



**Wanda & another v Opondo (Civil Appeal 67 of 2019)  
[2023] KEHC 2809 (KLR) (Civ) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2809 (KLR)

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

**CIVIL**

**CIVIL APPEAL 67 OF 2019**

**PM MULWA, J**

**MARCH 31, 2023**

**BETWEEN**

**MICHAEL OTIENO WANDA ..... 1<sup>ST</sup> APPELLANT**

**HELEKA NJEGA OUKO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID OMONDI OPONDO ..... RESPONDENT**

*(Being an appeal against the judgment and decree delivered by D O Mbeja (Mr) (Senior Resident Magistrate) on February 1, 2019 in Milimani CMCC NO 7233 of 2017)*

**JUDGMENT**

1. David Omondi Opondo, the respondent herein, filed a suit against the 1<sup>st</sup> and 2<sup>nd</sup> appellants in which he sought for both general and special damages in the sum of Kshs 14,080/ plus 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 KBP 134W (“the first motor vehicle”) at all material times whereas the 2<sup>nd</sup> appellant was sued as the driver of the first motor vehicle.
3. The respondent pleaded in the plaint that sometime on or about October 14, 2016 he was lawfully travelling as a passenger aboard the motor vehicle registration number KBM 441R (“the second motor vehicle”) along Mombasa Road when the first motor vehicle being driven by the 2<sup>nd</sup> appellant collided with the second motor vehicle, causing the respondent to sustain bodily injuries.
4. The respondent attributed the accident to negligence on the part of the appellants, by setting out the particulars in his plaint.



5. Further to the foregoing, the respondent relied on the *res ipsa loquitur* doctrine.
6. Upon entering appearance, the appellants filed their statement of defence jointly to deny the allegations set out in the plaint, specifically denying their association with the first motor vehicle and the particulars of negligence pleaded against them.
7. The appellants further pleaded in their statement of defence that in the alternative, the respondent either substantially or wholly contributed to the material accident, by setting out the particulars thereof under paragraph 5 of the statement of defence.
8. At the hearing of the suit, the respondent testified as the sole plaintiff witness whereas the 2<sup>nd</sup> appellant testified for the defence case.
9. The parties thereafter filed written submissions.
10. Eventually, the trial court entered judgment on February 1, 2019 in favour of the respondent and against the appellants jointly and severally in the manner hereunder:  
Liability 100%
  - a) General damages for pain,  
suffering and loss of amenities Kshs 800,000/
  - b) Special damages Kshs 14,080/  
Total Kshs 814,080/
11. The aforementioned judgment is now the subject of the appeal before this court. To challenge the judgment, the appellants have put forward the following grounds of appeal vide their memorandum of appeal dated February 12, 2019:
  - (i) That the learned trial magistrate erred in law and fact in finding the appellants fully liable for the injuries sustained by the respondent whereas the respondent failed to prove his case to the required standards on a balance of probabilities.
  - (ii) That the learned trial magistrate erred in law and fact in failing to consider relevant authorities and submissions both on the issues of liability and quantum filed by the appellants.
  - (iii) That the learned trial magistrate erred in law and in fact in making an award which was not within the limits of already decided cases of similar nature.
  - iv) That the learned trial magistrate erred in law and fact in awarding the respondent general damages of Kshs.800,000/ which award is inordinately high and excessive considering the injuries sustained by the respondent being a fracture right tibia.
  - (v) That the learned trial magistrate erred in law and fact in failing to consider that the injuries sustained by the respondent had fully healed without any permanent incapacitation and thereby arrived at an award that is inordinately high and excessive.
  - (vi) That the judgment of the learned trial magistrate is against the law and weight of the evidence on record.
12. This court directed the parties to file written submissions on the appeal.
13. On liability, the appellants contend in their submissions that the respondent did not tender sufficient evidence to warrant the finding entered on liability against them.



