



**Tabwara v Mwananchi Bakers and Confectioners Ltd (Civil Appeal
95 of 2021) [2023] KEHC 22224 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 22224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 95 OF 2021
F WANGARI, J
MAY 25, 2023**

BETWEEN

BINTI HASSAN SUDI TABWARA APPELLANT

AND

MWANANCHI BAKERS AND CONFECTIONERS LTD RESPONDENT

(Being an appeal from the Judgment and Order of the Honourable Sandra Ogot, Senior Resident Magistrate at Msambweni Law Court dated 25th June, 2021 in Civil Suit No. 85 of 2020)

JUDGMENT

1. This is an appeal from the Judgment and Order of the Learned Senior Resident Magistrate Hon. Sandra Ogot in Msambweni SRMCC 85 of 2020 given on 25th June, 2021.
2. The Appellant appealed on the whole judgement and proceeded to set out five (5) grounds on both quantum and liability against the judgment delivered by the Court. The Trial Court apportioned liability at 50% against each of the parties.
3. 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 in 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.
4. 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...”

5. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

Pleadings

6. The Plaintiff (Appellant herein) instituted a suit against the Defendant (Respondent herein) seeking general and special damages for alleged injuries sustained in an accident said to have occurred on 5th March, 2020 along Milalani – Kikoneni Road within Kwale County involving the Appellant and the driver of motor vehicle registration number KCP 059D. The accident is said to have occasioned the Appellant severe bodily injuries among them fracture of the right humerus bone and right shoulder dislocation. The Appellant blamed the Respondent for causing the accident which led to her injuries.
7. The claim was defended. A statement of defence dated 21st September, 2020 was filed on 29th September, 2020. In the said defence, the Respondent blamed the Appellant for among other grounds, that she crossed into the path of motor vehicle registration number KCP 059D when she knew it was not safe. The matter went through the usual motions and the same was finally heard and a judgement was delivered on 25th June, 2021. The Trial Court apportioned liability at 50% against both parties and made various awards on quantum in favour of the Appellant subject to contributory negligence. It is this decision that precipitated the present appeal.

Evidence

8. The Appellant (PW1) testified on 4/2/2021. She adopted her witness statement as her evidence in chief. In summary, she stated that she was involved in a road accident and she broke her right hand. She was taken to Msambweni Hospital where she was admitted from 5/3/2020 to 20/3/2020. Upon discharge, she was told to be attending hospital for outpatient services. She was later re-admitted in May, 2020. She stated that the accident occurred next to the road as she had already crossed to the opposite side. She reported the accident at Diani Police Station and later engaged a lawyer who referred her to a doctor to prepare a medical report. She produced most of the documents other than the police abstract and the medical report. She blamed the driver of motor vehicle KCP 059D for the accident.
9. On cross examination, she stated that she had just crossed the road when she was hit and that the place where she crossed is where people normally cross. She added that she had seen the vehicle from far and it was speeding. She heard people shouting but before she could react, the vehicle had already reached her.



10. Dr. Darius Kiema testified as PW2. He confirmed having examined the Appellant and prepared a medical report which he produced detailing the injuries sustained and the required treatment. He opined that the Appellant had suffered 14% permanent disability. He equally stated that the Appellant would require future medical costs to purchase painkillers, physiotherapy and removal of metal plates. On cross examination, he stated that there are cheaper painkillers of less than Kshs. 3,000/= as indicated in his report. On physiotherapy, he confirmed that the Appellant could get the same at a public hospital at a cost of less than 50% of his figures. On removal of plates, he stated that he made reference to LN 131/2016 which cost ranges from Kshs. 90,000/= to Kshs. 144,000/=.
11. PC Dominic Asumwa testified as PW3. He stated that he was based at Diani Police Station carrying out traffic duties. He told the court that on 5.3.2020 at 1500hrs, a road traffic accident occurred at Vuleni Market Area along Milalani – Kikoneni Road involving a motor vehicle KCP 059D Isuzu lorry and a pedestrian, the Appellant herein. This was reported through phone call by a member of the public. CPL Hassan Ali and PC Mumo went to the scene and established that one Sande Katana while driving motor vehicle KCP 059D lost control of the said vehicle and knocked down the Appellant who was on the left side of the road. The Appellant sustained fracture of the right hand and was taken to Msambweni County Hospital for treatment. He produced the police abstract. He added that the accident occurred in a market area where speed should be 50kph or less. From the facts of the case, he blamed the driver for the accident.
12. On cross examination, he stated that he was neither the investigating officer nor did he visit the scene but he insisted that where the accident occurred was in a market area where speed should be 50kph. He confirmed that he did not know the speed the motor vehicle was being driven at. Referred to the abstract, he stated that the abstract did not show that the driver was to blame. However, it was his opinion that the driver was to blame. He stated that the officers who went to the scene prepared a report but it was not in the file as it was still pending investigation. That marked the close of the Appellant’s case.
13. The defence case proceeded on 8/4/2021 where one Sande Katana Kahindi testified as the only witness for the defence. He adopted his statement as his evidence in chief. In summary, he blamed a bodaboda for the accident. He was speeding and he was in the middle of the road. The Appellant was equally crossing while carrying a container of water. He swerved a little bit and the front side of the vehicle hit the Appellant. On cross examination, he stated that he was blaming the bodaboda for causing the accident. It was his vehicle that hit the Appellant and it is the one that occasioned her injuries. He confirmed that the area was like a market centre and that he was driving at 30kph. He only hit the Appellant as she was in front of the vehicle. On the point of impact, he confirmed that it was on the left side of the road and he had come off the road. By consent of the parties, a medical report by Dr. Muthuri dated October 7, 2020 was produced and thereafter, the defence case was closed.
14. Both parties filed their submissions before the Trial Court and judgement subject of this appeal was delivered on 25th June, 2021. As stated above, liability was apportioned at the ratio of 50:50.

