



REPUBLIC OF KENYA



**Raj & another v Ogongo (Civil Appeal 613 of 2016)  
[2023] KEHC 2811 (KLR) (Civ) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2811 (KLR)

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

**CIVIL**

**CIVIL APPEAL 613 OF 2016**

**PM MULWA, J**

**MARCH 31, 2023**

**BETWEEN**

**JETHVA RAJ ..... 1<sup>ST</sup> APPELLANT**

**PATEL KAMLESH KUMAR ..... 2<sup>ND</sup> APPELLANT**

**AND**

**OLUOCH HEZRON OGONGO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Honourable D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 7th September, 2016 in CMCC NO. 6960 OF 2014)*

**JUDGMENT**

1. The respondent who was the plaintiff in CMCC No 6960 of 2014 instituted a suit against the 1<sup>st</sup> and 2<sup>nd</sup> appellants through the plaint dated November 20, 2014 seeking both general and special damages as well as costs of the suit and interest thereon.
2. The 1<sup>st</sup> appellant was sued in his capacity as the registered owner of the motor vehicle registration number KBZ 246T (“the subject motor vehicle”) while the 2<sup>nd</sup> appellant was sued as the driver of the subject motor vehicle at all material times.
3. The respondent pleaded in the plaint that sometime on or about August 30, 2014 while he was lawfully riding the motorcycle registration number KMDG 093W (“the motorcycle”) along Parklands Sports Club in Nairobi area, the subject motor vehicle being negligently driven by the 2<sup>nd</sup> appellant, lost control and knocked him down, resulting in severe injuries to the respondent. The particulars of negligence were laid out under paragraph 6 of the plaint.



4. The 1<sup>st</sup> and 2<sup>nd</sup> appellants entered appearance and put in their statement of defence dated January 26, 2015 jointly to deny the averments made in the plaint.
5. At the trial, the respondent testified and called one (1) other witness, while the 2<sup>nd</sup> appellant testified for the defence case.
6. Upon close of submissions, the trial court entered judgment in favour of the respondent and against the appellants jointly and severally, in the following manner:  
Liability 100%
  - a) General damages for pain,  
Suffering and loss of amenities Kshs 400,000/
  - b) Special damages Kshs 255,500/  
Total Kshs 655,500/
7. Being aggrieved by the abovementioned judgment, the appellants have now approached this court by way of an appeal. Their memorandum of appeal dated October 3, 2016 features a total of nine (9) grounds of appeal to challenge the findings on both liability and quantum.
8. The appeal was canvassed through written submissions.
9. The appellants contend that the trial court erred by not apportioning liability equally between the parties herein and yet the evidence tendered shows that the respondent did not exercise precautions in preventing the accident on his part, quoting the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR in which the court determined the following:
 

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”
10. On quantum, the appellants contend that the trial court erred by awarding the sum of Kshs 400,000/ on general damages, which sum the appellants deem to be manifestly excessive and incommensurate to the injuries sustained. According to the appellants, the sum of Kshs 310,000/ would form a more suitable award under that head.
11. The appellants further faulted the decision by the trial court to award special damages in the sum of Kshs 253,000/ in the absence of proof of the same.
12. Overall, it is the submission by the appellants that the decision by the trial court ought to be interfered with, pursuant to the following principles set out by the court in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] Kar 5 on instances where an appellate court can interfere with an award made by a trial court:
  - a. Where the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or
  - b. Where the amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.



13. For the above reasons, the appellants have urged this court to disturb the decision made by the trial court in the manner set out hereinabove.
14. The respondent replied by submitting that on liability, the trial court entered a correct finding in view of the evidence tendered to show that it is the 2<sup>nd</sup> appellant who was solely to blame for the accident and which evidence is corroborated. The respondent therefore urges this court to uphold the finding on liability.
15. In respect to quantum, it is the submission by the respondent that the award made on general damages is reasonable and within the range of comparable awards previously made by the courts. The respondent has drawn the attention of this court to the case of *Henry Binya Oyala v Sabera O Itira* [2011] eKLR in which the court awarded the plaintiff the sum of Kshs 500,000/ for comparable injuries.
16. The respondent further urges this court to uphold the award made under the head of special damages, citing that the same were pleaded and duly proved.
17. I have considered the rival submissions and various authorities cited on appeal. As is required of an appellate court, I have re-evaluated the evidence which the trial court had the opportunity to consider, as well as the trial court's findings on the same.
18. As earlier mentioned, the appeal touches on the findings on liability and quantum. As such, I will address the appeal under the two (2) separate limbs.
19. On the first limb touching on liability, PC George Ogot who was PW1 attended the trial and produced the police abstract and an extract from the Occurrence Book (OB) as P Exhibits 1 and 2 respectively, in relation to the accident.
20. The police officer stated that the material accident occurred as the motorcycle being ridden by the respondent was joining the main road headed in the direction of Parklands Police Station.
21. The police officer further stated that the driver of the subject motor vehicle did not give way to the motorcycle and hence the collision.
22. In cross-examination, it was the evidence by the police officer that he did not investigate the accident or visit the scene of the accident but that he could tell the details of how the accident occurred by looking at the contents of the OB.
23. In re-examination, PW1 gave evidence that the driver of the subject motor vehicle was to blame for the accident.
24. The respondent by way of his evidence as PW2 adopted his signed witness statement as evidence and stated that on the material date, he was on his way to work when the accident took place, and for which he blamed the driver of the subject motor vehicle.
25. The respondent further stated that he could not avoid the accident.
26. In cross-examination, the respondent testified that he has been riding a motorcycle for a number of years, having attended driving school.
27. The respondent further testified that he did not cause or contribute to the accident, and this was echoed at the point of re-examination.
28. The 2<sup>nd</sup> appellant being DW1 testified that by the time he noticed the respondent, the subject motor vehicle had already joined the road. He too adopted his executed witness statement as evidence.



