



**Gideon & another v Ondiek (Civil Appeal 22 of 2020)
[2023] KEHC 19356 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 22 OF 2020
MS SHARIFF, J
JUNE 27, 2023**

BETWEEN

AKWABI GIDEON 1ST APPELLANT

CHRIMSOM AGENCIES LIMITED 2ND APPELLANT

AND

DAVID OTIENO ONDIEK RESPONDENT

*(Being an appeal from the judgement and decree of Hon B.A Omollo
R.M in Kisumu CMCC No. 400 of 2017 delivered on 12/03/2020)*

JUDGMENT

1. In the suit at the trial court, the respondent sued the appellants being the beneficial owner and registered owner respectively of motor vehicle registration number KBE 461E which hit the respondent while lawfully walking off the road. He pleaded that he sustained serious injuries as a result of the accident. He blamed the appellants for negligence and sought special and general damages.
2. The appellants entered appearance and filed their statement of defence and the suit thus proceeded to hearing.
3. Pw-1, David Ondiek testified that he was knocked down by the motor vehicle and sustained injuries on his head, shoulder and limbs. He was treated at Jaramogi Oginga Odinga Hospital and discharged.
4. PW-2 PC Mwakwekwe Nyoka confirmed the occurrence of the accident and produced the police abstract.
5. PW-3 Philip Kilimo, a Clinical Officer from Kisumu East Hospital examined the respondent on November 30, 2016 and filed the P3 form on May 17, 2017. He enumerated the injuries he observed on the respondent. He assessed the degree of injury as maim.



6. Gideon Andrew Akwabi testified as DW-1 and he stated that the accident occurred after the respondent ran into the road while attempting to cross. That there was no zebra crossing on that part of the road. He applied emergency brakes and hooted to alert the respondent in vain.
7. After considering the evidence, the trial magistrate held the appellants 100% liable for the accident and awarded Kshs 1,000,000/- in general damages and Kshs 4,750/- in special damages. The appellants being aggrieved moved this court by way of appeal raising the following grounds;
 - i. The learned trial magistrate erred in finding the appellants 100 % liable for the accident.
 - ii. The learned trial magistrate erred in failing to appreciate the appellants' defence and thereby arriving at a wrong and erroneous conclusion condemning the appellant 100% liable.
 - iii. The learned magistrate erred in awarding damages in favour of the plaintiff without any legal justification.
 - iv. The learned trial magistrate erred failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding.
 - v. The learned trial magistrate erred in awarding Kshs 1,000,000/- as general damages without any legal and or evidential justification.
 - vi. The learned trial magistrate erred in failing to appreciate;
 1. That the evidence adduced in support of the plaintiff's case was incongruous with pleadings.
 2. That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining damages as awarded
 - vii. The learned trial magistrate erred in awarding excessive damages without regard to the defendant's submissions.
 - viii. The learned trial magistrate erred by awarding excessive damages beyond the scope of evidence and or legal entitlement.
 - ix. The learned trial magistrate erred in entering judgement in favour of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish his case more especially on damages.
8. The appeal was canvassed by way of written submissions. Both parties complied. On the issue of liability, the appellants submit that there was no fault established on the 1st appellant's part wherefore there was no basis to hold him 100% liable. They propose an apportionment of liability at 50: 50 against the parties.
9. On quantum, the appellants propose the sum of Kshs 350,000/- and support this with; *Pauline Gesare Onami v Samuel Changamure & another* (2017) eKLR where Kshs 600,000/- was awarded, Kenya Power & Lighting Company Ltd & anor v Zakayo Saitoti Naingola & another (citation not provided)



where Kshs 300,000/- was awarded and Mwavita [Jonathan v Silvia Onunga](#) (2017) eKLR where Kshs 400,000/- was awarded.

