



Mugo & another v Kibera (Suing as the Spouse and Next Friend of Stephen Murungaru Kibera) (Civil Appeal E043 of 2023) [2024] KEHC 9271 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E043 OF 2023
LM NJUGUNA, J
JULY 31, 2024**

BETWEEN

FR. JEREMIAH NJAGI MUGO 1ST APPELLANT

DIOCESE OF EMBU 2ND APPELLANT

AND

**ANNE WANJIRU KIBERA (SUING AS THE SPOUSE AND NEXT FRIEND OF
STEPHEN MURUNGARU KIBERA) RESPONDENT**

*(An appeal from the judgment of Hon. J. Otieno in Embu
CMCC No. 70 of 2020 delivered on the 24th Day of July 2023)*

JUDGMENT

1. The appellants herein filed a Memorandum of appeal dated 09th August 2023 seeking the following orders:
 - a. That the honourable court be pleased to set aside the learned trial magistrate's judgment on liability and accordingly apportion liability between the appellants and the respondent;
 - b. The honourable court be pleased to reduce the general damages for pain and suffering which was awarded to the respondent; and
 - c. That the appeal be allowed with costs to the appellants.
2. The grounds of appeal are that the learned Senior Resident Magistrate erred in law and fact:
 1. For holding that the appellants were 100% liable for the accident whereas the respondent did not call an eye witness to prove that the accident was caused by the negligence of the 1st appellant;



2. For failing to wholly consider the cogent evidence of the 1st appellant in deciding who is to blame for the accident;
 3. For relying on the evidence of the traffic police officer in holding that the appellants were 100% liable for the accident whereas he did not witness the accident;
 4. For holding the appellants 100% liable for the accident regardless of the fact that the 1st appellant testified that the respondent did not indicate his intention to turn the motor vehicle to the right-hand-side of the road;
 5. In awarding the respondent general damages which were manifestly and grossly excessive;
 6. Awarding the respondent general damages which were not commensurate with the nature of injuries sustained by the respondent;
 7. In departing from the principle that comparable injuries should as far as possible be compensated by comparable awards;
 8. In failing to warn herself that the award must be reasonable and ought to be assessed with moderation;
 9. Acting on the wrong principles in arriving at an award of Kshs.4,500,000/= as general damages for pain and suffering;
 10. In failing to consider factors which she should have considered thereby arriving at a wrong decision on quantum- general damages for pain and suffering; and
 11. The judgment was against the weight of evidence.
3. The respondent filed amended plaint dated 09th October 2020 seeking judgment against the appellants for general damages for pain and suffering, special damages of Kshs.1,496,391/=, general damages for diminished earning capacity, future medical expenses and costs with interest. The particulars of the claim are that on 08th July 2017 at around 11:30 a.m along Embu-Meru Road, the respondent was driving motor vehicle registration number KCA 836X and had indicated his intention to make a turn when the 1st appellant who was in control of motor vehicle registration number KBY 948Q, so recklessly, negligently and without regard to traffic rules, overtook other vehicles and needlessly hit the respondent's vehicle from the driver's side as a result of which the respondent sustained serious injuries which ambulated him under serious nursing case. That the 2nd appellant is vicariously liable for the accident.
 4. The appellants filed a statement of defense in which they denied the allegations made in the plaint and attributed negligence to the respondent. At the hearing, PW1 was Ann Wanjiru Kibera, the wife of Stephen Murungaru who stated that as a result of the accident, her husband was incapacitated and could not talk or stand and that he depends on nursing assistance from home. That on the day of the accident, she received a call about the accident and she went to Embu Level 5 Hospital where she found her husband at the x-ray room. That owing to the severity of the injuries, he was transferred to Nairobi Hospital where he was admitted. That the medical bill was paid by NHIF but all the medication was paid for in cash amounting to Kshs.1,496,391/= according to the receipts that were produced. That they spent KShs.4,000/= weekly on physiotherapy done by a doctor who visits their home for the sessions. She produced 3 medical reports from different doctors and stated that her husband needs a caregiver at home and this extra help costs them Kshs.40,000/= per month. She produced documentary evidence in support of her claim. On cross-examination, she stated that her husband lost an income of Kshs.10,000/= to Kshs.20,000/= per session as a master of ceremonies. That as a result of the accident,



her husband suffered diminished co-ordination and he is forgetful. That he also uses diapers as part of his care.

