



REPUBLIC OF KENYA



**KENYA LAW**  
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**Moimbi v Nyangwara (Civil Appeal E024 of 2022)  
[2023] KEHC 3725 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E024 OF 2022**

**WA OKWANY, J  
APRIL 27, 2023**

**BETWEEN**

**ROBERT MOIMBI ..... APPELLANT**

**AND**

**RUSIA BOSIBORI NYANGWARA ..... RESPONDENT**

*(Being an Appeal against the Ruling of Hon. M. C. Nyigei – PM Nyamira dated and delivered at Nyamira on the 18<sup>th</sup> day of May 2022 in the original Nyamira Chief Magistrate’s Court Civil Case No. 72 of 2019)*

**JUDGMENT**

**Background**

1. The Respondent herein, Rusia Bosibori Nyangwara, sued the Appellant before the Lower Court in Nyamira CMCC No 72 of 2019 seeking both general and special damages arising out of a road traffic accident that occurred on December 7, 2018.
2. The Respondent’s case was that she was on the material date a lawful pedestrian along Kisii – Nyamira Road when at Sironga, due to the negligence of the Appellant’s driver, the Appellant’s motor vehicle Registration No KBQ 285V (hereinafter “the suit motor vehicle”) veered off the road and knocked her down thereby occasioning him serious bodily injuries.
3. The trial court heard the case in which the Respondent presented the evidence of 2 witnesses while the Appellant did not call any witness. At the close of the case, the trial Magistrate entered judgment on liability at 100% in favour of the Respondent and awarded her Kshs 350,000/= general damages, Kshs 17,240 special damages together with costs and interest.



4. The said decision of the trial court triggered the filing of the instant appeal in which the Appellant challenges the findings on liability and quantum and enumerated the following grounds of appeal in the Memorandum of Appeal: -
  1. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendant without considering the Circumstances of the case.
  2. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendant whereas the Police Abstract produced as plaintiff's exhibit indicated that the matter was still pending under investigation.
  3. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs 350,000/= that was overly in excess in the circumstances of the case.
  4. That the Learned Trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
  5. That the Learned Trial Magistrate's exercise of discretion in assessment of quantum was injudicious.
5. The appeal was canvassed by way of written submissions which I have considered.
6. The main issue for determination is whether the lower court erred in its findings on liability and quantum.
  1. The duty of this court, as the first appellate court, is to reconsider and re-analyze the evidence presented before the trial court with a view to arriving at its own conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal stated that: -
 

“[A]n 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.”
7. The Respondent's testimony before the Lower Court was contained in her witness statement dated May 31, 2019 which she adopted as her evidence in chief. In the said statement, the Respondent avers that she was lawfully walking along Kisii – Nyamira Road when at Sironga, the suit motor vehicle, which was being driven at a high speed lost control, veered off the road and hit her thereby occasioning her the following injuries: -Bruises on the right knee.Cut wounds on the right arm.Cut wounds on the right knee.Cut wounds on the temporal region.Cut wounds on patella region.Deep cut wounds on the lower back.Head injury with loss of consciousness.Blunt trauma lower back.Cut wounds on the lower lip.
8. The Respondent was rushed to Kinara Hospital Nyamira for treatment where she was admitted for 2 days. The accident was reported at Kisii Police Station where the Respondent recorded her statement after which she was issued with a Police Abstract and a P3 Form.
9. The Respondent was on February 19, 2018 examined by Dr. Morebu who prepared a Medical Report. She testified that she had not fully recovered from the injuries she sustained in the accident. The



Respondent produced the Treatment Notes, Police Abstract, P3 Form, Medical Report, X-Ray Films and bundle of Receipts as Exhibits 1, 2, 3, 4, 5 and 6 respectively.

10. On cross examination, she stated that she still experiences pains on the head, chest, back, hand and leg. She added that she was still undergoing treatment. She explained that the motor vehicle hit her from behind.
11. Pw2, Cpl. Albert Micha testified that one John Kiprono, the driver of the suit motor vehicle, reported the accident on December 7, 2018. On cross examination, he conceded that he did not investigate the accident which was still pending under investigation.
12. As I have already stated in this judgment, the Appellant did not call any witnesses in its defence.

