



REPUBLIC OF KENYA



**Davis v Otieno aka Emmaculate & another (Civil Appeal E034 of 2023)
[2024] KEHC 14603 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E034 OF 2023
TA ODERA, J
OCTOBER 30, 2024**

BETWEEN

OTEBA PAPA DAVIS APPELLANT

AND

IMMUCULATE AUMA OTIENO AKA EMMACULATE 1ST RESPONDENT

FREDRICK NYANTIKA 2ND RESPONDENT

*(Being an appeal from the Judgment delivered by Hon. C. OCHARO
(CM) on 10th March, 2023 in KISII CMCC NO. 547 OF 2020)*

JUDGMENT

Introduction

1. This Appeal arises from the Judgment delivered on 10th March, 2023 in KISII CMCC NO. 547 OF 2020 on the following terms.
 - a. Liability 100% as against the defendant jointly and severally.
 - b. Pain and suffering; Kshs. 5,000,000/=
 - c. Loss of expectation of life Kshs. 1,745,151/=
6,745,151
 - d. Costs of the suit and interests on special damages from the date of filing of the suit and general damages from the date of this judgement were awarded to the plaintiff.
2. Being aggrieved by the Judgment of the lower court the Appellant filed the Appeal herein based on the following grounds of Appeal;



- i. The learned magistrate erred in law and in holding that the defendants/ appellant was 100% liable.
 - ii. That the learned magistrate's erred in the law and the fact in adopting the wrong principles, in the assessment of damages of Kshs. 5,000,000 which were manifestly excessive in the circumstances and in view of the evidence adduced.
 - iii. The learned trial Magistrate erred in act and in law by failing to consider the Appellants Submissions on Quantum and Liability and legal authorities relied upon in support thereof.
 - iv. The Learned Magistrate erred in fact and in law in failing to consider the Appellants thereby arriving at an erroneous decision.
3. The appellant sought from this court the following orders
 - a. This Appeal be allowed with costs.
 - b. This Honorable court be pleased to set aside the lower court's decision and the same be substituted with a judgment and or order dismissing the respondent's suit with costs to the Appellant.
 - c. The honorable court be pleased to reassess the damages payable by the respondent
 - d. The appellant prays for costs of this Appeal.
4. The background of the matter is that the Respondent filed a suit against the appellant vide an amended plaint dated 2nd November, 2024 seeking Special Damages amounting to Kshs. 1,745,151.00, general damages and costs of the suit and interests. To support her claim, the Respondent alleged on 12th April, 2020 she was a lawful passenger on motorcycle registration number KMCE 598F Boxer Kisii-Keroka road at Gesonso area when motor vehicle registration number KBW 619T RAV 4 that was being driven carelessly and negligently lost control and hit the motor cycle causing her serious bodily injuries which included; chest pelvic contusion, abdominal pain, compound fractures on the distal left femur and left tibia fibula; above knee amputation of the left leg. As a consequence of the injuries she suffered she continues to suffer chest, abdominal and pelvic pains, painful fracture sites, healing stump and phantom left lower limb.
5. It was her case that prior to the accident she was a college student but as a result of the accident she has been forced to drop out of college, undergo a long and treatment and has since lost her left leg on account of amputation. She also claimed that her career prospects, marriage, love and her life generally stand drastically reduced as a result of the accident. She testified that she will require physiotherapy, occupational therapy and extensive counseling to enable her cope with her new condition. She also disclosed that her disability had been assessed at 50% and thus her earning capacity stood drastically affected.
6. The 2nd Appellant did vide an Amended defense dated 3rd December, 2021 denied each and every allegation raised by the Appellant. In the alternative the 2nd Defendant and pleaded that if at all an accident had occurred (which they denied) then the same was caused the plaintiff and the rider/owner of the motor cycle registration Number KMCE 598F were to blame for the negligence. He set out the particulars of negligence in paragraph 6 of his amended defence statement of defence. He thus prayed for dismissal of the Plaintiff's suit.



