



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oburo & another v Musya (Suing as the Personal Representative of the Estate of Johnson Sikuku Wafula) (Civil Appeal 17 of 2022) [2024] KEHC 11618 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11618 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL 17 OF 2022  
FR OLEL, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**JULIUS OJOO OBURO ..... 1<sup>ST</sup> APPELLANT**

**POWERDOM LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSEPH MUNINI MUSYA (SUING AS THE PERSONAL REPRESENTATIVE OF  
THE ESTATE OF JOHNSON SIKUKU WAFULA) ..... RESPONDENT**

*(Being An Appeal From The Judgment & Decree of Delivered By Honourable  
M.onkoba In Mwingi CMCC No 164 of 2017 Dated 16Th February 2022)*

**JUDGMENT**

**A. Introduction**

1. The Appellants was the defendants in the primary suit, where they had been sued as the insured and beneficial owner of Motor vehicle registration Number KBR 085B Isuzu Frr Omnibus Matatu (hereinafter referred to as the suit motor vehicle). The respondent's son, (the initial plaintiff, who passed on during subsistence of the suit) alleged that on 26<sup>th</sup> April 2017, he was a lawful passenger on the suit motor vehicle, driven by the appellants driver and/or authorized employee and agent, when the same was so negligently and carelessly driven controlled that the said suit motor vehicle was allowed to veered off the road and overturned thus occasioning the now deceased plaintiff serious injuries, loss and damage.
2. The Appellants did file their statement of defence where they denied all the allegations made with respect to ownership of the suit motor vehicle and the said accident. Further they denied the particulars of negligence attributed to them and/or their driver and in the alternative averred that if an accident did occur, the same was substantially contributed to by the respondent's son negligence as he had failed to heed the instruction given for his safety. On 13<sup>th</sup> June 2018, the appellants sort leave to enjoin a



third party one David Shikuku Wafula and the same application was allowed. On 6<sup>th</sup> September 2018, they requested for interlocutory judgment to issue as against the said 3<sup>rd</sup> party who had failed to enter appearance within the prescribed period.

3. During trial, the respondent husband died and leave was granted to the respondent to be substituted as the legal representative of her late husband. The suit did subsequently proceed and she testified and called two (2) witnesses to support her case. The Appellants on the other hand called one witness to testify on their behalf. The trial Magistrate after considering the evidence adduced and submissions made did find that the Appellant's were 100% liable for the accident and proceeded to assess general damages for pain and suffering at Kshs.500,000/= Special damages Kshs.8,625/= plus costs and interest of the suit.

## **B. The Appeal**

4. The Appellants being dissatisfied by the whole judgment did file their Memorandum of Appeal dated 13<sup>th</sup> April 2022 and raised the following grounds of appeal namely: -
  - a. That the learned Magistrate erred in fact and in law in finding that the respondent was entitled to liability apportionment of 100%.
  - b. That the learned Magistrate erred in law and in fact in finding that the respondent was entitled to General damages of Kshs.500,000/=
  - c. That the learned Magistrate erred in law and fact in finding that the respondent was entitled to general damages that were too high in view of the evidence tendered. The same was too high and the same is not justified.
  - d. That the learned Magistrate erred in fact and in law in failing to consider the Appellants evidence on quantum and liability and submissions thereto.
  - e. That the learned Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
5. At the hearing, the Plaintiff called three witnesses. PW1 Dr Muli Simon Kioko testified that he was a general medical practitioner based at Matuu. On 19.05.2017, he had examined the deceased plaintiff at his clinic. He was 25 years old, and had been involved in a road traffic accident which occurred on 29.04.2017 along Thika – Mwingi highway. He was initially attended to at Mwingi level 4 hospital. His major complaints were pain, swelling of the left arm and he was unable to lift the left upper limb. The left distal humerus had a fracture and POP had been applied and a sling suspension placed to hold it. PW1 produced his medical report as an Exhibit and in cross examination confirmed that the deceased plaintiff had suffered fracture of the left elbow bone and assessed the injuries to be grievous in nature.
6. PW2, the respondent herein confirmed that the deceased was her son and had unfortunately died on 28<sup>th</sup> April 2019. She had applied for letter of administration and was the administrator of the said estate. She confirmed that her son had been involved in a road accident and as a result had sustained serious injuries. She produced into evidence her bundle of document's which she relied on to prove her case and urged the court to award her compensation on behalf of the deceased estate. Upon cross examination PW2 confirmed that her son died two years after the accident and could not expressly state if the injuries initially sustained, were the cause of his death as he had died at home and no post mortem was carried out.
7. PW3 PC Justin Mureithi, stated that he was attached to Mwingi police station, and performed traffic duties. He had with him in court an O.B recorded on 29.04.2017 at around 12.10 hrs. It stated that a