14. The appellants contend that the respondent did not tender any evidence to support his testimony that the first motor vehicle was being driven at an excessive speed on the material day or to support the contents of the police abstract, citing the case of *Charles Kawai (Suing as the Administrator of the Estate of the Late Kevin Kioko Charles) v Bonface Mutunga & another* [2020] eKLR in which the court held that:
 

“A police abstract is merely evidence that a report of an accident has been made to the police....That document could not therefore be the basis of finding liability on the part of the Respondents.”
15. The appellants therefore urge this court to substitute the finding of 100% on liability with one of 50% liability.
16. On quantum, it is the submission by the appellants that the sum of Kshs 800,000/ awarded by the trial court on general damages is manifestly excessive. Consequently, the appellants propose an award of Kshs 350,000/ under that head, while placing reliance *inter alia*, on the case of *Paul Muiruri Njau v David Waruinge Gichia & another* [2020] eKLR where the court awarded the sum of Kshs 350,000/ on appeal to a plaintiff with a fracture of the right tibia fibula and the case of *Simon Kimote v Agro Solutions Limited* [2021] eKLR in which the court, upon considering injuries in the nature of a right femoral fracture lower 1/3, tibia plateau fracture, blunt head injury and blunt neck injury, upheld a similar award made on general damages in the sum of Kshs 350,000/.
17. In retort, the respondent argues that the trial court acted correctly in finding the appellants fully liable upon considering the totality of the evidence which was adduced at the trial, including the contents of the police abstract which found the 2<sup>nd</sup> appellant to blame for causing the accident for negligently driving behind the second motor vehicle. To buttress his point here, the respondent refers this court to the judicial authority of *David Ogol Alwar v Mary Atieno Adwera & another* [2021] eKLR where the court determined that:
 

“In my humble view, a motorist or rider who is driving or riding behind other motorists/riders is tasked with much more duty of care to ensure that he does not collide with cars that are ahead of him as he has a full view of that which is ahead of him. Such care involves the keeping of adequate distance from the car ahead and driving at reasonable speed so as to avoid ramming into the vehicles ahead.”
18. On the subject of damages, it is the argument by the respondent that the trial court made a reasonable assessment on general damages and which assessment was within range of comparable awards made in injuries of a similar nature, citing the cases of *Kornelius Kweya Ebichet v C & P Shoe Industries Ltd* [2008] eKLR and *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] eKLR where the respective courts awarded the sums of Kshs 1,000,000/ and Kshs 1,300,000/ at the instance of comparable injuries.
19. It is therefore the submission by the respondent that the trial court arrived at a correct finding on both liability and quantum, and hence there is no need for interference with the impugned judgment.
20. I have considered the rival written submissions on appeal and the authorities cited in support thereof. Moreover, I have considered the evidence which the trial court had the opportunity to look at.
21. It is clear that the appeal lies against the findings on liability and quantum. It is thus appropriate for me to address the appeal under the two (2) limbs.



