on 24/1/2019 when the injuries were still raw and fresh. PW1 stated on cross examination that:
- “The fracture had healed save for the pains from the diastasis at the pubic area...the pain is embraced by movement like walking or turning around. The pain would be persistent for a long time. It would last for a life time.”
33. What the 2 doctors, PW1 and DW2 agree on is that the Respondent has since made adequate recovery since the pelvic fractures have healed and united. The Respondent in her testimony admitted that she had healed save for the recurrent pains on the left leg and thigh and inability to walk for long distance or stand for long.
34. Although this court accepts that the injuries sustained by the Respondent were severe as she was admitted at St. Theresa Mission Hospital -Kiirua for a whole month, and she still attends physiotherapy clinics at Meru Level 5 Hospital, this court feels that the award of general damages of Kshs 2,050,000 was excessive in the circumstances. The decision of the trial court was based on the authority of *Millicent Atieno Achuonyo Vs. Katola Richard* (2015) eKLR, in which the Court (D.A. Onyancha, J.) granted Kshs 2,000,000/- in general damages on a more severe case of “complex pelvic fracture with a fracture of the right public bone and separation of the pubic symphysis ... [where] the degree of permanent incapacity is about 40%.”
35. In *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo* [2019] eKLR, where the claimant sustained a pelvic fracture and open back facial bruises with pain when walking or running, the court (S. Chitembwe J.) substituted an award of Kshs 2,000,000 with Kshs 1,400,000.
36. In *Joseph Njeru Luke & 3 others v Stellah Muki Kioko* [2020] eKLR, where the claimant sustained pelvic fractures and soft tissue injuries, the court (D.S. Majanja J.) substituted an award of Kshs 1,700,000 with Kshs 750,000.
37. In this court’s considered view, even with current inflationary trend, an award of general damages of Kshs 1,000,000 would be sufficient compensation to the Respondent since, unlike in *Millicent Atieno Achuonyo Vs. Katola Richard* (2015) eKLR, where there was a permanent disability of 40%, all the injuries sustained by the respondent herein as a result of the accident have healed, save for the expected occasional pains, and there, on the evidence, was no permanent incapacitation.

Consideration of the Appellant’s submissions and authorities

38. Whereas the Appellant faults the trial court for completely failing to consider its submissions and authorities, the Respondent contends that the trial court properly took into account both sets of submissions and authorities before reaching the decision it did.
39. This court finds that the said objection is baseless as the trial court did consider both sets of submissions and authorities in equal measure when it observed in its impugned judgment, thus:
- “The plaintiff in his submissions prayed for a sum of Kshs 3,000,000/= as general damages and relied on several authorities. The defendant on its part argued that a sum of Kshs 400,000/= would be sufficient general damages. I note however that part of the defendants attached authorities were not very clear as some of them were blurred. I am persuaded by



the plaintiff's attached authority in Millicent Atieno Achuonyo Vs. Katola Richard (2015) eKLR which in my opinion consists of comparable injuries as the injuries sustained by the plaintiff in this case.”

Besides, non-consideration of a party's submissions cannot of itself be a basis to overturn a trial court's decision because, as was aptly put by the Court (P.J.O. Otieno J.) in *Charles Mutuma M'kanake v Diocese of Meru Trustees Registered* [2021] eKLR

“such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision.”

Orders

40. Accordingly, for the reasons set out above, this court allows the appeal and makes the following orders:

1. The trial court's award of general damages of Kshs 2,050,000 is hereby set aside and substituted with an award of Kenya Shillings one million (Kshs 1,000,000). The apportionment of liability and the awards of special damages, interest and costs in the trial court remains as made by the trial court.
2. The Appellant shall have costs of the appeal to be paid by the Respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kiruki & Kayika Advocates for the Appellant.

M/S Muia Mwanzia & Co. Advocates for the Respondent.