7. The trial court upon hearing the parties the trial court delivered a judgment wherein held as follows;

I have carefully considered the evidence before me both oral and documentary as well as the submissions and the case law relied on. The 1st defendant did not participate in these proceedings. In the amended-plaint, he is described as a joint owner of the accident motor vehicle. Submissions is not evidence and the 2nd defendant cannot submit that the plaintiff was not wearing-a reflector Jacket yet they did not come up during cross examination. The evidence as given by the plaintiff is that the vehicle veered off its lane onto the motor cycle's lane and hit them. The defendant did not offer any explanation why the driver allowed the vehicle to veer onto the lane of oncoming motor vehicle neither has he given a contradictory version of how the accident may have occurred.

I do find no other explanation other than that the defendants were negligent in light of the evidence by the plaintiff that she saw the vehicle approaching when it veered off its lane and hit the motor cyclist as he tried to avoid a head on collision.

I do find that the defendants' motor vehicle's driver was negligent in veering off its lane and onto the lane of the oncoming vehicle. The plaintiff was a passenger and could not have contributed in any way to this collision and can therefore not be held responsible. The defendant must suffer consequences of his agent's negligent acts.

Under the circumstances I do find the defendants 100% liable jointly and severally.

On quantum, being guided by the authorities cited, the medical reports and treatment notes and the nature of injuries and the disability percentage and taking into account the high cost of living and the inflationary trends, I believe a sum of Kshs. 5,000,000/= (five million shillings) would be adequate compensation. This is a plaintiff whose life completely changed at a very young age when she had all the hope of leading a very bright future which has completely been cut short. The level of pain and suffering she went through was excruciating and the post traumatic experience she has to undergo.

In *Capital Fish Kenya limited vs. The Kenya Power and Lighting Company Limited* [2016] e.

KLR, the Court of Appeal reiterated the fact that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit. The total sum proved as pleaded at Kshs. 1, 745,151/= and it shall be awarded.

Judgment is hereby entered as follows

Liability at 100% against the defendants jointly and severally

General damages Kshs. 5,000,000/-

special damages Kshs. 1,745,151/-

Total Kshs. 6,145,151/-

Plaintiff is also to be awarded costs of the suit and interest on special damages from the date of filing suit and on general damages from the date of this Judgment.

8. It is against this decision that the Appellant filed this Appeal. This court directed that the Appeal to be disposed of by way of written submissions. The Appellants filed the written submission through the learned counsel on 19th January, 2023, while the Respondent's submissions were filed on 18th November, 2022.



The Appellants' Submissions

9. The learned counsel for the Appellant on liability submitted the respondent did not tender sufficient evidence before the trial court to demonstrate that the Appellant was 100% responsible for the accident. According to the learned counsel, the respondent did not tender evidence whether the motor cycle and the motor vehicle were headed in the opposite direction or the same direction. He claimed too that no eye witness was brought to court to corroborate the evidence of the Respondent. The learned counsel equally submitted that the police officer who testified was not the investigating officer nor did he have an investigating police file to confirm whether the accident occurred or did not occur. He argued too that the police officer did not produce any OB extract to confirm that indeed the accident occurred nor did he produce a sketch map to show the point of impact or skid marks to show who veered to the others lane he contended that the police abstract produced was only relevant to show that indeed an accident occurred between the motor cycle and was reported at the said police station but was not relevant in showing how the accident occurred. He also argued that the police abstract neither showed who was to blame for the accident nor was there an indication of any person charged in court for the accident. He contended that the fact that the Appellant has not been charged means that was not responsible negligent.
10. Regarding the holding by the trial court that the respondent's testimony was not controverted since the defendants did not avail any witness, the learned counsel submitted that the finding was erroneous because the respondent's testimony was controverted through cross-examination by the appellant's counsel.
11. On quantum, the learned counsel for the Appellant submitted that the award Kshs. 5,000,000 as general damages were manifestly excessive in the view of the injuries suffered. He contended that the trial court did not indicate any comparable authority he relied on in arriving at the award and thus the same must be held to be erroneous.
12. The learned counsel proposed a value of Kshs. 1,500,000 to Kshs. 2,200,000. To support his proposal counsel relied in the case of *Fredrick cleaning services and another vs Daniel Meshack Shikanga* (2017) eKLR and *Edwina Adhiambo Ogol vs James Kariuki* (2020) where the victims whose left legs were amputated above the knee were awarded Kshs. 1,500,000 and 2,200,000 respectively

