



**Lumiti v Akhasungu Obunaka Limited (Civil Appeal E121 of 2023)  
[2024] KEHC 8203 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8203 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E121 OF 2023  
JK NG'ARNG'AR, J  
JUNE 26, 2024**

**BETWEEN**

**MERCY MUSINZI LUMITI ..... APPELLANT**

**AND**

**AKHASUNGU OBUNAKA LIMITED ..... RESPONDENT**

*(An appeal from the judgment and decree of the Chief Magistrate's Court at Limuru  
(P.M. Mugure, PM.) delivered on 19th April 2023 in CMCC No. 200 of 2020)*

**JUDGMENT**

1. The appellant was the plaintiff in CMCC No. 200 of 2020. By plaint amended on 17<sup>th</sup> November 2021 and filed on 19<sup>th</sup> October 2022, the appellant averred that the respondent was at all times material to this suit, the registered owner of motor vehicle registration number KCP 197J. On 29<sup>th</sup> January 2019 at around 5:00 p.m., the appellant continued that she was a fare paying passenger aboard the said motor vehicle when the driver lost control and caused an accident. As a result of the accident, the appellant suffered a mid-fibular fracture, a deep cut wound on her right leg and multiple tissue injuries. According to the appellant, the preliminary investigations of the police officers revealed that the respondent's driver was to blame for the accident. He was resultantly charged with the offence of causing death by dangerous driving. She thus prayed for general damages, special damages in the sum of 216,968.00 with others to be proved and costs of the suit.
2. By judgment of the trial court dated 19<sup>th</sup> April 2023, the learned magistrate found that the appellant had failed to prove her case. It was resultantly dismissed with costs to the respondent. Aggrieved by that outcome, the appellant filed a memorandum of appeal dated 3<sup>rd</sup> May 2023 on that day. He raised six grounds disputing the judgment of the learned magistrate that can be summarized as follows: that the respondent had admitted ownership of the suit motor vehicle; that since no evidence controverted the fact of ownership, the respondent's driver was liable in negligence; that the trial court failed to



give due regard to Article 159 of *the Constitution* calling upon courts not to overly rely on procedural technicalities; that since liability had been proved, she was entitled to damages. For those reasons, the appellant urged this court to set aside the judgment of the trial court and substitute the same with an award of general damages, special damages and costs of the suit. She further prayed for costs of this appeal.

3. Although the appeal was directed to be disposed of by way of written submissions, the parties herein did not furnish their submissions for my determination. It is also instructive to note that the record of appeal had not been placed before me. However, this court shall rely on the trial court file that was furnished before this court.
4. I have considered the trial court file, examined the evidence and analyzed the law. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. [See Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR].
5. The evidence on record is that PW1 PC PAULINE KIBATI testified that on 29<sup>th</sup> January 2019, an accident occurred along the Naivasha-Nairobi Highway at Kinungi area at 2:00 a.m. between motor vehicle registration number KCP 197J and KCE 824J. According to PW1, the driver of motor vehicle registration number KCP 197J failed to keep distance and rammed into the rear of motor vehicle registration number KCE 824J. As a result of the accident, several persons were injured. P3 forms were issued to the victims. Following their preliminary investigations, PW1 testified that the driver of motor vehicle registration number KCP 197J was charged with the offence of causing death by dangerous driving. The said motor vehicle was extensively damaged from the front. She produced the police abstract that was marked P. Exhibit 3.
6. PW2, the appellant herein, accused the respondent's driver for causing the accident. During the journey, she was seated on the front seat next to the driver. According to PW2, the driver drove at an excessive speed during the hours of the night where the visibility was poor, failed to keep to his lane, carelessly overtook without paying attention in oncoming traffic, failed to apply brakes and encroached the opposite lane. That the driver collided with motor vehicle registration number KCE 824J. Following the accident, PW2 sustained injuries particularized in her plaint. She produced assorted receipts, medical bills, demand letter dated 30<sup>th</sup> October 2019, P3 form, discharge summaries dated 31<sup>st</sup> January 2019 and 24<sup>th</sup> July 2019, search certificate and invoice and treatment notes marked P. Exhibits 1, 2, 4, 5, 6, 7, 8, and 9 respectively. She added that she paid Kshs. 62,000.00 towards her hospital bill and was yet to pay the balance. As at the time of her testimony, the appellant was yet to undergo corrective surgery.
7. The respondent did not testify though cross examined the appellant's witnesses. In dismissing the appellant's case, the trial court doubted the authenticity of the search certificate for the reason that the search was only conducted nine months' post-accident. He could not thus ascertain that at the time of the accident, the respondent was the owner of the suit vehicle. He also found that the appellant's evidence failed to tally with her pleadings as she failed to prove what was stated in her pleadings at paragraph four of her amended plaint where she submitted evidence in the contrary. That the appellant clearly pointed out that it was her motor vehicle that caused the accident and the defendant could not be held liable.
8. It is not in doubt that the appellant sued the respondent vicariously for the actions of the defendant. It is also not gainsaid that the appellant was a passenger aboard motor vehicle registration number KCP 197J when its driver collided with motor vehicle registration number KCE 824J. Furthermore, it is



not denied that an accident occurred between these two motor vehicles wherein none of the vehicles placed the appellant as the owner and/or driver of the suit motor vehicles. I therefore find that it was a jarring conclusion to arrive at based on the fact that it is apparent that the appellant erroneously stated at paragraph 4 of her amended complaint that her vehicle was to blame for the accident.

