



REPUBLIC OF KENYA



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**Stejes Agencies Limited v Paul (Civil Appeal E067 of 2021)
[2023] KEHC 19523 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E067 OF 2021**

**MW MUIGAI, J
JUNE 30, 2023**

BETWEEN

STEJES AGENCIES LIMITED APPELLANT

AND

BENJAMIN MALONZA PAUL RESPONDENT

*(Being an appeal from the judgment of the Hon B. Kasavuli
(PM) delivered on 1.04.2021 in Mavoko CMCC NO 876 of 2019)*

JUDGMENT

1. Vide a Complaint dated on 15.11.2019 it is averred that the cause of action arose on 16.09.2019 along the Nairobi- Mombasa Road. The Plaintiff is said to have been travelling as a fare paying passenger in motor vehicle registration number KCM 074Z when near National Oil or thereabout, the Defendant's driver, servant and/or agent in the course of his employment of driving motor vehicle registration number KCQ 181Z drove recklessly, carelessly and negligently permitting it to lose control and hit the motor vehicle the Plaintiff was in causing him serious injuries. The Defendant is said to be vicariously liable for the accident and that he took out Saham Assurance company policy no MGL/08/080/10152/2019-COMP hence liable for the injuries sustained
2. The Plaintiff pleaded that the injuries were deep cut wounds on the left side of the face, blunt injuries to the anterior chest wall left side, soft tissue injuries to the left forearm, fractured distal radius bone, fractures distal ulna bone, cut wound on the right knee, deep cut wound on the left leg, segmented fractures left tibia bone.
3. The Plaintiff prayed for general damages, special damages, costs and interest of the suit.
4. Upon service of the Complaint, the Defendant filed a statement of Defence on 4.12.2019 in which he denied the allegations raised in the Complaint but admitted to there not being a suit between the parties. The Defendant averred that if the accident occurred, it was caused by the negligence, recklessness and



careless driving of the registered owner, beneficial owner or driver, agent or servant of motor vehicle registration number KCM 074Z. He therefore asked the court to dismiss the suit with costs.

The Hearing

5. The Plaintiff called 3 witnesses.
6. PW1 Benjamin Malonza Paul adopted his statement and further stated that he was travelling from Nairobi- Machakos aboard KCM 074Z when on reaching near 39 saw a lorry emerging at high speed from a petrol station and joined the road. He said he just heard a bang and only found himself at Shalom hospital and that the lorry emerged from the left side.
7. He said he has a cut on the face, fracture of left hand, chest injury, fracture of left leg and cut wound and cut wound on knee right leg. He was transferred to Machakos Level 5 hospital and was later issued with P3 and police abstract. He said he had not fully recovered and still had pain at the injured area. He couldn't use his limb and leg as before. He had fastened the belt. He blamed the lorry and prayed for compensation.
8. Upon cross examination, he said that he was seated middle row behind the driver, he saw a lorry emerge from the left side of the road as you face Machakos general direction. The vehicle was on the left side of the road, he realized it had suddenly emerged. He denied that the driver knocked the lorry. He said he saw the lorry came from the petrol station side. The matatu knocked on the side. I can't tell if their driver applied brakes. He has a cut wound on the face blunt injury on head. The left hand can carry a diary. The last time he ever did work was on 14/9/2019. He had not indicated on his witness statement that he can no longer work due to injuries. He told his doctor he cannot work. The leg, hand and head are my current areas are still in pain. He still goes to hospital for further treatment and did not have current treatment documents in court.
9. Upon re- examination, he stated that the matatu was on the highway, the lorry was joining main road from petrol station. The lorry's side was knocked by their matatu. He was wearing a belt and it was after the bang that he found himself in hospital. He heard their driver applying emergency breaks.
10. PW2, Paul Muthengisaid he was served with summons to produce police abstract on accident of 16.9.2019 which occurred near National oil petrol station along Nairobi- Mombasa road involving motor vehicle KCQ 181Z Faw lorry and matatu KCM 074Z whereby one of the passengers in the matatu Benjamin Malonza Paul were injured. He stated that on the material day and time the matatu driven by Edward Nyingi carrying fare paying passenger was headed to Machakos general direction and on reaching National oil petrol station collided with the lorry which joined the main highway without giving priority to motor vehicles using the highway. Immediately after the accident, the driver of the lorry escaped from the scene.
11. It was his testimony that the scene was visited by police officers from their station and booked the report vide OB 5/17/9/2019. The driver of KCQ was blamed for not giving way to motor vehicle using the highway and produced the police abstract.
12. Upon cross examination, he stated that he was not the investigatin officer and did not visit the scene, he was not in the station. Corporal Mugi visted the scene and is still at Athi River Police station. The base commander choose the person to attend court. He said he got information from the OB and did not have the OB abstract. He was not aware of any independent witness recorded witness statement except for injured passenger. He did not have a sketch maps. According to the police abstract, the case was put under investigation and he was not aware if the case was concluded. He said that there were no independent eye witness other than the victim.



