



REPUBLIC OF KENYA



**Ngugi v Karanja & another (Civil Appeal 161 of 2018)
[2023] KEHC 2368 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 161 OF 2018
JM CHIGITI, J
MARCH 27, 2023**

BETWEEN

CAROLINE NGUGI APPELLANT

AND

EDWARD M KARANJA 1ST RESPONDENT

MICHOBO CATHERINE 2ND RESPONDENT

*(Being an appeal from the judgment in Kikuyu SPMCC no. 25 of 2016 by
Honourable Magistrate Mr. Onsarigo delivered on 8th November 2018)*

JUDGMENT

Brief background:

1. The appellant herein, was the 1st Defendant in Kikuyu SPMCC No. 25 of 2016. The claim arose from a road traffic accident which occurred on 2nd August 2015 involving motor vehicle registration number KBZ 996T owned by the 2nd Respondent and managed by the Appellant.
2. The 1st respondent sustained serious injuries and suffered loss and damages as a result of the accident. The learned trial magistrate delivered judgment on November 8, 2012, apportioned 100% liability to the appellant and the 2nd respondent. The court awarded the sum of Kshs 700,000/= as general damages and special damages the sum of Kshs. 15,030/= to the 1st respondent.
3. The appellant was aggrieved by the said judgment and filed this Appeal raising the following grounds:
 - a. That the learned Magistrate erred in law and in fact in apportioning liability at 100% against the appellant in total disregard of the evidence adduced and the appellant's submissions.
 - b. That the learned magistrate erred in law and in fact in awarding general damages at Kshs 700,000/= which award was excessive and unwarranted in light of the evidence adduced.



- c. That the learned magistrate erred in law and in fact in awarding the claim of special damages at Kshs. 15,030/= which award was not proved and was excessive and unwarranted in light of the evidence adduced.
 - d. That the learned magistrate erred in law in not taking into account entirely the written submissions of the appellant.
 - e. That the learned Magistrate's finding and decision were against the weight of the evidence adduced.
4. The Appellant seeks the following orders:
- i. The appeal be allowed
 - ii. That the apportionment of liability, awards for General damages and special damages be set aside.
 - iii. The appellant be granted costs.
5. The Appeal was opposed by the 1st respondent through the grounds of opposition hereunder.
- a. That the record of appeal is fatally defective as it offends Order 42 rule 13 sub-rule (e) of the *Civil Procedure* and as such the appeal must be struck out.
 - b. That the appeal lacks merit.
 - c. That the appeal is misconceived, frivolous and vexatious and is an abuse of the court process.
 - d. That the appeal is mala fides.
 - e. That the learned magistrate directed himself properly and diligently to the law and facts in arriving at the finding on liability and quantum.
 - f. That there has been unexplained, inordinate delay in concluding this matter since the memorandum of appeal was filed in 2018 over 4 years ago.
 - g. That the 1st Respondent /plaintiff is unfairly being denied the fruits of the legitimate judgment.
 - h. That the appeal should be dismissed for want of prosecution.
6. The appeal was heard by way of written submissions.

Analysis and determination:

7. Mr. Nyamwaye counsel for the appellant filed submissions on November 10, 2022, wherein he submits that the 1st respondent failed to prove the particulars of the negligence as particularized in the plaint. He submits that in the assessment of liability, there are 2 elements, causation and blameworthiness.
8. He urges the court to find that the 1st respondent was negligent and thus to blame for the accident. He points out the 1st respondent failed to provide prima facie evidence against the appellant on the issue of liability and that the evidential burden did not shift to the appellant.
9. According to the appellant, the damages awarded were excessive and unwarranted as the trial magistrate erred in failing to follow the principles and rules of precedents in awarding general damages.



10. He pleaded with the court to award general damages of Kshs 300,000/= which are commensurate to the injuries sustained by the 1st respondent as guided by the case of *Mwavita Jonathan v Silvia Onunga* (2017) eKLR where the court awarded general damages of Kshs 400,000/= where the respondent sustained injuries to the left hip commuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back and deep wound on the left lower leg.
11. Counsel submits that the trial court failed to consider the Appellant's submissions filed in the lower court and thus arrived at the wrong principles of law. According to him claim for special damages should fail as the 1st respondent did not specifically prove and plead special damages.

1st Respondents submissions

12. Counsel for the 1st Respondent filed submissions on August 31, 2022, wherein he submits that the award by the trial court as proper since the trial magistrate exercised his unfettered discretion based on the evidence placed before him.
13. The exercise of judicial discretion is not to be interfered with unless it is shown that it was exercised on the wrong principle.
14. He submits the appellant at the trial court did not rebut the evidence of the 1st respondent on both issues of liability and quantum. He submits the appellant has not met the threshold of interfering with the discretion of the trial court as was held in *Mbogo v Shab* (1968) EALR pg 93. In conclusion, he urged the court to dismiss the appeal.
15. This court sitting as the first appellate court is under a duty to evaluate the entire evidence on record bearing in mind it had no advantage of seeing the witnesses testify. As cited in the case of *Selle v Associated Motor Boat Co Ltd* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
16. The same position was reinstated in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this 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 allowances in this respect.”
17. During the trial, the 1st respondent who was the plaintiff called one witness in support of his case. He testified that on August 2, 2015 while at Nderi he was involved in a road traffic accident and was treated at St. Teresa Hospital. He adopted his witness statement and list of documents produced as exhibits. He blamed the driver of the Motor Vehicle KBZ 996T for the accident. During cross-examination he stated the accident occurred at 7.30 pm, it was dark.
18. The defendants did not call any witnesses to rebut the evidence of the plaintiff. The learned trial magistrate in his judgment evaluated the evidence adduced and the authorities and awarded the plaintiff special damages of Kshs 15,030/= as pleaded and proved and general damages of Kshs 700,000/=.



