



**Oyugi v Masese & another (Civil Appeal 13 (E013) of 2022)
[2023] KEHC 17714 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17714 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 13 (E013) OF 2022
PN GICHOHI, J
MAY 25, 2023**

BETWEEN

GERALD OREMO OYUGI APPELLANT

AND

SAMUEL OCHAKO MASESE 1ST RESPONDENT

KONANA KOILEKEN 2ND RESPONDENT

(Being an appeal from the whole judgment/decree of Hon. D.O. Mac'candere Resident Magistrate delivered on 4th February, 2022 in CMCC No. 790 of 2019 at Kisii)

JUDGMENT

1. This is an appeal by Gerald Oremo Oyugi (Appellant) against the judgement and decree of Hon DO Mac'candere Resident Magistrate Kisii dated and delivered on February 4, 2022. In that suit, he was the Defendant while Samuel Ochako Masese (1st Respondent) was Plaintiff and Konana Koileken (2nd respondent) who was a Third Party.
2. By a plaint dated September 26, 2021 and filed by the firm of Ben K Gichana & Co Advocates, the 1st Respondent pleaded that the Appellant was the proprietor (registered, equitable, beneficial or otherwise) of motor vehicle registration number xxxx which was in the lawful control or that of his driver, agent, servant and /or employee.
3. That on or about May 26, 2019, he was lawfully travelling as a passenger in the said motor vehicle along Kisii -Migori road when at Itierio junction area, the Appellant 's driver, agent, servant and /or employee so negligently drove, managed and/or controlled the said motor vehicle and permitted it to collide with motor vehicle registration number xxxx as a result of which the 1st Respondent sustained serous injuries. He pleaded that the Appellant should be held vicariously liable for the tortious acts committed on him.



4. He therefore prayed that judgement be entered against the Appellant for general damages for pain and suffering and future medical expenses. He also sought special damages of Kshs 6,610/- costs and interest.
5. The Appellant filed a defence dated November 7, 2019 and filed by the firm of Kairu & McCourt, in which he generally denied the allegations raised by the 1st Respondent in the plaint and without prejudice and in the alternative, he pleaded that if the accident did occur as pleaded by the 1st Respondent and which he denied, then the same was caused by the reckless, negligent and/or careless acts or omissions of the 1st Respondent and the owner of motor vehicle registration number xxxx which he sought to enjoy. He therefore prayed that the suit be dismissed with costs.
6. The firm of Kimondo Gachoka & Co Advocates filed a Notice of Change of Advocates on June 26, 2020 and took over conduct of the matter on behalf of the Appellant . The obtained leave of the court and issued a Third Party Notice against the 2nd Respondent and ultimately, judgment was entered against the Third Party for failure to file a memorandum of appearance and defence.
7. Both the 1st Respondent and the Appellant called witnesses in support of their respective cases. They also filed submissions and ultimately, the court entered judgement in favour of the 1st Respondent as follows: -
 1. Liability 100%
 2. General damages Kshs 500,000/=
 3. Special damages Kshs 6,660= together with interest at court rates from the date of this judgment till payment in full.
 4. The Plaintiff to have the costs of the suit.
8. Aggrieved by the said judgment, the Appellant preferred this appeal. In the Memorandum of Appeal dated February 7, 2022, he raises eleven (11) grounds of appeal which are hereby summarised as follows: -
 1. That the learned magistrate erred in law and misdirected himself when he failed to consider the Appellant 's submissions and legal authorities thereof on liability and quantum on both points of law and facts.
 2. That the learned magistrate erred in fact and law by overly relying on the Respondent's submissions which were not relevant and without addressing his mind to the circumstances of this case.
 3. That the learned magistrate erred in fact and law in failing to consider conventional awards in cases of similar nature.
 4. That the learned magistrate decision was unjust , against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned miscarriage of justice.
 5. That 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.



6. That the learned magistrate erred in law and fact in finding the Appellant 100% liable in view of the evidence produced before court and in particular in finding that the Plaintiff/ Respondent failed to prove his case on liability against the Defendant/Appellant.
 7. That the learned magistrate erred in law and fact in failing to find the Third Party 100% liable for the accident in view of the evidence produced before court.
 8. That the learned magistrate erred in law and fact in awarding the Plaintiff/Respondent Kshs 500,000/- as general damages thus arriving at the wrong finding as regards the nature of the injuries sustained by the Plaintiff.
 9. That the learned magistrate erred in law and fact in awarding the Plaintiff a sum that was so excessive and erroneous as to the estimate of general damages suffered by the plaintiff in the circumstances of this case.
9. The Appellant therefore prayed that:-
- a. The appeal be allowed with costs.
 - b. The judgment delivered on February 4, 2022 be set aside and judgement of this court dismissing the suit against the Appellant with costs be entered in its place.
 - c. Without prejudice to (b) above this court re-assesses the quantum awarded.
 - d. Costs in the lower court and in this appeal be awarded to the Appellant.
 - e. Such further orders as this court may deem fit to grant.

