



**Mungai v Coptic Othodox Church & another (Civil Appeal  
58 of 2018) [2023] KEHC 21474 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21474 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL 58 OF 2018  
FROO OLEL, J  
JULY 31, 2023**

**BETWEEN**

**KENNETH MUCHINA MUNGAI ..... APPELLANT**

**AND**

**COPTIC OTHORDOX CHURCH ..... 1<sup>ST</sup> RESPONDENT**

**DOMINIC KINYANJUI MUTERIA ..... 2<sup>ND</sup> RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON E. RIANY  
DELIVERED ON 27TH JUNE 2013 IN NAIVASHA CMCC No. 714 OF 2010)***

**JUDGMENT**

1. The Appellant was the plaintiff in the primary suit, where he had sued the respondent's as the registered owner and driver of Motor vehicle KAR 321N (hereinafter referred to as the 1<sup>st</sup> suit motor vehicle). The appellant alleged that on 8<sup>th</sup> April 2010 he was lawfully driving motor vehicle KAC 622V ( hereinafter referred to as the 2<sup>nd</sup> suit motor vehicle) along Nakuru- Naivasha road at around Delamere fly over area, when the 2<sup>nd</sup> respondent negligently drove, managed and/or controlled the 1<sup>st</sup> suit motor vehicle and caused it to lost control and violently collided with the 2<sup>nd</sup> suit motor vehicle, thereby occasioning injuries to the Appellant.
2. The defendants filed their statement of defence dated 6<sup>th</sup> September 2010 where they denied the occurrence of the accident and stated in the alternative that if at all the accident occurred, (which was denied) then it was caused solely and/ or largely contributed to by the negligence of the plaintiff which was particularized in the said statement of defence as filed.
3. After hearing the suit, the learned magistrate in her judgment delivered on 27<sup>th</sup> June 2018 apportioned Liability at 100% as against the Respondents but however did not award the Appellant damages, on



the basis that injuries sustained had not been established due to contradiction in his evidence and thus dismissed the suit.

4. The Appellant, being dissatisfied by the whole of the judgment did file his memorandum of Appeal on 17<sup>th</sup> February, 2022 and raised several grounds of appeal namely:-
  - a. That the learned trial Magistrate erred in law and in fact in dismissing the appellant's case.
  - b. That the learned trial magistrate erred in law and in fact by failing to take into account the submissions given on behalf of the appellant while considering her judgment.
  - c. That the learned trial magistrate erred in law and in fact in finding that the appellant had not discharged his evidential burden of proving the injuries sustained.
  - d. That the learned trial magistrate erred in law and in fact by failing to put into consideration the relevant legal principles hence arriving at the wrong conclusion of the matter.
5. The Appellant herein is thus mainly aggrieved with the issue of quantum of damages not being awarded despite liability being apportioned 100% as against the Respondents .

#### **Facts of the Case**

6. The appellant testified that he was lawfully driving the 2<sup>nd</sup> suit motor vehicle on his designated lane along Nakuru-Naivasha road and on reaching Delamere Flyover, 2<sup>nd</sup> respondent while driving the 1<sup>st</sup> suit motor vehicle started to recklessly overtake from the opposite direction, without due care and lookout for other road users and as a result thereof, collided head-on with the appellant's motor vehicle thereby occasioning the appellant to suffer severe injuries. The appellant blamed the respondents for the accident, as he was on his lawful lane and it was the 2<sup>nd</sup> respondent, who caused the accident by overtaking when it was not safe to do so. The appellant sought compensation against them for the injuries sustained.
7. The defendants did not call any witness to testify on their behalf and the trial magistrate proceeded to consider the evidence tendered by the appellant and rendered her judgment dismissing the appellants suit.