Submissions on Appeal

15. The Appellant filed her submissions dated 3/2/2023 on the same day. The Appellant contends that apportionment of liability at 50:50 was erroneous and it was not based on the evidence of the parties. She contended that from the evidence of all the Appellant’s witnesses and confirmed by the Respondent on cross examination, the accident occurred off the road. The facts on how the accident occurred and point of impact are not in doubt. The Learned Trial Magistrate was faulted for failing to



give reasons for her decision contrary to the provisions of Order 21 Rule 4 of the [Civil Procedure Rules](#). On the issue of obstruction, it was the Appellant's submissions that no third party was enjoined.

16. Several authorities among them [James Gikonyo Mwangi v D.M \(Minor suing through his mother and next friend, IMO\)](#) [2016] eKLR were cited in support of setting aside the apportionment of liability at 50:50 and in its place, find the Respondent 100% liable. Though the Appellant had equally appealed on quantum, she never made any submissions on the same. Be that as it may, the Appellant thus urged that the appeal be allowed.
17. The Respondent filed its submissions dated 14th February, 2023 on the same date. On liability, the Respondent maintained that the evidence tendered did not tell with certainty who was to blame for the accident and thus considering that the evidence was contradictory, the apportionment by the Trial Court was fair in the circumstances. The cases of [Tombe Tea Factory Ltd v Samuel O. Araka](#) [2010] eKLR and [Hussein Omar Farah v Lento Agencies](#) [2006] eKLR were cited for the above proposition.
18. On quantum, the Respondent submitted on various heads. For pain and suffering, a sum of Kshs. 350,000/= was proposed on reliance in the case of [Maina Onesmus v Charles Wanjohi Githome](#) [2019] eKLR. On special damages, the Respondent submitted that no receipts were produced and thus the Appellant was not entitled to any special damages. On pain killers under cost of future medication, a sum total of Kshs. 10,800/= was proposed on the basis that over the counter painkillers are equally effective as confirmed by PW2. On physiotherapy sessions, it was submitted that the same was not strictly proved. [Tracom Limited v Hassan Mohamed Adan](#) [2009] eKLR was cited for this proposition. On the cost for removal of plate and screws, [Legal Notice No. 131 of 2016](#) was relied upon and a figure of Kshs. 30,000/= proposed based on a range of Kshs. 24,000 – 60,000/=. Lastly, the Respondent sought for the dismissal of the appeal with costs.

Analysis and Determination

19. I have carefully considered the pleadings, evidence, submissions, judgement, the grounds of appeal and the law and accordingly, the following are the issues for determination: -
 - a. Whether the Trial Court fell into error in apportioning liability at the ratio of 50:50;
 - b. Whether the quantum awarded under various heads were properly and correctly awarded;
 - c. Who bears the cost?
20. On the first issue, it is trite that he who alleges must prove. In the present case, it was the Appellant's duty to prove her case on a balance of probabilities. In [Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another](#) [2005] 1 EA 334 the Court of Appeal had the following to say: -

“...As a general proposition under Section 107 (1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the [Act](#)...”
21. The occurrence of an accident on 5/3/2020 and resultant injuries on the Appellant based on the said accident are not in dispute. What is disputed is the party responsible for the accident. There were only two people who were at the accident scene and appeared to testify before the Trial Court, the Appellant and the Respondent's driver. Each gave a different version of what transpired depending on where each wanted the pendulum to swing. In her testimony, the Appellant confirmed that she had crossed



