



REPUBLIC OF KENYA



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**Odhiambo v Ojowa (Civil Appeal E109 of 2021)
[2023] KEHC 21251 (KLR) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 21251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E109 OF 2021**

**MS SHARIFF, J
MAY 29, 2023**

BETWEEN

DORIS ADOYO ODHIAMBO APPELLANT

AND

MICHAEL OCHIENG OJOWA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. N. Oruo (SRM) delivered at Maseno in Principal Magistrate's Court Case No 49 of 2020 on 17th August 2021)

JUDGMENT

Introduction

1. In his decision of 17th August 2021, the Learned Trial Magistrate, Hon. C. N. Oruo (SRM), entered Judgment in favour of the Respondent herein against the Appellant on a hundred (100%) per cent basis as follows:-

General damages Kshs 1,300,000/=
Special damages Kshs 6,500/=
Kshs 1,306,500/=

Plus costs and interest of the suit.
2. Being aggrieved by the said decision, on 16th September 2021, the Appellant filed a Memorandum of Appeal dated 14th September 2021. She relied on nine (9) grounds of appeal.
3. Her Written Submissions were dated and filed on 20th December 2022 while those of the Respondent were dated and filed on 13th January 2023. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for consideration were:-
 - a. Whether or not the Learned Trial Magistrate erred in having found the Appellants wholly liable for the accident herein;
 - b. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.
7. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Liability

8. Grounds of Appeal Nos (3), (4), (5), (6), (7), (8) and (9) of the Memorandum of Appeal were dealt with under this head. Notably, Grounds of Appeal Nos (7), (8) and (9) cut across both issues of liability and quantum.
9. The Appellant submitted that it was settled law that he who alleges must prove. She asserted that the Respondent had an obligation and duty to prove his case by explaining how the accident occurred and why he blamed her for the same and that it was not enough for him to just state that she hit him.
10. She was emphatic that the finding on liability was not based on any evidence as he did not demonstrate what she failed to do or what she did so as to occasion the accident. It was her argument that a police abstract was indicative of the occurrence of an accident but did not prove the blameworthiness of a party as against the other. She averred that he failed to produce any evidence to prove the particulars of negligence he attributed to her and that in fact, PW 3 (sic) was not even the investigating officer and hence, he failed to prove his case against her on a balance of probabilities.
11. She argued that the Learned Trial Magistrate misdirected himself by ignoring the principles applicable in determining liability and the relevant authorities on liability that she cited in her submissions. She pointed out that the Learned Trial Magistrate failed to see the Respondent as an equal road and hence he would have also apportioned liability against him. She asserted that there was no sufficient evidence that was produced before the court to make such an unfair conclusion.
12. In this regard, she invoked Section 107 (1) of the *Evidence Act* and placed reliance on the case of *Statpack Industries Ltd vs James Mbithi Munyao* [2005] eKLR where it was held that not every injury was necessarily as a result of someone's negligence.
13. On his part, the Respondent reproduced the evidence at the Trial Court and submitted that the Appellant's theory of defence was an afterthought, hence the reason why it was not raised earlier but was brought up at the conclusion of the case when he had no chance to respond to it. In that respect,



he placed reliance on the case of *Hellen Gathoni Mbuthia & Another vs Nelson Wachira Murage* [2016] eKLR where the court held that the respondent therein who had sought to rely on a copy of records ought to have cast aspersions on the contents of the police abstract and the case of *Esther Chepkemoi Ngecher vs John Kung'u & Charles Muthoka* [2022] eKLR where it was held that failure to test evidence through cross-examination could reduce the relevance or probative value to the person relying the same.