22. On the first limb touching on liability, the respondent adopted his signed witness statement and the documents constituted in his list and bundle filed before the trial court.
23. The respondent stated that the 2<sup>nd</sup> appellant being the driver of the first motor vehicle on the material date was to blame for the accident, since he hit the second motor vehicle from behind.
24. In cross-examination, it was the evidence by the respondent that he was seated at the back of the second motor vehicle prior to the accident and that he had his safety belt on.
25. It was also the evidence by the respondent that the 2<sup>nd</sup> appellant knocked the second motor vehicle into a ditch upon losing control.
26. In re-examination, the respondent reiterated his earlier testimony that the second motor vehicle was knocked from behind, and that the accident was reported at Industrial Area Police Station.
27. On his part, the 2<sup>nd</sup> appellant also adopted his signed witness statement as evidence and stated that on the material date, he was driving along Mombasa Road amidst heavy traffic when he came across a stationary vehicle containing three (3) occupants.
28. The 2<sup>nd</sup> appellant also stated that he hit the vehicle from behind through his left headlight and that he later rushed the respondent who has sustained injuries to Mariakani Cottage Hospital before having him transferred to Mbagathi Hospital.
29. It was the testimony by the 2<sup>nd</sup> appellant that the second motor vehicle had stalled in the middle of the road and that he had to balance between hitting a trailer and the second motor vehicle.
30. In cross-examination, the 2<sup>nd</sup> appellant gave evidence that he was cautious and therefore blamed the driver of the second motor vehicle together with its occupants for being careless.
31. In re-examination, the 2<sup>nd</sup> appellant gave evidence that he recorded a statement with the police in relation to the accident and that he was issued with a police abstract.
32. On his part, the learned trial magistrate reasoned that there was evidence tendered to show that the driver of the first motor vehicle was to blame for the accident; namely, the 2<sup>nd</sup> appellant, notwithstanding the fact that no one was indicated as having been charged and/or convicted in relation to the said accident.
33. The learned trial magistrate further reasoned that the 2<sup>nd</sup> appellant did not demonstrate that he exercised due caution while on the road and was therefore satisfied that the respondent had proved his claim for negligence against the appellants on a balance of probabilities, thus finding the appellants 100% liable. The 1<sup>st</sup> appellant was found vicariously liable in his capacity as the registered owner of the first motor vehicle.
34. Upon my re-examination of the evidence tendered before the trial court, it is not controverted that the material accident on the date earlier referenced.
35. It is also not controverted that the accident involved the first and second motor vehicles, as well as the 2<sup>nd</sup> appellant being the driver of the first motor vehicle, and the respondent, who sustained injuries as a result.
36. On the subject of ownership of the first motor vehicle, the respondent produced a copy of records to show that the 1<sup>st</sup> appellant was at all material times the registered owner of the first vehicle.
37. The above evidence was not at all disputed by the appellants by way of evidence. In the premises, the contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the



provisions of Section 8 of the [Traffic Act](#), Cap 403 Laws of Kenya which provides that the person whose name appears on the registration document in respect to a motor vehicle will be considered the owner of the same.

38. This brings me to the question of negligence which will in essence answer the question of liability.
39. Upon my re-examination of the pleadings and evidence, I note that it is not in dispute that the respondent was a passenger aboard the second motor vehicle at all material times, whereas the 2<sup>nd</sup> appellant was driving the first motor vehicle on the material date.
40. Upon my further re-examination of the pleadings and evidence, I reiterate that it is not in dispute that the 2<sup>nd</sup> appellant hit the second motor vehicle from behind.
41. I also note; as the learned trial magistrate did; that the 2<sup>nd</sup> appellant did not bring any credible evidence to refute the particulars of negligence made out against him or against the 1<sup>st</sup> appellant vicariously.
42. On the subject of the police abstract which I have similarly re-examined, I note; as the learned trial magistrate did; that the same indicates that the first motor vehicle was to blame for the accident.
43. Upon my study of the record, I observed that the police officer who investigated the accident was not called as a witness to shed light on the events that likely took place on the material date, which only left the trial court to rely on the evidence which was tendered before it.
44. Suffice it to say that, it is noteworthy that the appellants did not challenge the contents of the police abstract, which in the absence of any contrary evidence, is deemed to be sufficient proof of the circumstances surround the accident, in my view.
45. Further to the foregoing, upon my study of the pleadings, I noted that the doctrine of *res ipsa loquitur* was pleaded in the plaint.
46. The doctrine was discussed in the authority of [Susan Kanini Mwangangi & another v Patrick Mbiti Kavita](#) [2019] eKLR with reference to the East African Court of Appeal's decision in *Embu Public Road Services Ltd v Riimi* [1968] EA 22 where the following was held:

“The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”
47. From my understanding of the above rendition, a mere reliance on the doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.
48. In the present instance, it is apparent that none of the parties sought to enjoin the driver and/or owner of the second motor vehicle to the suit. In the premises, I am of the view that the argument raised by



