



**Wambugu v Malia (Civil Appeal E25 of 2021)
[2024] KEHC 9742 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E25 OF 2021**

**FROO OLEL, J
JULY 30, 2024**

BETWEEN

HESBON MWANGI WAMBUGU APPELLANT

AND

MARY MALIA RESPONDENT

(Being an appeal from the judgment of Hon C.C. Olouch (C.M) delivered on 27th January 2021 in the Mavoko Chief Magistrate Court Civil suit No. 502 of 2019)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment/decree of Honourable C.C. Olouch, Chief Magistrate delivered on 27th January 2021 in Mavoko Chief Magistrate court case no. 502 of 2019, where she found the appellant 100% liable for the accident that occurred on 26th March 2018, and proceeded to awarded the Respondent a total of Ksh.903,550/= as general and special damages.
2. The Respondent had filed her claim as against the appellant claiming damages in tort. In the plaint and her witness statement, the respondent averred that on the 26.03.2018, she was a lawful passenger in motor vehicle KBY 954H-LORRY MITSUBISHI CANTER hereinafter referred to as the suit motor vehicle), which suit motor vehicle was being driven along Mombasa road, when Mto Mawe the Appellants authorized driver negligently and carelessly drove the said suit motor vehicle as a result allowed it to violently ram into the back of another motor vehicle and as a result causing her to suffer severe injuries, loss and damage.
3. The appellant on his part did file a statement of defense where he denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellant further denied all the particulars of negligence, carelessness and recklessness attributed to him and/or their servant, employee or agents and put the respondent to strict proof thereof.



B. Evidence

4. PW1 Mary Malia testified and adopted his witness statement as part of his evidence in chief. In the said statement she recalled that on 26th March 2018, she was travelling aboard the suit motor vehicle from Makueni to Nairobi and when they reached Mto Mawe area along Mombasa road, the appellants driver attempted to overtake another motor vehicle and while at it hit a pothole and rammed into the rear of the said motor vehicle causing her to sustain serious body injuries. She was rushed to Shalom Hospital where she was initially treated and later transferred to Machakos level 5 Hospital, where she remained admitted for four months. She blamed the appellant's driver for driving carelessly and recklessly and prayed for compensation.
5. The respondent produced all her documents into evidence as exhibits and further stated that as a result of this accident, she had suffered serious fractures on her left leg. The Aerial plates had been removed, but the internal plate was still in the leg and she still had to walk using crutches. In cross examination PW1 stated that she boarded the suit motor vehicle at around 11.00p.m and sat on the front cab with the suit motor vehicle driver. The accident occurred at about 2.00am, and she did not see the registration number of the other motor vehicle involved in the said accident. The suit motor vehicle driver was negligent and was driving at high speed and as a result occasioned the said accident. she had suffered serious injuries including, the fracture of her leg on three places.
6. The Appellant did not call any witness, but the parties did admit the 2nd medical report by consent and the Appellant closed their case. Upon considering the submissions filed, the trial court did enter judgment for the Respondent as against the appellant's in the following terms;
 - i. Liability 100%
 - ii. General Damages Ksh.700,000/=
 - iii. Special damages Ksh. 3,550/=
 - iv. Future Medical Expenses Kshs 200,000/=Total Ksh 903,550/=
Plus, cost and interests
7. The Appellant being wholly dissatisfied by the said judgement did file their memorandum of appeal dated 1st March, 2021 and raised the following grounds of appeal;
 - a. That the learned magistrate erred in fact and in law in assessing liability at 100% against the Defendant yet the Defendant was not charged for any traffic offence emanating from the accident.
 - b. That he trial magistrate erred in law and in fact in awarding general damages at an inordinately high sum of Kenya shillings nine hundred and three thousand and fifty shillings (Kshs 903.050/=) for the injuries contrary to the precedents and submissions urged before them.
 - c. That the learned Magistrate erred in law and in fact by misdirecting herself and failing to consider, appricate and uphold the Appellants Defence and entered judgment for the plaintiff against the Defendant therein.
 - d. That the trial Magistrate erred in law and in fact in making an excessive award to the respondent as stipulated in the Judgement.



- e. That the trial Magistrate erred in law and in fact in coming to the conclusions and the Judgement she came up with was contrary to the precedent and the submissions argued before her.
8. The Appellant urged the court to find that this appeal has merit, it be allowed and the award of the trial Magistrate be set-aside and/or be varied and be replaced with a more moderate award.

C. Analysis and Determination

9. I have considered the pleadings, evidence presented and submissions of both parties filed in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
10. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.
11. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the civil procedure Act a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316.

(i) Liability

12. The appellant's in their memorandum of appeal has challenged both quantum and liability. As regards liability, the Appellants failed to call any witness to rebut the evidence of the respondent as relates to how the accident occurred. The appellants therefore failed to prove the particulars/facts alleged as pleaded in their statement of defence filed and the trial court was therefore right in awarding liability at 100% as against them.
13. In the case of *shaneebal limited Vs County Government of Machakos* (2018) eKlr , Odunga J made a similar determination, while relying on the case of *Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others Nairobi* (Millimani) HCCS No 1243 OF 2001 where it was held that;
- “ it is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged”
14. Similarly In *Motrex Knitwear Vs Gopitex Knit wear Mills Ltd Nairobi* (Millimani)HCCC NO 834 OF 2002 Lessit J citing the case of *Autar Singh Bahra & Another Vs Raju Govindji*, HCCC NO 548 OF 1998 where it was appreciated that;
- “ Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence



rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail.”

(ii) Quantum

15. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004] eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages in the following terms: -

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage’s awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate”.

16. Similarly, in *Jane Chelagat Bor vs Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

17. The appellant challenged the General damage award of Kshs.700,000/= and stated that the same was inordinately high and was not commensurate with the injuries suffered. The 1st Medical report by Dr. Cyprianus Okoth Okere dated 22nd January 2020 had confirmed that indeed the respondent had suffered a fracture of the left tibia and fibula and assessed her disability at 30%. The respondent later underwent a second medical assessment done by Dr Waithaka Mwaura and he did observe that the respondent has sustained sever Skeletal tissue Injury and under went surgical correction, but was yet to fully recover. She still walked with the Aid of crutches and the degree of permanent injury was assessed at 18%.
18. Relying on the cases of *Tarbo Transports Ltd Vrs Absalom Dova Lumbasu* (2015) Eklr , *Amritlal S. Shah Wholesalers & Another Vrs Joshua Ekeno*(2012), *Zacharia Mwangi Njeru Vrs Joseph Wachira Kanoga* (2014), *Harun Munyoma Boge Vrs Daniel Otieno Agulo* (2015) eklr & *Civicon Limited Vrs Richard Njomo Omwancha & 2 others* (2019) eklr, where average award was given between 300,000/= to 500,000/= for similar injuries suffered the appellant urged this court to reduce the General damages awarded to match similar awards.
19. The respondent on the other hand urged this court to uphold the award as the respondent did suffer multiple fracture injuries and produced medical documents to support her claim. She had suffered fracture of the left tibia, fracture of the left fibula, had recurrent pain on the left leg with inability to carry heavy load and/or to walk fast or run. She still had a surgical scar on her leg and had a permanent incapacity of 30% as stated by Dr C Okere in his medical report. The award of Kshs.700,000/= was fair considering that similar injury claims had attracted far much higher awards. Reliance was placed



on Dickson Githae Kibue Vrs Lucy Wanjiku Nderitu (2019) eklr, Civil Appeal No 12 of 2015, Dorcas Wangithi Mwaura Vrs Samuel Kiburu Mwaura & Another, Civil Appeal No 58 of 2013 and Mt Longonot Medical services Limited & Another Vrs Andason Kitonyo Kinyenze, 2017 Civil Appeal No 7 of 2014. Where awards given were in the range between Kshs.1,000,000/= to Kshs.2,000,000/=

20. Considering the circumstances of this case and the evidence adduced, it has not been proved by the appellant that the trial magistrate acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. The award of Kshs.700,000/= for the multiple fracture injury which the respondent sustained, was reasonable and fair when considered with similar injury awards and for good measure she should have been awarded a slightly higher amount given that she suffered triple fracture

E. Disposition

21. This appeal therefore lacks merit and the same is dismissed with costs to the respondent.
22. The said costs are assessed at Kshs.170,000/= all inclusive.
23. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 30th day of July, 2024.

In the presence of: -

No appearance for Applicant

No appearance for Respondent

Susan/Sam Court Assistant