The Respondent's Submissions

13. The learned counsel for the Respondent on liability submitted that the trial court found that found that the respondent testified and called 2 witness and proved her case against the Appellant as required by the law especially as the appellant choose not rebut the same by tendering any evidence.
14. On quantum the learned counsel defendant equally defended the decision of the trial court. He argued that the court relied on the evidence medical evidence tendered by PW1, Dr. Daniel Nyameino to establish that in deed the respondent suffered severe injuries that led to amputation of her leg above the Knee. He argued too that the award of the trial court was correct given that the respondent's life had drastically been affected by the accident.
15. The learned counsel thus urged this court not to interfere with the decision of the lower court.

Issues of DeterminatioDIVISION -

16. Having analyzed the grounds of Appeal, reviewed the written submissions of the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the sole issues of determination are:



- a. Whether the trial court erred in finding that the Appellant was 100 percent liable for the accident
- b. Whether appeal has met the threshold for this court as an appellate court to disturb the amount of general damages awarded by a trial court.

Analysis and Determination

Whether the trial court erred in finding that the Appellant and the 2nd respondent were 100% liable for the accident jointly and severally.

17. In *Khabi and Another v Mahithi and Another* [1968] EA 70, 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.”

18. The above was the position in the cases of *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mabendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

19. It is trite law that he who alleges must prove. The question therefore is whether the 1st respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein she suffered severe injuries that led to amputation of her leg. The Respondent who testified as PW2 and adopted her witness statement as evidence. She narrated that on 13th April, 2020 she was involved in an accident around Gesonso area as a result of which she suffered the injuries outlined in her plaint. She stated further that as a result of the accident she was admitted for several days at several hospitals which included KTRH, St. Monica, Tenewek, Marble and AIC Kijabe. As a result, the complexities of the injuries her left leg was amputated. She decried that her life has drastically been affected as result of the accident. She produced several documentary evidence including treatment notes from the hospitals she was being treated, treatment payment receipts, a copy of the P3 form, Medical report prepared by Dr. Nyameino, copy of records for the motor vehicle (KBW 619T) which caused the accident. She blamed the driver of the motor vehicle for driving veering off to their lane.

20. During cross-examination by the learned counsel for the Appellant, the Respondent revealed that the accident occurred at about 7.45 PM and that it was dark. She indicated that she was the only passenger on the motor cycle. She confirmed that she saw the motor vehicle before the accident occurred. She reiterated her testimony in chief that the motor vehicle lost control and veered towards their lane. She stated that the motor cycle was hit as the rider tried to avoid the collision.

21. PC Venah Kieya a traffic police officer at Gesonso Police station produced a police abstract of the accident that occurred on 13th April, 2020 along Kisii-Migori road involving motor vehicle registration number, KBW 619T and motor cycle registration number, KMCE 598F as a result of which the Respondent suffered severe injuries. He stated the motor vehicle was from Migori when it lost control and veered to the lane of the motor cycle. He further produced a copy of the P3 form and as well as the OB extract. During cross-examination she indicated that she was not the investigating officer. She



also indicated that she could neither tell whether the driver was charged nor could she tell the possible point of impact.