29. On being cross-examined, the 2<sup>nd</sup> appellant testified that he knocked the motorcycle on which the respondent was, while leaving his residential area and that he was moving quite fast when joining the road but that he had his indicators on.
30. It was the evidence by the 2<sup>nd</sup> appellant that upon seeing the respondent, he had expected him to stop and that he applied brakes to avoid hitting the respondent, to no avail.
31. In re-examination, the 2<sup>nd</sup> appellant stated that it is the respondent who hit the subject motor vehicle and that he was at the centre of the road when the accident occurred.
32. Upon taking down the evidence, the learned trial magistrate found that the respondent had proved his claim for negligence as against the 1<sup>st</sup> and 2<sup>nd</sup> appellants, jointly and severally. Consequently, the learned trial magistrate found the appellants 100% liable.
33. Upon my re-examination of the evidence, it is not in dispute that the accident took place on the material date and involving the parties herein.
34. From the record, while it is apparent that the police officer who testified was not the investigating officer, he was able to corroborate the testimony of the respondent on the manner in which the accident likely occurred, upon relying on the contents of the OB and the police abstract, none of which were controverted by the appellants, by way of any credible evidence to the contrary.
35. From the record, it is apparent that the respondent had reasonably shown that it is the subject motor vehicle which failed to give way to the motorcycle being ridden by the respondent, thereby resulting in a collision. This position is reinforced in the testimony by the 2<sup>nd</sup> appellant, who during cross-examination, mentioned that he tried to apply brakes with little success, which points to the likelihood that he was driving at a speed which made it a challenge for him to stop.
36. Upon my further re-examination of the evidence, I note that while it is apparent that the matter was still pending under investigation at the time of taking evidence by the trial court and it is not clear what the outcome of the investigations was subsequently, I am satisfied that the learned trial magistrate upon considering the pleadings and documents tendered and supported by the relevant oral testimonies, correctly found that the respondent had proved the particulars of negligence on a balance of probabilities and which particulars were not challenged by the appellants, by way of any contrary evidence.
37. On the subject of contributory negligence and apportionment of liability, upon my re-examination of the evidence, I am of the view that the appellants did not tender any credible evidence to support their assertions or to demonstrate the manner in which the respondent contributed to the accident, in the circumstances.
38. In my reasoned view, therefore, the learned trial magistrate arrived at a reasonable finding on liability and I see no need to interfere with the same.
39. On quantum, the law sets out that an award of the trial court can only be interfered with in the following scenarios as articulated in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) Kar 5 cited in the submissions by the appellants:
  - a) Where an irrelevant factor was taken into account.
  - b) Where a relevant factor was disregarded.



- c) Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

40. Going by the grounds of appeal and submissions filed, it is clear that the appeal is challenging the award made under the following heads.

#### **General damages for pain, suffering and loss of amenities**

41. On his part, the respondent proposed an award in the sum of Kshs 500,000/ citing the case of *Henry Binya Oyala v Sabera O Itira* [2011] eKLR where the court awarded the sum of Kshs 200,000/ at the instance of a contusion and abrasions on the right arm, compound fracture of the radius bone and swelling of the right ankle joint. In contrast, the appellants proposed an award of Kshs 321,000/ and cited the case of *Tarasila Wanja & another v Peter Kirimi Muthuri* [2014] eKLR where a similar award was made.
42. As earlier mentioned, the learned trial magistrate on his part awarded the sum of Kshs 400,000/ but did not cite any guiding authorities.
43. Upon my study of the record, I note that the pleadings and medical evidence particularize the injuries sustained by the respondent as being a fracture of the left radius, resulting in his admission in hospital briefly. The medical report by Dr Wokabi and dated October 3, 2014 made mention that the respondent had suffered a previous fracture of the left ulna upper third for which a metal plate was inserted in 2012. The doctor assessed degree of permanent incapacity at 10% and his report was corroborated by that dated September 30, 2015 and prepared by Dr Oluoch Hezron.
44. Upon considering the authorities cited by the parties, I note that though containing relatable injuries, the authorities were cited a number of years back.
45. I therefore considered the case of *Benard Muinde Kilonzo v Andrea M Maiko Mogi & another* [2021] eKLR where the court awarded the sum of Kshs 500,000/ on appeal under this head for a fracture injury with permanent incapacity assessed at 20%.
46. Upon considering the award made in the above authority, I am satisfied that the award made by the learned trial magistrate was reasonable and I do not see any reason to interfere with it, in the circumstances. The award made on general damages is therefore upheld.

#### **b) Special damages**

47. Here, the respondent sought for the total sum of Kshs 255,500/ being the medical and related expenses incurred, as well as the costs incurred in obtaining the copy of records and the medical report.
48. The learned trial magistrate awarded the respondent with the sum of Kshs 255,500/ under this head.
49. It is trite law that special damages ought to be specifically pleaded and strictly proved, in order to be awarded.
50. In the present instance, upon my re-examination of the evidence tendered in that respect, I am satisfied that the respondent had tendered credible evidence to support his claim for special damages and I therefore find that the learned trial magistrate acted correctly by awarding the sum pleaded and proved. I see no reason to interfere with the award made.
51. Final Orders:
- i). The appeal fails and it is hereby dismissed for lack of merit.



ii). The judgment delivered by the trial court is upheld.

iii). Costs to the respondent.

**JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT MILIMANI THIS 31<sup>ST</sup> DAY  
OF MARCH, 2023**

.....

**P.M. MULWA**

**JUDGE**

**In the presence of:**

**Aden – Court Assistant**

No appearance for Appellant

No appearance for Respondent

