



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Osebe v Njoroge (Civil Appeal E408 of 2023)
[2024] KEHC 9654 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9654 (KLR)

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

CIVIL

CIVIL APPEAL E408 OF 2023

S MBUNGI, J

JULY 30, 2024

BETWEEN

KEVIN ASIRA OSEBE APPELLANT

AND

STEPHEN MWANGI NJOROGE RESPONDENT

*(Appeal against the Judgement of Hon. S. A. Opande (PM) delivered
on the 17th April 2023 at Milimani CMC. Case No. E114 of 2022)*

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment of the Honourable S. A. Opande (PM) delivered on 17th April 2023 in Milimani Chief Magistrates' Civil Case No. E114 of 2022 Between Kelvin Aira Osebe versus Stephen Mwangi Njoroge, filed the Memorandum of Appeal dated 16th May 2023 and the Record of Appeal dated 1st September 2023, seeking the following orders: -
 1. The appeal be allowed.
 2. The Judgement and decree of the learned Magistrate be substituted and/or varied.
 3. This Honourable court be pleased to re-assess the issue of liability on Plaintiff and hold the Respondent 100% liable, and assess general damages and special damages.
 4. The costs of Appeal and that of the subordinate Court be awarded to the Appellant together with interests.
2. The Appeal was premised on the following grounds: -



- i. That the learned magistrate erred in Law and in fact in apportioning liability at 50:50 per cent contrary to the weight of the evidence tendered before him.
- ii. That the learned magistrate erred in Law and in fact by arriving at an award in Quantum so low as to be erroneous.
- iii. That the learned magistrate erred in Law and in fact by awarding manifestly low general damages to the Appellant not commensurate with the extent of injuries sustained and proved before the Court.
- iv. That the learned magistrate erred in Law by failing to consider that the police abstract provided by the police officer blamed the Respondent for the accident.
- v. That the learned magistrate erred in Law and in fact by not fully considering and/or appreciating all the evidence before him together with the parties submissions and thereby ignoring relevant guiding facts to reach a fair reasoned determination on liability.
- vi. That in all the circumstances of the case, the findings of the learned magistrate on liability were characterized with misapplication of the Law and wrong exercise of discretion.
- vii. That the learned magistrate erred in Law and in fact in relying on information not in parity with the facts of the instant case before him.

Written Submissions At Appeal

3. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Musili Mbiti & Associates Advocates were dated 29th February 2024. The Respondents' written submissions drawn by Mugambi Mungania & Company Advocates were dated 18th March 2024.

Background to the appeal

4. The Appellant *vide* a Complaint dated 12th January 2022 and supported by a verifying affidavit sworn on an even date sought before the trial magistrate court the following reliefs: -
 - a. General Damages.
 - b. Special damages as per paragraph 5 above
 - c. Costs of this suit.
 - d. Interest from the date of filing this suit.
5. The complaint had been accompanied by a list of witnesses dated 12th January 2022, the Appellant's Witness statement dated on an even date, his list of Documents dated on an even date, and his bundle of documents (Pg. 3 – 21 of the record are all pleadings by the Appellant before the lower court).
6. The claim was opposed. The Respondent/Defendant entered appearance(pg.22) and filed their Statement of Defence dated 18th February 2022(Pg.-23-25) which was accompanied by their undated list of witnesses (Pg.26-27).
7. The Appellant filed a Reply to the Respondent's Statement of Defence dated 7th March 2022(Pg.28), complied with Order 11, and filed their list of issues dated 7th March 2022(pg. 29-31 of Record).



8. The Respondents filed his witness statement dated 26th April 2022(Pg.32), the supplementary list of documents dated 18th May 2022 and the annexures therein (pg.33-34 of Record).
9. The matter proceeded by way of *viva voce* evidence 15th September 2022 with Appellant testified as PW1, Pw2 Doctor Okere, PW4(sic) as PC Jackline Naeku (The Respondent testified in his own case as DW on the same day (Pg. 35-44). The parties filed written submissions after the hearing. The plaintiff submissions (Pg. 45-51). The Respondent's submissions (Pg. 52-55). The judgement was delivered on 17th April 2023(Pg. 56-58). The trial magistrate entered judgement partially favour of the Appellant's case as follows: "The Plaintiff has partly proved his case against the defendants on a balance of probability and the court now enters judgment for the plaintiff against the defendants jointly and severally as follows: -
 - i. Liability 50:50 between the plaintiff and the defendant.
 - ii. General damages Kshs. 550,000/-
 - iii. Special damages for Kshs. 6,190/-
 - iv. Costs of the suit and interest."

Determination

10. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle and another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

"An appeal to this Court from a trial by the High Court is by way of a 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 demeanor of a witness is inconsistent with the evidence in the case generally."

11. Further in *David Kaburuka Gitau & Another v Nancy Ann Wathithi Gatui & Another* Nyeri HCCA No. 43 of 2013, the court opined: - 'Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions.'

Issues for determination

12. The Appellant in his submissions identified the following issues for determination in the appeal:-
 - a. Whether the trial learned magistrate applied the correct principles of law and available facts in apportioning liable at 50:50 percent.
 - b. Whether the learned trial magistrate applied the correct principles of law and available facts in arriving at an award in quantum.