#### **Appellants Submissions**

8. The appellant filed his submissions on 13<sup>th</sup> January 2023 and framed the issues for determination to be; whether the appellant pleaded specifically the nature of injuries as required by order 2 Rule 4 of the civil procedure rules and whether the appellant based on the evidence presented was entitled to be awarded damages.
9. The appellant submitted that he did specifically plead the injuries which he suffered in the plaint and thus complied with provisions of Order 2, Rule 4 of the civil procedure rules. Reliance was placed on Trendsetters Tyres limited Vs Wekesa Wepukhulu (2010) &Independent Boundaries commission & Ano Vs Stephen Mutinda Mule & 3 others
10. The appellant further submitted that the injuries had also been evidenced in the P3 form which was produced in court and marked as Exhibit 2 and the medical report By Dr Theophilus Wangata which was also produced as exhibit 4(a). The injuries noted in the said documents, were similar to those stated in the pleading and since the evidence adduced during trial was not challenged by the Defendants, the court ought to have found that he had proved his case.



11. It was further submitted that in assessing general damages, the injured person is entitled to what is in the circumstances, a fair compensation for both the plaintiff and the defendant as was stated in the case of *Pho Choo V Camden & Islington Area Health Authority*(1979) & *Cecilla Mwangi & another Vs Ruth Mwangi*, CA 251 of 1996 & *Nancy oseko Vs Board of Governors Masai Girls High school*.
12. The applicant submitted that he had cut wounds to the frontal part of the scalp, blunt trauma to the chest, blunt trauma to the right knee and further suffered blood loss, physical and psychological pain. He submitted that an award of Ksh.401,500/= (inclusive of special damages) would have been an appropriate award in the circumstances. Reliance was on *Peter Njuguna Vs Francis Njuguna Njoroge* (2015) eKLR & *Catherine Wanjiku Kingo’ri & 3 others Vs Gibson Theuri Gichobi* (2009) eKLR.

### **1<sup>st</sup> Respondent Written submission**

13. The 1<sup>st</sup> Respondent did file their submission on 20<sup>th</sup> January 2023 in opposing the appeal. It was submitted that the role of the first appellate Court is to re- evaluate the evidence before the trial court and arrive at its own independent judgment on whether to allow the appeal
14. It was submitted that the plaintiff was not a credible witness. The trial magistrate noted that he gave contradictory evidence and that the appellant did not discharge the burden as provide under section 107(1) of the *Evidence Act*. The Trial court was thus right in refusing to award damages to the Appellant because it was not possible for the appellant not to be certain as to the injuries sustained. The 1<sup>st</sup> respondent relied on the case of *George Kyalo Kilunda v Donjaves Limited* (2021) eKLR to support this contention. The court was urged to uphold the decision of the Trial Court and dismiss the appeal with costs to the first Respondent.

### **Analysis and Determination.**

15. I have considered the pleadings, evidence presented and submissions of the parties in this appeal. This court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
16. As held in *Selle & Another Vs Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hamed Saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270,

17. In *Coghlan V Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

“ Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must



then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... When the question arises which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

18. Also it has been held by the court of appeal in *Ephantus Mwangi and Another Vs Duncan Mwangi* Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278 that;

“A member of an appellate court is not bound to accept the learned judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstance’s or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

20. The respondents did not tender any evidence at the trial and the trial magistrate rightly held them to be 100% liable for this accident. On quantum the appellant submitted that he had pleaded and adequately proved on a balance of probabilities, the nature of injuries sustained through his oral evidence and the Exhibits produced in court, namely the medical report, patient treatment notes and P3 form. The trial courts finding that his evidence was contradictory was a misdirection and an error in law.

21. On quantum the trial magistrate held that the appellant had stated that he sustained injuries to his lips and left knee. The Appellant’s evidence, his pleadings and P3 were contradictory thus the injuries were not established. The appellant’s suit was thereby dismissed.

22. Section 107(1) of the *Evidence Act* provides that;

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist.”

Section 108 of the *Evidence Act* further provides that ;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side.”

23. In the supreme court case of *Raila Amolo Odinga & others Vs IEBC & 2 others* {2017} eKLR it was stated inter-alia that;

“Though the legal and evidentiary burden of establishing the facts and contentions which support a parties case is static and remains constant through a trial with the plaintiff, however depending on the effectiveness with which he or she has discharged this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were to be introduced.”



