



REPUBLIC OF KENYA



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**Makokha v Sifuna (Civil Appeal E027 of 2021)
[2023] KEHC 21386 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E027 OF 2021**

DK KEMEL, J

JULY 28, 2023

BETWEEN

ANTHONY SIMIYU MAKOKHA APPELLANT

AND

BENJAMIN SIFUNA RESPONDENT

*(Being an appeal from the judgement and decree of the Senior
Principal Magistrate Hon. Munyekenye (SPM) at Webuye Magistrate's
Court Civil Suit No. 158 of 2019 delivered on 19th May 2021)*

JUDGMENT

1. The Appellant Anthony Simiyu Makokha vide a Complaint dated 2nd August 2018 sued the Respondent claiming damages, special damages, cost and interest of the suit. According to the Complaint, the cause of action arose on or about 21st April 2018 along Webuye -Kitale Road Jaggery area while the Appellant riding his motorcycle registration number KMEE 564H TVS lawfully, when motor vehicle registration number KAM 190H registered in the name of the Respondent was so negligently driven or managed that the same was allowed to hit the motorcycle and as a result the Appellant sustained severe bodily injuries.
2. Vide a defence dated 30th October 2018, the Respondent alleged that the accident was caused by the negligence of the Appellant and particulars whereof were pleaded.
3. At the end of the trial, the learned magistrate entered judgement for the Respondent holding that the Appellant failed to prove his claim on a balance of probability and dismissed the same with costs to the Respondent.
4. Aggrieved by the decision of the trial court on liability and quantum, the Appellant appealed to this Court putting forth the following grounds:



- i. The learned trial Magistrate erred in law and in fact by finding and holding that the Appellant did not discharge his burden of prove as required by the law and that the decision made was against the weight of evidence that was adduced thereby occasioning miscarriage of justice.
 - ii. The learned trial Magistrate erred in law and in fact by absolving the Respondent from blame which finding was against the evidence that was tendered thereby occasioning miscarriage of justice.
 - iii. The learned trial Magistrate erred in law and in fact by dismissing the Appellant's claim.
 - iv. The learned trial Magistrate erred in law and in fact by failing to appreciate that the Appellant was entitled to special damages and never made a comment on special damages in her judgement.
5. The Appellant prays for the judgement to be set aside and substituted with an order allowing his suit with costs and interest of this appeal and lower Court. He further prayed for interests to be awarded to the Appellant and that those on special damages to be calculated from the date of filing the Plaint and those on general damages to be calculated with effect from the judgement in the subordinate Court.
 6. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.
 7. Vide submissions dated 17th January 2023 and filed on 18th January 2023, the Appellant in a nutshell submitted that this being a first appeal, the Appellant urged this Honourable Court to exercise its unfettered discretion as envisaged under Section 78 of the Civil Procedure Act and be pleased to re-evaluate and re-look into the trial magistrate's judgement. He urged this Court to re-look and re-evaluate the trial Magistrate's decision and make a proper finding on liability and special damages awarded to the Appellant.
 8. The Respondent in his submissions dated 3rd February 2023 and filed on 14th February 2023, with regard to liability, submitted that the Appellant did not dispense with his duty as per the dictates of Section 107, Section 109 and Section 112 of the Evidence Act to warrant this Court to make any apportionment on liability.
 9. On quantum, the Respondent submitted that the same could not be awarded as the Appellant failed to succeed in his claim against the Respondent. He urged this Court to dismiss the appeal with costs.
 10. It is imperative to analyze the evidence tendered before the trial court. It was the evidence of PW1, No. 75424 PC Joseph Karanja that he is attached at Webuye Police Station on traffic duties and that he was not the investigation officer in this matter. According to him, the investigating officer, Boaz Tietie, is on leave. He told the Court that he has a Police Abstract which shows occurrence of an accident on 21st April 2018 at about 1900 hours at Malaha area and which involved a motor vehicle registration number KAN 190H Toyota and a motorcycle registration number KMEE 564H TVS. He produced the Police Abstract in Court as PEXH.1. It was his evidence that a police file was opened and he had it with him in Court (AIR No. 11/2015) and that the statement of the victim was not in the file. According to him, the file did not have a sketch map or the statement of the investigating officer and that the Appellant was charged with riding without an insurance cover vide WBY TR No. 394/2018.
 11. On cross-examination, he told the Court that he was not the investigating officer and according to the initial report, the scene was visited by the investigation officer but no sketch map was done or has been produced. It was his testimony that he could not tell on what side the motor vehicle was and the



Abstract does not disclose who was to blame for the accident. The rider was charged for riding without an insurance cover.

