



REPUBLIC OF KENYA



KENYA LAW
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**Mokono v Momanyi (Civil Appeal 162 of 2021)
[2023] KEHC 1378 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 162 OF 2021
CW GITHUA, J
FEBRUARY 23, 2023**

BETWEEN

JULIUS MORARA MOKONO APPELLANT

AND

GLADYS MORAA MOMANYI RESPONDENT

JUDGMENT

1. The appellant, Julius Morara Mokono was the defendant in Kisii CMCC No 197 of 2019. He was sued by the respondent, Gladys Moraa Momanyi, then the plaintiff who sought general and special damages following personal injuries sustained in a road traffic accident which occurred on or about March 30, 2018.
2. According to the plaint dated April 10, 2019, the respondent was at the material time travelling as a fare paying passenger in motor vehicle registration No KBN 139 C (the subject vehicle) when the appellant negligently drove or controlled the vehicle to an extent that it veered off the road.
3. In his statement in defence dated July 24, 2019, the appellant denied all the allegations contained in the plaint and put the respondent to strict proof thereof. In the alternative and without prejudice, the appellant claimed that if the accident occurred which was denied, it was caused by the respondent's negligent and reckless acts or omissions.
4. The trial court's record shows that after a short trial in which the respondent only testified, the learned trial magistrate delivered her judgment on January 31, 2020 and made a finding on liability in favour of the respondent against the appellant at 100%. On quantum, the respondent was awarded general damages in the sum of Ksh 500,000 and special damages amounting to Ksh 13,050. The respondent was also awarded costs of the suit and interests.



5. The appellant was dissatisfied with the trial court’s decision on both liability and quantum. Through his advocates Ms Kimondo Gachoka & Company Advocates, he proffered the instant appeal through a memorandum of appeal dated December 15, 2021.
6. In support of his appeal, the appellant advanced ten grounds which were to a large extent duplicated. In a nutshell, the appellant complained that the learned trial magistrate erred in law and fact by finding him 100% liable which was unjust and against the weight of evidence presented before the court. The appellant also faulted the learned trial magistrate for awarding the respondent Kshs 500,000 in general damages which was excessive and inordinately high as to be an erroneous estimate of the damage suffered by the respondent; failing to consider the appellant’s submissions on both liability and quantum, and, failing to consider conventional awards in cases of a similar nature.
7. In compliance with directions issued by the court, the appeal was prosecuted by way of written submissions which both parties duly filed.
8. This being a first appeal to the High Court, it is an appeal on both facts and the law. As the first appellate court, I am fully conscious of my duty which as succinctly articulated by the Court of Appeal in the case of *Abok James Odera t/a AJ Odera & Associates V John Patrick Machira & company Advocates*, [2013] eKLR is to:

“.....re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
9. I have carefully considered the grounds of appeal, the evidence on record and the parties rival submissions alongside the authorities cited. I have also read the judgment of the trial court. Having done so, I find that two main issues emerge for my determination which are:
 - i. Whether the learned trial magistrate erred in her finding on liability and quantum of damages awarded to the respondent
 - ii. Who should be awarded costs of the appeal?
10. Starting with the issue of liability, as noted earlier, only the respondent testified in this case as she did not call an additional witness and the appellant chose not to offer any evidence. In her testimony, the respondent who testified as PW1 stated that she was travelling as a passenger in the subject vehicle along Kisii-Miruka road when its driver, due to over speeding, veered off the road and hit a nearby house. She sustained injuries on the legs and was treated at Ekerenyo sub-county hospital, Kisii Teaching and Referral Hospital as well as Tenwek Hospital.
11. In support of her case, she produced medical records from the above hospitals and a copy of records from the National Transport and Safety Authority evidencing ownership of the subject vehicle. She also reported the accident to the police and was issued with a P3 form (Pexbt 8) and a police abstract (Pexbt 9).
12. In his submissions on liability, the appellant, relying on the authority of *Robert Collins Murimi V Benson Njibia Kamau (suing as the legal representative of the Estate of Veronica Nuru Jibia Deceased)* [2017] eKLR invited me to set aside the trial court’s finding on liability and in its place apportion liability in the ratio of 50:50 as in his view, the respondent failed to prove negligence on his part.



13. The respondent in her submissions supported the trial court's finding on liability arguing that her evidence which was uncontroverted, proved negligence against the appellant to the standard required by the law.
14. After my own appraisal of the evidence, I find that the respondent was clear and consistent in her evidence that on the date in question, she was a passenger in the subject vehicle and the appellant negligently drove it by over speeding as a result of which it veered off the road and hit a house off the road.
15. As correctly submitted by the respondent, PW1's evidence was not controverted by any evidence to the contrary since the appellant did not offer any evidence. PW1's evidence was further supported by the content of the police abstract produced as Pexbt8 which not only confirmed occurrence of the accident but also indicated that the appellant who was the driver of the subject vehicle was to blame for the accident. And as the respondent was a passenger in the appellant's vehicle she could not have contributed to the occurrence of the accident in any way. In the premises, I find no reason to fault the learned trial magistrate's finding on liability.
16. On quantum, the appellant proposed an award of a maximum of Ksh. 70,000 arguing that the amount would be adequate compensation for the soft tissue injuries suffered by the respondent.

