



**Diamond Trust Bank Ltd & another v Mulatya (Civil Appeal  
22 of 2021) [2023] KEHC 3866 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3866 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL 22 OF 2021**

**G MUTAI, J**

**APRIL 24, 2023**

**BETWEEN**

**DIAMOND TRUST BANK LTD ..... 1<sup>ST</sup> APPELLANT**

**LANDMARK HOLDINGS LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHARITY KAMENE MULATYA ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Judgment of the Principal Magistrates court at Kajiado CMC Civil Suit No. 345 of 2018 delivered on 26<sup>th</sup> April 2022 by Hon. E. Mulochi. In the said judgment the court awarded Kes.500,000.00 as general damages, Kes.78,200.00 as special damages totaling to Kes.578,2000.00. The judgment was entered against the defendants jointly and severally.

**Duty of the appellate court**

2. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
3. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd*[1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

## **Evidence**

4. The plaintiff testified that she was a pillion passenger on motorcycle KMDX 179J. She was involved in an accident involving motor vehicle KCD 290Q which hit them and as a result she suffered serious injuries. The injuries she suffered were: -
  - a. Bruises on the back.
  - b. Bruises on the left elbow
  - c. Fracture of the left proximal radius and ulna
  - d. Bruises on the left thigh.
5. The plaintiff testified and adopted the statement dated 2<sup>nd</sup> July 2018. The Respondent stated that she was not wearing protective gear and that she had healed as at the time she testified.
6. PW2 IP Charles Gilgitele the base commander at Kitengela testified. He blamed the motor cyclist. The rider was crossing the road and the vehicle was on its right lane. The plaintiff closed their case while the third party and the defendants did not produce any evidence.

## **Analysis**

7. There is on record an application for review which the court dealt with and gave directions on 22<sup>nd</sup> September 2021. There is no evidence on record in support of the defence evidence and also the third party evidence. There was no evidence led on the role of the first appellant Diamond Bank of Kenya Ltd which is a banking institution.
8. The first Appellant therefore was wrongly joined since it is apparent that they were financiers. There cannot therefore be a judgment against the 1<sup>st</sup> Appellant. Consequently, the 1<sup>st</sup> Appellant is struck out as a party both from this appeal and the court below. They have to bear their own costs.
9. The court notes that the 1<sup>st</sup> Respondent led evidence which was contradictory.
10. The police evidence was that the motorcycle rider was to blame for the accident as he joined the road when it was not safe to do so. I agree there was no evidence led that would lay the blame of the 2<sup>nd</sup> Appellant.
11. Unfortunately, it's the appellants who joined the third parties and not the first Respondent. Having found the motorcycle registration No. KMDX 179J wholly to blame for the accident I proceeded to allow the appeal and dismiss the plaintiffs case on liability in the lower court.
12. The Plaintiff having not joined the tortfeasor to the proceedings they cannot as such benefit from the presence of the third party. They ought to have sued the third party. The consequence of this judgment is that although motorcycle registration No KMDX179J was to blame the Respondent did not file a case against him.
13. I must also point out that the neither the Appellants nor Respondent provided evidence that would help the Court discern who the owner of Motorcycle KMDX 179J.
14. Having dismissed the appeal on liability the other two appeals related to this appeal become unnecessary and fatuous.



15. Having found that the 2<sup>nd</sup> Appellant was not liable I would have put down my pen at this point. The law however requires me to consider the damages I would have granted had the appeal been unsuccessful. In this I am guided by the persuasive authority of *Elijah Kinyua Mwangi versus Haggai Ikelo Wanangasa & Another* [2020] eKLR where Mwita, J stated as follows in paragraph 50:-

“Although the trial court dismissed the Appellant’s suit, it did not assess the damages it would have awarded had he succeeded. The trial court should always even when dismissing a case for personal injuries, assess the damages it would have awarded had the plaintiff succeeded. That is important for purposes of considering damages on appeal should the losing party opt to appeal”.

### **Quantum**

16. I agree with the above decision. I will thus consider below the quantum of damages I would have awarded had the appeal been unsuccessful. I do this as this Court is not the final court of appeal in this matter. It is open for a party in this appeal, who is aggrieved, to file a further appeal.
17. The duty of this court regarding quantum is the same as a court exercising discretion. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. I have reviewed the following authorities on fractures. In Multiple fractures of; (1) frontal left orbital roof.(comminuted) (2) right temporal bones(petrous) (3) Bleeding in the skull airspaces (haemosinus), cut on the head(frontal) and cut on the chin. The examining doctor reached a conclusion that the Appellant would recover satisfactorily since she was of tender age. The court awarded her Kes.500,000.00

19. In *Lim v Camden HA* [1980] AC 174:

“ Even in assessing compensatory damages, the Law seeks at most to indemnify the victim for the loss suffered, not to punish the tortfeasor for the injury he has caused.”

20. I do not find any fault in the judgment of the court below regarding quantum.

### **Determination**

- a. The first appellant was an unnecessary party both in the lower court and in this court and as such is struck out as a party from both courts with no orders as to costs.
- b. The appeal on liability by the 2<sup>nd</sup> Appellant is allowed.
- c. Though motor vehicle cycle No. KMDX 179J was wholly to blame it was not joined as a Defendant by the Respondent. The judgment against third parties is therefore set aside.



- d. The court need not and cannot determine who between the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties is the owner of motorcycle registration No. KMDX 179J as no evidence was led by either the defendants or the third parties.
- e. The appeal on quantum is dismissed.
- f. Given that the Respondent was injured, and the case turned on nonjoinder of the correct tortfeasor, each of the parties is bear their own costs.
- g. This appeal Applies to all the other appeals filed from the decision of the Learned Magistrate in Kajiado CMCC 345 of 2018, that is Kajiado HCC Appeal No. E.064 of 2021 and E.058 of 2021. The finding herein applies to those Appeals.
- h. This file be marked as closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24<sup>TH</sup> DAY OF APRIL, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**GREGORY MUTAI**

**JUDGE**

**In the presence of:**

No appearance for the Appellant

No appearance for the Respondent.

Winnie Migot – Court Assistant

