



**Ventures & another v Mutai (Civil Appeal E027 of 2021)
[2024] KEHC 13424 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E027 OF 2021
RL KORIR, J
OCTOBER 31, 2024**

BETWEEN

VISIONS GEAR VENTURES 1ST APPELLANT

KARSIS ENOLE NTUTU 2ND APPELLANT

AND

WELDON MUTAI RESPONDENT

*(Being an Appeal from the Judgment of the Principal Magistrate, K. Kibelion
at the Principal Magistrate's Court at Bomet, Civil Suit Number 52 of 2018)*

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellants (then Defendants) for general and special damages arising from a road traffic accident on 29th August 2017. He claimed that while walking as a pedestrian along Bomet-Kaplong road, motor vehicle registration number KAN 459S hit him occasioning him serious injuries.
2. The trial court conducted a hearing where both parties produced two witnesses each.
3. In its Judgment dated 8th September 2021, the trial court found the Appellants 70% liable for the accident and awarded the Respondent (then Plaintiff) a net sum of Kshs 792,785/=.
4. Being aggrieved with the Judgment of the trial court, the Appellants filed their Memorandum of Appeal dated 29th September 2021 appealing against the liability and quantum of damages and relied on the following grounds:-
 - I. That the learned Magistrate erred in law and fact in finding that the Defendants/Appellants were partially liable for the accident in issue.



- II. That the learned Magistrate erred in law and fact in failing to accord due regard to the evidence by the Defence's witnesses, the documents on record and the Defendants' submission in arriving at its Judgement on liability.
 - III. That the learned Magistrate erred in law and fact in awarding Kshs 1,000,000/= less 30% contribution under general damages for pain and suffering which was inordinately high in the circumstances.
 - IV. That the learned Magistrate erred in law and fact in failing to accord due regard to the Appellants' submissions on quantum on applicable principles for assessment of damages.
 - V. That the learned Magistrate erred and misdirected himself in law and in fact in misapplying the principles applicable to assessment of damages.
5. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in so doing, to have in mind that I have neither heard nor seen the witnesses testify. This principle was espoused in the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR

The Plaintiff's/Respondent's case.

6. Through his Complaint dated 29th May 2018, the Respondent stated that he was a lawful pedestrian walking along Bomet-Kaplong road when motor vehicle registration number KAN 459S hit him.
7. The Respondent stated that the 1st Appellant and the 2nd Appellant being in possession of the said motor vehicle and its owner and driver respectively were negligent in causing the accident and particularized the negligence in paragraph 6 of the Complaint.
8. That as a result of the accident, he suffered the following injuries:-
 - a. Compound fracture of the left leg with fractures at the proximal and distal.
 - b. Bruised abdomen.
9. The Respondent's claim against the Appellants was for special and general damages as a result of the accident.

The Appellants'/Defendants case

10. Through their statement of defence dated 26th November 2019, the Appellants denied that they were in possession or was the registered owner of motor vehicle registration number KAN 459S.
11. The Appellants denied the particulars of negligence levelled against them. That if any accident happened, it was caused solely by the negligence of the Respondent. They particularized the negligence in paragraph 7 of their Defence.
12. On this Appeal, parties were directed to file submissions to canvass the Appeal.

The Appellant's submissions.

13. Through their submissions dated 10th January 2023, the Appellants submitted that they were not liable for causing the accident. That the Respondent was drunk while crossing the road. They further submitted that PC Lwembe Nzai (PW2) stated that the Occurrence Book stated that the Respondent was drunk and that further DW1 who was the driver testified that the Respondent carelessly crossed



the road and he hit him when trying to swerve. That the Appellants' submission that the Respondent was the author of his misfortune.

14. It was the Appellants' submission that the Respondent failed to prove his case on a balance of probabilities. That he did not show how the driver could have been negligent. It was their further submission that if this court found them liable that it was only fair that they share equal liability with the Respondent. They relied on Calistus Juma Makhanu vs Mumias Sugar Co. Ltd & another (2021) eKLR.
15. The Appellants submitted that the award of Kshs 1,000,000/= as general damages was inordinately high. They proposed an award of Kshs 400,000/= and relied on Eldoret Steel Mills vs Elphas Victor Esipila (2013) eKLR, Francis Ndungu Wambui & 2 others vs VK (a minor suing through next friend and mother of MCWK) (2019) eKLR, Naom Momanyi vs G4S Security Services Kenya Limited (2018) eKLR, Wakim Sodas Limited vs Sammy Aritos (2017) eKLR and Gladys Lyaka Mwombe vs Francis Namatsi & 2 others (2019) eKLR.
16. It was the Appellants' submission that this court should interfere with the trial court's award.

The Respondent's submissions.