Submissions

10. The appeal was disposed of by way of written submissions. In their submissions dated January 15, 2023, counsel for the Appellant submits that the PC Nicholas Musyoki who was the investigating officer testified that the probox registration number xxxx was being driven from Suneka heading to Kisii and that on reaching the scene of accident the driver veered off the road as he was negotiating to enter the main road and as he tried to avoid a head on collision with a Nyamira bus. That it was in the process that he was knocked by the matatu registration number xxxx that was being driven from Kisii to Suneka. That he did not know the point of impact. On cross examination, he stated that the matatu did not veer off the road.
11. Counsel submits that the said evidence was corroborated by the driver of the matatu Moses Mogere that he was on his lane and never left the said lane when his vehicle (matatu) was hit by the probox. The Appellant blamed the driver of the probox for the accident. That though the scene visiting officer PC Peter Saoke (DW1) stated that the accident occurred on the probox, lane, he contradicted himself when he stated that the matatu never left its lane. He could not then explain how the impact was on the probox's lane if the matatu never left the lane. He further submits that PC Saoke's evidence is therefore self-contradictory.
12. Further counsel submits that despite being served, the 2nd Respondent never entered appearance to challenge the Appellant's evidence and therefore, judgment was entered against him. He submits that Moses Mogere's evidence was that the bus was overtaking a motor cycle and when the driver of the probox saw bus coming to his lane, he veered off to the left side out of the road and when trying to join the road, it hit his vehicle and the front lamp was damaged. As a consequence, the Appellant's case against him remained uncontroverted.



13. He therefore submits that by holding the driver of the matatu 100 % liable, the trial magistrate failed to take into account the conduct of the probox driver who recklessly joined the road without looking to see if there was another vehicle on the road and hence, the probox driver should have been held 100 % liable.
14. On quantum, counsel submits that the sum of Kshs 500,000/= awarded to the Respondent was excessive considering that the Respondent sustained soft tissue injuries as pleaded and the medical report dated 4th June 2019 by Dr Morebu Peter Momanyi. While relying on the case of Power Lighting & Company Limited & another [2008]eKLR cited in the case of *Jenifer Mathenge v Patrick Muriuki Maina* [2020]eKLR, counsel urges the Court to interfere with the award.
15. On general damages, counsel cites the case of *HB (Minor suing through mother & next friend (DKM) v Jasper Inchonga v Magari & another* [2021]eKLR and *Eva Karemi & 5 others v Koskeing Kieng & another* [2020] e KLR among others, in support of his proposal that the Respondent be awarded a sum of Kshs 50,000/- . Lastly , he urges the Court to allow the appeal with costs to the Appellant .
16. On his part, the 1st Respondent filed his submissions dated January 20, 2023 and urges the Court to dismiss the appeal with costs to the 1st Respondent. On liability , counsel submits the trial court's finding on liability is accurate and proper in principle and material evidence and facts. Citing the case of *Bhut v Khan 1977 I eKLR*, counsel urges the Court not to disturb the trial court's find arguing that the Appellant is trying to exploit the third party's non- appearance in a manner that lacks sound basis in law and fact.
17. On quantum , counsel submits that the Court can only interfere with the award of where it finds that trial court applied wrong principles of law by taking irrelevant factor, leaving out of account some relevant one and therefore arriving at an erroneous estimate of damages to be awarded.
18. In this case, counsel submits that the injuries sustained by the 1st Respondent were serious and therefore the trial court correctly and properly considered inflationary trends in awarding Kshs 500,000/= as the trial court was guided by and that the injuries herein were comparable to those in the case of *Poa Link Services Co Ltd & another v Sindani Boaz Bonzemo* [2021] eKLR where an award of Kshs 350,000/- was made. He therefore submits that the award by the trial court should not be disturbed.
19. In support, counsel cites among others, the case of *Blue Horizon Travel Co Ltd v Kenneth Njoroge* [e KLR] where the Plaintiff was awarded Kshs 400,000/= as general damages for bruises on the scalp, neck, abdomen, lower back and cut wound on the left thumb and left palm and subluxation of the left shoulder joint.

