**Ongori v Mokua (Civil Appeal E061 of 2022)**
**[2024] KEHC 17055 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 17055 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL APPEAL E061 OF 2022**

**TA ODERA, J**

**NOVEMBER 22, 2024**

**BETWEEN**

**IBRAHIM ONYWORI ONGORI ..... APPELLANT**

**AND**

**DOUGLAS AKORA MOKUA ..... RESPONDENT**

***(Being an appeal from the Judgment delivered by Hon. P.K MUTAI (PM) on 31ST May, 2023 in KISII CMCC NO. 309 OF 2021)***

**JUDGMENT**

## Introduction

1. This Appeal arises from the Judgment delivered on 10th March, 2023 in Kisii CMCC NO. 215 OF 2020 on the following terms:

    a. Liability 100% in favor of the plaintiff against the defendant.

    b. General damages award at Kshs. 600,000

    c. Special damages award at Kshs 21,600

    Total Kshs. 621,600

    d. cost of the suit and interests from the date of this judgment till payment in full

2. Being aggrieved by the Judgment of the lower court the Appellant filed the Appeal herein which was based on the following grounds of Appeal that;

    i. The award of general damages awarded to the respondent was inordinately and manifestly excessive in the circumstances

ii. The learned trial magistrate erred in law and in fact in holding that the appellant was 100% liable whereas the accident was wholly and substantially occasioned by the Respondent and the third party on whose half the suit was mounted

iii. The learned magistrate acted in error when he failed to evaluate the evidence on record and thus arriving at an erroneous decision.

iv. The learned trial magistrate misapprehended the principle applicable in assessment of damages in personal injuries claims occasioning miscarriage of justice.

v. The trial magistrate erred in law and in fact by relying on extraneous issues as a basis of his determination on liability

3. Based on the above grounds the appellant sought from this court the following orders;

i. The Judgement and decree of the learned trial Magistrate dated 31st May, 2023 be set aside varied and quashed.

ii. This court be pleased to dismiss the plaintiff suit with costs.

iii. In the alternative this court to re-visit the issue of assessment of liability and quantum of damages payable and assess/review/vary the same to reasonable amount which commensurate the injuries sustained by the respondent and the ratio of liability should be taking cognizance that the respondent wholly occasioned or substantially contributed to the accident.

iv. That the costs of this Appeal be borne by the Respondent

v. Any such further orders may be made by this Honourable Court may deem just and expedient to grant in the circumstances.

4. The background of the matter is that the Respondent filed a suit against the Appellant seeking;

a. General damages

b. Special damages

c. Costs of the suit

d. Interests on (a) (b) and (c)

e. Any such other order this court may deem fit and just to grant

5. To support his claim, the Respondent alleged that on or about the 2/1/2021 he was lawfully riding a motor cycle KMEX 033J along Ram Hospital- Daraja Moja Hospital road and when at Diplos Hotel the driver, servant or agent of the defendant's motor vehicle Registration number KCF 316A negligently permitted the same to violently collide with his motor cycle and as a consequence the respondent sustained bodily injuries to wit;

a. Scalp contusion

b. Whiplash injuries to the neck

c. Chest contusion and abrasions

d. Fracture of the left tibia/fibula bones

e. Contusion on the left foot

6. In its defense the Appellant denied allegations against it and pleaded that if an accident had occurred (which they denied) the same was caused solely and/or substantially contributed the respondent's own negligence.

7. The trial court upon hearing the parties the trial court delivered a judgment on 8th June, 2022 wherein the learned trial held follows;

> "I have considered evidence as tendered by plaintiff and submissions filed. The issues for determination are as follows: -
>
> a. Whether there was road traffic accident on 2nd January, 2022
>
> b. Whether the plaintiff sustained injuries as a result
>
> c. If so, who is to blame and to what extent.
>
> d. Quantum or damages payable if any.
>
> e. Cost of the suit

8. On the first issue, there is no dispute that there was accident on 2nd Jnauary 2021. Both parties agree on this and there abstract to buttress this fact. The plaintiff was injured and according to the Defendant he took him and pillion passenger to hospital. The second issue is on liability. The plaintiff is blaming the Defendant for being careless. According to PW2 PC Kenneth Walumbe; the driver of motor vehicle slowed down and then made U turn and the motor cycle hit him. This was not dislodged. The Defendant was reckless and is held 100% liable. The next item is quantum payable. Medical report by Daniel Nyameino dated 18th January 2021 shows that the plaintiff suffered;