12. On re-examination, he told the Court that had there been any sketch map the same would be on the file but that was not the case with that file.
13. PW2 was Dr. Charles Andai, who testified that he is a private practitioner at Libinu Medical Clinic and that he saw a patient, the Appellant herein, on 25th July 2018. According to him, the Appellant was involved in an RTA on 21st April 2018 along Webuye-Kitale road as he was hit by a motor vehicle while seated on a stationary motorcycle and that the injuries sustained were: lacerated wound on the right knee and compound fracture of the right femur. He was treated at Bungoma County Referral Hospital and was admitted for two weeks. He told the Court that the Appellant had an exofix fixed on the right thigh at Kakamega Orthopedic Centre where he was treated for one month as an in-patient. He walked with a limp supporting himself on crutches. He had a scar 4cm×2cm on the face. He had a stiffness on the right knee and another scar on 6cm ×4cm on the right thigh. He told the Court that he observed that there was shortening of the limb by approximately 6cm with a permanent disability of 20%. He produced his report dated 25th July 2018 as PEXH.2; the filled P3 form as PEXH.3; receipt of Kshs. 8,000/= for the report as PEX.4 and receipt of Kshs. 5,000/= for Court attendance as PEXH.5.
14. On cross-examination, he told the Court that he did examine the Appellant himself and as per the narration of the Appellant, he was knocked while seated on a motorcycle.
15. PW3 was Anthony Simiyu Makokha who recorded his statement on 2nd August 2018 and adopted the same as his evidence in chief. He recalled on 21st April 2018 at about 7.00pm while he was at the side of the road seated on his motorcycle, along Kitale-Webuye road to be precise at Jaggery area, a motor vehicle registration No. KAM 190H which was coming from the opposite direction suddenly lost control crossed to his lane and in the process knocked him and damaged his motorcycle. He told the Court that he sustained injuries and that he lost consciousness and found himself at Bungoma County Referral Hospital where he was treated for two weeks. He produced in Court a discharge summary as PEXH.6. He recorded his statement at Webuye Traffic Base. He further produced in Court the following documents: receipts of treatment of Kshs. 21, 700/=, four in number, as PEX7(a), (b), (c) and (d) and a demand letter dated 26th July 2018 as PEXH8 and a certificate of postage as PEXH.9.
16. He further testified that, at the time of the accident he had stopped his motorcycle and a customer was alighting. He fell on the left side of the road facing Kitale and that he was not drunk. He noted that the motor vehicle was overtaking and it hit him on his lane.
17. On cross examination, he told the Court that he is 19 years old and that the accident occurred at 7.30pm and it was then raining a little and it was dark. He told the Court that the accident occurred while he was riding his motorcycle and that he was dropping his passenger.
18. On re-examination, he told the Court that the Traffic Police said that he was to blame for the accident because he did not have a reflector jacket.
19. At the defence hearing, DW1, Benjamin Sifuna, adopted his statement sworn on 22nd October 2019. He told the Court that on 21st April 2018 at around 9.00 PM he was lawfully driving his motor vehicle registration number KAM 690H along Webuye-Kitale road and on reaching Malaha area, driving on the left side of the road, as he was negotiating a slight bend, there was a motor cycle rider who was coming from the opposite direction and had no headlights on. He immediately tried to avoid hitting him by swerving off the road onto the far left side of the road but the motor cycle rider rammed into his right side of the vehicle as he was riding at a very high speed and who landed into a ditch by the side of the road where he fell unconscious. He told the Court he was driving at a speed of 40-50 Km/



hr. He further testified that the Appellant looked very drunk and that if it was not for the prompt response, the situation would have ben dire. He left the scene of the accident and proceeded to Webuye Police Station where he reported the accident and that the police visited the scene and took pictures. He produced a copy of driving license as DEXH.2 and a copy of his National Identity Card as DEXH.3.