Determination

20. This appeal is both on liability and quantum. This being a first Appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions while bearing in mind that unlike the trial court, this court has neither seen nor heard the witnesses when they testified as stated in *Selle & Another v Associated Motor Boat Co LTD & Others (1968) EA 123*.
21. On liability , a perusal of the lower court records confirms that on obtaining leave to issue third party notice, the Appellant subsequently served the third party (2nd Respondent) as required by law and when he failed to appear enter appearance as required, judgment against him was entered as requested



by Appellant . The consequences of default of appearance and defence by a third party served with the third-party notice is provided for Order 1 Rule 19 of the *Civil Procedure Rules* that ;

' Where a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third-party notice; the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him:'

22. The entry of default judgment against the third party does not mean it determines liability as between the Plaintiff and the Defendant. If judgment is entered against the Defendant, then the Defendant is at liberty to claim from the third party to the extent of the he had claimed in the third party.

23. In her judgment, the trial magistrate held on liability;

' PW1 in his pleadings and evidence in court blamed the defendant for the accident stating that he drove the motor vehicle negligently thereby causing the accident. PW2 also blamed the defendant since he told the court that the accident happened on the left side of the road while the matatu which the defendant's driver was driving was supposed to be on the right lane . The defence witness DW2 told the court that the accident happened on the lane of the probox which means that it occurred off its lane. His evidence and that of the PW2 exonerated the driver of the probox from any blame. A look at the abstract produced indicates that the Defendant is the owner of the of the matatu and the particulars of insurance were written on top of the abstract as such I hold him 100% vicariously liable for the said accident.'

24. This is a finding of fact by the court that heard the case. So, did she err in this finding? The evidence by the investigating officer (PW2) was that the driver of the probox was trying to avoid a head on collision with a bus when it veered off the road as he negotiated to enter the main road and, in the process, hit the matatu and landed into a ditch.

25. On cross examination, he told the court that he did not have a sketch plan but the matatu was slightly on the left side facing Kisii. That without a sketch plan he could not confirm the point of impact. He told the court that no one was charged for the accident but the matter was still pending under investigations.

26. PW1 Cpl Peter Saoke testified on what was in the OB by the investigating officer. That preliminary investigations at the scene showed that the driver of the matatu was to blame for he did not keep to his lane. In cross examination, he told the court that there was no way the matatu could be blamed because the accident occurred on the road as one faces Kisii direction.

27. On this part, Moses Mogere Rosana (PW2) who was the matatu driver told the court that the probox veered off the road to the left side and out of the road and when trying to join the road, it hit the matatu and damaged the head lamp.

28. From this evidence , the Plaintiff who was a passenger in the matatu had no contribution to make in that accident. Further, there was no clear evidence for holding the matatu liable at 100 %. Since it was not clear from the evidence as to the extent of the contribution by either party to the accident, then liability should have been apportioned between the two vehicles (matatu and probox) equally.



29. An award of damages is discretionary and the appellate court would not interfere with that discretion unless the award is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the trial court proceeded on wrong principles or that she misapprehended the evidence in some material respect and therefore arrived at a figure which was either inordinately high or low.
30. Further the trial court should be guided by comparable awards for similar injuries while bearing in mind that that money cannot fully compensate for injuries sustained. The trial should also consider to age of the case cited in support of the award so as to allow for inflation.
31. In this case, it is not disputed that the Plaintiff therein sustained soft tissue injuries that is , chest contusion, bruises on the face , scalp , right upper limb, right and left knee. In awarding Kshs 500,000/= as general damages, the trial magistrate was guided by the case Poa Link Services Co Ltd & another v Sindani Boaz Bonzemo [2021] eKLR where the Respondent suffered blunt injury to the chest, bruises on the lower abdomen, right hip joint, and on the knee. He was awarded Kshs 350,000/-
32. In Blue Horizon Travel Co Ltd v Kenneth Njoroge [e KLR , the Plaintiff was awarded Kshs 400,000/= as general damages for bruises on the scalp, neck, abdomen, lower back and cut wound on the left thumb and left palm and subluxation of the left shoulder joint.
33. In HB (Minor suing through mother & next friend (DKM) v Jasper Inchonga v Magari & another[2021]eKLR , relied on by the Appellant , the Plaintiff sustained blunt object injury to the head, neck, thorax , abdomen and limb and was awarded Kshs 60,000/= by the lower court which was upheld on appeal. In Eva Karemi & 5 others v Koskeing Kieng & another [2020] e KLR the injuries sustained therein are also not comparable. The trial magistrate in this case considered the injuries sustained in by the Plaintiff herein and the inflation. I see no reason to disturb that award.
34. In the upshot , trial magistrate's judgment on liability is set aside and substituted with judgment at 50: 50 as between the Appellant and the 2nd Respondent . The Award of Kshs 500,000/= is hereby upheld. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED IN OPEN AT KISII THIS 25TH DAY OF MAY, 2023

Patricia Gichohi

Judge

In the presence of:

N/A for Appellant

Mr. Marongo for Respondent

Kevin Isindu, Court Assistant

