



**Macharia v Mugenyu (Civil Appeal E567 of 2021)**  
**[2023] KEHC 1120 (KLR) (Civ) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1120 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**  
**CIVIL APPEAL E567 OF 2021**

**JN MULWA, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**FRANCIS NGIGI MACHARIA ..... APPELLANT**

**AND**

**EVANSON KAGO MUGENYU ..... RESPONDENT**

*(Being an Appeal from the judgment and decree delivered in the Chief Magistrate Court at Nairobi in CMCC No. 785 of 2020 by Hon. D. O. Mbeja (PM) on 13th August, 2021)*

**JUDGMENT**

1. This appeal arises from Milimani CMCC No 785 of 2020 in which the respondent sued the appellant for general and special damages as well as future medical expenses for injuries sustained in a road traffic accident that occurred on April 16, 2019 at Gacharage along Nairobi – Limuru Road. It involved a collision between motor vehicle registration number XXXX driven by the respondent and the appellant’s motor vehicle registration number XXXX being driven by his agent. The respondent attributed the accident to the negligent acts of the appellant’s driver and sought to rely on the doctrine of res ipsa loquitor.
2. The appellant denied the claim in entirety and blamed the accident on the negligence of the respondent.
3. Upon trial the court found that the appellant’s driver was 100% liable for the accident and held the appellant vicariously liable. The court awarded the respondent Kshs 1,500,000/- for general damages, Kshs 60,350/- for special damages and Kshs 200,000/- for the removal of metal implants.



4. Being aggrieved by the said decision, the appellant lodged this appeal challenging both liability and quantum. He raised seven grounds of appeal which can be summarized as follows:
- 1) That the learned magistrate erred in law and in fact by assessing liability at 100% in favour of the respondent despite the fact that there was no evidence whatsoever showing the appellant as being wholly or in part to blame for the accident.
  - 2) That the learned magistrate erred in law and in fact in awarding general damages of Kshs 1,500,000/- which was inordinately too high in the circumstances of the case as to amount to an erroneous estimate of damages.
  - 3) That the learned magistrate erred in law and in fact in awarding full special damages when the same though pleaded had not been proved.
5. The appeal was canvassed through written submissions which this court has duly considered alongside the grounds and record of appeal. The issues that arise for determination are:
- a) Whether the learned trial magistrate erred by assessing liability at 100% in favour of the respondent?
  - b) Whether the learned magistrate's awards for general and special damages were erroneous and highly excessive.

**Whether the learned trial magistrate erred by assessing liability at 100% in favour of the respondent?**

6. The appellant submitted that the trial court's finding on liability was erroneous since the respondent did not prove that the appellant's driver was negligent and/or was driving at an excessive speed. He contended that from the evidence on record, it is evident that it was the respondent who was negligent and ought to have been held wholly liable for the accident. He argued that the respondent did not produce evidence in the form of photographs, motor vehicle assessment report and/or inspection certificate of his vehicle to ascertain the point of impact between his motor vehicle and that of the appellant. Further, the appellant urged that the trial magistrate failed to consider the fact that the copy of police abstract admitted in evidence did not put blame on any of the parties herein as the matter was still pending under investigation.
7. On the other hand, the respondent submitted that the trial court's finding on liability was proper and should be affirmed as it was based on entire evidence on record. It was submitted that the admission by the appellant's driver that he hit the respondent motor vehicle from behind and that he had seen him prior to the accident, leads to the conclusion that indeed the respondent proved negligence on the part of the appellant's driver. Further, the respondent argued that the appellant did not adduce any evidence to illustrate that his vehicle joined the road wrongly from a feeder road and was thus to blame for the accident.
8. During trial, Evanson Kago Mugenyu, the respondent herein, testified that he was driving his vehicle along Mucharage - Ruaka road. He signalled with the intention of turning. Suddenly, he heard a loud bang from behind. The appellant's lorry registration number XXXX hit him. He stated that the driver of the appellant's vehicle was to blame as he was speeding and was careless. On cross examination, PW1 stated there was a T-junction for Gacharage, Ndenderu, Ruaka nearby; that the accident occurred at Gacharage at a petrol station on the left side of the road and was on the main road which is Ndenderu - Ruaka road and signalled to go to the



petrol station. The lorry came from Ndenderu heading towards Ruaka and due to the high speed it was being driven at, the driver was unable to apply brakes and thus hit his vehicle from behind, causing it to enter into a culvert.