17. Through his submissions dated 24th April 2023, the Respondent submitted that the trial court's finding on liability was fair and just and was based on proven facts.
18. It was the Respondent's submission that he proved that the Appellants were negligent in causing the accident. That through the testimonies of PW1 and PW2, he proved that the Appellants were in control of the subject motor vehicle at the time of the accident and that the Appellants' driver failed to control the subject vehicle thereby causing an accident. It was his further submission that he proved that he sustained bodily injuries.
19. Regarding general damages, the Respondent submitted that the award of Kshs 1,000,000/= was reasonable and commensurate with the injuries sustained. That as a result of the injuries, he suffered permanent disability that was assessed at 10%. He further submitted that he produced evidence which left no doubt as to the extent of the injuries he suffered which caused him pain and suffering and further led to a loss of earning capacity.
20. It was the Respondent's submission that this court should not interfere with the trial court's award. He relied on Patrick Kinyanjui Njama vs Evans Juma Mukweyi (2017) eKLR and Finlays Horticulture Kenya Limited vs Grace Wacugu Chiira (2020) eKLR. It was his further submission that this court should not interfere with the award of Kshs 132,550/= as special damages as he pleaded and proved the same.
21. I have gone through and carefully considered the Record of Appeal, the Appellants' written submissions dated 10th January 2023 and the Respondent's written submissions dated 24th April 2023. The two issues for my determination were:-
 - i. Liability
 - ii. Quantum
 - i. Liability
22. The Respondent (PW1) stated that on the material day as he was walking towards Chebole, the subject motor vehicle hit him causing him injuries. That he blamed the driver (DW2) for causing the accident as he hit him when he was far off the road. When he was cross examined, he stated that he was on the



- right side of the road facing Chebole when the subject vehicle hit and denied being drunk at the time of the accident.
23. No. 72792 PC Ryland Lwembe Nzai (PW2) testified that the accident occurred on the material day and it was booked in the Occurrence Book as number 6/29/8/2017. That according to the Occurrence Book, PW1 was hit by the subject vehicle and the driver (DW2) was to blame for causing the accident. He produced a Police Abstract as P.Exh 2 which confirmed the occurrence of the accident. When he was cross examined, PW2 stated that according to the Occurrence Book, PW1 was drunk while crossing the road.
 24. In an interesting turn of events, PW2 also testified as DW1 and he reiterated the evidence he gave as PW2. He further stated that he was not the investigating officer. It appears that no issue was raised by either party in calling the same witness for the plaintiff and the defendant.
 25. Wesley Kipyegon Ruto (DW2) stated that he was the driver of the subject motor vehicle and that on the material day, PW1 rushed from the right side of the road crossing to the left side and he fell in the middle of the road. That the vehicle only hit him after he fell. DW2 further stated that PW1 appeared drunk and was unable to stand. When he was cross examined, he blamed PW1 for causing the accident as he was drunk.
 26. From the above, it is clear that there was no eye witness to the accident and the victim (PW1) and the driver (DW2) blamed each other for causing the accident. I have gone through PW2's evidence and it is my view that his evidence could not assist this court to determine liability. He relied on the contents of an Occurrence Book which was not produced as evidence and which was filled by the investigating officer who was not called as a witness.
 27. The allegations of PW1 being drunk therefore remained unsubstantiated and I disregard the same.
 28. The circumstances surrounding the occurrence of the accident, lead me to the conclusion that the driver (DW2) was more to blame for causing the accident than the complainant. This is because the Respondent was a pedestrian crossing the road. There was no evidence from the driver on what he did to try and avert the accident.
 29. I also do not believe that the Respondent fell down first before being hit by the motor vehicle. If he was hit when already on the ground, he would have been run over and would have suffered more severe injuries than the ones he suffered (fractured leg). I find it more probable than not that he was hit while still on his feet crossing the road. Being a pedestrian however, the Respondent owed a duty of care to himself and other road users to be careful when crossing the road.
 30. Flowing from the above, it is my view that the driver (DW2) bore more responsibility than the Respondent in causing the accident. I therefore find no fault with the trial court's apportionment of liability in the ration of 70:30 in favour of the Respondent.

Quantum

31. As per the Plaint, the Respondent suffered the following injuries:-
 - i. Compound fracture of the left leg with fractures at the proximal and distal.
 - ii. Bruised abdomen.
32. In his testimony, the Respondent (PW1) stated that after he was hit by the subject motor vehicle, he suffered a fracture on his hip joint and he was admitted at Tenwek Hospital. He produced a discharge summary as P.Exh 1a, P3 Form as P.Exh 3 and a Medical Report as P. Exh 4. When PW1 was cross