### **Liability**

13. The Appellant did not address the issue of liability in the written submissions filed before this court. The Respondent, on her part, submitted that the trial court's findings on liability are legally sound in principle as her evidence was not discounted.
14. The trial court held as follows on liability: -

“The defendant did not call any evidence to controvert that of the plaintiff. I shall therefore find that she has established her case against the defendants on a balance of probabilities and I hold the defendant 100% liable for the accident.”
15. The question that arises is whether failure by the Appellant to call evidence on liability automatically connotes that he was 100% liable for the accident. The answer to the above question is to the negative. I find that the trial court was still under an obligation to determine the issue of liability based on the evidence availed before it. In the present case, the Respondent did not present the evidence of an independent eye witness to prove to the court that Appellant was indeed solely liable for the accident. I note that even though the Respondent claimed that the suit motor vehicle was being driven at a high speed and that it lost control and veered off the road before knocking her down, no material was placed before the court to show that the Appellant's motor vehicle was being driven in the manner described by the Respondent.
16. The Police Officer (Pw2) testified that the accident was still under investigation which, to my mind, means that the driver of the suit motor vehicle had not been charged with any offence.
17. Considering the totality of the circumstances surrounding the case and the fact that no charges were preferred against the driver of the said motor vehicle, I find that the Appellant cannot be said to have been solely liable for the accident. The Respondent was under a duty to take precautions to secure her safety while walking on the road. I find that the trial court should have apportioned liability at 70% to 30% in favour of the Respondent.

### **Quantum**

18. Turning to the issue of quantum, it is trite that an appellate court ought not to disturb the trial court's award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate.



The Court of Appeal held as follows on the circumstances under which an award may be disturbed in *Butt v Khan* [1977] 1 KLR: -

“It must be shown that the judge proceeded on wrong principles, or that he misapprehended in some material respect and so arrived at a figure which was either inordinately high or low.”

19. In the instant case, I note that the trial court considered the injuries sustained by the Respondent and the parties’ submissions wherein the Respondent proposed an award of Kshs 500,000/= while the Appellant suggested Kshs 70,000/=. The trial court held as follows on quantum: -

“In assessing damages, I shall agree with the defendant as per the finding in *Nancy Oseko v BOG Maasai Girls High School* [2011] eKLR that the injured person is only entitled to what is in the circumstances a fair compensation for both the plaintiff and the defendant and that the plaintiff cannot be fully compensated for all the losses suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.

I have considered the above decisions in comparison to the injuries sustained herein and respectfully, I do find them useful in making this decision.

Having taken note of the plaintiff’s injuries and compared them to those of the victims in the cited cases, and having appreciated and noted the effect of the injuries suffered by the plaintiff on her life, and especially the residual pain in the jaw that affects her chewing, and more so noting that chewing is an essential activity to ensure survival, my duty is now to assess an appropriate award commensurate to those injuries while considering the following principles: -

An award of damages should not be too low or high. Damages are not meant to enrich but compensate a victim for the injuries suffered and restore him where possible to the position he was in before the accident. Decisions in past cases on awards are mere guides and each case has to depend on its own circumstances. The award should be such that it does not render the entire exercise of the assessment nonsensical.

Having all the above in mind, I believe that an award of 350,000.00 would come close to compensating the plaintiff for the injuries sustained.”

20. I note that the trial court considered authorities with comparable injuries to those sustained by the Respondent together with the aspect of inflationary trends before arriving at the award of Kshs 350,000/= general damages. I am not persuaded by the Appellant’s argument that the trial court erred in its assessment of damages. I find that even though the injuries sustained by the Respondent were soft tissue in nature, the Medical Report (P Exhibit 4 (a)) reveals that the said injuries led to loss of consciousness and would heal with permanent ugly scars. The report also reveals that the head injury may lead to post traumatic epilepsy. I further find that the learned trial Magistrate applied the correct principle in assessing the general damages. I find that the award of Kshs 350,000/= as general damages is not so inordinately high as to be wholly erroneous estimate of the damages.
21. For the reasons stated in this judgment I will allow the appeal, albeit in part only, in respect to the finding on liability.
22. In conclusion, I set aside the judgment of the lower court on 100% liability in favour of the Respondent and substitute it with a distribution of liability at 70% to 30% in favour of the Respondent.
23. The appeal is therefore allowed, in part, as follows: -



- a. General Damages – Kshs 350,000/=
  - b. Special Damages – Kshs 17,240/=
- Total – Kshs 367,240/=
- Less 30% Contribution – Kshs 110,172/=
- Net Total Due – Kshs 257,068/=.
24. General damages will attract interest, at court rates, from the date of judgment in the lower court until payment in full. Special damages will earn interest from the date of filing suit until payment in full. Because the appeal is partly successful, I award the Appellant half of the costs of the appeal which I assess at Kshs 30,000.
25. This file is marked as closed.
26. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

**W. A. OKWANY**

**JUDGE**

