



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Mwangi (Civil Appeal E011 of 2021)
[2023] KEHC 18664 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E011 OF 2021
SC CHIRCHIR, J
MAY 31, 2023**

BETWEEN

JOSHUA MUGURO MWANGI APPELLANT

AND

GLADYS NYAMBURA MWANGI RESPONDENT

*(An appeal from the judgment of Hon. E. Mutunga (SRM) at Kandara Law courts,
delivered on the 3rd day of December, 2020 in Kandara PMCC No.130 of 2019)*

JUDGMENT

1. The Respondent filed Civil Suit No.130 of 2019 at the Chief Magistrate's court at Kandara seeking for damages for injuries and incidental loss sustained as a result of a Road traffic accident which occurred along Kenol- Thika road. She was a passenger in motor vehicle Registration number No. KAN 478 which collided with motor vehicle registration No. KBY 827 G . The Respondent was injured as a result.
2. After trial court held the Appellant fully liable for the accident and awarded general damages of ksh. 400,000/= and special damages of Kshs. 2,500
3. The Appellant was aggrieved by the judgment and proffered this Appeal, setting out the following grounds:
 - a). That the learned Magistrate misdirected himself in law and principle by making an award for general damages for soft tissues injuries in the sum of Kshs. 400,000/= which sum is inordinately high in the circumstances.
 - b). That the learned Magistrate erred in law by finding the Appellant 100% liable in negligence in disregard of the sum of evidence adduced at the hearing in regard to Respondent's evident contributory role in the accident.



- c). That the learned magistrate erred in law in arriving at a decision contrary to the principle of *Stare decisis* in finding that the Appellant was liable in tort and awarding excessive damages for soft tissue injuries
- d). That the learned trial magistrate erred in fact and in law by wrongly evaluating the matter before him in total disdain of settled principles of law
- e). That the learned trial magistrate failed to take into consideration the submission of the appellant.
- f). That the judgment of the learned magistrate is contrary to the fundamental principles of law and ought to be set aside
- g). That the entire judgment of the learned magistrate is too excessive in the circumstances, conflicting with fundamental principles of law and ought to be set aside.

The appeal proceeded by way of written submissions

Appellant's submissions

- 4. It is submitted that while the trial magistrate stated that the Appellant's driver did not testify, the said driver indeed testified and that his testimony is contained on page 96 of the record of Appeal.
- 5. It is further pointed out that the police officer called to testify by the Respondent was not the investigating officer, did not have the sketch plan or photographs of the scene of the accident and that her testimony did not carry any weight.
- 6. It is further contended that the Appellant was never charged with any traffic offence.
- 7. The Appellant argues that there were conflicting versions of how the accident occurred and consequently liability should have been apportioned in the ratio of 50: 50. The Appellant has relied on the case of *Hussein Omar Farah vs. Lento Agencies* (2006) eKLR and *Welch Vs. Standard Bank Ltd* (1970) EA 115 at 117 and *Simon vs. Carlo* (1970) EA 285 to buttress his in this regard.
- 8. On the quantification of damages, it was submitted that the Applicant did not prove her case on a balance of probabilities. The Appellant also complains that the award was inordinately high. It further argued that the medical reports by both Doctors, whose reports were presented by either side, respectively, show that the Respondent sustained soft tissue injuries and there was no permanent disability suffered. Therefore, it is submitted, the trial court failed to follow the rules of precedent in awarding Kshs. 400,000.
- 9. He has urged the court to set aside the award by the trial court and substitute it with an award of Kshs. 200,000/= . Reliance has been placed on the case of *James Nganga Kimani & anor Vs. Giachagi Njoroge & 2 others* (2019) eKLR and *Elizabeth Wamboi Gichoni Vs. Bernard Ouma Owuor* (2019) eKLR.

The Respondent's submissions.

- 10. In response, the Respondent points out that she suffered injuries as follows:
 - a). Head injuries involving a cut wound on the forehead extending to the upper side of the right eye
 - b). Bleeding gums and tongue injury



- c). 2 upper Broken teeth and 1 lower incisor teeth
 - d). Cut wounds on 2 fingers right hand
 - e). Cut wounds on the left leg above the ankle joint
 - f). Blunt soft tissue injuries on the lower back.
11. She relied on the case of *Mombasa maize millers (KSM) and Ano vs Rengo Joshua Wafula* (2017) eKLR and *Michael Okello vs. Priscilla Atieno* (2021) eKLR where the high court reduced the award of Kshs. 500,000/= to Kshs. 250,000/= for simple soft tissue injuries. While in the case of *Mary Wairimu Njuguna Vs. Kenya power and lighting company Ltd* (2018) eKLR, the court upheld the award of Kshs. 800,000/= in general damages.
 12. On contributory negligence, the Respondent argues that the Respondent played no role in the causation of the accident as she was not in control of either vehicle and the Appellant should have enjoined the driver of Motor vehicle KBY827G by way of 3rd party proceedings