9. DW1, Nelson Njoroge Mwangi was the driver of the appellant's motor vehicle on the material day. He testified that the respondent's vehicle emerged from a T-Junction and was entering a nearby petrol station; that he tried to avoid the respondent's vehicle but hit it from behind and it landed in a culvert. He reported the accident at Ndenderu police station and was not blamed for the accident. On cross-examination, DW1 conceded that he was driving from Ndenderu heading to Ruaka while the respondent was entering the petrol station. He admitted that he saw the respondent from 20 meters away and stated that he tried to swerve and apply breaks to avoid the accident but hit the respondent's vehicle's left rear tire and the impact caused the respondent vehicle to enter into the culvert. He also stated that he was driving at 40 Kmph.
10. DW2, No 7XXXX PC Erick Kiruri from Karui police station testified that the accident was reported by DW1 through OB/4XXXX2019. The respondent's motor vehicle registration No XXXX was blamed for the accident as the driver of XXXX had the right of way. On cross examination, he stated that he was not the investigating officer. He confirmed that he never visited the scene of the accident, had no sketch plan for the scene and the matter was pending under investigation. He maintained that the respondent was blamed for causing the accident but admitted that it is not indicated in the abstract that the driver of XXX was to blame.
11. There is no dispute that an accident occurred involving the appellant's motor vehicle registration number XXXX and the respondent's motor vehicle registration number XXXX. The police abstract confirms this fact but indicates that the matter was still pending under investigation. The investigating officer was not called to testify and give the court a clear picture of how the accident occurred and who was to blame for the accident. Further, no sketch map of the accident scene was adduced to enable the court appreciate how the accident occurred. To that end, the court finds the *res ipsa loquitur* pleaded by the respondent is inapplicable in the circumstances of the case as he failed to prove facts which give rise to an assumption of liability on the part of the appellant.
12. In reaching the decision that the appellant's driver was wholly to blame for the accident, the learned magistrate took note of DW1's own admission that he hit the respondent's motor vehicle from behind. The learned magistrate noted that DW1 ought to have taken reasonable measures to avoid the accident such as slowing down bearing in mind the presence of the respondent on the road. Whilst this court agrees with the learned magistrate's reasoning to some extent, it is also clear that the respondent did not tender any watertight evidence that would have led the court to find, even on a *prima facie* basis, that the appellant's driver was wholly to blame. In the premises, this court holds the view that liability ought to be shared between the appellant's driver and the respondent. However, the appellant's driver shall bear more blame in view of the fact that he is the one who hit the respondent from behind.

**Whether the learned magistrate's award of Kshs 1,500,000/- for general damages was erroneous and highly excessive**

13. The appellant submitted that trial magistrate's assessment of general damages was based on the wrong principles as the court did not consider the fact that comparable injuries should be compensated by comparable awards. He contended that the general damages award of Kshs 1,500,000/- was highly excessive and amounted to an erroneous estimate. In the appellant's view, Kshs 300,000/- would be adequate compensation considering the injuries that the respondent sustained. The appellant urged the court to be guided by the following cases:



*Hashim Mohamed Said & another v Lawrence Kibor Tuwei [2018] eKLR; Erick Onyango Okumu v SDV Transami (K) Limited [2007] eKLR* and *Eric Otieno Ayieko v Micheal Ngondo [2017] eKLR*.