19. In the award of general damages, the trial magistrate noted that he perused the medical report and factored in that the plaintiff could not stand up freely, lift heavy objects and has inconsistencies of stool. He considered that the plaintiff suffered a 10% permanent disability. I have had the occasion to relook at the medical report and confirmed as much.
20. In *Cogblan v Cumberland* (1898) 1 Ch 704, the Court of Appeal (of England) stated as follows -

“ Even where, as in this case, the appeal turns on a question of fact, the court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”
21. This court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.
22. An appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan* [1981] KLR 349 page 356 Law JA stated: an appellate court will not disturb an award of 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 a figure which was either inordinately high or low.
23. The appellant in this is challenging the decision of the trial magistrate on liability, and quantum of both special and general damages.

Liability:

24. The Appellant submits the 1st Respondent failed to prove his case against the Appellant.
25. Section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya provides that: Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
26. The burden of proof is on the plaintiff who sought the relief of this court, he tendered his evidence and blamed the Appellant for the accident. The burden of proof shifted to the Appellant to rebut.
27. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLE 526 stated that:

“ In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed



to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

28. Similarly, Lord Nicholls of Birkenhead in *Re H and others (Minors)* [1996] AC 563, 586 held that;
- “The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”
29. The appellant did not call any witnesses to rebut the evidence tendered by the 1st Respondent.
30. In the case of *Janet Kaphiphe Ouma & another v Maries Stopes International (Kenya)*, Kisumu HCCC No 68 of 2007, Ali Aroni, J citing the decision in *Edward Muriga through Stanely Muriga v Nathaniel D. Schulter*, Civil Appeal No 23 of 1997 the court held that:
- “In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”
31. The only evidence on record in the instant case was from the Respondent. According to him, he was hit by the appellant’s vehicle off the road. It was his evidence that the said vehicle swerved off the road and hit him when he was waiting to cross the road. That evidence was not rebutted.
32. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows: -
- “In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”
33. In the case of *Motex Knitwear limited v Gopitex Knitwear Mills limited* Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J citing the case of *Autar Singh Babra and another v Raju Govindji*, HCCC No. 548 of 1998 appreciated that:
- “Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
34. In the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.



35. In the case of *Karuru Munyororo v Joseph Ndumia Murage & another* Nyeri HCCC No 95 of 1988, Makhandia, J (as he then was) held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”
36. Similarly, in the case of *Interchemic EA Limited v Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No 165 B of 2000, Mbaluto, J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.
37. If one is still in doubt as to the legal position reference could be made to the case *Drappery Empire v The Attorney General* Nairobi HCCC No 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.
38. I am persuaded that the trial court considered the evidence tendered within the appropriate legal framework in arriving at a sound finding that the Respondent had proved her case on a balance of probabilities.
39. The appellants Statement of Defence remains a dead letter with no evidential value.
40. Guided by the above decision I find no basis upon which this court can interfere with the learned trial magistrate’s finding on liability.

General damages:

41. According to the Plaint, the 1st respondent was lawfully walking as a pedestrian along Nderi- Kikuyu Road when the appellant who was the driver of motor Vehicle KBZ 996T negligently managed the motor vehicle thereby causing it to knock down the 1st respondent. As a result of the accident, the 1st respondent suffered the following injuries: Blunt injury- low back, left side, mild subluxation of left sacral-iliac joint, and inconsistency of the stool.
42. In the trial court, the Appellant proposed Kshs 300,000/= while the 1st respondent proposed Kshs, 900,000/= for the award of general damages, with each party citing authorities in support of their proposal.
43. The appellant cited the case of: *Mwavita Jonathan v Silvia Onunga* (2017) eKLR where the court awarded general damages of Kshs 400,000/= where the respondent sustained injuries to the left hip commuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back and deep wound on the left lower leg.
44. The 1st respondent cited the case of *Easy Coach Ltd v Emily Nyangasi* (2015) eKLR where Justice Cherere upheld an award of Kshs. 700,000/=.
45. The authority cited by the appellant was decided in 2017, while the one cited by the 1st respondent was decided in 2015. The case cited by the appellant has more severe injuries compared to the one cited by the 1st respondent which is more similar to what was sustained by the 1st respondent.
46. I have evaluated the injuries sustained by the 1st respondent and the degree of permanent disability of the 1st respondent. I am not satisfied that the appellant has met the threshold that would persuade



the court to interfere with the award for general damages. It is my finding that the trial magistrate considered the evidence tendered and the authorities before awarding the general damages of Kshs. 700,000/=.

47. It is my finding that the trial magistrate applied the right principle in arriving the judgment. I decline to interfere with the trial court's award of general damages.

Special damages:

48. The Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 Of 1983 [1985] KLR 716, at P 717, and 721 held: "Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."
49. In the plaint the 1st respondent sought special damages of kshs 15,030/= which the trial court awarded. Upon evaluation of the receipts tendered by the 1st respondent at the trial court, the total amount in the receipts adduced is Kshs 16,480 being money spent on the motor vehicle search, treatment and drugs.
50. I find that the 1st respondent pleaded and strictly proved special damages of Kshs 15,030/=, I find no reason to fault the trial magistrate's award on special damages.

ORDERS:

- 51 The appeal lacks merit and it is hereby dismissed with costs.

DATED AND DELIVERED AT KIAMBU THIS DAY OF 27TH DAY OF FEBRUARY, 2023.

JOHN CHIGITI (SC)

JUDGE

