



REPUBLIC OF KENYA



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**Kan Travellers v Amudavi (Civil Appeal E030 of 2021)
[2023] KEHC 4005 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 4005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E030 OF 2021**

SM MOHOCHI, J

APRIL 25, 2023

BETWEEN

KAN TRAVELLERS APPELLANT

AND

MAURICE SANGALE AMUDAVI RESPONDENT

(Being an Appel from the Judgment by Honourable E. Kigen (Senior Resident Magistrate) in Eldoret in CMCC NO.870 of 2018 delivered on 10th September, 2020)

JUDGMENT

1. The appeal herein, arises from CMCC No.870 of 2018 filed in the Chief Magistrate's Court at Eldoret by the Respondent herein. The Respondent vide a plaint dated 8th August, 2018, as the Plaintiff sued the Appellant as the Defendant claiming general damages for pain and suffering, special damages of Ksh.49,462/= and costs and interests of the suit.
2. The cause of action, according to the plaint, arose on or about 6th March, 2018 along Eldoret-Kitale Road. According to the Respondent, he was lawfully riding motor cycle registration number KMDS 404 W Honda when motor vehicle registration number KCD 301 L Toyota Hiace (subject Motor Vehicle) registered in the name of the Appellant was so negligently driven that the same rammed into the said motor cycle as a result of which the Respondent sustained severe bodily injuries. The particulars of negligence, injuries and special damages were pleaded.
3. The Appellant denied the entire claim by the Respondent, through its defence dated 11th October, 2018 and averred that if an accident occurred the same was caused by the negligence of the Plaintiff and without prejudice that if indeed an accident occurred as alleged, then the same was inevitable.
4. The suit proceeded to full hearing during which, evidence was adduced by the respective parties. In her judgment, the learned magistrate found the Respondent 20% liable for the occurrence of the accident and the driver of the subject motor vehicle was found to be 80% liable for the accident then the Trial



Court proceeded to award the Respondent Kshs.2,000,000/= as general damages, Ksh.49,462/= as special damages and costs and interest of the suit.

5. Being dissatisfied with the decision of the Trial Court on the apportionment of liability and quantum awarded, the Appellant instituted this Appeal premised on the grounds THAT: -

1. The learned trial magistrate, erred in law and misdirected herself, when she failed to consider the Appellant's submissions on both points of law and facts.
2. The learned trial magistrate, erred and misdirected herself, as to the exact nature of the respondent's injuries and therefore erred in law in her assessment of damages which had not been proved.
3. The learned trial magistrate, erred in law and in fact, in failing to apportion liability judiciously.
4. The learned trial magistrate, erred in law and in fact, in unduly disregarding the Appellant's evidence on exaggerated injuries, and instead relied entirely on the respondent's medical report which particularized exaggerated injuries in the circumstances.
5. The learned trial magistrate, erred in law and in fact, in unduly disregarding the submissions and judicial authorities cited by the Appellants and by instead relying on authorities cited by the respondents which were excessive in the circumstances,
6. The learned magistrate, erred, in assessing an award, which was wholly erroneous estimate of the loss and damages suffered by the plaintiff.
7. The learned magistrate, erred in fact and in law, in failing to consider the appellant's submissions on liability, general damages and special damages
8. The learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

6. The Appellant thus prayed for orders THAT: -

1. This Appeal be allowed with costs.
2. The whole judgment of the Honourable Senior Resident Magistrate E.Kigen in Eldoret CMCC NO. 870 of 2018, delivered on the 10th of September, 2020, be set aside and/or varied.
3. That costs of this Appeal be borne by the Respondent.

7. The appeal was canvassed via written submissions.

Appellant's Submissions.

8. On liability, the Appellant submitted that the Respondent failed to prove his case on a balance of probabilities. It argued that according to the Police Abstract the matter was pending under investigation and that the trial magistrate erred in apportioning liability to its driver despite considering the discharge summary showed that the Respondent was drunk on the material date. According to the Appellant, the Respondent was the author of his own misfortune.



