



**Simiyu v Lex Oil Field Solutions Ltd & another (Civil Appeal  
108 of 2019) [2023] KEHC 3650 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 108 OF 2019**

**REA OUGO, J**

**APRIL 28, 2023**

**BETWEEN**

**AGGREY WANYAMA SIMIYU ..... APPELLANT**

**AND**

**LEX OIL FIELD SOLUTIONS LTD ..... 1<sup>ST</sup> RESPONDENT**

**LEX LOGISTICS COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and orders of the Principal Magistrates  
court of Kenya at Webuye delivered on 9th day of October 2019 by  
Hon. Munyekenye P.M in respect of Webuye PMCC NO 76 of 2016)*

**JUDGMENT**

1. The appeal before me is against the subordinate court's finding on liability and award of damages in the sum of Kshs 1,405,550/- for general and special damages. The respondents were found to be 30% liable for the accident and unknown motorcycle was found to have contributed to 70% of the accident. The appellant is aggrieved by the judgment and has filed a memorandum of appeal on the November 8, 2019. The grounds of appeal are that:
  1. That the learned trial Magistrate erred in law and in fact by failing to take into totality of the evidenced and facts presented before her in arriving at the decision.
  2. The trial magistrate's erred in law and in fact to acknowledge the fact that the defendants failed to refute the evidence adduced by the appellant herein.
  3. The learned trial magistrate erred in law and in fact by relying on the mere denial in the Respondent's defence and made a biased decision.



4. The learned trial magistrate erred in law and in fact by holding the unregistered motor cycle liable whose owner was never enjoined in the mother suit as 3<sup>rd</sup> party by the Respondents herein knowing that the appellant will not be able to recover the apportioned compensation quantum.
  5. The learned trial magistrate erred in law and in fact in failing to hold the respondents 100% liable for the accident and went ahead to hold the respondents 30% liable for the accident.
  6. The learned trial magistrate erred in law and in fact by assessing damages of Kshs 1,405,550/- and consequently making an order that the appellant was only entitled to recover Kshs 421,665/- as the final award.
2. A brief background is that on January 24, 2016 the appellant claims to have been travelling as a pillion passenger on motor cycle registration no. KMDC 266U along Webuye-Bungoma road at Wananchi area when the driver of the vehicle registered as KBM 750C/ZC 1554 Mercedes Benz negligently permitted the vehicle to knock the appellant from the motor cycle. The appellant suffered severe and serious bodily injuries. The appellant claims to have sustained bruises to the scalp; blunt injury to the chest; and a crush injury to the right lower limb.
  3. The respondents in their statement of defence denied the occurrence of the accident. They averred that the appellant did not sustain any injuries. They further pleaded without prejudice that if an accident occurred then it was wholly caused by the appellant and the rider of motor cycle KMDH 266U.
  4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanour. In *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was enunciated thus:
 

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”
  5. The matter before the subordinate court proceeded to a hearing and the appellant relied on the evidence of 3 witnesses while the defence case was closed without them calling any witness.
  6. Aggrey Wanyama Simiyu (Pw1) testified that on the material day he was a pillion passenger heading to Webuye when they were hit by the respondent’s motor vehicle. The motorcycle and the motor vehicle crushed his leg. He also injured his head and chest. He was taken to Webuye Hospital and admitted for 10 days. While receiving treatment his leg got infected and was amputated. He reported the accident at Webuye Police station once he recovered. Upon conducting a motor vehicle search and established that the vehicle was owned by the respondent. He blamed the driver of the vehicle for the accident claiming that the driver saw him and knocked him. On cross examination he testified that he saw another motorcycle ahead and that it was after he was hit by the vehicle from behind that the other motor cycle came. The motorcycle on the opposite side also hit them causing them to veer off to the left on pathway of the motor vehicle that hit them.
  7. Dr. Lumbasi Mutoro (Pw2) working at Webuye Hospital testified that Dr. Kubasu who prepared the medical report and P3 form was his colleague. He was therefore familiar with his handwriting. The



appellant was involved in a road traffic accident. He lost consciousness for 30 minutes and was taken to the theatre immediately. They performed a below the knee amputation to remove the severely damaged leg. He stayed in the ward under medication and upon discharge he attended surgical outpatient clinic. The appellant had sustained the injuries indicated in the P3 Form. He produced the medical report, P3 form and treatment notes as exhibits.

8. No. 75424 Joseph Karanja (Pw3) testified the investigating officer PC Musyimi had been transferred. He testified that the accident involved the vehicle, motor cycle KMDV 26U and unknown oncoming motorcycle. He produced the police abstract and testified on cross examination that the investigations had been concluded.