14. He contended that the Appellant's failure to cross-examine him in a manner that would have helped her test the theory of her case meant that she did not cast doubts, impeach or weaken his evidence. He added that her decision to omit the Inspection Report was poignant because she had admitted that the subject Motor Vehicle (sic) was inspected but did not give reasons why she opted to omit it from her list of documents.
15. In this regard, he relied on the cases of *Kenya Alliance Insurance Co Ltd vs Ritter Yongo* [2020] eKLR and *West Kenya Sugar Co Limited vs Lilian Auma Saya* [2020] eKLR where the common thread was that the inference to be drawn by the failure to produce the inspection report was that the evidence contained therein was adverse to the appellants' cases.
16. He also cited the cases of *Chase Bank (Kenya) Limited vs Cannon Assurance (K) Limited* [2019] eKLR which cited the case of *Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 Others* [2012] eKLR in which it was held that where a party had custody of evidence but withheld the same, the court could draw adverse inference.
17. He further submitted that despite the burden to prove its case being placed on a plaintiff, a defendant also had an obligation to show what she did as a reasonable person to avoid the accident. In this respect, he relied on the cases of *Mary Njeri Murigi vs Peter Macharia & Another* [2016] eKLR, *Fraciah Njeri Grace vs Isaiah Ngararika Muindi & Another* [2012] eKLR amongst other cases where the holdings were that a person driving a vehicle was under duty to exercise care and attention to other road users.
18. He also cited the case of *Masembe vs Sugar Corporation and Another* [2002] 2 EA 434 where it was held that a reasonable person driving a motor vehicle on a highway with due care and attention does not hit every stationary object on his way merely because the object is wrongfully there.
19. He submitted that a driver was expected to exercise more caution when he was driving at night to avoid accidents as was held in the case of *Mildred Mumbi Kanake & Another (Suing as the Legal Representative and Administrators of the Estate of Peter Mwangi Waciuri (Deceased) vs Robert Kariuki Nyaga* [2019] eKLR.
20. He averred that the Appellant ought to have exercised more care as she was in control of a lethal weapon. He pointed out that the accident occurred at night when the Appellant ought to have exercised more caution. He invoked Regulation 70 of the Highway Code that provides that it was difficult to see pedestrians, cyclists and unlit vehicles at night and hence, one was required to drive at a low speed so as to be able to stop well within the distance illuminated by the lights.
21. He contended that the Appellant opted to drive at a speed of 60 kph in the night when it was clear that she had difficulty seeing and was not able to apply brakes to avoid the accident. He argued that she failed to show the proper skill that she exercised in trying to avoid the accident and pointed out that despite having she testified that she saw him, she still hit him. It was his averment that the Learned Trial Magistrate held her liable on the ground that her failure to exercise due care, caution and diligent driving resulted in the accident and she must therefore take responsibility for failing to take reasonable steps to avoid hitting him.



22. He further placed reliance on the case of Charles Ogolla Obiero vs Joseph Munyambu Karega [2017] eKLR where it was held that the evidence of the investigating officer though desirable, was not mandatory. He was emphatic that his testimony was cogent, clear and undisputed on issue of liability and it was therefore not compulsory for him to have called the investigating officer because he never witnessed the accident.
23. According to the Respondent, on 12th April 2020, he was at Obambo riding a motor cycle heading to Holo when a motor vehicle, whose registration number he could not remember, came from Bondo heading to Kisumu and that the same was being driven in a zigzag manner. He said that he asked to give (sic) way by signalling his light and hooting but as he passed the said motor vehicle, it hit his motor cycle. He told the Trial Court that he was riding on the edge of the tarmac road. On re-examination, he confirmed that he was riding his motor cycle in the opposite direction of the subject Motor Vehicle.
24. No 78851 PC Edward Ambege (hereinafter referred to as “PW 2”) admitted that he was not the initial Investigating Officer. He produced the Police Abstract. He contended that the Police file could not be traced. His evidence was that the accident occurred within Maseno Police Station area. He confirmed that the Respondent who was a motor cycle rider.
25. On being cross-examined, he stated that he had part of the Occurrence Book (OB) which had scanty information about the accident. He also said that the Police Abstract could not tell who was to blame for the accident and that there was no other witness.
26. In his testimony, James Odongo Ogao (hereinafter referred to as “DW 1”) told the Trial Court that he was the driver of the subject Motor Vehicle (sic) and that the accident occurred on the left side of the road. He added that the Respondent joined the road without indicating. On cross-examination, he stated that it was the Respondent’s Motor Cycle Registration Number KMFB 657J that hit the Appellant’s Motor Vehicle Registration Number KCQ 418M. He asserted that he was not approaching from the opposite direction. He confirmed that an inspection of the Motor Vehicle was done but that the Certificate of Inspection was not produced as an exhibit. He averred that the point of impact could not be shown without the said Certificate.
27. It was the Appellant’s assertion that the Respondent joined the road without indicating while the Respondent averred that the Appellant’s driver was being driven from the opposite direction. In the absence of an independent witness, this was a case of one person’s word against the other.
28. Notably, Section 107 (1) of the *Evidence Act* Cap 80 (Laws of Kenya) stipulates that he who asserts must prove while Section 108 of the *Evidence Act* states that the burden of proof in a suit or proceedings lies on the person who would fail if no evidence was given by either side.
29. The burden lay upon the Respondent to prove that DW I was negligent making the Appellant herein vicariously liable for his negligence. It was not sufficient for him to have merely stated that DW I was negligent. It was important for him to have demonstrated how DW 1 was negligent.
30. Having analysed the evidence that was adduce by both DW 1 and the Respondent herein, it was not clear to this court why the Respondent indicated and hooted to be given way if he and DW 1 were moving in different directions or how the accident occurred on the left edge of the road if DW 1 was driving from the opposite direction in a zig zag manner with no explanation of how the Appellant’s Motor Vehicle veered from its side to the left side of the road where he was riding at the edge of the road on the left side.