(i) Scalp contusion

(ii) Whiplash injuries to the neck

(iii) Chest contusion

(iv) Fracture of left tibia and fibula

(v) Contusion to the left foot

Both parties submitted on quantum. The plaintiff proposed Ksh 1 500 000 relying on the following cases;

(i) *Dennis Matagaro v NKO (Minor suing through next friend and father WOO* (2021) eKLR. In this case, the plaintiff suffered mild head injury, tenderness on the neck, dislocation of the left shoulder tenderness I on the back, deep lacerated cut wounds on the forearm and a fracture of left tibia and fibula. General damages were assessed at Ksh 700,000.

(ii) *Francis Ndungu Wambui 2 others v VK (a minor suing through next friend and mother MCWK* (2019) eKLR. In this case the Respondent suffered soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more than 3minutes. He was awarded Ksh 1,000,000 as General damages.

The Defendant on the other hand submitted that an award of ksh 350,000 would be reasonable for injuries suffered relying on the following cases; -

(i) *Civicon Limited v Richard Njomo Omwancha & 2 others* (2019) eKLR. In this case, the appellants suffered soft tissue injuries and awarded between ksh 450,000 and Kshs 500,000 as General damages.

(ii) *Jitan Nagra v Abidnego Nyandusi Oigo* (2018) eKLR. In this case the Respondent suffered lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back, blunt trauma to the chest, bruises on the left elbow, compound fracture of right tibia / fibula and segmental distal fracture of the right femur. General damages were assessed at Ksh 450,000.

I find both cases cited by the Defendant relevant and applicable. Considering injuries suffered, comparable awards and inflations, I award the plaintiff Kshs 600,000 as General damages. On special damages, it is trite law that same must be specifically pleaded and strictly proved. The plaintiff pleaded Kshs 30,100 as special damages and produced receipts for Kshs. 21,600. I award the plaintiff Kshs 21,600 as special damages. The plaintiff shall also have costs of the suit and interest from the date of judgment till payment in full.

It is against above holding of the trial that the Appellant has approached this court in the manner hereinabove highlighted.

9. This court directed that the Appeal be disposed of by way of written submissions. Both parties filed their submissions which I have considered in my determination herein below.

**Determination**

10. In this appeal, it is clear that the determination of the appeal revolves around the question of liability and the quantum of damages.

11. Regarding the issue of liability, the learned counsel for the appellant contended the respondent herein did not discharge his legal burden of prove that the accident was occasioned by the appellants' negligence. He urged the court upon re-evaluation of the evidence and testimonies of the parties to find the trial court erred in law and in fact by holding that the Appellant was 100% liable whereas the accident was substantially occasioned was wholly or substantially occasioned by the Respondent. On the other hand, the learned counsel for the respondent submitted that the trial court correctly captured that the Appellant's driver slowed down, made a U-turn in the middle of the road and thus causing the accident. He contended that the defendant did not call any witness to controvert the Appellant's case and thus the trial court was right to observe that the Appellant was 100%.

12. The *evidence act* under Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows regarding who bears the burden of prove:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

13. In order to establish whether the respondent did discharge his duty under section 107 of the *Evidence Act* as outlined hereinabove to prove that in deed the Appellant was 100% liable , this court as a first appellate court has the duty to re-evaluate in facts and evidence as tendered in the lower court to arrive at its own conclusion bearing in mind that it neither saw not heard the witnesses during their testimony as was held in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 the court observed as follows;

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact

if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

14. During the hearing of the plaintiff case's the plaintiff called four witness to testify in support of his case. However, it was only two witnesses who testified in relation to the issued of liability that, the plaintiff and PC Kenneth Watumba who testified on behalf of the investigating officer, PC Kasera.