20. On cross-examination, he told the Court that on 21st April 2018 he was driving KAM 690H and it was his motor vehicle. He reported the accident at Webuye Traffic Base and noted that the motor cycle touched the motor vehicle at the front right side at the mud guard and that the front bumpers was ripped off due to the impact.
21. I have given due consideration to the appeal herein, the evidence before the trial Court, the grounds of appeal and the submissions by the appellant in this appeal as well as the parties' submissions in the lower Court. In my humble view, I find the only issues for consideration are whether the trial Court's apportionment of liability for the accident was proper and whether this Court should interfere with the award of damages by the trial Court.
22. It is trite that this is a first appeal to this Court and as provided in the well settled principles, I am entitled to rehear the dispute, but must remember that the learned trial magistrate had the advantage of hearing and seeing witnesses testify before her, that advantage is not availed this court (See Peters v Sunday Post Limited [1958] EA 424.)
23. The Court also in the cases of Bundi Murube v Joseph Omkuba Nyamuro [1982-88]1KAR 108 had this to say; -

“However, a court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did.”

And also, in Rahima Tayabb & Another V Ann Mary Kinamu [1982-88] 1KAR 90 Law JA also stated; -

“An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him.”

24. On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws from the Latin phrase “Onus Probandi” and when we talk of burden we sometimes talk of onus.
25. Burden of proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term “burden of proof” has two distinct meanings:
 1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.



26. Section 107 of *Evidence Act* defines burden of proof as– of essence the burden of proof is proving the matter in court. Subsection (2) Refers to the legal burden of proof.
27. Section 109 of the *Evidence Act* exemplifies the Rule in section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
28. The question therefore is whether the Appellant herein discharged the burden of proof that the Respondent was liable in negligence for the occurrence of the accident wherein the Appellant was said to have been severely injured.
29. It was the testimony of the Appellant (PW3) that he was seated atop his motorcycle when the Respondent lost control of this motor vehicle which swerved to his side and knocked the motor cycle. He further testified that at the time of the accident, he had stopped his motorcycle and that a customer was alighting. He stated that he fell on the left side of the road facing Kitale and that he was not drunk. He noted that the motor vehicle was overtaking and it hit him on his lane. On cross examination, he told the Court that the accident occurred while he was riding his motorcycle and that he was dropping his passenger. The Respondent on the other hand told the Court that on 21st April 2018 at around 9.00 PM he was lawfully driving his motor vehicle registration number KAM 690H along Webuye-Kitale road and on reaching Malaha area and while driving on the left side of the road and as he was negotiating a slight bend, there was a motor cycle rider who was coming from the opposite direction and who had no headlights on. He immediately tried to avoid hitting him by swerving off the road onto the far left side of the road but the motor cycle rider rammed onto his right side of the vehicle as he was riding at a very high speed and he landed into a ditch by the side of the road where he fell unconscious. He told the Court that he was driving at a speed of 40-50 Km/hr. He further testified that the Appellant looked very drunk and if it was not for the prompt response, the situation would have been dire. He left the scene of the accident and proceeded to Webuye Police Station where he reported the accident and that the police visited the scene and took pictures. He produced a copy his driving license as DEXH.2 and a copy of the National Identity Card as DEXH.3. On cross-examination, he told the Court that on 21st April 2018 he was driving KAM 690H and it was his motor vehicle. He reported the accident to Webuye Traffic Base and noted that the motor cycle had touched the motor vehicle at the front right side at the mud guard and that the bumpers in front were ripped off due to the impact.
30. It is noted that the trial court in its judgement doubted the honesty of the Appellant as regards the discharge summary which had different names. Though contradicting, the evidence of both PW3 and DW1 established that an accident occurred. Even if the account of the Respondent was to be believed, then his failure to see the Appellant in time on account of a little darkness, when he had the option to put on head-lumps to enhance his vision must be seen to have contributed to the accident. A reasonable driver facing darkness is reasonably expected to engage the use of head-lumps. Failure to do so is not expected of a reasonable man and is thus ipso facto negligence. I find that whichever way the accident occurred, the Respondent had the duty to exercise care and attention, as a driver of a motorized vehicle in order to prevent injuring other road users. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it... A



reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.”