5. PW2 was Police constable Ibrahim Ali Yakub who produced a police abstract relating to the accident. He stated that he was one of the officers who visited the scene of the accident and investigated it. In his view, the motor vehicle registration number KBY 948Q was to blame for the accident since its driver was trying to overtake 2 motor vehicles but ended up hitting motor vehicle registration number KCA 836X. On cross-examination, he stated that both motor vehicles were travelling from Embu towards Meru general direction. That motor vehicle registration number KCA 836X was ahead of the 2 motor vehicles that the driver of motor vehicle registration number KBY 948Q was trying to overtake and that eye witnesses said the respondent's vehicle had indicated its intention to turn right.
6. PW3 was Dr. Roger Hannington Kayo who stated that he examined the respondent following the accident and he detailed the injuries sustained, being mainly on the head. That the respondent had a medical report by Mr. Kiboi Julius Githungi. He assessed the degree of disability at 100% since the respondent cannot do anything on his own and must be assisted. He produced the medical report as evidence. On cross-examination, he stated that he examined the respondent 3 years after the accident but he did not treat him. That the injuries on his head caused damage to the nerves which affected the upper and lower limbs function. That the fractures have united but have deformed.
7. DW1 was the 1st appellant who stated that he is a priest at the 2nd appellant. He stated that there were 3 vehicles ahead of him and they were moving slowly so he decided to overtake them and the respondent's motor vehicle was the first one in that series of vehicles. That he did not know that the respondent wanted to turn right to country view and he hit the said motor vehicle from the driver's side. He stated that he met the respondent at the hospital being severely injured.
8. In its judgment, the court relied on the cases of GA (Minor suing thro' her father and next friend BZ) v Paul Muthiku (2020) eKLR, In Re Estate of ESMK (2017) eKLR and Isaac K. Chemjor & another v Laban Kiptoo (2019) eKLR in awarding general damages for pain and suffering of Kshs.4,500,000/= . She noted that the respondent is 100% incapacitated and awarded Kshs.200,000/= as damages for diminished earning capacity. The trial court further relied on the case of Tracom Limited & another v Hassan Mohamed Adan (2009) eKLR and awarded Kshs.780,000/= as future medical expenses. Special damages of Kshs.1,510,091/= was awarded.
9. The appeal herein was canvassed by way of written submissions.
10. The appellants submitted that the trial court erred in its findings on liability since the evidence showed that the appellants attempted to apply the brakes but the accident was eminent since the respondent did not indicate that he was turning right and so the 1st appellant did not know that he intended to turn. He urged the court to find that the accident was caused as a result of the respondent's negligence. That the award of KShs.4,500,000/= being general damages for pain and suffering is manifestly high and he urged the court to review the same downwards.
11. They relied on the cases of Robert Msyoki Kitavi v. Coastal Bottlers Ltd (1985) KAR 891 at pg 895 and Idi Ayub Shabani & Yusuf Juma v. City Council of Nairobi & Another (1985) 1 KAR 681. They urged the court to award Kshs.1,500,000/= and they relied on the cases of Isaac K. Chemjor & another v Laban Kiptoo (2019) eKLR, Edward Nyaga v. Mombasa Liners Machakos HCCC No. 197 of 1999, GA (Minor suing thro' her father and next friend BZ) v Paul Muthiku (2020) eKLR and David Mutisya Kisui v Anastasia Wagiciengo Civil Appeal No. 170 of 1998.
12. The respondent, in his submissions, urged the court to re-evaluate the evidence adduced at the trial before deciding to review any of he findings. She relied on the cases of China Zhongxing Construction



Company Ltd v. Ann Akuru Sophia (2020) eKLR, Selle & Another v. Associated Motor Boat Co. Ltd & Others (1968) EA 123 and Butt v. Khan (1977) KAR 1. It was her submission that on a balance of probabilities, the evidence shows that the accident was as a result of the 1st appellant's negligence since PW2 testified that an eyewitness saw the respondent indicating his the intention to turn right.