- the appellants on the subject of contributory negligence and the apportionment of liability against the second motor vehicle could not have been a subject for consideration either before the trial court or on appeal.
49. In view of all the foregoing circumstances, I am satisfied that the learned trial magistrate, upon considering the pleadings and evidence which was tendered before him, arrived at a proper finding on liability, which I am not inclined to interfere with.
  50. On quantum, it is apparent that the appellants are solely challenging the award made under the head of general damages for pain, suffering and loss of amenities.
  51. On the part of the respondent, the sum of Kshs 1,500,000/ was proposed under that head with reliance being placed on the case of *Hussein Abdi Hasbi v Hassan Noor* [2004] eKLR where the court awarded the sum of Kshs 800,000/ on general damages at the instance of injuries in the nature of a fracture of the lateral malleolus and fractures of metatarsals (2<sup>nd</sup> to 5<sup>th</sup>) and a large laceration anterior to the ankle, with permanent incapacity being assessed at 20%. The appellants on their part suggested the sum of Kshs 100,000/ as constituting a fair award on general damages. The appellants cited the authority of *Ndungu Dennis v Ann Wangari Ndirangu & another* [2018] eKLR in which the court granted the sum of Kshs 100,000/ in respect to minor bruises on the back; no fractures on the tibia or fibula area of the right leg; tenderness on the right leg; blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands. The appellants also cited the case of *Mokaya Mochama v Julius Momanyi Nyokwoyo* [2013] eKLR where the court awarded damages in the sum of Kshs 70,000/ for cerebral concussion i.e. lost consciousness for a short duration, deep cut wound on the back of his head and bruises on the right foreleg; among other cases.
  52. In the end, the learned trial magistrate awarded the sum of Kshs 800,000/ though I note that he did not cite any authorities to support his assessment.
  53. The medical reports and related evidence tendered indicate that the injuries suffered by the respondent are in the nature of a compound fracture of the right tibia and fibula lower 1/3.
  54. In one of the medical reports dated December 15, 2016 and prepared by Dr G K Mwaura, permanent incapacity was assessed at a degree of 10%. In the second medical report prepared by Dr P M Wambugu and dated March 6, 2018, no permanent incapacity was recorded.
  55. Upon my consideration of the above-cited authorities cited by the parties on quantum, I am of the view that those cited by the respondent constituted injuries of a slightly more severe nature in comparison to those suffered in the present instance. I equally opine that the authorities cited by the appellants were either decided a few years ago or did not relate to comparable injuries.
  56. I therefore took into account the case of *Hussein Sambur Hussein v Shariff A Abdulla Hussein & 2 others* [2022] eKLR where the court upon considering injuries in the nature of fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and pain in the injured areas, with a permanent incapacity of 18%, awarded the sum of Kshs 600,000/ on appeal. It is noteworthy that the degree of permanent incapacity in the above-cited case is higher than that assessed in the present instance.
  57. I similarly took into account the case of *DG (Minor suing through her next friend MOR v Richard Otieno Onyisi* [2021] eKLR in which the court awarded general damages in the sum of Kshs 400,000/ at the instance of left tibia fracture, bruises on the left foot and bruises on the left leg, with no assessment being made on permanent incapacity.



58. In view of the foregoing circumstances, I reason that the award made by the learned trial magistrate is on the higher side, thereby necessitating interference.
59. Taking into account the abovementioned authorities, the injuries sustained and inflation factors, I find an award of Kshs 500,000/ to be more suitable in the circumstances.
60. On the subject of consideration of the submissions and authorities cited by the appellants; however, upon my perusal of the impugned judgment, I did not come across anything to indicate that the learned trial magistrate overlooked the same.
61. **Determination**
- i). The appeal succeeds in respect to the award made on general damages for pain, suffering and loss of amenities.
  - ii). The trial court's award in the sum of Kshs 800,000/ made under that head is hereby set aside and is substituted with an award in the sum of Kshs 500,000/.
  - iii). Accordingly, the judgment shall now read as follows:
    - a. General damages Kshs 500,000/
    - b. Special damages Kshs 14,080/  
Total Kshs.514,080/
  - iv). Costs of both the suit and the appeal are awarded to the respondent and are to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> appellants jointly and severally.
  - v). The respondent shall also have interest on special damages at court rates from the date of filing the suit until payment in full and interest on general damages at court rates from the date of judgment until payment in full.

**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