9. The Appellant relied on the case of *Benter Atieno Obonyo v Anne Nganga & another* [2021] eKLR for the proposition that the burden of proof lay on the respondent to prove his case on a balance of probabilities.
10. On quantum, the Appellant submitted that it is trite that awards must be within consistent limits and courts awards for damages must be made taking into account comparable injuries or similar injuries and awards. For this propositions reliance was placed on the case of *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR & *Kigaraari vs Aya*(1982-88) 1 KAR 768 as was quoted in the case of *Godfrey Wamalwa Wamba & another v Kyalo Wambua* [2018] eKLR .
11. The Appellant argued that the Respondent did not sustain a fractured skull as per the CT scan report dated 31st January, 2019. That the only injury captured in the discharge summary from Moi Teaching and Referral Hospital is the moderate head injury with small epidural hematoma.
12. The Appellant argued that the award of general damages was excessive in view of the injuries sustained and urged this Court to substitute the same with Ksh.300,000/=. To buttress this position, the Appellant relied on the following cases: -
 1. *Duncan Mwenda & 2 others v Silas Kinyua Kithela* [2018] eKLR- where the High Court reviewed downwards the trial court’s award of Ksh.600,000/= as general damages to Ksh 350,000/= for a claimant who had sustained severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall.
 2. *Edward G. Nyaga v Mombasa Liners HCCC No. 197 of 1999* as quoted in the case of *Nickson Kazungu Karisa & another v Isaac Solfa Muye* [2020] eKLR where the court therein awarded the plaintiff who was unconscious for several days, hospitalized for one month and had suffered a fracture of the skull, jaws, and left leg and as a result of the head injury he suffered headaches, double vision, likelihood of suffering epilepsy a sum of Kshs.400,000.00 for pain and suffering and loss of amenities
 3. *Ouru Super Stores Limited v Jackson Keragori Obure* [2018] eKLR- where the court awarded Ksh. 1,000,000/= as general damages to the plaintiff who sustained a serious head injury that required a craniotomy. The plaintiff also sustained a permanent disability due to reduced vision.
13. On costs, the Appellant submitted that the same follow the event. The Appellant thus prayed to be awarded the costs of this appeal Pursuant to section 27(1) of the [Civil Procedure Act](#).

Respondent’s Submissions.

14. The Respondent concurred with the trial court’s finding on liability. He submitted that his case on liability was uncontroverted as the Appellant closed its case without calling any witness.
15. He referred this court to the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] where the court stated that in every legal proceedings parties are required to adhere to evidentiary standards and burden of proof Rules and found that failure by the appellant to adduce evidence to rebut the Respondent’s evidence left the Respondent’s evidence unchallenged.
16. The Appellants also cited the cases of *Interchemie E. A. Limited vs Nakuru Veterinary Centre Limited* [2001] eKLR, *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR &



Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schalter & another [1997] where the courts therein adopted the above position.

17. In regards to quantum, the respondent similarly submitted that his evidence on the same was uncontroverted by the Appellants. He submitted that based on injuries he sustained the trial court award of Ksh.2million as general damages was not inordinately high. He urged this court not to interfere with the same.
18. The respondent placed reliance on the following cases: -
 1. Leah Wambui Githuthu V Attorney General & Another [2005] eKLR- where the court awarded Kshs. 2,000,000/= as general damages to the plaintiff for total loss of sight.
 2. Kenya Power And Lighting Company Limited v Bernard Mutuku Kilonzo [2015] eKLR where the court awarded the plaintiff who had sustained severe burns on the scalp and forehead with loss of sight in the left eye Ksh.1,500,000/= as general damages.
19. The respondent submitted that the Appeal lacks merit and prayed that it be dismissed with costs.

Issues For Determination

20. Upon reading the parties rival written submissions, the following issues arise for determination: -
 - i. Whether the appellant proved liability to the desired threshold;
 - ii. Whether the trial court award of Ksh. 2 million as general damages was manifestly excessive as to warrant interference by this court.

Analysis.

21. The Court of Appeal in the case of Selle & Another v Associated Motor Boat Co. Ltd &Another [1968] EA 123 held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect; in addition, the Court will normally as an Appellate Court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal also held that: -

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, Kneller & Hancox AG JJA In Mkube Vs Nyamuro [1983] KLR, 403-415, AT 403).”

Issue No.1: - Whether the appellant, proved liability to the desired threshold?

22. In Henderson v Henry E Jenkins & Sons [1970] AC 282 at 301 Lord Pearson at letter D stated: -

“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.