15. The plaintiff testified as PW4 and stated that he was involved in a road accident on 25th November, 2020. He adopted his witness statement dated 2nd January 2021 filed in court on 22nd February, 2021 as his evidence in chief. In his witness statement he reiterated on 2nd January, 2021 he was lawfully riding his motor cycle KMEX 316 along Ram Hospital- Daraja Moja Hospital, when at Diplos, when motor vehicle KCF 316A that was being driven at speed veered off its lane and collided with his motor cycle resulting into an accident that caused him the injuries outlined herein above. On cross examination, he stated that the motor cycle was not his though he confirmed that he had a driving licence which he did not have in court. He also confirmed that he had a helmet on during the accident and that his motorcycle was insured. He also confirmed that he had carried a pillion passenger.

16. PC Kenneth Watumba testified as PW2. He produced a police abstract in relation to the accident which indicated that an accident did occur on 2nd January, 2022 at 1700 Hours involving a motor vehicle and motor cycle that were headed in the same direction and the motor vehicle was ahead. The driver of the motor vehicle slowed and stopped to make a U-turn. The driver then indicated to accelerate to the road but was hit by the rider who together and the pillion passenger he was carrying sustained injuries as a result of the accident. The Vehicle dent on the front door and the side mirror. He pointed out that the abstract indicated that the matter was pending investigation but did not indicate who was to blame in the accident.

17. The Appellant was the sole defense witness. He adopted his witness statement dated 28th June, 2021. In his statement he recalled that on 2nd January, 2021 at around 5:20 pm while driving his motor vehicle at slow speed of 20km/hr. keeping his lane the motor cycle herein attempted to overtake at high speed but ended up ramming into the driver's door and side mirror. The rider and his pillion passenger fell in front injured as he stopped on spot, took them to Kisii Teaching and Referral hospital for treatment. He thereafter proceeded to report the matter at Kisii Central police station. The police officers did visit the scene of the accident and then they went back to the station where his motor vehicle was detained for inspection as he recorded a statement.

18. From the above analysis of the testimonies of the plaintiff it is common ground that the accident occurred, that it was the Defendant's motor vehicle that was involved in the accident, that both the motor cycle and the motor vehicle were headed in the same direction, and that the respondent sustained injuries out of the accident. However, from the accounts given by both the Appellant and the defendant significantly differ from the account given by PW2. The Respondent claims that the Appellant's motor vehicle veered off its lane and collided with his motor cycle. The Appellant claims that the respondent attempted to overtake his motor vehicle at a very high speed and but ended up hitting the front door and right side mirror of his motor vehicle. However, the PW2 states that the appellant indicated to turn, slowed down to make a U-turn and the motor cycle that was approaching hit his vehicle. It is worth noting that the appellant in his evidence did not mention that he indicated to overtake. The trial court it would appear that the trial court did consider the account given by PW2 and disregarded the accounts given by both appellant and their respondent in their witness statements as I have herein above outlined.

19. From such analysis can it be said that the Appellant was 100% liable for the accident? Considering the account of the Appellant, PW2 admitted that he did not have sketch plans of the scene and he never visited the scene. It has emerged that there are three versions to the occurrence of the accident from PW1, PW2, and DW1 and the police abstract says pending investigations. The evidence of PW2 was related to the occurrence of the accident which was not contested. The evidence of PW2 was exaggerated as to the occurrence of the accident as he neither visited the scene nor was he an investigating officer. The police file was not produced and the investigating officer was not called to testify. No reasons were given for the same. To make the matters worse he did not produce the sketch plans of the scene. The respondent did not state on which side of the road he was at the material time. He only said that the vehicle veered to its lane. He was also not able to produce his driving licence in court to prove that he is a driver. The 3 witnesses herein were very economical with evidence in this case and so this court is unable to tell who between the appellant and the respondent was to blame for the accident.

20. It is trite law that when the court is faced with such a dilemma then it holds the two drivers equally to blame as was held by Madam, J (as he then was) in *Welch v Standard Bank Limited* [1970] EA 115 expressed himself as hereunder:

> " When there is no material to generate actual persuasion in the court's mind, still the court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Every day, proof of collision is held to be sufficient to call on the two defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame...Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgement, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardizing the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion...There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case."

21. Similarly, in *Lakhamshi v Attorney-General* [1971 EA 118 it was held that:

> " A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been

negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them."

