**Nyamatari v Lagat & another (Civil Appeal E021 of 2023)**
**[2024] KEHC 16485 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16485 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAROK**

**CIVIL APPEAL E021 OF 2023**

**F GIKONYO, J**

**DECEMBER 20, 2024**

**BETWEEN**

**ALBERT MAGARE NYAMATARI ..... APPELLANT**

**AND**

**NANCY NJEPTEPKENY LAGAT ..... 1ST RESPONDENT**

**HARUN KAMAU MACHARIA ..... 2ND RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. A.N. Sisenda (SRM) delivered on 24/10/2022 in Narok CMCC No. E021 of 2021)***

**JUDGMENT**

## Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. E021 of 2021 delivered on 24/10/2022 in which the trial court made awards as follows: -

    a. Liability 80%

    b. General damages Kshs. 200,000/=

    less 20% Kshs. 40,000/=

    85% Kshs. 160,000/=

    c. Special damages Kshs 7,550/=

    TOTAL Kshs. 167,550/=

    d. Costs of the suit plus interest at court rates

2. The memorandum of appeal dated 13/03/2023 cited three (3) grounds of appeal which relate to; i) liability and ii) quantum of damages.

**Background**

3. The suit arose from a road traffic accident, which occurred along Narok- Mai-Mahiu road on 07/12/2020 involving a motor vehicle registration Nos. KCP 225V and KCP 688C. The appellant was traveling in motor vehicle registration no. KCP 225V as a fare-paying passenger. The appellant blamed the driver (1st respondent). The appellant sustained serious bodily injuries in the accident. Particulars of negligence were set out against the driver of the 2nd respondent.

4. The appellant during the trial testified and did not call any other witnesses.

5. The respondents did not call any witnesses.

**Directions of the court**

6. The appeal was canvassed by way of written submission.

**The Appellant's Submissions**

7. The Appellant submitted that the trial court erred by apportioning liability in the ratio of 20:80 in favour of the appellant against the respondents yet the respondents did not call any witnesses to rebut the appellant's record. The appellant contends that failure to wear a seat belt is not known in law to contribute to the occurrence of the accident especially where two vehicles are involved and the appellant being a passenger in one of them. The appellant argued that there was overwhelming evidence adduced that the respondents should be 100% liable for the said accident. The appellant relied on the case of Rosemary Wanjiku Kuru Vs Francis Mutual Mburu And Arnold [2014] eKLR, Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu [2012], Interchemie E.A. Limited Vs Nakuru Veterinary Centre Limited Nairobi (Milimani)HCC No. 165B of 2000, Janet Kaphiphe Ouma & Another Vs Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 citing *Edward Muriga Through Stanley Muriga V Nathaniel D. Schulter Civil Appeal No. 23 of 1997*.

8. The appellant submitted that the trial court erred in law and fact by awarding inordinately low general damages bearing in mind the nature of injuries borne by the appellant. The appellant relied on the case of Issa Transportes Ltd Vs Chengopangatswa Mombasa HCC 151/2017.

**The 1st Respondents' Submissions**

9. The 1st respondent submitted that while failure to fasten a seat belt could not have caused or contributed to the occurrence of the accident, it could have however mitigated the extent of the injuries sustained and or minimized the adverse effects of the accident on the appellant. The 1st respondent urged the court to hold that in the absence of evidence that the appellant had taken adequate measures in averting the extent of injuries by fastening his seat belt such the judgment on liability at 20:80 was well placed and only ought to be reviewed in the instance that both respondents ought to shoulder liability, equally. The 1st respondent relied on Haybourhill V Young [1992] 2 ALL ER 396 quoted in Benson Dulo V Joseph Waire Njoroge [2022] eKLR, page 4 of the NTSA highway code, section 56, 68(1)(3), 22A (3) of the *Traffic Act*, Oscar Omondi Onoka V H.A. Amin & Co Ltd [2011] eKLR, R V Sande [1978] KLR41, Kamau V Nairobi City Council [1976-80] 1 KLR 90, Karugi & Another V Kabiya & 3 Others [1987] KLR 347

10. The 1st respondent submitted that award made would suffice. The 1st respondent relied on West (H) & Son Ltd V Shepherd (1964) AC 326 at page 345 And Limp Poh Choo V Camden And Islington Area Health Authority [1979] 1 ALL ER 332 both of which were approved and cited in Cicilia W Mwangi & Ano. Ruth W. Mwangi C. A No. 251 Of 1996, Sheikh Mushtaq Hassan V Nathan Mwangu Kamau Transpoerterds & 5 Others Nbi Caca No. 123 Of 1985, Patrisia Adhiambo Omolo V Emily Mandala [2020] eKLR, and West Kenya Sugar Company Limited V David Luka Shirandula [2017] eKLR.

