



**Bolpak Trading Company Limited & another v Nyamweya (Civil Appeal
131 of 2021) [2023] KEHC 17991 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 131 OF 2021**

REA OUGO, J

MAY 26, 2023

BETWEEN

BOLPAK TRADING COMPANY LIMITED 1ST APPELLANT

GEOFFREY MICHIERA MARIGA 2ND APPELLANT

AND

PAUL MACHENERI NYAMWEYA RESPONDENT

*(Being an appeal from the judgment delivered by the Honourable
P.K Mutai, Principal Magistrate on 29th September 2021)*

JUDGMENT

1. The respondent filed a suit filed before the trial court as a result of a road traffic accident that occurred on 2nd July 2018. The accident occurred along Kisii-Oyugis Road. The respondent who was abroad in motor vehicle registration no. KAR 947G belonging to the appellants alleged that the vehicle lost control at Nyakoe area and hit motor vehicle registration no. KBW713H and KAZ 519T. The respondent sustained injuries as a result of the accident. After considering the evidence and submissions before it, the trial court entered judgment in favour of the appellant.
2. This appeal challenges the judgment of Hon. P.K. Mutai delivered on 29th September 2021 awarding the respondent Kshs 300,000/- as general damages, Kshs 5,100/- as special damages, costs and interest of the suit. In this appeal the appellant seeks to have the judgment of the trial magistrate set aside and the court to re-assess the quantum awarded. The appeal is anchored on the following grounds:
 1. The learned magistrate erred in law and misdirected himself when he failed to consider the appellants submissions on both points of law and facts.



2. The learned magistrate's decision was unjust, against the weight of the evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 3. The learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, CAP 405.
 4. The learned magistrate erred in law and fact in finding the Defendants/Appellants 100% liable in view of the evidence produced before the trial court and in particular the following:
 - a. That the Plaintiff/Respondent failed to prove his case on liability against the Defendant/Appellant.
 5. The learned magistrate erred in law and fact in awarding the Plaintiff/Respondent Kshs 300,000/- for general damages hence arriving at a wrong finding as regards the nature of injuries sustained by the plaintiff.
 6. The learned magistrate erred in law and fact by awarding the plaintiff an inordinately high quantum as damages in the circumstances of this case.
 7. The learned magistrate erred in law and fact in awarding the Plaintiff a sum that was so excessive as to an amount that is so erroneous as to the estimate of general damages suffered by the plaintiff.
 8. The learned magistrate erred in law and fact in failing to consider the Appellants' submissions on quantum and liability and legal authorities relied upon in support thereof.
 9. The learned magistrate erred in law and fact by overly relying on the Respondents' submissions which were not relevant and without addressing his mind to the circumstance of the case.
 10. The learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
3. The appeal was canvassed by way of written submissions. The appellant in his written submissions dated 29th June 2022 argues that there was no testimony from the police officer and that Pw1 in his evidence did not blame the appellant for causing the accident. They argue that it is trite law that liability must always follow fault and that it was incumbent on the respondent to show that the appellant was indeed liable. The respondent on the other hand submits that he proved his case on a balance of probabilities and his evidence remained unchallenged. Therefore, there can be no appeal on the issue of liability.
 4. This being the first appeal I am required to consider the evidence adduced before the trial court, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123).
 5. The only evidence as to the occurrence of the accident was from Paul Machereri Nyamweya (Pw1). He adopted his witness statement as his evidence in chief. He testified that he was aboard motor vehicle reg. No KAR 947. The vehicle lost control and knocked two vehicles, motor vehicle registration mark No. KAZ 519T and KBW 713H, which were oncoming vehicles. He blamed the appellant's driver for



driving in the vehicle carelessly and allowing it to knock the other two vehicles therefore causing the accident.

6. The fact that the accident occurred was not disputed and this was further confirmed by the police abstract. It was also clear from the testimony of Pw1 that the accident was as a result of the appellant's driver losing control of the motor vehicle and ramming into two oncoming vehicles. Pw1's evidence was not shaken on cross examination and the trial magistrate cannot be faulted for making a finding that the appellants were 100% liable for the accident. The appellants did not lead any evidence on liability and closed its case without calling any witnesses. In my view, the appeal on liability therefore fails.
7. I now turn to consider the award of damages. In dealing with an appeal on quantum I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”
8. According to paragraph 6 of the plaint, the respondent sustained the following injuries: multiple deep cut wound on the frontal region; deep cut wound on the face; chest contusion; blunt trauma to the right shoulder, right knee and lower back; and bruises on the right leg. The discharge summary from Oasis Hospital where the respondent was admitted noted that he sustained soft tissue injuries following the accident. He was bleeding from his skull and mouth. The injuries were confirmed by the P3 Form and the medical report which were both prepared by Dr. Morebu Peter Momanyi. Dr. Morebu concluded that the respondent had sustained multiple soft tissue injuries that were in the process of healing but would leave behind permanent scars.
9. The injuries sustained by the respondent are not been contested. However, the appellant in their submissions argue that the damages awarded by the trial magistrate were inordinately too high. They urge the court to consider an award ranging between Kshs 50,000/- to Kshs 70,000/-. They relied on the case of *HB (Minor suing through mother & next friend DKM V Jasper Nchonga Magari & another* [2021] eKLR where an award of Kshs 60,000/- was upheld where the appellant had sustained blunt injury to the head, neck, thorax, abdomen and limbs. In *Nyamira HCCA No E015 of 2021* (Unreported) *Francis Oraro v Hemson Ochomba Nyaigoti* the court awarded Kshs 100,000/- to a plaintiff that had sustained cut wound on the left gluteal region and left leg; and contusion on the chest.
10. The respondent supported the finding of the trial magistrate and placed reliance on the case of *Charles Gichuki v Emily Kawira Mbuba & another* (2018) eKLR and *Joseph Kimani Gathanga & Another v Dickson Ndungu Njoroge* (2019) eKLR.
11. In the case of Francis *Ouari Ogara v IAO (minor suing through next friend and father GOD* [2021] eKLR respondent therein sustained the following injuries: Multiple cut wounds on the right lower limb; bruises on the right lower limb; bruises on both elbows; bruises on the right iliac region; bruises on the frontal region; bruises on the temporal region; lacerations on the frontal region; cut wounds on the left iliac region; cut wounds on the frontal region; cut wounds on the temporal region; and blunt trauma to the abdomen. The court set aside the award of Kshs. 230,000/- and substituted with one for Kshs. 180,000/=. The cases cited by the appellant were of injuries that were less severe compared to those sustained by the respondent herein and therefore provide the court with little guidance.



12. The injuries sustained by the respondent herein were more comparable with those in Francis Omari Ogaro v JAO (*supra*), I therefore find that the award of Kshs 200,000/- would be reasonable in the circumstances. The award of special damages of Kshs 5,100/- warrants no interference as the same was pleaded and proved.
13. In the end, I set aside the award of the learned trial magistrate of Kshs 300,000/- and substitute it with an award of Kshs.200,000/=. The appellant shall have half costs of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MAY 2023.

R.E. OUGO

JUDGE

In the presence of:

Appellant Absent

Miss Kusa For the Respondent

Aphline C/A