But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

23. In the instant case, two witnesses testified on liability.
24. The Respondent testified as PW4. He adopted his witness statement in which he stated that on 6th March, 2018, he was lawfully riding the motor cycle registration number KMDS 404 W Honda, along Eldoret-Kitale Road heading to Kitale Town. Upon reaching Tulin Supermarket he saw the subject motor vehicle coming from the opposite direction while overtaking another motor vehicle carelessly and in a high speed and resultantly it encroached into his lane and knocked him.
25. The police officer, P.C Philip Kiboi testified as PW3. He told the court that on 6th March, 2018 he received a call from a member of the public regarding the accident herein. He proceeded to the scene in company of CPC Langat where they found the subject motor vehicle and motor cycle. He said both were on the right side of the road as you face Matunda. He said the subject motor vehicle was heading to Kitale while the motor cycle was coming from the opposite direction and the subject motor vehicle failed to keep to his lane and as a result collided with the motor cycle. He said the driver of the subject motor vehicle was charged and the matter is pending determination.
26. The Respondent's evidence was not controverted. It follows that the Appellant's statement of defence is nothing more than mere allegation. The issue of uncontroverted evidence was addressed by Justice Mwongo in Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & Another 2019 eKLR where he stated: -

“22. There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

23. In the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In *Trust Bank Limited vs. 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.

24. Similarly, in *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007* Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* 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”.

27. In view of the foregoing it is my view that the Respondent discharged the burden of proof to the required standard- that is, on a balance of probabilities. The Trial Court erred by finding the Respondent 20% liable for the accident on ground that he failed to establish the point of impact. Be that as it may the Respondent has not cross appealed on this issue and therefore the liability as determined by the Lower Court stands.

Issue No.2-Whether the trial court award of Ksh. 2 million as general damages was manifestly excessive as to merit interference by this court.

28. It is true that where a trial exercises its discretion and makes an informed award on damages, an appellate would rarely interfere unless it is shown that the Trial Court took into account an irrelevant factor or disregarded a relevant or that the amount awarded in so inordinately high or so low as to amount to erroneous estimate of principle. This principle was well illustrated in the decision of *Kemfro Africa Ltd T/a Meru Express Service & Another -vs- Mm. Lubia & Another* [1998] eKLR where the Court of Appeal held as follows: -

“The Principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge are that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of damages.”

29. The Respondent herein pleaded that he sustained head injury with loss of consciousness for two weeks; blunt injury to the scalp with hematoma formation; cut wounds on the left forehead; fractured skull; bruises on both hands; and bruises on the right knee.
30. During hearing he told the Court as a result of the accident he lost his sight.
31. DR. Joseph Sokobe corroborated the evidence of the Respondent. He confirmed the Respondent suffered the pleaded injuries and that he lost vision in both eyes. He assessed disability at 100%. He produced his medical report as exhibit no.1 a.
32. Dr. Rono from Moi Teaching and Referral Hospital testified that the Respondent sustained severe head injury and injury to the nerves supporting both eyes. He said such injury was likely to cause blindness.
33. The Appellant on their part similarly led no evidence to controvert the nature of injuries that the Respondent sustained.
34. It is trite that comparable injuries should attract comparable damages.
35. The Court of Appeal observed in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR that: –

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”



36. I have looked at the authorities cited by the Appellants vis some vis the injuries sustained by the Respondent. Those authorities are irrelevant and do not reflect the seriousness of the Respondent's injury.
37. The claimant in the authorities cited by the Respondent sustained similar injuries with the Respondent herein.
38. I have also considered the case of Pioneer Holdings (Africa) Limited v Francis Shitsukane Abakala & another [2017] eKLR in which the Court upheld an award of KShs.2, 500,000/= made at the instance of a Plaintiff who sustained chemical burns to the eyes resulting in total blindness.
39. In view of the foregoing, it is my considered view that an award of general damages of Ksh. 2 Million was not manifestly excessive and it was within the range of similar awards.
40. The appeal therefore lacks merit and it should be dismissed with costs to the Respondent.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 25TH DAY OF APRIL, 2023.

MOHOCHI S.M (JUDGE)

Counsels for the parties

M/S Kimondo Gachoka & Co. Advocates for Appellant

M/S Mbugua Korir & Co. Advocates- For The Respondent