- c. Whether the learned trial magistrate's determination on the amount payable to the Appellant was inordinately low as to present an entirely erroneous estimate of compensation to which the appellant was entitled.
13. The Respondent in his submissions identified one issue for determination in the appeal as: -
 - a. The liability of parties and whether the apportioning of 50:50 ratio by the trial court was in fact justified.
 - b. Whether the quantum arrived at was indeed inordinately low.
 14. The court finds that the issues placed by the parties for determination in the appeal are with regard to apportionment of liability, and the quantum of damages and formulates the issues for determination in the appeal as follows:-

a. Whether the trial magistrate arrived at the wrong conclusion as regards the extent of liability and quantum.

Liability

Appellant's Submissions

15. The Appellant submits that what is in contention is not that an accident occurred, but rather the circumstances leading to the accident. He submits that he was riding his motorcycle Registration number KMFQ 244S along Outer Ring Road when the respondent without indicating, turned right with his Motor vehicle registration number KBP 647X to enter a service lane, without considering oncoming motorists thus causing the accident. The appellant blames the respondent for the accident as the Police officer who testified as PW3 stated that the respondent was responsible for the accident by failing to give way thus hitting a motorcycle ridden by the appellant as per the occurrence book.
16. The appellant submitted that the respondent did not rebut that he caused the accident, or state that he indicated his intention to turn right.
17. The appellant submitted that the Respondent testified that he was joining a service lane on the opposite lane and turned right when the appellant's motorcycle hit him (Pg. 32 and 41 of record). He submits that the respondent failed to give way to oncoming motorists and he should only have proceeded to join after ensuring that the road was safe.
18. He submits that the trial court misdirected himself by apportioning liability on a 50:50 basis yet no evidence was adduced to show the appellant was negligent. He asks the court to set aside the trial court determination and apportion 100% liability against the respondent.

Respondent's submissions

19. The Respondent submits that the trial court acted within its discretion in apportioning liability at 50:50 in the accident that occurred on 13th October 2021, considering that the officer who presented evidence admitted that she was not the investigating officer and no sketch maps were presented to guide the court on the point of impact to establish blameworthiness.
20. The respondent submits that there were two police abstracts (Pg. 9 and 34 of the Record) one dated 13th October 2021 and the other dated 19th October 2021 respectively. The latter which was produced by the respondent in his supplementary documents on 18th May 2022, indicated that the matter was



pending under investigation, and the appellant remained with the burden to prove his case as per Section 109 of the *Evidence Act*.

21. The respondent submits that the appellant failed to submit corroborative evidence about the accident at trial and thus the court was right in apportioning equal liability based on the evidence presented.
22. The Respondent further submits that the Appellant testified before the trial court that he had not been speeding but he was unable to explain why he had been unable to stop to prevent the collision with the Respondent's motor vehicle. He submits that the court considered common sense in the absence of any other logical explanation.
23. The respondent's statement before the trial court (Pg. 32 of record) was to the effect that the appellant hit the rear of his vehicle and thus there was no way he could have hit the appellant.
24. He asserted that in his submissions before the trial court (pg. 45) he explained that he had been making a right turn and that is why the appellant hit the rear of his vehicle otherwise the contrary would have been a head collision if he had hit the appellant.
25. He asserts that the court's finding was fair and just in apportioning equal liability.
26. To buttress the above assertions, he relied on the decision in *Elizabeth Gathoni Thuku (suing as legal representative of the estate of Charles Gitonga Wathuta) v Peter Kamau Maina & another* (2021) eKLR.

Analysis

27. As relates to the apportioning of liability, the appellant in his written statement (pg.7 of record) stated that after the accident caused by the respondent's making of a right turn without caring about the other road users, he sustained serious injuries and was rushed to Mama Lucy Hospital where he was treated and discharged on the same day with expected further medical appointments.
28. PC Jackline Naeku who was PW4 in testifying on the circumstances of the accident, stated that the accident occurred on 13/10/21 along Outering Road and that the motor vehicle has been blamed. She testified that she was not present at the accident scene and she was not the investigation officer but she had the preliminary report. She testified that she did not have a sketch plan of the accident, and as relates to the other Abstract produced stating pending under investigation, she was not aware of it as she testified using the abstract which tallied with the OB Record which blamed the respondent for the accident(pg.35-44).
29. The Trial court found that the officer who presented evidence admitted she was not the investigating officer and no sketch plans to guide the court on the point of impact were availed nor was there evidence of any eye witness and apportioned 50:50 liability.
30. While testifying, PW4 testified that the investigating officer indicated that the respondent was to blame for the accident. There was no sketch map to show how the accident occurred and no eyewitnesses were called to corroborate either the Appellant's or the respondent's positions that neither of them was to blame.
31. The Court of Appeal in *Hussein Omar Farar 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.”

32. 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).
33. In the circumstances, I find no reason to interfere with the learned trial magistrate’s finding on liability.

