



**Ngati v Cherop & another (Civil Appeal E447 of 2023)
[2024] KEHC 9245 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9245 (KLR)

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

CIVIL

CIVIL APPEAL E447 OF 2023

S MBUNGI, J

JULY 30, 2024

BETWEEN

ALEX SILA NGATI APPELLANT

AND

EDWARD KIPYEKO CHEROP 1ST RESPONDENT

FARAJA HADNAN 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the Honourable
H.M Ng'an'ga (Principal Magistrate) delivered on 11th May, 2023
in Milimani Chief Magistrate's Court CMCC No. E433 OF 2022)*

JUDGMENT

Introduction

1. This appeal arises from the judgement of Hon. H.M Nganga- Principal Magistrate delivered on 11th May, 2023 in a Milimani Chief Magistrate's Court No. CMCC NO. E 433 of 2022 which sought the Appellant to pay the Respondent/Plaintiff special and general damages amounting to kshs 5,550/- together with costs. The Appellant seeks the following orders: -
 - i. That the trial court finding on liability be set aside and/or reviewed
 - ii. That the trial court finding on general damages be set aside and /or reviewed.
 - iii. That the trial court award of costs be set and /or reviewed.
 - iv. That the appeal on liability and general damages be allowed.



- v. That the Honourable court be pleased to make such further and other orders it may deem fit and just.
 - vi. That the costs of the appeal be borne by the respondents
2. The Appellants three (3) grounds as stated in the Memorandum of Appeal dated the 26th day of May, 2023 are as follows: -
- a. That the trial Magistrate grossly misdirected himself on the evidence tendered before court and arrived at a wrong conclusion on liability.
 - b. That the learned trial Magistrate grossly misdirected himself on the binding precedents and arrived at a wrong conclusion on the award of general damages.
 - c. That the trial court misdirected himself in awarding 30% of the costs to the appellant.
3. The court directed parties to file written submissions. The appellant and 2nd Respondent filed while the 1st Respondent failed to file his written submission.

Appellants Submissions

- 4. On liability, the Appellant submitted that he adduced sufficient evidence to show that the said accident occurred and that the same was solely caused by the Respondents motor vehicle.
- 5. The Appellant submitted that his evidence, the police officer's evidence and the evidence of the Respondents witnesses clearly showed that the Appellant discharged the burden of proof
- 6. He faulted the trial court for holding that the Appellant should bear 70% of the liability while the 2nd Respondent in his submission considered to 50% liability.

Respondents Submission

- 7. The 2nd Respondent raised two issues in his submission in the appeal: -
 - i. Whether the learned Magistrate erred in law and in fact in finding that the Appellant was guilty of contributory negligence and subsequently finding that he was 70% liable
 - ii. Whether the learned Magistrate erred in law and in fact in its finding on quantum.
- 8. The 2nd Respondent submitted that apart from the plaintiff alleged that the 2nd respondent lost control of motor vehicle Reg. No. KBR 204A make Man-Prime Mover and collided with his motor cycle no. KMDDQ 997D along North Airport road did not call an eye witness to support his allegations, he only relied on PW1 a police officer who upon cross examination confirmed that she never investigated the accident nor did she visit the scene of the accident .(See pages 26 of the record of appeal)
- 9. The police abstract and the initial report produced as Exhibit by PW1 blamed the Appellant for causing the accident.
- 10. The 2nd respondent further faulted the appellant for claiming that the motor vehicle KBR 204A make man-prime mover was being driven at a speed of 120kph which was not possible in a road which was so congested in a very busy estate pipeline estate and further the injuries sustained by the appellant were slight injuries as noted in the medical reports by doctor Cyprianus Okoth and doctor Wanjora P.M Marked P-Exhibit No. 1 and D-Exhibit no. 1 respectively and opined that if the motor vehicle was being driven at a high speed the injuries sustained by the appellant would have been more severe



11. The 2nd Respondent further submitted that the accident occurred as a result of the appellant attempting to over take the motor vehicle without ascertaining whether it was safe to do so given that there was ongoing construction along the said road and urged the court to uphold the finding of the lower court (trial court) and cited the case of *Eurochem International Limited v Emma Kabura Kariuki* [2021] eKLR where it held as follows:

“The court will normally as an Appellant court, not interfere with a lower court’s judgment on a finding of fact unless the same is founded on wrong principles of fact and or law; the court of appeal also held that: a court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

Determination Of Liability

12. The issue to determine is who was to blame for causing the accident.
13. I have looked at the proceedings, PW1 police officer on cross examination said that from their investigations they could not determine who was to blame that is why no charges was preferred against either of the drivers. The police file is still open pending further investigations awaiting an independent witness
14. PW1 did not produce any sketch plan and measurements of the scene to enable the court determine the point of impact.
15. Without clear evidence on how the accident occurred, lack of eye witness and the fact that no sketch plan or measurement of the scene were taken or if taken were not produced as exhibits. I cannot see any basis which the trial court relied on to apportion the liability as it did.
16. The trial court rightly observed (See paragraph 16 of the judgment) “without sufficient evidence from the police, the court is left at a stalemate between the plaintiff and the defendant’s contrasting claims of liability. In this instance, I will be guided by the case of Samwel Kebati Osoro v Mohamed Antuly & another [2019] eKLR, where the court in similar circumstances apportioned blame equally as it was impossible to determine who was responsible for the accident. The trial court relied on the case of Hussein Omar Farah v Lento agencies [2006] eKLR to arrive at this decision.
17. The Court of Appeal in *Hussein Omar Farah v Lento Agencies* C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR observed that-

“In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

18. The law is trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. In the case of *Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another*, Majanja J, H.C Kisii C.A 29/2016 quoted with approval the Court of Appeal decision in the case of *Berkly Steward Limited v Waiyaki* [1982-1988] KAR where it is cited with approval the decision in *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that- “Every day proof of



collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn(sic) any distinction between them.” (emphasis added).