driver one Caxton Muranguli Ngaliuuli was driving the suit motor vehicle along Mwingi - Thika Road and on reaching Manyuni area, he had lost control of the said motor vehicle and had veered off the road and overturned, facing Mwingi direction. Several passengers were injured including the deceased plaintiff and they had been rushed to Mwingi level 4 hospital for treatment. The accident only involved one Motor vehicle and he produced the police abstract as Exhibit 12. Upon cross examination PW3 confirmed that he was not the investigating officer nor did he visit the accident scene, but as per the O.B report, which he had in court, the accident involved one motor vehicle. He had no record to indicate that a second motor vehicle had been involved in the same accident.

8. DW1 Corporal Stephen Kuria, testified and stated that he was also a police officer based at Mwingi police station, but was not the investigating officer of the accident which occurred on 29.04.2017. The same case was investigated by Police constable Mburu and Chief Inspector Obala. Both were no longer based at Mwingi police station as they had been transferred. He produced the police abstract that lay blame on the driver of trailer KBQ 745P/ZB 7507 for causing this accident and produced the said police abstract, which had had as Exhibit D1. Upon cross examination DW1 stated he did not know the circumstance's as to how the accident occurred but according to O.B number 3 of 30/4/2017, the accident was self-involving as the driver of the suit motor vehicle had lost control of the omnibus, veered of the road to the rear side and landed on a ditch. The O.B did not mention the trailer anywhere and no charges were preferred as against the suit motor vehicle driver.

### C. Analysis & Determination

9. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).
10. 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 v Varkey Ouseph* AIR 1969 Keral 316
11. In *Coghlan v Cumberland* [1898] 1 Ch, 704 , the court of appeal of England stated as follows;

“ Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises, which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.
12. The appellant did challenge both the trial courts finding both on liability and quantum.



## i. Liability

13. The appellant submitted that the trial magistrate wrongly evaluated the facts presented by their witness and arrived at the wrong finding. The respondent and her witness did not witness the said accident and therefore did not prove negligence on the part of the appellants driver. secondly the evidence of DW1 did prove that it was the third-party motor vehicle, which was to blame for the accident, since the said motor vehicle had rammed into the side of the suit motor vehicle and caused it to veer off the road. Since the third party though served, deemed it fit not to file any statement of defence, liability ought to have been placed 100% on his doorstep and urged this court to so find.
14. PW3, PC Justin Mureithi, did have the O.B of 29/4/2017 when he testified in court and therein it was reported that at around 12.10 hours, a driver named Caxton Muranguli Ngaliuli was driving the suit motor vehicle along Mwingi -Garissa road. Upon reaching Manyuni he lost control of the suit motor vehicle, it veered off the road and overturned facing Mwingi direction. The accident was self-involving and the O.B contained details of the first report made. The records did not indicate involvement of a second motor vehicle.
15. DW1 Cprl Stephen Kuria, confirmed that he was not the investigating officer and produced the second police abstract, which blamed the 3<sup>rd</sup> party Motor vehicle registration Number KBQ 745P/ ZB 7507 -Trailer for causing the said accident. In cross examination DW1 upon perusing the O.B confirmed that the accident was self-involving and no trailer/ second suit motor vehicle was placed at the accident scene. While under reexamination, DW1 again changed his story and stated that he had been informed by the investigating officer that the alleged trailer was intercepted at Nguutani and taken to Nguutani police station. After investigations the trailer driver was blamed for the said accident.
16. The issue of apportionment of liability was discussed in *Khambi and another v Mahithi and another* [1968] E.A 70 where it was held that;

“It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.” Similar decisions have been reached in *Mabendra M Malde v George M Angira* Civil Appeal No 12 of 1981.
17. In this matter, I do concur with the finding of the trial court, that the subsequent police abstract adduced into evidence by the Appellant did not conclusively prove the presence and involvement of the third-party motor vehicle in the accident which occurred on 29.04.2017. As noted by the said trial court, the parties did present three different police abstracts before court. The first one dated 29.04. 2017 was produced as an exhibit P12 by PW3. The appellants filed the second police abstract dated 1<sup>st</sup> May 2017 and annexed it to their supplementary list of documents dated 9<sup>th</sup> November 2018. They further annexed the third police abstract in their further list of documents dated 30<sup>th</sup> June 2020, the said abstract too was also dated 1<sup>st</sup> May 2017, but had a bold inscription made in bold ink, which inscription did add motor vehicle registration Number KBQ 745P/ZD 7507. It is the second police abstract which was produced by DW1 as exhibit D1, to prove involvement of the 2<sup>nd</sup> suit motor vehicle in this accident.
18. DW1 was not the maker of the subsequent police abstract produced (Exhibit D1) and no explanation was given by the appellants as to why the same document filed two years earlier did not have the additional hand scribed details, subsequently inscribed into the police abstract produced into evidence