For this proposition, he relied on the following authorities.

- i. [HB \(Minor suing through mother & next friend DKM V Jasper Nchonga Magar & Another](#) [2021] eKLR where an award of Ksh. 60,000 was upheld on appeal for soft tissue injuries on the head, neck, thorax, abdomen and limbs.
 - ii. [Francis Oraro V Harrison Ochomba Nyaigoti Nyamira](#) HCC No E015 of 2021 (unreported) where an award of Ksh 500, 000 for cut wounds on left gluteal region and left leg and contusion on the chest was reduced on appeal to Ksh 100,000.
 - iii. [Joash Ouko Nyabuko & Another V Clinton Motieko Ongocho](#) Kisii HCCA No 117 of 2021, where an award of Ksh 500,000 for pain on left Knee joint and injury to skin of the head was reduced on appeal to Ksh 100,000.
17. As expected, the respondent urged me to uphold the trial court's award relying on the following authorities
 - i. [Patrick Kinoti Miguna V Peter Mburugu Muthama](#) 2022 eKLR in which the plaintiff was awarded Ksh 300,000 general damages for bruises on the right parietal region, two loose lower incision teeth, dislocation of right shoulder, cut on the left leg and bruises on the right leg and dorsum of right hand.
 - ii. [George Omenja Obare V Francisca Tavitha Mbuvi](#) [2019] eKLR where an award of Ksh 1,000,000 was reduced on appeal to Ksh 600,000 for injuries allegedly similar to that sustained by the respondent.
 18. After considering the evidence and the parties written submissions, I find that the injuries sustained by the respondent as pleaded in the plaint and confirmed by the medical report of Dr Morebu Peter Momanyi (Pexbt 10) were not disputed by the appellant.

The respondent sustained the following injuries;

Blunt trauma to the lower back abdomen and left leg. Bruises on the right and left hand and bruises on the lower right and left limb.



19. It is now settled law that as a general rule, an appellate court should be slow to interfere with an award of damages made by the trial court. This is essentially because the award of damages is at the discretion of the trial court and unless it is demonstrated that the court in arriving at its decision erred by applying wrong legal principles or considering extraneous factors or failing to consider relevant ones, the High Court ought not to interfere with the award. The court can also disturb an award if it was satisfied that it was either inordinately high or low as to represent an erroneous estimate of the damage suffered See: *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] IKAR, *Kemfro Africa Ltd T/A Meru Express Services & Another v Lubia & Another* [1987] KLR 30.
20. In the assessment of damages, the common method of approach is that comparable injuries should be compensated by comparable awards in order to create some measure of uniformity in the making of awards.
21. The record shows that in arriving at her decision on quantum, the learned trial magistrate relied on the authority of *Patrick Kinoti Miguna V Peter Mburunga Muthama (supra)* in which as she correctly noted, the plaintiff was awarded Ksh 300,000 for more severe injuries than those sustained by the respondent.
22. In my opinion, the learned trial magistrate erred by relying on an authority in which the plaintiff had sustained not only more severe injuries but injuries which were different in nature and were not at all comparable to the injuries the respondent had suffered.
23. The award of Ksh 500,000 for the multiple soft tissue injuries sustained by the respondent which according to the doctor were severe but were expected to heal leaving only an ugly scar was inordinately high even after considering the rate of inflation as to give rise to an inference that the award represented an erroneous estimate of the damage suffered by the respondent.
24. From the medical report, it can safely be deduced that the scar left on the injury site had some cosmetic significance and taking everything into account, I find that an award of Ksh 200,000 in the year 2020 when the trial court's judgement was delivered would have adequately compensated the respondent for the pain and suffering she experienced as a result of her injuries. I consequently set aside the trial court's award on general damages and substitute it with an award of Kshs 200,000.

As the award of special damages was not disputed, the same is affirmed.

The award of general damages will attract interest at court rates from date of judgment of the trial court while the award on special damages will accrue interest from date of filing suit.
25. On costs, the appellant will pay the respondent costs in the lower court but as the appeal has partially succeeded, each party will bear its own costs of the appeal.

It so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF FEBRUARY 2023.

C.W. GITHUA

JUDGE

In the presence of:

Ms. Cheruiyot holding brief for Mr. Ndolo for the appellant

Mr. Migiro for the Respondent

Ms. Aphline Court Assistant