14. On the part of the respondent, it was submitted that the award of Kshs 1,500,000/- for general damages was reasonable compensation in the circumstances of the case. The respondent relied on the case of *Bayusuf Freighters Limited v Patrick Mbatha Kyengo [2014] eKLR* where in his view, the court awarded the respondent therein Kshs 1,600,000.00/= for comparable injuries. He also cited the case of *Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR* where the respondent therein was awarded Kshs 1,500,000/- for comparable injuries, according to him.
15. It is well settled that an award of damages is an exercise of discretion by the trial court and thus an appellate court will not interfere with such discretion unless there are good grounds to do so. In *Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR*, the Court of Appeal stated thus:

' An appellate court will not disturb an award for general 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 either inordinately high or low.'
16. Further, an award of damages for personal bodily injuries should be commensurate to the injuries suffered and comparable to those made in past similar cases. In *Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR*, Majanja J stated thus:

' The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.'
17. At paragraph 6 of the plaint, the respondent particularized his injuries as fractured right femur and swollen, painful, tender right thigh. The injuries were confirmed in the medical report of Dr GK Mwaura dated January 2, 2020 adduced by the respondent. The doctor noted that the respondent was treated at St Peter's Orthopaedic Centre where x-rays were done and the fracture fixed internally with metal implants (nails). At the time of examination, the respondent could not run but could stand and walk for a short period. The doctor assessed the degree of permanent incapacity of the right lower limb at 10% and opined that the respondent would need Kshs 200,000/- in future for removal of the implants.
18. In arriving at the decision to award the respondent general damages in the sum of Kshs 1,500,000/-, the learned trial magistrate simply noted that he had considered the parties' submissions and authorities cited as well as the injuries suffered by the respondent. Further, the learned magistrate stated that he was guided by the case of *IG Transporters Limited & another v Moses Theuri Ndumia [2018] eKLR*.
19. The court notes that the victims in the two authorities cited by the respondent and the IG Transporters Case (supra) relied on by the learned magistrate, suffered far more serious injuries hence not comparable to those suffered by the respondent herein. The court also holds the



view that the case of Hashim Mohamed Said & another v Lawrence Kibor Tuwei (supra) cited by the appellant is not comparable as the victim therein did not suffer any permanent disability despite the fact that the injuries were related to those suffered by the respondent herein.

20. The court holds the view that the cases of Erick Onyango Okumu v SDV Transami (K) Limited (supra) and Eric Otieno Ayieko v Micheal Ngondo (supra) cited by the appellant are more comparable. In the former, the plaintiff sustained a fracture of the right thigh bone and suffered a permanent incapacity of 10% as well as post trauma osteoarthritis and was awarded Kshs 600,000/= in general damages. In the latter, the plaintiff suffered displaced fracture of the left femur midshaft, deep cut on the heel of the left leg, pain and swelling on the left thigh and tenderness on the chest. The trial court's award of Kshs 200,000/= was set aside at the appeal stage and enhanced to Kshs 600,000/=.
21. What this means is that the court finds that the trial court's award of Kshs 1,500,000/- was excessive in the circumstances of the case. Considering the two comparable precedents highlighted above, the court finds that an award of Kshs 800,000/- would be sufficient compensation.

### **Disposition**

22. The court finds that the appeal is merited.
  - a) The trial court's finding on liability is hereby set aside and substituted with a finding that liability is apportioned between the respondent and the appellant in the ratio of 10:90 against the appellant.
  - b) The trial court's award of Kshs 1,500,000/- in general damages is hereby set aside and substituted with an award of Kshs 800,000/- the awards of Kshs. 60,350/- for special damages and Kshs 200,000/- for the removal of metal implants is hereby upheld.

The revised award on general damages shall attract interest at court rates from the date of the trial court's judgment
  - c) There shall be no orders as to costs on the appeal.

Orders Accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023**

**J.N. MULWA**

**JUDGE.**

