



**Osore & another v Masese (Civil Appeal E821 of 2023)
[2024] KEHC 16786 (KLR) (Civ) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16786 (KLR)

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

CIVIL

CIVIL APPEAL E821 OF 2023

NIO ADAGI, J

AUGUST 14, 2024

BETWEEN

STEPHEN ETEMESI OSORE 1ST APPELLANT

PLASTICS & RUBBER INDUSTRIES (2005) 2ND APPELLANT

AND

PHILIP NAOMI MASESE RESPONDENT

*(Being an Appeal from the Judgment of Hon. Caroline Ndumia
(SRM) in Milimani Small Claims Court in SCC No. 2466 of 2023))*

JUDGMENT

1. The Respondent in the Statement of Claim dated 30.5.2023 claimed that on or about 5.7.2023, motor vehicle registration number KAU was negligently and carelessly being controlled along Mombasa Road near General Motors (GM) within Nairobi County that it rammed into the motor vehicle KBN 421K occasioning the Respondent severe injuries.
2. The Appellant in the statement of defence denied the Respondent's claim and prayed for the same to be dismissed with costs to the Appellant.
3. The matter proceeded by way of Section 30 of the SCCA and written submissions.
4. Upon consideration of the claim, the trial court found as follows -

Liability

The claimant in his witness statement stated that he worked as a conductor and on 5/5/2023 while on board motor vehicle KBN 421K along Mombasa Road near General Motors within Nairobi County the 2nd Respondents motor vehicle KAU 347Y occasioned an accident by ramming into the motor



vehicle he was travelling in. The claimant alleged that he blamed the driver of motor vehicle KAU 247Y for hitting the motor vehicle KBN 421K and causing the accident. The police abstract produced by the claimant confirmed occurrence of the accident and that the claimant was a conductor. The respondent produced investigation reports which showed that four passengers were in the vehicle, and also produced police abstracts with the driver, three other passengers as well as the abstract for the claimant who is also confirmed as a passenger in the investigation report by GA insurance Company Ltd. Therefore, in consideration of all the evidence on record it is proved that the claimant was a conductor in the motor vehicle KBN 421k

5. The 1st Respondent in his statement stated that on 5/5/2023 he was driving motor vehicle KAU 247Y in the inner lane and on reaching at General Motors stage there was a matatu that was ahead of him in the middle lane. That it changed lanes and when he hooted it swerved back to its lane and he swerved to his right to avoid ramming onto its rear but due to the short distance and there was a ditch on the right he hit the right rear side and all the vehicles stopped.
6. The conductor Harrison June in his statement stated that the matatu switched lanes to the lane of the Respondent's vehicle and when the driver tried to swerve to the left there was a ditch so he hit the matatu on the right rear tyre.
7. The trial court then considered as follows:

“in taking into account the circumstances of the accident, it is not disputed that the Claimant was a conductor in motor vehicle KBN 421K therefore for all intents and purposes of the claim he was a passenger and therefore had no control over how either of the motor vehicles were being driven. The Respondent did not institute Third Party proceedings against the driver of vehicle KBN 421K and therefore this court finds that the 1st Respondent 100% liable for the accident and the 2nd Respondent vicariously liable for the acts of the 1st Respondent”.

Quantum

8. The trial court then went ahead to consider evidence and the Claimant's submissions in the absence of the Respondents' submissions which were not on court record and found the Respondents 100% liable. The trial court awarded the Claimant general damages of Ksh.600,000/-, special damages of Ksh.5,550/- plus costs of the claim and interest.
9. The Appellants in this appeal being aggrieved by the said judgment appealed to this court raising 11 grounds of appeal in the Memorandum of appeal dated 21.8.2023.
10. This being a first appeal, this court is reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) EA 123. (1958) E.A page 424.
11. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the



appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the 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 first appellate court had discharged the duty expected of it.

12. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
13. I have considered the grounds of appeal and in summary the Appellants seem to be appealing the judgment on both liability and quantum to the extent that i) the Respondent was equally to blame for the occurrence of the accident, ii) the documents relied upon by the Respondent were fraudulent and iii) that the general damages awarded were manifestly excessive as to be erroneous *visa vis* the injuries sustained by the Respondent.
 - i. Whether the Respondent was equally to blame for the occurrence of the accident,
14. From the evidence on record and I agree with the trial court that the Respondent was a conductor in motor vehicle KBN 421K therefore for all intents and purposes of the claim he was a passenger and therefore had no control over how either of the motor vehicles were being driven and cannot be held liable in any way.
 - ii. Whether the documents relied upon by the Respondent were fraudulent.
15. The Appellants before the trial court put in a letter dated 20th July 2023 stating that the Respondent did not appear in the accident and emergency outpatient register at the Mama Lucy Kibaki Hospital but the same document also requested for copies of attendance cards to note the OP/NO. The investigation report by GA insurance company limited stated that the records officer at Mama Lucy Kibaki Hospital stated that they could not trace the documents of any of the patients and the alleged treatment notes were alleged to be fraudulent. I have considered this issue and the finding of the trial court on the same and I agree fraud was not “pleaded and strictly proved to the required standard and adopt the finding in the case relied upon by the trial magistrate of *Kinyanjui Kamau vs George Kamau [2015] eKLR* where the Court expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: “..We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud. The standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities: In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis mine)
16. The Appellants in the Response to the Statement of claim did not plead fraud the same was only been inferred from the documents filed by the Appellants. There is also no evidence of the Appellant referring the claimant for a second medical report to verify the injuries sustained.
 - iii. Whether the general damages awarded were manifestly excessive as to be erroneous.



17. The fact that in an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lobia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR* thus:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage".

18. In the case of *Harun Muyoma Boge v Dr. Daniel Otieno Agulo (2015) eKLR*, the court held that:-

"The assessment of general damages is not an exact science and the court in doing the best it can takes into account the nature and extent of the injuries in relation to awards made by the court in similar cases. It is ensured that the body politic is not injured by making excessively high awards and that the Claimant is fairly compensated for his or her injuries"

19. Rule 5(3)(a) of the SCCA Rules provides that a person claiming compensation for personal injuries pursuant to section 12 (1) (d) of the Act shall attach to the statement of claim a medical report from a licensed medical practitioner.

In this case the claimant attached the medical report from Dr. Nzeti in addition to the medical report from Mama Lucy Kibaki Hospital which all confirm injuries being fracture of the jaw, tender anterior chest wall and tender lower jaw. The trial court awarded Ksh.600,000/- in general damages.

20. It is noted that the Respondent suffered Maim. He sustained severe soft tissue injuries and fractured bone which cause him untold pain and suffering. This court finds the award by the learned trial magistrate was not manifestly excessive in the circumstances. I am thus unable to find fault with the finding of the learned magistrate as she did not consider wrong principles in arriving at the award of Kshs. 600,000/-. The authority relied upon was sound in that the effects of inflation since 2017 would definitely lead to an award higher than the Kshs. 500,000/- awarded in 2017. Hence the award by the learned magistrate must be upheld.

21. As regards the aspect of special damages, I note that the appeal herein only targeted the general damages and therefore the said special damages as awarded by the trial court shall remain intact.

22. In the result it is my finding that the appeal lacks merit. The same is dismissed with no order as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF AUGUST 2024

HON. LADY JUSTICE NOEL I. ADAGI