22. In the circumstances I found both the appellant and respondent herein equally to blame for the accident proceed to apportion liability at 50 :50 between them.

23. Regarding the issue of quantum, the principles under which an appellate court can interfere with an award of damages made by a trial court were set out by the court of Appeal in the case of *Kemfro Africa Limited T/A Meru Express Services [1976] and another v Lubia and another* (No.2) [1985] eKLR, in which the Court (Kneller, Nyarangi, JJA and Chesoni, Ag JA) 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 a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."

24. Equally in the case *Shabani v City Council of Nairobi* [1985] KLR 516 at page 518, Hancox, JA stated as follows:

> " The test as to when an appellate court may interfere with an award of damages was stated by Law JA in *Butt v Khan*, Civil Appeal No. 40 of 1997 (a case referred to in another context by the learned Judge), as follows:
>
> > "'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that, he misapprehended the evidence in some material respect, and so arrived at a figure which was so inordinately high or low.'
>
> This discretion has since been followed frequently by this Court."

25. The learned counsel for the Appellant in his submissions argued that the award of 600,000 as a general damages was inordinately excessive as compared to awards for general damages in similar cases. The learned counsel thus urged the court to review the award taking into account comparable precedents. In support of his case the learned counsel relied on the case he had highlighted in his submissions in the lower court and which the learned trial magistrate highlighted in his judgement that I have summarized hereinabove.

26. The learned counsel for the respondent on his part submitted that the award by the trial court was not inordinately high to warrant an interference by this court. he equally highlighted the cases he had relied on in his submissions at the lower.

27. Prior to making a determination as to whether the award for general damages given by the trial court was in ordinately high, it important to consider the testimony of the PW3 who examined the Respondent immediately he was admitted. In his testimony PW3 confirmed that an X-ray was carried out wherein it was established that the chest was normal but there was a fracture on left tibia and fibula.

He also stated that the Respondent did also suffer other soft tissue injuries that were outlined on the medical report. He described the injuries as grievous harm. He also stated that permanent disability was assessed at 5%. The appellant cited the case of *Dennis Matagaro v NKO (Minor suing through next friend and father)* 2021 eKLR where an award of Kshs 700,000/= for a fracture of tibia fibula was upheld. The appellant submitted that an award of general damages of Kshs 350,000/= and supported this with the case of *Civicon Limited v Richard Njomo Omwancha* (2019) eKLR where the plaintiff sustained a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, fracture of the tibia and fibula and dislocation on the left hip joint and was awarded Kshs. 450,000/=. Also *Jitan Nagra v Abidnego Nyandusi Oigo* (2018) eKLR where the plaintiff sustained multiple soft tissue injuries and compound fracture to the tibia/ fibula and he was awarded Kshs 450,000/=. I have considered the injuries in the cited cases they are comparable to the ones sustained by the respondent herein save that the respondent sustained 5% permanent disability whereas in the other cases the4re was no permanent disability. The awards in case cited by the respondent and appellant also vary. The cases emanate from courts of concurrent jurisdiction with this court thus are not binding on this court. I am persuaded by the cited case of Dennis Matagaro. The Injuries sustained However the case cited by respondent quoted an award which is slightly high while appellant cited have considered the precedents presented by the Appellant and find them to be older than the one cited by the respondent. I have considered the nature of the injuries sustained by the respondent, the cited cases and their ages and the inflation factor. I am guided herein by the cited case of Dennis Matagaro and I find that the award by 600,000/= was not ordinately high as claimed by the Respondent but was adequate considering the nature of injuries a. I find no reason to interfere with the same.

28. Special damages were awarded at Kshs 21,000/= which is not contested.

29. The upshot is that; the appeal partially succeeds. I proceed to enter judgment for respondent against the appellant at Ksh. 600,000/= plus Kshs 21,000/= special damages = Kshs 621,000/=less the 50 % liability = Kshs 310,500/=.

30. I also costs and interests from the date of the judgment of the lower court till payment in full.

31. Each party to bear its own costs.

32. It is so ordered.

**T.A ODERA**

**JUDGE**

**22. 11.24**

In the Presence of:

O.M Otieno for the Appellant

Mr. Nyangosi for the Respondent

Court Asistant: Oigo