10. On the respondent's part, it is submitted on the issue of liability that a pedestrian cannot cause an accident and therefore the accident was solely caused by the 1st appellant. Reliance is placed on [Raphael Oduor Wanyama v Lawrence Baraza Sasyendet](#) (2018) eKLR and [Makombo Musanju V Flora alias Nightie Flora & another](#) (2016) eKLR.
11. On quantum, the respondent supports the award on the strength of [Ndathi Mwangi & 2 others v Benson Lumumba Ndivo](#) (2018) eKLR.

Analysis and determination.

12. In [Gitobu Imanyara & 2 others v Attorney General](#) [2016] eKLR, the Court of Appeal stated the duty of a first appellate court thus;

“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”

13. Having appraised myself on the nature of the appeal, I am of the view that the same raises issues of both liability and quantum.
14. On liability, there is no doubt that the motor vehicle is registered in the second appellant's name and was driven by the 1st at the time of the accident. This is confirmed by the police abstract which reveals the person who made the report to the police station. The 1st appellant also testified of how the accident occurred. There is no dispute that the ownership of the accident motor vehicle was proved.
15. On causation of the accident, the respondent averred that he was walking by the road when he was hit by the said motor vehicle. As held in *East Produce (K) Limited v Christopher Astiado Osiro* in Civil Appeal No. 43 of 2001 where it was held that:-

“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991* where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

16. The respondent attributed the accident to the 1st appellant's negligence while the 1st appellant attributed the accident to the fact that the respondent ran into the road leading to the accident. The appellants asked the court to apportion liability in the ratio of 50: 50.
17. The circumstances under which liability can be apportioned was discussed in [Hussein Omar Farar v Lento Agencies](#) [2006] eKLR where it observed that-

“In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our



jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

18. It was further held in *Ndatbo v Chebet* (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment) where it was held;

The law is trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally

19. In this case, there was no independent witness who saw the accident occur. The police officer’s evidence was unhelpful in any way as he did not visit the scene of the crime and he was not the investigating officer.
20. In light of the above, I find that the evidence presented before the trial court on liability was not supported by any evidence. In the circumstances, the trial court’s finding on liability at 100% against the Appellants was erroneous and I therefore proceed to interfere with same and I thus set aside the judgment on liability and I hereby apportion liability at 50:50 as against the appellants on one hand and the respondent on the other.
21. On the issue of quantum, the trial magistrate found and held that the respondent sustained; injuries of tenderness on the forehead and bruises, tenderness on the shoulders, frictional burns on the left lower limb, swelling on the left limb, fracture on the femur and bruises on the left knee. The nature of the injuries were classified as maim.
22. The principles guiding the award of damages has been explained in various authorities of this court; in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR it was reasoned that:
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
23. Looking at the nature of the injuries sustained herein and the authorities supplied by the parties, I have no doubt of the injuries sustained their classification as maim. I have similarly looked up previous awards and take cognizance of the fact that no injuries are similar, I am inclined to find that the award was within limits as supported by the following authorities;
24. In *Wakim Sodas Limited v Sammy Aritos* [2017] eKLR, the respondent sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs 400, 000/- which was upheld on appeal. In *Vincent Mbogholi v Harrison Tunje Chilyalya* [2017] eKLR, the appellate court declined to disturb an award of Kshs 500, 000/- for a fracture of the left tibia leg bone, blunt injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe. In *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs 1, 600, 000/- had the same reduced on appeal to Kshs800, 000/-
25. The above awards though slightly lower, I am minded of the passage of time and inflation, the sum of Kshs 1,000,000/- is sufficient in the circumstances. The award shall then be subjected to 50% contribution and the respondent is therefore entitled to only Kshs 500,000/-.
26. Premised upon the above reasons, the appeal is partially successful to the extent of liability only. Each party shall bear it’s own costs of this appeal.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 27TH DAY OF JUNE 2023.

MWANAISHA. S. SHARIFF



JUDGE

In the presence of: Miss Raburu holding brief for M.M. Omondi for the Respondent.

N/A by the firm of Mose, Mose & Milimo for the Appellant.