9. I am alive to the fact that parties are indeed bound by their pleadings and cannot detract from them. However, the trial court ventured into a cherry picking exercise in absolving the respondent without appreciating the pleadings holistically as well as the evidence on record. All through, the respondent was the owner of the motor vehicle that carried the appellant; the respondent's driver was in control of the said motor vehicle; the appellant was never held accountable for any wrongdoing; the appellant was a fare paying passenger and the driver was accused of being a careless driver. While paragraph four of the amended complaint speaks to the plaintiff, I agree with the appellant that Article 159 of *the Constitution* is not intended to defeat a cause of action on the basis of such an error. In my view, that was a typographical error that should not have placed the appellant at a disadvantage. I however must remind parties that this does not in any way sanitize them from drafting pleadings that would in effect bring confusion. Parties must always yield to the call to being proper drafters, clearly precision pleadings and make no room for error as the negation of this would potentially cause a would be merited case to suffer a dismissal.
10. It is evident that PW1's concluded preliminary investigations found the respondent's driver liable for the accident. PW2 testified that she sat next to the driver and could attest as to his careless driving. That evidence was not controverted; yet, the trial court further went ahead to absolve the respondent on account of the fact that the search was conducted nine months later. However, a look at the police abstract reveals that the owner of the motor vehicle was the defendant. That it had taken out an insurance cover that commenced on 8<sup>th</sup> January 2019 and expired on 7<sup>th</sup> February 2019. The insurance had been taken out in favor of the defendant herein. For those reasons, I find that it was for the respondent to rebut that it was not the owner of the motor vehicle. That evidentiary burden shifted to the respondent who failed to discharge themselves from blame. I therefore find that based on the police abstract, corroborated with the search certificate, it can only be rationally concluded that the respondent was the registered and/or insured owner of the motor vehicle.
11. It is for the above reasons that I find that the trial magistrate erred in failing to apportion liability to the respondent. It is clear that the driver drove the motor vehicle carelessly as particularized in PW2's testimony and corroborated with the evidence of PW1. That as a result of the careless driving, the appellant was injured. For those reasons, I set aside the trial court's findings on liability and substitute the same with an order finding the respondent 100% liable for the accident.
12. On quantum, as documented in the P3 form and the discharge summaries, the appellant suffered a fracture to the right leg with multiple injuries with grafting procedures. She also suffered a scare on her right lower leg. Her injuries were classified as harm. That indeed proves that the appellant indeed suffered injuries. The guiding principle in the award of general damages is that whereas no two injuries are exactly alike, comparable injuries should, as far as possible, be compensated by comparable awards. (See *Stanley Maore vs. Geoffrey Mwenda* [2004] eKLR and *Mbaka Nguru and Another vs. James George Rakwar* [1998] eKLR).
13. In *Fred Mohinga Kipkigiya vs. David Agreey Zimbiru* [2011] eKLR, the court reduced an award of Kshs. 800,000/= to an award of Kshs. 650,000/=. The plaintiff in that matter had sustained a fracture of the right femur and fracture of the distal femur in addition to soft tissue injuries. In *Wainaina vs. Wagacha* [2023] KEHC 26226 (KLR), the respondent sustained a fracture of the left hand necessitating him to be admitted and operated on. The judgment of general damages in the sum of



Kshs. 700,000 was substituted with an award of Ksh. 500,000 as general damages. Taking into account the foregoing, I award the appellant general damages in the sum of Kshs. 500,000.00.

14. On special damages Kshs. 550.00 search of the suit motor vehicle and a receipt from Kakamega General Hospital of Kshs. 50,132.00 have been proved. The receipts from the pharmacy do not prove that they were obtained as a result of the injuries sustained herein and are therefore dismissed. It is also noted that there is a balance of Kshs. 62,868.00 incurred by the appellant and which she had not paid following the accident. The promissory note from the Ministry of Health revealed this sum wherein the appellant endeavored to settle the sums owed over a period of time. Since this expense was incurred as a result of the accident, it is only right and just that the respondent does refund or settle those sums pending.
15. In light of the above, I make the following orders:
  - i. The appeal is allowed;
  - ii. The respondent is found 100% liable in negligence;
  - iii. Judgment on quantum is entered in favor of the appellant as against the respondent as follows:
    - a. Kshs. 500,000.00 in general damages;
    - b. Kshs. 113,550 in special damages;
  - iv. The appellant is awarded costs of the suit with interest on costs and (iii) above;
  - v. The appellant shall have costs of this appeal.
  - vi. 30 days granted.

It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>th</sup> DAY OF JUNE, 2024.**

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**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of:-

Massavisu for the Appellant

Omachu for the Respondent

Court Assistant- Peter Ong'idi