24. The appellant clearly pleaded the injuries sustained and, in the plaint, stated that he sustained the following injuries
- a. Cut wound to the frontal part of the scalp
  - b. Blunt trauma to the chest
  - c. Blunt trauma to the right knee
  - d. Blood loss, physical and psychological pain

25. The same injuries were captured in the medical report of Dr Theophilus Wangata produced as Exhibit 4(a) and the P3 form. While the appellant testified that he was injured on the left knee and on the lips, the trial court erred and misdirected herself in failing to consider that the contradiction in evidence was minor and it did not misplace the fact, that the appellant's evidence was not rebutted.

26. In *David Ojeabuo Vs Federal Republic of Nigeria* the court stated that;

“Now, contradictions means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

26. The court's generally, will ignore minor contradictions, unless the court thinks that they point to deliberate untruthfulness or if they affect the main substrum of the facts to be proved. The evidence of the appellant had discrepancies as to the nature of injuries, but was not opposite of what was pleaded and also proved by the other medical document produced into evidence. The trial magistrate was thus wrong to dismiss the suit on this basis and wrongly failed to award the appellant damages.

27. Regarding assessment of damages due, the trial court did not assess any damages, for the reason that it had dismissed the suit. That was manifestly erroneous on the face of the binding decision in *Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua* [2015] eKLR, where the court held that:-

“Indeed, even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.”

28. Similarly in *Lei Masaku versus Kalpama Builders Ltd* [2014] eKLR, it was observed thus:

“It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.”



29. I find that there was an obvious error which cannot be left to stand but must be set aside in compliance with the law. I reiterate that a trial court has the duty to assess damages even where the suit fails. I will thus perform the duty of the court on first appeal and assess damages.
30. The purpose of adequate compensation was appreciated in the case of *West(H) and Sons Limited vs Shepherd* [1964] AC 326 at 345 it was appreciated that :-
- “The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously”.
31. The Appellant submitted that for similar injuries and comparable awards, he ought to be awarded as a sum of Ksh.401,500/= for general and special damages. He relied on *Peter Njuguna Vs Francis Njuguna Njoroge* (2015) eKLR & *Catherine Wanjiku Kingo’ri & 3 others Vs Gibson Theuri Gichobi* (2009) eKLR.
32. The 1<sup>st</sup> Respondent in their submissions supported the findings of the trial magistrate and stated that no damages was due to the appellant and this case ought to be dismissed with costs.
33. It is trite law that when it comes to assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. It however needs recalling that no two cases are unusually similar in terms of nature and extent of injuries sustained. The court of appeal in *Stanley Maroa Vr Geoffrey Mwenda* (2004) eKLR stated as follows;
- “Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable award keeping in mind the correct level of awards in similar cases.”
34. Further in the case of *Charles Oriwo Odeyo Vs Apollo Justus Andabwa & Ano* (2017) eKLR the court stated that;
- “The court in making an award for damages must always consider prevailing inflation.”
35. The appellant suffered soft tissue injuries’, being cut wounds to the frontal part of the scalp, blunt trauma to the chest, blunt trauma to the right knee and blood loss, physical and psychological pain. These injuries were confirmed by the medical evidence tendered.
36. In the following cases;
- Jyoti Structures Limited & Another v Truphena Chepkoech Too & Another* [2020] eKLR, *Maimuna Kilungwa v Motrex Transporters Ltd* [2019] eKLR, *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR, *John Wambua v Matthew Makau Mwololo & Another* [2020] and *Justine Nyamweya Ochoki & Jared Nyangau Obino v Juma Karisa Kipingwa alias Juma Karisa Kipingwa*. The average quantum awarded was Kshs 100,000/= to Kshs 150,000/= for soft tissue injuries. I do exercise my discretion and award the appellant a sum of Ksh.100,000/= as quantum for injuries suffered.



**Disposition**

- 37. Having exhaustively analyzed all the issues raised in this appeal I find that it succeeds and do issue final orders as follows;
  - a. General damages Ksh.100,000/=
  - b. Special damages Ksh.1,500/=
  - c. Plus cost and interest
- 38. The costs of this appeal is awarded to the appellant and is assessed at Ksh.100,000/= all inclusive.
- 39. It is so ordered.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 31<sup>st</sup> day of July, 2023.

**In the presence of;**

.....for Plaintiff  
.....for Defendant  
.....Court Assistant