13. In re- examination he said that he was sent by the base commander. The OB had the date of the accident, the Police abstract shows motor vehicle to blame. The primary investigations show that the lorry was to blame. He said the sketch map was enough to show who is to blame and as per the OB, the lorry was from a feeder road joining the highway.
14. PW3, Dr. Titus Ndeti produced the accident report and stated that he relied on the client's history, his physical observations, treatment notes and P3 form . He charged Kshs 5,000 which he was paid and for the court attendance charged Kshs 10,000
15. Upon Cross examination, he stated that he examined the plaintiff on 14th November. His general condition was fair. According to his assessment, the plaintiff would attend to all his duties after a year. He still had a P.O.P so he could not do any work.
16. In re- examination, he said that in his opinion recovery was not conclusive and he had not seen him again.
17. The Defendant did not call any witness.
18. Mr. Mochama, advocate for the Plaintiff indicated that this suit was being used a test suit. By consent, the 2nd medical reports in C.C No 809 of 2019, 810 of 2019, 808 of 2019, 957 of 2019, 807 of 2019 and 876 of 2019 were produced as DExb 1.

Trial Court Judgment

19. The Court made its determination on two issues; liability and quantum. Firstly, the court found the driver of the lorry to blame for the accident, and found 100% liable for the accident for which acts/ omissions and the Defendant was held vicariously liable.
20. On Quantum, the court awarded Kshs 11,600 as special damages and Kshs. 800,000 as general damages.

The Appeal

21. Dissatisfied by this judgment, the Appellant filed a memorandum of Appeal dated 20.04.2021 seeking the following orders;
 - a. The appeal be allowed and the judgment and/or decree on general damages by the Trial Magistrate dated 1.4.2021 be set aside in its entirety.
 - b. The Honourable court be pleased to hold that the General damages awarded to the Respondent is excessive and that the same be revised to a favorable amount.
 - c. The costs of the Appeal be borne by the Respondent.
22. The Appeal is founded on the grounds that;
 - a. The learned trial magistrate erred in law and in fact in awarding the Respondent a sum of Kshs 800,000 on General damages which award is inordinately excessive considering the injuries sustained by the Respondent and existing awards and comparable injuries.
 - b. The learned trial magistrate misdirected himself by failing to consider sufficiently the Appellants submissions, the medical reports on record, the



treatment notes, the pleadings and the evidence thereby arriving at a wrong decision on General damages which has occasioned miscarriage of justice

- c. The learned trial magistrate grossly misdirected himself ignoring the principles applicable and relevant authorities on General Damages cited in the written submissions presented and/or filed by the Appellant.
- d. The learned trial magistrate proceeded on wrong principles when assessing the General damages to be awarded to the Respondent and failed to apply precedents and tenets of the law applicable thereby arriving at a figure which is manifestly excessive.
- e. The Learned Trial Magistrate erred in law and in fact in applying a high inflation rate thereby arriving at an erroneous award in General Damages that is inordinately excessive for such injuries.
- f. The Learned Trial Magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstances occasioning miscarriage of justice by deviating from existing and established Judicial Principles on accident claims.
- g. The Learned Trial Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
- h. The Learned Trial Magistrate erred in law and in fact in misapprehending and misunderstanding the extent and severity of the injuries suffered by the Respondent thereby leading to an erroneous estimate of the injuries sustained by the Respondent.

23. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

24. The Appellant filed submissions dated 16.2.2023 in which he indicated that the only issue he had was on quantum. It was submitted that both parties produced medical reports, one by Dr. Titus Ndeti Nzina dated 14.11.2019 and one by Dr. Joab Bodo dated 21.07.2020 which the Trial court did not consider. That the two doctors stated that the Respondent had healed well without any disability and further the evidence of Dr. Ndeti was that the Respondent would attend to all his duties after a year.
25. It was submitted that the award of Kshs 800,000 was highly excessive, erroneous and not commensurate with comparable injuries. Reliance was placed on the case of Godfrey Wamalwa Wamba & Another vs Kyalo Wambua, HCCA 3 of 2016 and Evans Otieno Nyakwana vs Cleophas Bwana Ongeru HCCA 7 of 2014.