31. In the absence of any other evidence, this court was more persuaded by DW 1's evidence that he and the Respondent were moving in the same direction which could explain why the accident occurred on the left edge of the tarmac as they both narrated to the Trial Court.
32. In his decision, the Learned Trial Magistrate concluded that the failure by a driver to do all in his power to avoid an accident from happening would result in that driver being automatically blamed for the accident.
33. Notably, PW 2 conceded that the Police file could not be traced and the information in the OB was scanty. He also confirmed that the Police Abstract Report did not indicate who was to blame for the accident. A perusal of the Police Abstract Report showed that the matter was Pending Under Investigation (PUI).
34. This court did not therefore agree with the Learned Trial Magistrate's conclusion that the Appellant was wholly to blame on the ground that DW 1 did not do everything in his power to avoid hitting the Respondent herein. Indeed, the Respondent also owed other road users a duty of care. He did not demonstrate what action he took to evade the accident. He could not therefore escape liability for the misfortune that befell him.
35. Having said so, DW 1 was in control of a more powerful machine and hence, a larger part of negligence was attributable to him. Doing its best, this court found and held that liability herein ought to be apportioned at 70%-30% against the Appellant in favour of the Respondent herein.
36. The Appellant's failure to adduce the Certificate of Inspection was not fatal to her case as she was under no obligation to assist the Respondent in proving his case by showing the point of impact.
37. In the premises, Grounds of Appeal Nos (3), (4), (5), (6), (7), (8) and (9) of the Memorandum of Appeal were merited and the same be and are hereby dismissed.

II. Quantum

38. Grounds of Appeal Nos (1) and (2) of the Memorandum of Appeal were dealt with under this head.
39. The Appellant placed reliance on the case of Boniface Waiti & Another vs Michael Kariuki Kamau [2007]eKLR where it was held that in assessing damages in a personal injury case, a court must be guided by the principles that an award of damages is not meant to enrich but to compensate a victim for injuries sustained, the award should be commensurable with the injuries sustained, previous awards in similar injuries sustained should be a guide but that each case should be treated on its own facts and that awards should not be inordinately low or high.
40. She further placed reliance on the case of Joseph Mbuta Nzii vs Kenya Orient Insurance Company Limited [2015] eKLR where it was held that parties are bound by their pleadings and that any averment that is at variance with the averments of the pleadings must be disregarded.
41. She submitted that the evidence on record showed that the Respondent suffered a single fracture to the left leg and several soft tissue injuries. She contended that the Respondent did not lead any evidence for the alleged fractured and deformed wrist and a deformed left leg knee joint as he had pleaded in his Plaintiff. She added that he did not adduce any evidence to show that he had not healed and was permanently disabled as a result of the accident.
42. She argued that the Learned Trial Magistrate erred when making an award for quantum based on injuries that had merely been stated and not proved. She was emphatic that the award was not commensurate to the injuries that the Respondent suffered. She blamed the Learned Trial Magistrate Court for ignoring her submissions and the authorities she cited and placed reliance on the case