- the road when the accident occurred. However, DW1 admitted that though he hit the Appellant, it is because she was on the road crossing.
22. PW3's testimony could not come to the aid of the Appellant for the reasons that he was neither the investigating officer nor did he visit the scene. His role was only limited to what was stated in the police abstract which he produced. Indeed, on cross examination, he confirmed that the driver was never blamed for the accident yet the abstract was filled by CPL Hassan Ali who PW3 confirmed to have visited the scene.
 23. The Appellant stated that she heard people shouting at her. It is interesting that none of these people who were shouting at her could come to her aid in court. Similarly, PW3 stated that a report was made about an accident through phone call by a member of the public. It would have been prudent for the officers who visited the scene to have reached out to this member of the public since his or her phone was known. With no independent eye witness to corroborate either of the versions, I hold that the Trial Court did not err in apportioning liability at the ratio of 50:50. The Appellant submitted that the Trial Court did not give reasons for its decision contrary to the requirements of Order 21 Rule 4 of the *Civil Procedure Rules*. I have perused the Trial Court's judgement particularly at pages 76 and 77 of the Record of Appeal and I have no hesitation to hold that the Trial Court gave its reasons for the decision. It therefore follows that nothing turns on this issue.
 24. To this end, I am satisfied that the Trial Court rightly apportioned liability between the Appellant and the Respondent and I so hold.
 25. On quantum, the Court of Appeal in *Catholic Diocese of Kisumu v. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“...It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate...”
 26. From the plaint filed, the Appellant suffered the following injuries: -Fracture right humerus bone with fragments and displacement and right shoulder dislocation; Fracture right radius bone.
 27. Permanent disability was assessed at 14% by PW2 and 2 months later, the doctor who prepared the second medical report assessed the disability at 3%. In its judgement, the Trial Court having considered the two reports reviewed the disability to 7% and I have no reason to interfere with this discretion. It is trite that comparable injuries should as much as possible attract comparable awards (See *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR).
 28. I am equally alive to the fact that no two injuries can be exactly the same. In awarding a sum of Kshs. 400,000/=, the Trial Court relied on the case of *Mbiti Muinde William v Rose Muthen Mulatia* [2019] eKLR where the Respondent had suffered among other injuries, fracture of the right tibia and 5th metacarpal bone. I do not consider the said award to be inordinately low or inordinately high to be construed as erroneous estimate of the injuries sustained. In *Maina Onesmus v Charles Wanjobi Gitbome* [2019] eKLR, an award of Kshs. 600,000/= was reviewed to Kshs. 350,000/= for a Plaintiff who had sustained mid shaft fracture of the humerus and condyles and fragment fracture of the



shoulder girdle. Taking into account the rate of inflation, the award of Kshs. 400,000/= as awarded by the Trial Court was sufficient and I see no reason to disturb it.

29. On special damages, it is trite that the same must not only be specifically pleaded but strictly proved (See *Hahn v Singh* [1985] eKLR). The Appellant pleaded a sum of Kshs. 24,350/=. I have gone through the Appellant's documents in support of special damages and I am satisfied that this amount was specifically pleaded and strictly proved and I uphold the Trial Court's award on this head.
30. Finally, on cost of future medication, the Appellant pleaded a sum of Kshs. 292,000/=. I note that the figure was derived from PW2's medical report. On painkillers, the Trial Court awarded Kshs. 36,000/= . On physiotherapy, an award of Kshs. 50,000/= was made. For removal of plate and screws, Kshs. 120,000/= was made. Having reviewed the Trial Court's reasoning on the various awards, I will not disturb the awards on painkillers and physiotherapy. However, on the removal of plate and screws, I am of a different opinion. Under *Legal Notice No. 131 of 2016* at 4.0 titled "Removal of Implants," there is a range provided at 4.2 which covers long and short bones. The bones involved in the present case are the humerus and radius which fall in the class of long bones.¹ The range is between Kshs. 24,000 – 60,000/=. I thus set aside the award of Kshs. 120,000/= for removal of plate and screws and in its place, I substitute it with an award of Kshs. 45,000/= being a figure close to the average.
31. Lastly, on the issue of costs, the same follow the event as guided by section 27 of the *Civil Procedure Act*. However, the court retains its discretion to order otherwise. In the circumstances, though the Respondent has partially succeeded, I direct that each party to bear its own costs.
32. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The appeal is found to be without merit and it is hereby dismissed;
 - b. The award of Kshs. 120,000/= as the cost for removal of plate and screws from the humerus is set aside and in its place, substituted with an award of Kshs. 45,000/=;
 - c. Each party to bear its costs.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 25TH DAY OF MAY, 2023.

.....

F. WANGARI

JUDGE

In the presence of:

N/A by the Appellant

N/A by the Respondent

Guyo, Court Assistant

¹ <https://open.oregonstate.education/aandp/chapter/6-2-bone-classification/> Accessed on 2nd May, 2023 at 1730hrs.