13. That the vehicles driving ahead of the 1st appellant had slowed down because the respondent, who was ahead of the trail wanted to turn right and none of them attempted to overtake for this reason. That the point of impact and the place where the vehicle rested after impact speaks of the 1st appellant's negligence, for which he should be held accountable. That the police abstract was not challenged thus the respondent discharged the burden of proof under the doctrine of *res ipsa loquitor* and he relied on the cases of Joel Muga Opija v. East African Sea Food Limited (2013) eKLR and Susan Kanini Mwangangi & Another v. Patrick Mbithi Kavita (2019) eKLR. He stated that from the medical reports produced, the injuries were detailed therein and that the award of damages was commensurate with the injuries suffered. He stated that the trial court was correct in relying on the cases relied upon in reaching its findings.
14. After carefully considering the evidence adduced before the trial court by both parties, the grounds of appeal and submissions, the issues for determination are:
 1. Whether the trial court's finding on liability is erroneous; and
 2. Whether quantum should be reviewed.
15. In determining the issues herein, it is paramount that the evidence adduced at trial be re-evaluated by this court. This was stated in the case of Williamson Diamonds Ltd and another v Brown (1970) EA 1, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
16. On the issue of liability, PW2 testified that he investigated the accident after visiting the scene. He lay blame on the appellants for the accident and stated that the eye witnesses told him that the respondent had slowed down and had indicated that he was intending to turn right. DW1 stated on cross-examination that the respondent's vehicle was one of 3 vehicles driving ahead of him and they had been going slowly for about 500 meters. That when he noticed that the other drivers were going slowly, he decided to overtake all of them, but the respondent intended to turn right, unbeknownst to him since he did not see any indicator lights. That he could not avert the accident since the distance was too short, even though he applied the brakes.
17. Proof of liability is a matter of fact which should be proved through the available evidence which should be determined on a balance of probability and the principles laid down under sections 107 and 109 of the *Evidence Act*. In the case of Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, it was held that:

“Denning J. in Miller v. Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow.



A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

18. From the testimonies, it is evident that the respondent did not contribute to the occurrence of the accident. The trial court’s finding on liability cannot be disturbed on account of the testimony adduced.

19. On the issue of quantum, the appellants challenged the trial court’s finding on general damages for pain and suffering which was Kshs.4,500,000/=. In determining this issue, the court should consider the injuries suffered by the respondent. From the amended plaint and the medical report by Dr. Kiboi Julius Githinji, it was the respondent’s case that he suffered these injuries:

1. Head injuries: left acute subdural hematoma, frontal right compound skull fracture, right zygoma fracture;
2. Contused brain;
3. Brain oedema; and
4. Right upper and lower limb fractures.

He also particularized the following as complaints following the accident:

5. Dysphasia- deficiency in generation of speech;
6. Weakness in upper right limb which has affected mobility;
7. Epilepsy; and
8. Large frontal skull deformity.

1. General damages for pain and suffering are awarded depending on the amount of time which the injured person suffered following the accident. In this case, the respondent was treated and the injuries healed, albeit not completely, but the accident left him with life-long incapacity. According to the medical report by Dr. Kayo, the respondent was termed as an invalid who will need assisted care for the rest of his life. That he has remained with deformities of cosmetic significance on the face and he has become epileptic. He assessed disability at 100%.

2. In the case of *Rosemary Wanjiru v. Elijah Macharia & Anor* (2014) eKLR where a plaintiff with 100% incapacity was awarded Kshs.3,000,000/=. In the case of *James Musyoka Nzeke v. Kenya Power & Lighting Co. Ltd* (2019) eKLR the court declined to enhance an award of Kshs.2,500,000/= as general damages for pain and suffering and loss of amenities where the plaintiff had suffered injuries resulting in 100% disability. In that case, the plaintiff claimed that as a result of the accident, he had had to employ a house help on full-time basis.

3. The trial court awarded the respondent Kshs.4,500,000/= which is a bit on the higher side. In my view, the trial court’s award under this head should be reduced to Kshs.4,000,000/- which is fair in the circumstances.

4. Seeing as the appellants have not challenged any other awards made by the trial court, I shall rest here.



5. Having considered the evidence herein and the relevant laws, I find that the appeal partially succeeds as shown above. Each party to bear its own costs of the appeal.
6. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent

