



**Odeyo v Kevonge (Civil Appeal 085 of 2022)
[2024] KEHC 9811 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9811 (KLR)

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

CIVIL

CIVIL APPEAL 085 OF 2022

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

WILLIAM NYINKULI ODEYO APPELLANT

AND

COLLINS KEVONGE RESPONDENT

*(Being an appeal from the judgment of Hon. D. W. Mburu Milimani
MCCC No. E6980 of 2020, delivered on 28th January 2020)*

JUDGMENT

1. William Nyinkuli Odeyo the appellant herein was sued by Collins Kevonge the respondent for general and special damages arising from an accident that occurred on or around 22/06/2020 along Argwing Kodhek road. It is stated in the plaint that the appellant's authorized driver drove, managed and controlled motor vehicle registration number KCA 088D causing it to hit the respondent's motor cycle registration number KMEU 976E as a result of which he sustained serious bodily injuries and suffered loss and damage.
2. The appellant in his defence denied the claim and the matter proceeded to full hearing. Thereafter the trial court delivered Judgment in favour of the respondent at 100% liability, general damages Ksh 750,000/=, special damages 3,550/= plus costs and interest.
3. Being aggrieved by the Judgment the appellant filed this appeal citing the following grounds:
 - i. The learned Magistrate erred in law and in fact by failing to be guided Order 13 Rule 2 of the Civil Procedure Rules. 2010 with regard to Plaintiffs testimony and admission of - facts made therein, at the hearing of the mains suit.



- ii. The learned Magistrate erred in law and in fact by failing to take into account the pertinent issues raised in the appellants' submissions.
 - iii. The learned Magistrate erred in law and in fact by failing to appreciate the appellant's contentions and arguments.
 - iv. The learned Magistrate erred in law and in fact by disregarding the evidence on record thus arriving at an erroneous decision.
 - v. The learned Magistrate misdirected himself by considering erroneous facts and evidence.
 - vi. The Learned Magistrate's ruling consequently occasioned a miscarriage of justice.
4. The Appeal was canvassed by way of written submissions.

Appellant's submissions

5. These were filed by Diro Advocates LLP and are dated 15th March, 2024. Counsel identified one issue for determination being whether the appeal should be allowed and the judgement be set aside, quashed and substituted by this court's orders.
6. Counsel submitted that PW1, a police officer testified that the motor cycle belonging to the respondent was to blame for the accident and his evidence was corroborated by the testimony of PW2 (the respondent). That the respondent failed to prove his case on a balance of probabilities. He urged the court to apportion liability at the ratio of 90:10 in favour of the appellant. Counsel further submitted that the respondent failed to prove his claim for special damages since he had produced invoices indicating the expenditure incurred as a result of the accident but failed to support the same by providing corresponding payment receipts. He urged the court to be guided by the decisions in *Hahn v Singh* Civil Appeal No. 42 of 1983 [1985] KLR 716 and *Joseph Kimani & Another v James Kangara Kahanya* [2017] eKLR.
7. On the award for general damages counsel urged the court to be guided by the following cases;
 - i. *Buds and Bloom Limited v Lawrence Emusungut Obwa* [2016] eKLR where the court reduced an award of Kshs 70,000/= to Ksh. 50,000/= where the plaintiff suffered a deep cut wound on the left leg and soft tissue injuries on the leg. 21.
 - ii. *Kipkere Limited vs Peterson Ondieki Tai* [2016] eKLR Kshs 30,000.00 was awarded for the following injuries; deep cut wound on the left leg, chest contusion and bruises on the left shoulder.
 - iii. [*Rege v LA \(Minor suing through her father and next friend GAA\) \(Civil Appeal E111 of 2021\)*](#) [20227] KEHC 16634 (KLR) (20 December 2022) (Judgment), where the Court of Appeal overturned the decision of the trial court which had awarded 100% liability, Kshs 400,000.00 in general damages and kshs 6,605.00 special damages in favor of the respondent.
8. Counsel urged the court to award general damages amounting ksh. 40,000/= and apportion liability between the parties at the ratio of 90: 10 in favour of the appellant.

Respondent's submissions

9. These were filed by Waiganjo Wachira & Company Advocates and are dated 28th March, 2024. Counsel identified three issues for determination.



10. The first issue is whether the trial court erred in its findings on liability. He submitted that the trial magistrate considered the evidence tendered by both parties, and found the appellant to have solely caused the accident and so held him 100% liable. The court's attention was drawn to the decisions in *Mary Njeri Murigi v Peter Macharia & Another* [2016] eKLR and *Juma v Rabote* (Suing as the legal representative of the Estate of Leonard Taabu Rabote (Deceased) (Civil Appeal E044 of 2022) [2023] KEHC 2909 KLR which quoted with approval the case of *Masembe v Sugar Corporation and Another* [2002] 2 EA 434.
11. On the second issue, that is whether the trial court erred in its finding on general damages, counsel urged the court to be guided by the following cases:
 - i. *Savco Stores Ltd Vs. David Mwangi Kimotho* (2017) eKLR, where the appellate court awarded of Kshs. 800,000/= for fracture of the left tibia & left fibula, fracture of the left elbow & deep cut wound on the left forehead & consequently suffered 20% disability.
 - ii. *Alphonza Wothaya Warutu & Another Vs. Joseph Muema* (2017) eKLR, where the court awarded the Plaintiff general damages of Kshs 800,000/= for deep cut wound on the forehead, compound fracture on midshaft of the right humerus, compound fracture of the right tibia & deep cut wound on the right leg.
 - iii. *Pestony Limited & Another Vs. Samuel Itonye Kagoko* [2022] eKLR, where the high court set aside the Judgment of the lower court and substituted it with an award of kshs. 800,000/= on fracture of the left femur (mid-shaft) and swollen tender thigh.
12. Lastly, on what prayers the court should grant counsel urged the court to find the trial court's findings on liability and quantum to be justified and uphold the Judgment. He further urged the court to find the appeal to lack merit and dismiss it with costs.

Analysis and determination

13. This being a first appellate court, I am guided by the dictum in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1968] E.A. 123, where it was held that the first appellate court has the duty to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.
14. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse 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”
15. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are:
 - i. Whether the trial magistrate erred in finding the appellant wholly to blame for the accident.
 - ii. Whether the award on general damages was inordinately high.



16. On the first issue, I refer to the Court of Appeal decision in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR where it stated

“The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in *Stapley V Gypsum Mines Ltd (2) (1953) A.C 663* at pg 681 as follows;

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally”.

17. Further, in *Farah V Lento Agencies [2006] 1 KLR 124, 125*, the Court of Appeal held that:

“Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame”.

18. Guided by the above cited authorities it is my view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.
19. This court has considered the evidence adduced before the trial court. It is not in dispute that the appellant was the driver of motor vehicle registration number KCA 088D which collided with motor cycle registration number KMEU 976E belonging to the respondent. During trial the respondent called three witnesses, PW1 No. 77168 PC Bobby Okal of Kilimani Police Station informed the court that the respondent who was the rider of the motor cycle was to blame for overlapping. He produced the police abstract which was marked as P.Exhibit 9.
20. The respondent who testified as PW3 did not tell the court much on how the accident occurred. He only informed the court that he was hit by the appellant’s motor vehicle which was overtaking. On cross examination, he stated that he was riding on the left lane heading up towards Yaya Centre from Central Business District. That the appellant’s vehicle was going down while overtaking when it came to his lane. He added that he had been a rider for 4 years and had a valid driving licence but he did not file it in court.
21. The trial court in its judgment faulted the appellant for not calling evidence to challenge the respondent’s evidence. The court observed further that the appellant’s defence was not proved and its contents remained as mere allegations. For the said reasons the appellant was found 100% liable.



22. After analysing all the evidence above, this court notes that the only evidence on record is that from the respondent. Even though the appellant did not call any evidence the trial court had a duty to consider all the evidence placed before it to make a reasonable determination. PW1 who is a police officer from Kilimani police station confirmed that the accident was reported at the said station. He had with him in court the occurrence book. He explained that the respondent was blamed for overlapping which is an offence. The appellant, from the evidence was also overtaking hence the accident. I am of the view that the respondent's case would only be said to be unchallenged if PW1 had not given the evidence that he did. The said evidence clearly contradicted that of the respondent (PW3) on the cause of the accident.
23. In the current scenario the court would have to do a balancing act. Who between the motorcycle rider and the motor vehicle driver was responsible for this accident? I am persuaded that from the evidence adduced both the appellant and the respondent are to blame. Making that decision is not easy but that is where we find ourselves. I am persuaded on this by the finding in *Christine Kalama v Jane Wanja Njeru & another* [2021] eKLR. The rider cannot be allowed to carelessly overlap on a highway in total disregard of other road users. The same goes for motor vehicle drivers who overtake without regard to other road users. In the circumstances of this case I find justice to demand apportionment of liability in equal measure of 60:40 in favour of the respondent.
24. In addressing the second issue, on whether the award on general damages was inordinately high, I will rely on the Court of Appeal discussion in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another* (No.2) (1987) KLR 30 stated as follows:-
- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”
25. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated as follows: -
- “comparable injuries should attract comparable awards”.
26. In awarding quantum, the trial magistrate considered the treatment records from Mama Lucy Kibaki hospital and the Kenyatta National hospital together with the P3 form and the medical reports by Dr. G.k Mwaura which confirmed the injuries sustained by the respondent and permanent incapacity on the right lower limb at 5%. He also considered the authorities relied on by both parties and went ahead to award general damages amounting to kshs. 750,000/=.
27. This court has considered the said award as made by the trial magistrate based on authorities cited by the parties in submissions at the trial court. The appellant in his submissions at the trial court cited the case of *Buds and Bloom Ltd v Lawrence Emusugut Obwa* (supra), where the plaintiff was awarded general damages amounting to kshs. 50,000/= for a deep cut wound on the left leg and soft tissue injuries on the leg. The respondent on his part equally relied on several cases in support of his claim. The said cases include; *Savco Stores Ltd v David Mwangi Kimotho*(supra) where the plaintiff was awarded kshs. 800,000/= for suffering fracture of the tibia and fibula. *Hussein Abdi Hashi v Hassan Noor* (supra) where the plaintiff was awarded kshs. 800,000/= for suffering fracture of the left malleolus and metatarsal and laceration to the ankle.



28. The respondent pleaded the following injuries while relying on the medical reports as: Fracture of the right knee, Cut wound on the 5th toe, Cut wound involving right patilla ligament, Bruises and pain in the right knee.
29. A medical report from Mama Lucy Kibaki Hospital dated 29th July, 2020 plus a report by Dr. G. K. Mwaura from Kinoo Medical Clinic dated 15th October, 2020 (pages 10 and 13 of the record of appeal) were produced. They simply confirmed what was pleaded by the respondent. In fact, Dr. G. K. Mwaura indicated that the respondent was expected to heal within one year. He however assessed the permanent degree of incapacity at 5%. Nothing has been stated in the report to show what the incapacity was all about. Nothing peculiar was said about the fracture to the knee.
30. The trial court relied on the cases of Hussein Abdi Hashi Vs Hassan Noor [2004] eKLR; Abdi Salaam Nwon v Kenya Tea Development Authority HCCC No. 26 of 1999 and Savco Stores Ltd (supra) in each of which an award of Ksh 800,000/= was made for general damages. In this appeal the respondent cited the cases of Savco Stores Ltd (supra), Alphonza Wothoya Warutu & Another (supra) Pestony Limited & Another (supra) where again each of the courts awarded Ksh 800,000/=
31. The issue this court must address here is the similarity of the injuries suffered. In the Alphonza case the victim suffered a deep cut wound on the forehead, compound fracture on the midshaft of the right humerus, compound fracture of the right tibia and deep cut wound on the right leg. These were more serious injuries compared to what the respondent herein suffered. In the Savco Stores Case (supra) the victim suffered a fracture of the left tibia and left fibula; fracture of the left elbow and deep cut wound on the left forehead and consequently suffered 20% disability. Again, these were more serious injuries compared to what the respondent in this case suffered.
32. Relying on the cases of Kemfro Africa Ltd (supra) and Odinga Jackton Ouma (supra) I find that the award for general damages by the trial Magistrate was excessive and inordinately high.
33. In the case of Jikan Nagra V Abednego Nyandusi Oigo [2018] eKLR the court awarded Ksh 450,000/= for injuries similar to those suffered by the respondent. Similarly, in Mwavita Johathan V Silvia Omunga [2017] eKLR the court awarded Ksh 400,000/= for slightly more serious injuries than what the respondent suffered.
34. In my assessment, I find an award of Ksh 500,000/= to be appropriate in the circumstances of this case.
35. On special damages, I confirm that they were specifically pleaded. What was proved was Ksh 3,000/= for the medical report. There was no document nor invoice to confirm payment of Ksh 550/= for copy of records.
36. The upshot is that the Appeal has merit and is allowed. The Judgment of the trial court is set aside and substituted as follows:
 - i. Liability 60:40 in favour of the respondent
 - ii. General damages KSh 500,000/= less 40% contribution (200,000/=) Balance = Kshs 300,000/=
 - iii. Special damages Ksh 3,000/=.

I therefore enter Judgment for the respondent in the sum of Ksh 303,000/= (three hundred and three thousand shillings) plus interest and costs from the date of Judgment in the subordinate court.
- (b) No costs for the Appeal.



38. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