- of Stephen Mbugua Ikigu vs Peter M. Mbugua & 2 Others [2014] eKLR where it was held that a judgment must be clear and demonstrate a reasoned thought process.
43. She pointed out that in making an award of Kshs 1,300,000/= as general damages, the Learned Trial Magistrate ignored the cardinal principle in assessment of damages that comparable injuries should as far as possible be compensated by comparable awards as was held in the cases of Simon Taveta vs Mercy Mutitu Njeri [2014] eKLR.
 44. It was her contention that even after factoring the issues of inflation and the age of the authorities, the amount that the Learned Trial Magistrate awarded was still inordinately high and unjust as it was based on the wrong principles. In that regard, she relied on the case of Kigaraari vs Aya (1982-88) 1 KAR 768 where it was held that damages must be within the limits set out by decided cases and also within the limits the Kenya economy could afford. She also cited the case of Margret Ncekei Thurairia vs Mary Mpinda & Another [2015] eKLR where it was held that costs are generally a matter within the discretion of court.
 45. She submitted that an award between Kshs 500,000/= to Kshs 800,000/= would have been reasonable compensation. She urged the court to also consider the authorities she relied on in her submissions at the Trial Court and urged the court to allow her appeal with costs.
 46. In that respect, she relied on the following cases:-
 1. Jitan Nagra vs Abidnego Nyandusi Oigo [2018] eKLR where the court set aside an award of Kshs 1,000,000/= and substituted the same with an award of Kshs 450,000/= where the respondent therein had sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumber region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula and segmental distal fracture of the right femur. In that case, the respondent therein could not walk without crutches, was still on Plaster of Paris (POP) and complained of severe headache, severe pains on the chest, back, right hand and left leg.
 2. Joseph Mwangi Thuita vs Joyce Mwole [2018] eKLR where the court increased the award of Kshs 100,000/= to Kshs 700,000/= as general damages where the appellant therein sustained a fracture of the right femur, compound fracture of the right tibia, compound fracture right fibula with shortening right leg and episodic pain on the right thigh with inability to walk without support.
 47. On his part, the Respondent submitted that he had prayed for Kshs 1,500,000/= general damages. He placed reliance on five (5) cases amongst them James Gathirwa Ngugi vs Multiple Hauliers (EA) Ltd & Another [2015] eKLR and China Road and Bridge Corporation (Kenya) vs Job Mburu Ndungu [2021] eKLR that he relied upon during trial where the general damages ranged between Kshs 1,000,000/= and Kshs 2,000,000/=.
 48. He asserted that the injuries left him a permanent scar and disability. He submitted that he had not fully recovered and was walking with the aid of crutches and was therefore unable to continue with any gainful and income earning activity so as to feed his family. He added that the inability to walk had caused him great inconvenience, loss and forced him into debt.
 49. He pointed out that the thirty (30) days he was admitted in hospital confirmed the severity of the injuries he sustained. He was emphatic that the Appellant had not laid sufficient evidence before this court to prove that the Learned Trial Magistrate misdirected himself and failed to analyse the law and or the evidence on record in arriving at its Judgment. He further argued that the Appellant did not call any witness to refute the injuries that he suffered and hence his testimony remained rebutted.