- examined, he reiterated that he suffered injuries on his left leg after being hit by the subject motor vehicle.
33. I have looked at the discharge summary (P.Exh 1a) and it indicated that the Respondent was admitted at Tenwek Hospital on the material day (29th August 2017) and that he suffered subtrochanteric fracture and fracture of acetabulum. The P3 form (P.Exh 3) stated that the Respondent suffered hyperaemic skin on the abdomen consistent with trauma abrasion, femur fracture distal fracture and an old sutured wound on his lower leg.
 34. The Medical Report (P.Exh 4) by Dr. Idagiza Akidiva dated 29th March 2018 also stated that the Respondent had suffered a bruised abdomen and compound fracture of the left leg with fractures at the proximal and distal subtrochanteric and acetabulum respectively. Dr. Idagiza Akidiva further stated in his Medical Report that the Respondent had plates, nails and screws on his left femur which would need to be removed by an orthopaedic surgeon.
 35. From the evidence above, I have no reason to disbelieve the contents of the exhibits and the Respondent's testimony in regards to the injuries he suffered. It is therefore my finding that the Respondent suffered a compound fracture of the left leg with fractures at the proximal and distal subtrochanteric and acetabulum and also a bruised abdomen.
 36. For this court to interfere with an award, it must be satisfied that the trial magistrate misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice. See *Kemfro Africa Ltd T/A Meru Express Services and Another Vs. Lubia and Another (1982-1988) 1KAR 727*.
 37. In the present case, the Appellant submitted on the issue of general damages that the award of Kshs 1,000,000/= was inordinately high and they proposed an award of Kshs 300,000/=. They relied on *Francis Ndungu Wambui & 2 others vs VK (a minor suing through next friend and mother of MCWK)* where the court substituted an award of Kshs 150,000/= with an award of Kshs 300,000/= for fracture of the right tibia and fibula, *Gladys Lyaka Mwombe vs Francis Namatsi & 2 others (2019) eKLR* where the court awarded Kshs 300,000/= for a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and *Wakim Sodas Limited vs Sammy Aritos (2017) eKLR* where the court awarded Kshs 400,000/= for a fracture of the fourth rib and a compound fracture of the left tibia/fibula.
 38. On the other hand, the Respondent asked this court to uphold the award of Kshs 1,000,000/= as it represented a fair award. He relied on *Patrick Kinyanjui Njama vs Evans Juma Mukweyi (2017) eKLR* where the court awarded Kshs 1,500,000/= for segmental fracture of the right femur mid shaft, segmental fracture of the right tibia shaft and a fracture of the right fibula and *Finlays Horticulture Kenya Limited vs Grace Wacugu Chiira (2020) eKLR* where the court awarded Kshs 1,500,000/= for a fracture of the lateral malleolus of the left tibia leg and dislocation of the left ankle joint.
 39. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. See *Denshire Muteti Wambua Versus Kenya Power and Lighting Company Ltd (2013) eKLR*.
 40. The Respondent suffered compound fractures to his left leg and a bruised abdomen. In addition to the authorities quoted by the parties, I have found the following cases quite helpful in terms of comparison:-



- i. In Peter Namu Njeru v Philemone Mwangi (2016) eKLR the court held that Kshs 700,000/- was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.
 - ii. Akamba Public Road Services vs Abdikadir Adan Galalo (2016) eKLR where the award of Kshs.800,000/= was substituted with an award of Kshs.500,000/= on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.
 - iii. In Eston Mwirigi Ndege & another vs Joseph Macharia Kawira (2019) eKLR, the court awarded Kshs 500,000/= for the fracture of the right femur and right arm where the Respondent would require future surgery to remove the K nail.
 - iv. In Civicon Limited vs Richard Njomo Omwancha & 2 others (2019) eKLR, the court awarded Kshs 450,000/= for a deep cut wound on the left earlobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the tibia and fibula and dislocation on the left hip joint.
41. Guided by the above authorities, it is my finding that the award of Kshs 1,000,000/= as general damages by the trial court was excessive. Having taken into consideration the current inflation rates, it is my finding that an award of Kshs 800,000/= would be just and commensurate to the injuries suffered by the Respondent. I therefore substitute the award of Kshs 1,000,000/= with an award of Kshs 800,000/=.
 42. With regards to the special damages, the Respondent pleaded for a total of Kshs 132,550/-. He produced a bundle of receipts from Tenwek Hospital as P.Exh 1b, which indicated that he had spent Kshs 129,000/= for treatment. He further produced a receipt for motor vehicle search as P.Exh 5b. I have however not seen the receipt for the Medical Report and the same is dismissed. Consequently, it is my finding that the special damages proved are Kshs 129,550/=
 43. The final computation is as below:-

General Damages Kshs 800,000/=

Less 30% Contribution Kshs 240,000/=

Kshs 560,000/=

Add Special damages Kshs 129,550/=

Total Kshs 689,550/=.
 44. In the end, the Memorandum of Appeal dated 29th September 2021 succeeds only to the extent that the trial court's net award of Kshs 792,785/= is substituted with Kshs 689,550/=.
 45. Each party shall bear their costs of the Appeal while costs in the suit shall remain as awarded by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER, 2024.

R. LAGAT-KORIR

JUDGE



Judgement delivered in the absence of the parties. Siele (Court Assistant).