Quantum

Appellant’s submissions

34. On the damages awarded, the appellant states that he suffered: -
- a. Fracture of the left distal radius
 - b. Fracture of the left distal ulna
 - c. Pain on the left wrist
 - d. The left distal radius is tender on palpation
 - e. The left distal ulna is tender on palpation
 - f. Degree of permanent incapacity is 10%.
35. He submits that in his submissions before the trial court, he prayed for Kshs. 800,000 compensation and based on comparable awards by courts, Hon. Justice S. M. Githinji in *Francis Nzivo Munguti & another v Jotham Wanyonyi Nakasana & another* (2020) eKLR, the court awarded Kshs. 600,000 for fracture of right radius/ulna and multiple cuts on the forehead, right leg, and foot which were stitched, which was four years ago based on inflationary trends.
36. That in *Joseph Njuguna Gcabie v Jacinta Kavuu Kyengo* (2019) eKLR, the high court awarded Kshs. 600,000 for blunt temporal injury with swelling, facial bruises, blunt injury to the left forearm, comminuted fracture of the left radius, and dislocated left ulna joint, which was four years ago based on inflationary trends.
37. The appellant submits that the comparable cases must have been made at the time or close to the time the injuries were suffered by a claimant hence the provision for adjustment. To buttress this, he relied on the authority in *Mutua Kaluku V Muthini Kiluto* (2018) eKLR.
38. The appellant submits that the court failed to take into account the injuries sustained and in making the award failed to adjust it in light of the current inflation trends.



Respondent's submissions

39. The respondent submits that the trial court awarded the appropriate quantum of Kshs, 550,000 based on precedent on the same injuries. He submits that relying on *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouma* (2022) eKLR, comparable injuries should attract comparable awards.
40. The respondent submits that the medical report dated 15th December 2021 (pg.61 of the Record) states that the respondent suffered a fracture of the left distal radius and ulna and that in *Gogni Rajope Construction Company Limited v Francis Ojuok Olewe* (2015) eKLR for a comparative injury the court awarded Kshs. 350,000/- while in *Geoffrey Kamuki & another v RKN (minor suing through her late father and next friend ZKN)* (2020) eKLR, the trial court's award of Kshs. 600,000 was lowered to Kshs. 450,000.
41. The respondent urges the court to uphold the trial court's award.

Analysis

42. 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.
43. The question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be a wholly erroneous estimate of the damages or that it was inordinately low.
44. The trial magistrate awarded Kshs.550,000 as general damages. The appellant regards the award as inordinately low. The respondent agrees with the trial magistrate that the award is commensurate to the injuries sustained.
45. Emphasis is made on the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained. The respondent herein sustained the following injuries- a fracture of the left distal radius and ulna with 10% permanent incapacity as per the medical report of 15th December 2021. This was a single injury.
46. The Appellant however in the plaint submitted that he sustained the following injuries: -
 - a. Fracture of the left distal radius
 - b. Fracture of the left distal ulna
 - c. Pain on the left wrist
 - d. The left distal radius is tender on palpation
 - e. The left distal ulna is tender on palpation
 - f. Degree of permanent incapacity is 10%.
47. Despite the breakdown by the appellant for it to appear as though he had multiple injuries, the Medical report by Dr. Cyprianus Okere (PW2) was for a single injury of fracture of the left distal and ulna.
48. The decision of *Francis Nzivo Munguti & another v Jotham Wanyonyi Nakasana & another* (2020) eKLR quoted by the appellant was for an award of Kshs. 600,000 in 2020 where the claimant therein



had sustained not only a fracture of the right Radius /ulna but also multiple cuts on the forehead, right leg and foot which were stitched. The award of 600,000 was for a multiple of injuries.

49. Further in *Joseph Njuguna Gachie V Jacinta Kavuu Kyengo* (2019) eKLR relied on by the appellant, the claimant was awarded Kshs. 600,000 for blunt temporal injury with swelling, facial bruises, blunt injury to the left forearm, comminuted fracture of the left radius, and dislocated left ulna joint, the award was in 2019. The award in this case was for multiple injuries.
50. The respondent on his part relied on *Gogni Rajoje Construction Company Limited v Francis Ojuok Olewe* (2015) eKLR where for a fracture of the left distal radius/ulna and an award of Kshs. 350,000 was given in 2015 and on the decision in *Geoffrey Kamuki & another v RKN (minor suing through her late father and next friend ZKN)* (2020) eKLR, where in 2020 an award of Kshs. 600,000 was lowered to Kshs. 450,000/- for a comparable injury.
51. The accident occurred on 13th October 2021 and the judgement was delivered on 17th April 2023, which was a lapse of 1 year and 6 months. The appellant testified that he broke his hand and later went for the removal of the bandage.
52. There was no proof of any further injuries.
53. Considering the time lapse between the time when the said decision was handed down as well as the inflation, it is my view that the award of Kshs 550,000.00 by the trial magistrate was reasonable and there is no reason to interfere with it.
54. In the upshot, the appeal fails in its entirety.
55. The Respondent did not file written submissions hence there will be no orders as to costs in this appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF JULY 2024.

S. MBUNGI

JUDGE.

In The Presence Of

Court Assistant: Elizabeth Angong'a

Appellant: Absent

Respondent: Absent