**The 2nd Respondent's Submissions.**

11. The 2nd respondent did not file any written submissions.

**Analysis And Determination**

**Duty of court**

12. As the first Appellate Court, will, evaluate the evidence afresh and make own conclusions albeit bearing in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123 and S.78(2) of the *Civil Procedure Act*.

**Issues**

13. This appeal relates to liability and the quantum of damages.

**Liability**

14. Who is to blame for the accident, and by what proportion if at all?

15. The trial court found the appellant was partly to blame for failing to have his seat belt on.

16. The appellant sought 100% liability for the respondents.

17. Where does the evidence lead the court?

18. The police abstract does not indicate which vehicle was to blame for the accident; the matter was referred to insurance as there was a tire burst.

19. The respondents did not call any witnesses to rebut the appellant's case.

20. Be that as it may, it was shown that the appellant had not buckled up or fastened the seat belt.

21. The appellant has argued that, failure to wear a seat belt is not known in law to contribute to the occurrence of the accident especially where two vehicles are involved and the appellant being a passenger in one of them.

22. This submission is limited, and does not encompass; the 'reasonable person standard' requirement of a plaintiff to take reasonable steps to protect self from injury; and the real purpose of wearing a seat belt. A person claiming damages for personal injury is required by 'reasonable person standard' to take reasonable steps to protect self from injury. A passenger in a motor vehicle is by law required to wear a seat belt when travelling. Fastening of a seat belt secures and protects a person from or mitigates injury. Therefore, the trial court did not err in attributing contributory negligence to the appellant due to failure to wear a seat belt, which reduces the quantum of damages recoverable by the appellant.

23. Seat belts secure a person's safety and may prevent or mitigate injury.

24. Accordingly, there is nothing on which to blame the trial court in placing liability at 80:20 against the appellant. This court upholds the decision by the trial court on liability.

**Quantum**

25. On quantum, the Appellant contended that the award of Kshs. 200,000/- made by the trial court for general damages is low and should be increased to a figure of Kshs.1,000,000/=.

26. Assessment of damages is at the discretion of the trial court. The appellate court only interferes with the discretion where the trial court, in assessing damages, erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence ( see Mbogo Vs Shah (1968) EA 93 And Kemfro Africa Ltd T/A Meru Express & Another V A.M. Lubia and Another [1982-88] 1 KAR 727).

27. In the case of Catholic Diocese of Kisumu v Sophia Achieng Tele Civil Appeal, no 284 of 2001 [2004] 2 KLR 55, the Court of Appeal 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."

28. The Court of Appeal observed in Simon Taveta Vs. Mercy Mutitu Njeru [2014] eKLR that it is reasonably expected that so far as possible, comparable injuries should be compensated by comparable awards. Nevertheless: –

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

29. According to the medicolegal report of Dr. Obed Omuyoma, the appellant sustained the following injuries; colles fractured of the right wrist, blunt injury to the head leading to mild head injuries, blunt injury to the right thigh leading to soft tissue injuries, deep cut wound. The injuries were classified as grievous harm.

30. The medical report indicates that the appellant suffered several injuries and at the time of the examination, he complained of chest pain. Permanent disability was assessed at 10%.

31. This court has considered various cases such as Patrisia Adhiambo Omolo v Emily Mandala [2020] eKLR where the court found that the Appellant had proven the injuries of fracture of the left forearm radius and ulna bones also known as Colles fracture of the left forearm as demonstrated by a swollen and deformed distal aspect of the forearm. The award of Kshs 180,000 was upheld.

32. Although no two cases can be similar, but decided cases act as a guide. Therefore, the awards in the sum of Kshs.200,000/- made in this case as general damages for pain and suffering is reasonable compensation. The trial court considered the injuries and the past decisions and did not commit any error in principle. There is nothing on which to impeach exercise of discretion by the trial court.

33. In an upshot, this court finds that the appeal herein lacks merit and is wholly dismissed.

34. However, given the evaluation of the appeal, there is no order as to costs.

35. Orders accordingly

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION, THIS 20TH DAY OF DECEMBER, 2024.**

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**HON. F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Musa Machage for appellant

Karanja for respondent

Otolo C/A