The Summary of Evidence:

13. PW1 was a police officer from Thika Police station. He produced the police abstract dated 22/1/2019. He testified that Motor vehicle registration No. KBY 827 G was to blame for the accident. On cross examination, he admits that he was not the investigating officer. He did not file the sketch plan and the driver was never charged. He blamed the lorry driver for failing to give way.
14. PW 2 was the plaintiff. She produced her witness statement as evidence- in- chief which she asked the court to adopt as well as the medical report dated 23/06/2020. She stated that she had nerve problems in both her legs and that her left eye cannot close well. She also had a tongue problem and that she still goes to therapy.
15. On cross examination, she testified that she saw the lorry join the junction and block them, and that she saw it when it was ammeter away.
16. DW1 was the only defence witness, and the driver KBY 827 G. He told the court that he made the U-turn on the road after ensuring that it was safe to do so ,only to be hit on the left side . On cross examination, he claimed that he was hit by KAN 478 W while on the highway. That the KAN 478 was headed to Thika, while he was crossing to join Delmonte.

Determination

17. On liability, the Appellant stated that he was trying to make a U- turn to join Kakuzi road when he was hit ,but insists that the he had checked the road and confirmed that it safe to cross. He blamed the driver of the opposite vehicle for his fast approach. As such, he argues, liability should be shared equally.
18. The Appellant admits he was crossing a highway and as such, it was his responsibility to give way. He asserts that he had checked the road and was evident that it was clear for him to cross. However, he did not indicate to the court how far he could see towards the direction of the approaching vehicle so as for the court to determine whether indeed the approaching vehicle was speeding. If there was a bend for example, the fact that the “the road was clear” would not have been of any help to him. , because he could not have been in a position to determine how safe it was to cross. The onus was on him to demonstrate that, from as far as he could see, it was safe for him to cross the highway. Further there was no proof at all given to the court that the other motor vehicle was approaching at a high speed. The fact that the impact on the Appellant’s vehicle was on the side as opposed to being towards the



rear, in my view, suggest that the other vehicle was quite near when the Appellant started crossing and therefore it was unsafe for him to cross. It was the responsibility of the Appellant to give way to the vehicle which was on the highway, and for failing to do so he largely takes the blame.

19. The Appellant has blamed the driver of Motor vehicle registration number KAN478 accident yet he failed to enjoin him in the suit.
20. Order 1 Rule 15 of the [Civil procedure Rules](#) provide as follows:

“ 15(1) where a defendant claims as against any other person not already a party to a suit that (hereinafter referred to as the third party);

- a). that he is entitled to contribution or indemnity; or
- b)
- c)

he shall apply to the court within fourteen days after close of pleadings for leave of the court to issue a Notice (hereinafter called a third-party Notice) to that effect”.

21. The Respondent herein was a passenger. She played no role in the causation of the accident. If the Appellant wished to shift blame to a third party he ought to have taken out third party proceedings. The court cannot apportion blame to a person who is not a party to the suit even if it were to find out that the said third party contributed to the accident.
22. Consequently, I find no fault in the trial court’s finding that the Appellant was entirely to blame for the accident.

Quantification of Damages

23. The injuries sustained by the Respondent is as set out in paragraph 10 of this Judgment. Dr. Arshawin who examined the plaintiff on 23/6/20 stated that the injuries were soft tissue in nature and she suffered physical & and mental trauma. The trial court awarded Kshs. 400,000/- as general damages. The issue is whether this court should interfere with that award.
24. In the celebrated case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A M Lubia & Olive Lubia* [1982-88] KLR 727 the Court of Appeal held: “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage”. The court further held: “On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages:

- (1) Damages should not be inordinately too high or too low.
- (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
- (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.



(4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.....”

25. In my assessment, the injuries sustained by the Respondent may be classified as multiple soft tissue injuries. It is evident from the respondent’s testimony that she still suffered the effects of the injuries at the time of the hearing. She told the court that one of her eyes could not close properly and there was also some malfunctioning of the tongue, clearly an indication of some damage to the nerves.

26. Considering the injuries sustained by the respondent, keeping in mind that no injuries can be completely similar and considering the factors of inflation, the award cannot be said to have been too high as to constitute an erroneous estimate of the damage suffered by the Respondent.

27. In conclusion, I do not find any merit in the entire appeal, the same is dismissed, with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF MAY, 2023

S.CHIRCHIR

JUDGE.

In the presence of :

Susan- Court Assitant

Mr. Mbuthia for the Respondent

No appearance by the Appellant.