Respondent Submissions

26. The Respondent filed submissions on 28.2.2023 in which it was submitted that parties are bound by their pleadings and no new issue can be introduced as seen in the Appellants submissions on the issue of liability. The court was urged to expunge it from the section.
27. It was submitted that the injuries sustained by the Respondent were confirmed by the treatment noted from Machakos Level 5 hospital, P3 form, medical report by Dr. Ndeti and the Plaintiff written submissions. It was contended that the injuries sustained were quite severe and the trial court was



justified to award the said amount. That there was no cogent evidence of rebuttal that the Respondent never suffered the said injuries.

28. The Respondent contended that the record was incomplete and the court was urged to rely on the lower court record. Reliance was placed on the case of *Bashir Ahmed Butt vs Uwais Ahmed Khan* (1982-88) KAR 5 on the considerations to be taken by the court on whether or not to interfere with general damages. The court was urged to dismiss the Appeal.

Determination

29. I have considered the Trial Court record, the Memorandum of Appeal and the submissions of the parties.

30. This being a 1st Appeal, the court is guided by the finding in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 this court should evaluate and/or assess the evidence on record as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”

31. From a perusal of the Memorandum of Appeal, the Appellant only takes issue with the award of General damages of Kshs. 800,000.

32. From the Plaintiff, the Respondent sustained the following injuries;

33. This is sustained the following injuries;

- a. deep cut wounds on the left side of the face
- b. blunt injuries to the anterior chest wall left side
- c. soft tissue injuries to the left forearm
- d. fractured distal radius bone
- e. fractures distal ulna bone
- f. cut wound on the right knee
- g. deep cut wound on the left leg
- h. segmented fractures left tibia bone.

34. The injuries are confirmed by the medical report dated 14.11.2091 by Dr. Ndeti, medical report by Dr. Bodo dated 21.7.2020 and the P3 form. In the opinion of Dr. Ndeti;

“Benjamin suffered grievous harm. He sustained multiple bone fractures and soft tissue injuries which caused him untold pain blood loss, prolonged morbidity and suffering. He is still undergoing treatment. The injuries have interfered with his routine activities and for a period of one year he will be able to attend to his duties as before the accident.”



35. By consent of parties, a report by Dr. Bodos dated 21.7.2020 who said that;
- “the above named is well recovered with no permanent body disability”
36. The considerations to be taken by an Appellate court in interfering with damages were discussed in the case of *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another* (No. 2) [1985] eKLR as follows:
- a) Whether the trial court took into account an irrelevant factor, or
 - b) Whether the trial court left out of account a relevant factor, or
 - c) Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
37. In *P.N. Mashru Ltd V Omar Mwakoro Makenge* [2018] eKLR, the Court restated the principles stated above and added that Courts have a responsibility to keep themselves apprised of recent authorities, taking into account inflations which has taken a toll on the value of Kenyan Shilling.
38. In the Trial Court, the Appellant proposed an award of Kshs 450,000 to be sufficient while the Respondent proposed Kshs 1,500,000.
39. I have considered various cases such as *Patrisia Adhiambo Omolo v Emily Mandala* [2020] eKLR where the court found that the Appellant had proven the injuries of fracture of the left forearm radius and ulna bones also known as colles fracture of the left forearm as demonstrated by swollen and deformed distal aspect of the forearm. The award of Kshs 180,000 was upheld.
40. In *Narkiso Nyandara V John Nganga Mwaura* HCC 5152/88 where Mbogholi J awarded Sh. 100,000 general damages for a cut wound on the left supra orbital region, deformed sublecn left wrist and deep cut on the wrist, fracture of the left ulna and radius lower third.
41. Similarly in the case of *Peris Mwikali Mutua V Peter Munyao Kimata* Machakos HCCA 28/2007 sustained the following injuries; marked pain and tenderness of the left hip joint, marked swelling and severe tenderness of the left forearm, bruises on the left forearm and fractures of the ulna and radius (colles fracture) of the left distal forearm. The court upheld an award of Kshs 450,000.
42. Considering the time when the awards were given and inflation and the opinion of the doctor that the Respondent would be able to resume his duties in a year, This Court finds that an award of Kshs. 600,000 would be sufficient in the circumstances.

Disposition

1. This Court therefore reduce the award of General damages the Trial Court of Kshs 800,000 to Kshs. 600,000/-.
2. It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 30TH JUNE 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In The Presence Of:



Mr. Isolio H/b Mrs Ochieng - For The Appellant

Mr. Monchama - For The Respondent

Geoffrey/patrick - Court Assistant(s)

