



REPUBLIC OF KENYA



KENYA LAW
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**Letting v Lelei & another (Civil Appeal 100 of 2017)
[2023] KEHC 371 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 100 OF 2017
JWW MONG'ARE, J
JANUARY 24, 2023**

BETWEEN

ALEX KIPLAGAT LETTING APPELLANT

AND

NELSON KIPLAGAT LELEI 1ST RESPONDENT

HENRY KIBOR 2ND RESPONDENT

*(Being an Appeal from the judgment delivered on 1st August 2017 by Hon.
E. Obina (SRM) in Kapsabet Principal Magistrates Case No. 22 of 2013)*

JUDGMENT

1. The appeal before this court arises from the judgment in Kapsabet Principal Magistrates Case No 22 of 2013. The Appellant had instituted a suit against the Respondents by way of a plaint dated December 18, 2012 seeking general and special damages. The cause of action arose from an accident that occurred on May 6, 2011 where the plaintiff was a pedestrian walking along the Kapsabet-Lessos road when the Respondents' vehicle allegedly knocked him down causing him serious bodily harm.
2. The matter proceeded to full hearing and the trial court dismissed the suit with no orders as to cost. The plaintiff was found 100% liable for the accident. Being aggrieved with the decision of the trial court, the Appellant instituted the present appeal vide a memorandum of appeal dated August 21, 2017 on the following grounds;
 - i. That the learned magistrate erred in fact and law in finding that the plaintiff was 100% liable for the accident which was the subject matter of the suit.
 - ii. That the learned magistrate erred in law and in fact by failing to consider the plaintiff evidence on the issue of liability.



- iii. That the learned magistrate erred in law and in fact by not considering the submission analysis tendered by the plaintiff to make the decision.
- iv. That the learned trial magistrate erred in law and in fact in finding that the plaintiff was not entitled to general damages when there were enough evidence to prove on a balance of probability to award general damages.
- v. That the learned magistrate erred in law and in fact by failing to consider the plaintiff's submissions on quantum.
- vi. That the learned magistrate erred in law and in fact in failing to consider conventional awards for general damages in cases of similar injuries.
- vii. That the learned magistrate erred in law and in fact by not awarding general damages to the Appellant by failing to consider conventional awards for general damages in cases of similar injuries and circumstances.

The parties prosecuted their appeal by way of written submissions.

APPELLANT'S CASE

3. The Appellant submitted that he proved his case on a balance of probability based on the evidence given by PW2 during the trial. It was his submissions that PW3 a Sergeant traffic officer attached to Kapsabet police station testified that on the material day of the accident, the Appellant's name was on record as a victim of the accident and produced a P3 form as evidence. The Appellant produced treatment receipts, discharge summary and treatment notes as evidence. He stated that he testified how the accident occurred, the Appellant was in the line of duty and he has demonstrated that his employer owed him a duty of care and would have prevented the occurrence of the accident by ensuring that the tractor used was in good shape. He maintained that the Respondents were 100% liable for causation of the accident.
4. The Appellant submitted that an award of Kshs 5,000,000 would be sufficient compensation. He stated that he had discharged the burden of proving on a balance of probabilities that he was involved in the material accident and it was occasioned by the negligence of the Respondent. He prayed that the appeal be allowed with costs.

RESPONDENT'S CASE

The Respondent submitted that the Appellant failed to call any person to corroborate his evidence since the Respondent was the only witness to testify. He failed to prove on a balance of probabilities that he was injured to the detriment of the Respondent. The trailer driver DW1 testified that when he was at the junction, he heard screams that is when he checked and saw the Appellant behind the trailer wheel. He further stated that he had not seen the Appellant prior and that no signal had been made to him so as to allow the Appellant board the trailer as he so stated on cross-examination. Even though it was not disputed that the Respondent was injured, what was in dispute was how he sustained the said injuries. DW2 testified that on that material day he was on the road and that he saw the Appellant following the tractor running. He tried to jump on it, failed to get the grip and went under the trailer and the wheel went over him.

5. It was the Respondents position that there was no duty of care owed to the Appellant or if any, that the duty was breached. He further submitted that the injuries sustained by the Appellant were self-inflicted since he did not provide evidence to prove that he had signaled the Respondent's driver to stop. The Response further stated the Appellant did not suffer any permanent disability from the injuries sustained and even if he did, the same was self-inflicting and therefore he was not entitled to



any damages. He stated that the trial court was correct in not awarding any damages to the appellant for the injuries sustained. As such, the pronouncement by the trial court as to the same was proper.

He prayed that the appeal be dismissed with costs to the Respondents.

ANALYSIS AND DETERMINATION

6. This being an appellate court, there is a duty to re-evaluate the evidence adduced before the trial court as was held in *Selle vs Associated Motor Boat Co* [1968] EA 123 where the court held that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which 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.”

The following issues arise for determination;

- a. Whether the trial court erred in its finding on liability
- b. Whether the trial court erred in its finding on damages

WHETHER THE TRIAL COURT ERRED IN ITS FINDING ON LIABILITY

7. I have perused the record of appeal and the proceedings in the trial court in order to establish the sequence of events that resulted in the Appellant’s injuries. It is clear that the Appellant was running after the tractor on the material date and upon attempting to jump on it, he slipped and fell. He went under the tractor trailer wheels and thus was injured. It is clear that the driver was not aware that someone was attempting to board the tractor. Further, given that a tractor has no passenger’s seat and a trailer is not ordinarily used to ferry passengers, the Appellant must have known it is dangerous to attempt to board the tractor in the manner he did. I find that the doctrine of *volenti non fit injuria* suffices in determining the liability of the appellant in his own misfortunes. In the premises, the trial court was correct in its finding on liability.

WHETHER THE TRIAL COURT ERRED IN ITS FINDING ON DAMAGES

8. The trial court determined that the Appellant was 100% liable for the offence. As a result therefore the trial court did not assess damages or even consider any special loss that the Appellant may have incurred to obtain treatment for injuries sustained. This court finds the determination on liability proper and having not interfered with it, will not also interfere with the findings on damages. It follows that the finding on damages was a correct finding and shall remain undisturbed.

The court finds that the Appeal as filed lacks merit and is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 24TH DAY OF JANUARY, 2023.

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J.W.W. MONG’ARE
JUDGE



Judgment read in open court in the presence of;

1. Mr. Chepkwony for the Appellant
2. No appearance for the Respondent
3. **Mr. Kimathi court assistant**

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J.W.W.MONG'ARE

JUDGE

24.01.2023