as DW1. It was common ground that the O.B record contains first incident report details, and the details contained in the police abstract are usually extracted from this source. PW3 had the OB in court and it clearly indicated that the accident was self-involving and this evidence was not rebutted by the appellant.

19. The respondent therefore did discharge legal and evidential burden place on her as provided under section 107, 109 & 112 of the *Evidence Act*, Chapter 80 laws of Kenya and indeed proved that the said accident was self-involving. The evidential burden to disapprove the respondent claim, then fell on the appellants discharged as provided for under section 108 of the *Evidence Act*, Chapter 80 laws of Kenya which provides that, “ the burden lies in that person who would fail if no evidence at all were given as either side”. The appellant ought to have called the driver of the suit motor vehicle and the two investigating officer Police constable Mburu and Chief Inspector Obala to come explain the “after thought” amendments made to the police abstract and further to explain what occurred on the said night. The said witnesses did not testify nor did the appellants witness produce the scene of accident sketch map or photographs of both motor vehicles to support their contention. In short, the appellants introduced a tampered with police abstract, which introduced a third party but did not prove the involvement of the said third party motor vehicle in this accident.
20. The trial court finding that the Appellants were 100% liable for this accident was therefore correct and the Appellants grounds of Appeal based on the same has no merit and are dismissed.

#### **(ii) Quantum**

21. The Court of Appeal in *Catholic Diocese of Kisumu v 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”.

22. The Court of Appeal in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 also held that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

23. From the record, it is not in dispute that an accident occurred involving the suit motor vehicle and the respondent’s son, did suffer bruises, pain and swelling of left arm, which had a fracture of the humerus. The respondent did produce the treatment notes and discharge summary from Mwingi General



hospital, P3 form and a medical report by PW1 Dr Muli Kioko dated 19<sup>th</sup> May 2017, which confirmed the said injuries. The appellants did submit that for the injuries suffered, the award of Kshs.500,000/= was inordinately high and should be disturbed and reduced accordingly. The appellants relied on *Harun Muyoma Boge v Dr Daniel Otieno Agulo*, Migori HCCA No 86 of 2012, *Naomi Momanyi v G4S Security services Kenya limited* [2018] eKLR & *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] e KLR, where for similar injuries an award of Kshs.300,000/= was awarded.

31. The respondent on the other hand urged the court to maintain the award as it was fair and within range of similar injury decisions. The injury sustained was severe in nature and extent and as per the doctor's report, there was tenderness, oedemous formation and bone angulation at the left distal humorous bone. These injuries were so severe that the deceased plaintiff could not use the said hand to lift any object. Reliance was placed on *Global Allied Industries v Gerald Mwangi Muiruri* [2015]eKLR, where for similar injury a sum of Kshs.700,000/= was awarded.
24. I have taken into consideration both parties submissions and also taken into consideration the sentiments by Madan (JA) (as he then was),in *Ugenya Bus Service v Gachiki*,[1976-1985] EA 575, at page 579:

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.”

25. I do find that after considering the nature of injuries suffer, the age of the cited cases, the adjustment for inflation, the respondent's pain and suffering and period of partial morbidity/post-accident pain due to the injuries suffered. I do not find that the award was inordinate nor did the trial magistrate make an error of principal and/or took into account extraneous matter's in determining the quantum payable. See *Pestony limited & Another v Samuel Itonye Kagoko* [2022] eKLR & *Jacaranda Bodaboda operators & Another v Nyasero* (civil Appeal 774 of 2022), [2023] KEHC 23806(KLR)

## **E.Disposition**

26. Accordingly, having considered all the grounds of Appeal raised in this Appeal I do find that the same are not merited and dismiss this Appeal with costs.
27. The Appellant is awarded costs of this Appeal which is assessed at Kshs.150,000/= all inclusive.
28. It is so ordered.

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

**FRANCIS RAYOLA OLEL**

**JUDGE**

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

In the presence of:

No appearance Appellant

Ms Sirme Respondent



Susan/Sam Court Assistant