22. Considering the above summary of the two witness, it cannot be a true finding as argued by the learned counsel for the appellant that the trial court erred when observed that Appellant failed to controvert the testimony and evidence of the appellant that indeed the accident occurred and the appellant was to blame for the same. It a factual finding that indeed the Appellant did not call any witness to negate the fact that Respondent's claim that the accident did occur and it was appellant was to blame for the same. It was a true factual finding the appellant's claims that the Respondent did not have reflective jacket or a helmet when the accident occurred were only raised in the submissions of the learned counsel were not brought out during the cross examination of the Respondent.
23. The above observation notwithstanding, the learned counsel for the Respondent ought to know that the Respondent having been a pillion passenger, she was not in control of how the motorcycle was being managed or controlled and she could not have contributed in any way to the occurrence of the accident. Further, even if it could have been proven that the plaintiff or the driver of the motor cycle did not have helmets and reflective Jackets, such was a fact that would have constituted traffic offences but had no bearing on causation of the accident in question.
24. My foregoing findings lead me to the inevitable conclusion that the learned trial Magistrate did not make any error in finding that the Appellant was 100% liable for the accident.

Whether appeal has not met the threshold for this court as an appellate court to disturb the amount of general damages awarded by a trial court.

25. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate 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 at first instance. The appellate court can justifiably interfere with the quantum of damages 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 factor 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.”

26. Similarly, in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, 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 damage 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.”



27. The Court of Appeal in *Southern Engineering Company Ltd. vs. Musingi Mutia* [1985] KLR 730 equally observed as follows:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If, however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

28. In this case as pointed out by the learned counsel for the Appellant, the Learned Trial Magistrate did not indicate any basis for awarding Kshs 5,000,000 since no authority was cited in his judgement. That however is not fatal in light of this Court’s duty, sitting as the first appellate court to re-evaluate the evidence and arrive at its own decision. also citing of precedents in cases for award of damages is a practice meant to avoid disparity of awards for comparable injuries.
29. In the case *Akwaba Olubuliera Nicodemus v Dickson Shikuku* [2020] eKLR the respondent sustained injuries on the right clavicle bone and crush injury to the right leg leading to below-knee amputation of the right leg and was awarded Kshs 2,000,000/- as general damages.
30. In *Rai Cement Limited v Michael Ochieng Otieno* [2022] eKLR the respondent therein sustained the following injuries: multiple fractures of the right tibia and fibula leading to amputation of the right lower limb below the knee; massive damage of the right supra-pelvic and lower abdominal region; fracture of a rib from the right rib cage, with multiple soft tissue injuries; and soft tissue damage of the right hip region with haematoma. The respondent in that case was awarded Kshs 2,500,000/-. In *Yobesh Makori v Elmerick Mobisa Bota* [2021] eKLR the respondent sustained soft tissue injuries,



a fracture of the left clavicle, dislocation of the right tarsal bone and crushed left leg leading to amputation of the left leg and was awarded Kshs 2,000,000/- as general damages.

31. I am persuaded therefore that the Kshs 5,000,000/- awarded as general damages by the trial court was excessive and not supported by any comparable authorities as required by law. Having considered the rate of inflation and the comparable awards, I hereby substitute the award of Kshs 5,000,000/- with an award of Kshs. 2,800,000/.
32. Consequently, the Appeal partially succeeds in respect to the award made on general damages. Consequently, the trial Court's award of Kshs.5, 000,000/ for general damages is hereby set-aside and is substituted with an award of Kshs. 2,800,000. The judgment on appeal shall now read as follows:
 - a. Liability 100%
 - b. General damages Kshs 2,800,000
 - c. Special Damages Kshs. 1,745,151.00
 - d. Costs of the appeal and interest and interest.
33. The Respondent shall have interest on special damages and loss of earning at Court rates from the date of filing suit, and interest on general damages at Court rates from the date of judgment until payment in full.
34. Parties shall bear their respective costs of the appeal.
35. It so ordered

T.A ODERA

JUDGE

30.10.24

Delivered Virtually Via teams platform in the presence of:

Nyabuto for the Appellant

N/A for Respondent