19. From the above authorities the trial court clearly erred when it went ahead to find that the 2nd defendant bore less liability because of his persuasive argument in his submissions. Submissions are not evidence.
20. In the circumstances I apportion liability equally among the appellant and the driver of the motor vehicle and by extension the 1st respondent the owner of the motor vehicle.

On Quantum

21. The Appellant submitted that the trial court award of kshs.900,000.00/= on general damages was extremely low and that the same should be revised upward.
22. In his submission he cited the principles that were expounded by the High Court in the case of *Teresia Njoki Mwangi v Elizabeth Wanjiru Kimani*[2010] eKLR when it held as follows has been met:

“It is also trite law that an appellant will not ordinarily interfere with an award of damages by the trial court unless it can be shown that in arriving at the award, the trial court acted on wrong principle(s) and as a result arrived at an award inordinately so high as to amount erroneous estimate.”
23. The Appellant had submitted an award of 1,500,000/= while the respondents had submitted for an award of kshs.800,000/= (That is exhibited at page 31 and 39 of the record of appeal respectively.
24. He cited the case of *Tewoldge T/a Mehari Transporters Ltd v Damus Muasya Maingi*[2013] eKLR where the respondent was awarded general damages of kshs 1,500,000/= for comparable injuries. I have looked at the authorities, the respondent in that authority had sustained the following injuries: -
 - a. Compound and comminuted fracture of the right distal tibia
 - b. Compound and comminuted fracture of the right distal fibula
 - c. Fracture of the distal right radius extending to the wrist joint
 - d. Several head injuries involving fracture of the left zygomatic arch extending to the lateral wall of the left orbit, haematoma of the right temporal scalp and soft tissue contusion on the left peri-orbital and front scalp.
 - e. 8x3 cm large friction burns on the left forearm.
 - f. 6 cm long friction burn on the left forearm
 - g. Large wound on the right leg and foot.
25. The Appellant also relied on the case of *Frankline Chilibasi Spii v Kirangi Liaton* [2017] eKLR the respondent in that authority had sustained the following injuries: -
 - a. Compound and comminuted fracture of the right distal tibia
 - b. Compound and comminuted fracture of the right distal fibula
 - c. Fracture of the distal right radius extending to the wrist joint



- d. Several head injuries involving fracture of the left zygomatic arch extending to the lateral wall of the left orbit, haematoma of the right temporal scalp and soft tissue contusion on the left peri-orbital and front scalp.
 - e. 8x3 cm large friction burns on the left forearm.
 - f. 6 cm long friction burn on the left forearm
 - g. Large wound on the right leg and foot.
26. The Appellant herein according to the medical report prepared by Doctor Okere notes that the plaintiff sustained a comminuted fracture of the right distal femur with recurring pains, difficulty walking and an inability to perform heavy duties.
27. The 2nd Respondent relied on authorities cited by the trial court when it awarded general damages and submitted that there is no evidence that there are irrelevant factors that the trial court took into consideration when coming up with the award. Further, drawing from the two cases cited by the trial court, it is quite clear that the same is not inordinately low to the extent of requiring an increase by the appellate court.
28. The trial court relied on the case of *Pestony Limited & Another v Samuel Itonye Kagoko* [2020] e KLR, the respondent therein sustained the following injuries: mid-shaft fracture of left femur and swollen left tender thigh. The court on appeal substituted an award of kshs. 1,400,000 with an award of kshs 800,000/= as general damages for pain and suffering.
29. The trial court also relied on the case of *Francis Ndung'u Wambu & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR, the court of appeal upheld an award of kshs.1,000,000 as damages for pain and suffering the Plaintiff had suffered soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft and loss of consciousness for more than 30 minutes after the accident.
30. I have reevaluated the submissions on quantum, the trial court awarded 900,000/= as general damages. Taking into consideration the injuries sustained by the appellant and the cited authorities. I find that the award of ksh.900,000/= was commensurate to the injuries suffered also comparable to other awards given by courts in similar circumstances. The trial court never took into consideration the irrelevant factors when arriving to a decision to make the award.
31. The upshot of the above is that the appeal partially succeeds on the issue of liability. The Appellant and the respondent shall bear the liability on 50% / 50% basis.
32. The appellant shall have half of the costs of the appeal and also half of the costs of the lower court.
33. Right of appeal within 30 days.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JULY, 2024 AT KAKAMEGA HIGH COURT

HON. JUSTICE S. MBUNGI

JUDGE OF THE HIGH COURT

In the presence of:

The appellant – Absent

The respondent - Absent



Court Assistant -Elizabeth Angong'a