50. Notably, an award of damages is not meant to enrich the victim but to compensate such victim for the injuries that he sustained as was held in the case of *Boniface Waiti & Another vs Michael Kariuki Kamau* (Supra). Indeed, similar injuries should attract comparable awards. However, in the quest for consistency, courts must also recognise that no case is exactly the same as another and each case must therefore be decided on its own peculiar circumstances but keeping in mind that any monies awarded must be sustainable.
51. At the same time, an appellate court must keep at the back of its mind that it does not have the jurisdiction to interfere with the assessment of damages merely by substituting a figure of its own to that awarded by the trial court, even though it could have awarded a higher or lesser sum itself.
52. The rationale is both constitutional and statutory. Where a judgment has been made by a competent court, an appellate court is estopped from asserting the contrary position unless an award of damages is so inordinately high or low as to represent an entirely erroneous estimate or that the trial court has proceeded on wrong principles, or that it has misapprehended the evidence in some material respect as was correctly pointed out by both the Appellants and the Respondent and affirmed in the cases of *Butt vs Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470.
53. In Paragraph 7 of the Complaint dated 27th May 2014 and filed on 28th May 2014, the Respondent was said to have sustained a head injury involving tenderness and bruises on the face, tenderness on the left side of the chest wall, swollen left hand, fractured wrist left joint, deformed left wrist joint, tenderness on the left hip joint, swollen, bruised and tenderness on the right elbow joint, swollen and tenderness on the left leg and left knee joint, deformed left leg knee joint, multiple fracture on the left tibia and fibula.
54. He was rushed to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) where he was admitted for about thirty (30) days. He adduced in evidence, a Discharge Summary from the said hospital and a P3 Form.
55. He was examined by Dr L. W. Okombo on 27th May 2020, about a month and a half after the accident. In the said Medical Report, Dr L.W. Okombo observed that the Respondent sustained injuries that could be described as “grievous harm” and that at the time of the examination, he had not fully recovered and was complaining of headache with pains on the chest, left hand, right elbow joint, left leg, left hip joint which were as a result of the soft and bone tissue injuries. The said Medical Report showed that the Respondent would require further treatment physiotherapy, analgesics and orthopaedic attention.
56. As was held in the case of *Joseph Mbuta Nzii vs Kenya Orient Insurance Company Limited* (Supra), parties are bound by their pleadings. The averments in the pleadings must be supported by documentary and/or oral evidence.
57. According to the said Medical Report, the Respondent was said to have sustained fracture to the left leg, dislocation of the left wrist joint, bruises to the face and injuries to the left hand, chest and left hip joint. At the time of the medical re-examination, he complained of a headache, pain on the chest, left hand, right elbow joint, pain on the leg and pain on the left hip joint.
58. There was no indication if he was referred for a second medical examination at the request of the Appellant herein or if he was referred him for a second medical examination and he declined to go. This court therefore limited itself to Dr L. W. Okombo’s Medical Report for purposes of assessing the quantum that was reasonable in the circumstances of the case herein and disregarded the injuries that were in Paragraph 7 of the Complaint as the same were not supported by any documentary evidence.



59. In determining if the sum of Kshs 1,300,000/= general damages that was awarded by the Trial Court was reasonable compensation, this court had due regard to the following cases:-
1. Alex Wanjala vs Pwani Oil Products Limited & Another [2019] eKLR where the court awarded Kshs 600,000/= general damages where the appellant therein sustained a closed head injury leading to loss of consciousness for several weeks, closed fracture of the right humerus and closed fracture of the right femur.
 2. Reuben Mongare Keba vs LPN [2016] eKLR where the court awarded Kshs 800,000/= general damages where respondent therein suffered a fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg.
 3. EWO (suing as the next friend of a minor COW) vs Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR where the appellate court upheld an award of Kshs. 800,000/= general damages where the plaintiff had suffered fractures of the femur, tibia and fibula.
60. Taking into account the serious injuries that the Respondent herein sustained vis- a- vis the damages in comparable cases and the inflationary trends, this court came to the firm conclusion that a sum of Kshs 1,300,000/= general damages was inordinately and/or manifestly high warranting interference by this court. This court was of the considered that an award of Kshs 700,000/= would be sufficient to compensate the Respondent for the injuries that he sustained.
61. In the premises, Grounds of Appeal Nos (1), (2), (8) and (9) of the Memorandum of Appeal were merited and the same be and are hereby allowed.

Disposition

62. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on 16th September 2021 was partly merited. The effect of this is that the Judgment in the sum of Kshs 1,306,500/= that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgment be and is hereby entered against the Appellants herein in favour of the Respondent for the sum of Kshs 494,550/= made up as follows:-
- General Damages Kshs 700,000/=
- Special Damages Kshs 6 500/=
- Kshs 706, 500/=
- Less 30% contribution Kshs 211,950/=
- Kshs 494,550/=
- Plus costs and interest thereon at court rates. Interest on special damages will accrue from date of filing suit while interest on general damages will accrue from the date of judgment of the lower court.
63. To avoid further hardship to the Respondent herein in view of the reduced award, each party will bear its own costs of the Appeal.
64. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 25TH DAY OF MAY 2023

J. KAMAU



JUDGE

Dated, signed and delivered at Kisumu this 29th day of May 2023

M.S SHARIFF

JUDGE