### **Analysis And Determination**

9. The appeal was canvassed by way of written submissions and the parties have filed their rival submissions. The first issue in the appeal relates to the apportionment of liability. The trial magistrate found the respondents 30% liable for the accident arguing that it was the unknown motorcycle that greatly contributed to the accident. The appellant in his submissions argues that the respondents did not call any witness to prove their averments in their statement of defence. The respondent's driver cannot be said to be without blame when the injuries to the appellant's leg were caused by the motor vehicle. If at all the driver of the respondent was not driving at high speed he would have swerved or applied breaks.
10. The respondent in their submissions argued that the appellant had the burden of proving that it was the actions of the respondents that led to the accident. He had the duty to prove the averments contained in the plaint on a balance of probabilities. They relied on the decisions in *Karugi & another v Kabiya & 3 others* [1987] KLR 347; *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258; and *Gideon Ndungu Nguribu & another v Michael Njagi Karimi* [2017] eKLR. It is their submissions that the appellant failed to prove liability on the part of the respondent as the accident was due to the contributory negligence on the part of the motorcycle rider.
11. Pw1 testified that the respondent's vehicle first hit them from behind, and then they were subsequently hit by an oncoming motorcycle. There was no evidence led to show that the accident occurred as a result of negligence on the part of the appellant to warrant the trial magistrate to make a finding on the issue of contributory negligence. The respondents argued that the unknown motorcycle was partially responsible for the accident, and therefore, they should have instituted third-party proceedings against it seeking indemnity or contribution. In *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR, the Court held that;

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under order 1 rule 22 of the *Civil Procedure Rules*.

12. The trial court record reveals that there was no third party was instituted by the respondents and it is my finding that the trial court erred in apportioning the unknown motorcycle liability. The evidence of Pw1 was clear that he was first hit by the respondent's vehicle, he fell down and vehicle crushed his leg. Although there was also a collision with an unknown motorcycle, the accident initially began with the respondent's vehicle hitting them from behind. There was no evidence led by the defendant



to prove otherwise. The appellant therefore proved on a balance of probabilities that the respondents caused the accident and I find the respondents 100% liable.

13. I now turn to the issue of quantum raised in the appeal. The appellant in his submissions has relied on his submissions on the issue filed before the lower court. The respondents made no submissions on the issue of quantum.
14. An appellate court should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice (see *Mbogo & another v Shah* [1968] EA 93, the Court, (Sir Newbold, P.) stated at page 96).
15. According to the treatment notes the appellant sustained soft tissue injury and had crushed his right leg below the knee. The evidence of Pw2 also supported the appellant's claim that his leg was amputated below the knee. This was also captured in the medical report by Dr. Kubasu who concluded that the appellant will need physiotherapy and an artificial leg. The injuries sustained by the appellant were not contested.
16. The appellant in this case cited the case of *Sabina Nyakenya Mwangi v Patrick Kigoro & another* [2015] eKLR where the plaintiff was awarded Kshs 3,000,000 having sustained the following injuries fracture of the humerus, fracture of the pelvis, fracture of the right knee, fracture of the condyle femur, bruises on the face, severe retroperitoneal haemorrhage and multiple soft tissue injuries. The respondents before the trial court relied on the case of *Caroline Wanjiku Karimi v Simon K. Tum & another* [2012] eKLR that cited the case of *Simon Oyaro Ogachi v Faiz Mohamed Hassan* where the Plaintiff suffered bruises in the left wrist, crushed left leg which was amputated was awarded Kshs. 800,000/- in 2005. The trial magistrate awarded the appellant Kshs 1,200,000/- as damages for general damages he did not record reasons for his award.
17. The case cited by the appellant do not contain comparable injuries with those sustained by Pw1. The award in the Simon Oyaro Ogachi case (supra) was made in 2005 and does not capture the current trends and rate of inflation.
18. In *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR the plaintiff suffered injuries on the leg leading to amputation of the leg above the knee and was awarded Kshs 2,500,000/- as general damages. In *Yobesh Makori v Elmerick Mobisa Bota* [2021] eKLR an award of Kshs 2,000,000/- was upheld where the plaintiff crushed the left tibia fibula bones which led to amputation of the leg below the left knee.
19. Having considered the awards made by courts to plaintiffs who have sustained comparable injuries and the rate of inflation, the award by the trial magistrate on general damages was excessively low.
20. In the end, I find the respondents to be 100% responsible for the accident and the award of Kshs 1,200,000/- on general damages is hereby set aside and substituted with an award of Kshs 2,000,000/-. The appellant shall have the cost of the appeal. It is so ordered.

**Dated, Signed and Delivered at BUNGOMA this 28th day of April 2023**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

Appellant Absent



Mr. Keyeli for the Respondent

Wilkister C/A