31. Applying the foregoing principle to the facts of this case, i find that there was sufficient evidence that the Respondent failed in his expectation as a reasonable driver and should not have been wholly absolved from liability in the causation of the accident and injury to the Appellant. In the premises, the finding by the trial Court that the name in the discharge summary from Bungoma County Hospital was that of one Anthony Namaswa and not Anthony Makokha Simiyu and that the Appellant was not honest was not in sync with the evidence adduced. There was already evidence of the accident as well as the fact that the Appellant was injured. At no time did the Respondent dispute that the Appellant was an imposter. The Appellant did call an eye witness to the accident whose evidence was not severely dented.
32. It is my humble view that, due to lack of evidence to corroborate that of PW3, contradicting evidence from DW1, lack of a concluded police investigations and conclusion on who is to blame being made and the inconsistencies from the witnesses on how the accident occurred, raises doubt in the mind of this Court as to whether it is the Respondent in this case who caused the accident. While the Court must always record the incidence of burden of proof to be that it was always the duty upon the Appellant, as Plaintiff then, to prove the case on a balance of probabilities, that burden is never higher. He testified in court, produced exhibits in support of his testimony. In my considered view, the Appellant vividly proved his case on a balance of probabilities. That is my comprehension of balance of probabilities as defined by Kimaru J (as he then was) in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 as follows:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
33. Contrary to the finding by the learned trial magistrate that she was in doubt of the honesty of the Appellant and who between the two parties was to blame, the law states that where the Court is in such doubt, it is only fair to apportion liability equally. The Court of Appeal in *Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005* [2006] eKLR while dealing with the issue observed: -

“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.”
34. On the ownership of the motor vehicle, the copy of records and police abstract established that the accident motor vehicle was owned by the Respondent in accordance with the evidence of DW1. I therefore find that the respondent was the owner of the said motor vehicle at the time of the accident.
35. In my view, the trial Court erred in dismissing the suit against the Respondent, who did not dispute the occurrence of the accident that led to the Appellant sustaining injuries. I find that the Respondent contributed to the occurrence of the accident, because he was expected to exercise a duty of care to



other road users, including the appellant herein. The Appellant ought to shoulder some bit of blame since he was also expected to exercise care and caution when using the road. I am of the view that both the Appellant and Respondent were equally to blame for the occurrence of the accident and I hereby apportion liability in the ratio of 50:50.

36. On the issue of quantum, according to the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR: -

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...’

37. Similarly, in *Lei Masaku v 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.”

38. In this case, from the medical report prepared by PW2, Dr. Charles Andai, the Appellant sustained laceration wound of the right knee and a compound fracture of the right femur. After physical examination, it was his opinion that the Appellant walked with a limping gait supporting himself on crutches but in general the Appellant was fair with normal vital signs.

39. While I agree from the evidence that the Appellant sustained soft tissue injuries, the said injuries particularly on the right knee and right thigh injuries cannot be said to have been minor soft tissue injuries in light of the fact that for the Appellant to fully recover, he needed to visit an Orthopedic Centre.

40. As for the appeal on the quantum of damages, the question is whether the Appellant has convinced this Court that the award of the trial Court should be disturbed in that the trial magistrate took into account an irrelevant factor, or failed to take into account a relevant factor, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. I have considered the authorities. I find the authorities relied on by the Appellant in his lower Court submissions are not exactly similar in terms of the injuries sustained. In the premises, I concur with the award made by the lower Court of Kshs. 550,000/= in general damages

41. Out of the appellant’s claim for special damages in the sum of Kshs. 23,050/=:, it is noted that some of the receipts attached herein bear the name of one Anthony Namaswa and not Anthony Makokha Simiyu and no evidence was tendered by the Appellant to bring the Court the annexes of the two names. In that regard only Kshs. 8,105/= was proved by way of receipts that is the sum that is due to the Appellant herein, Anthony Simiyu Makokha. That is the only amount specifically proved by the Appellant.

42. In the result, it is my finding that the Appellant’s appeal has merit. The same I allowed. The lower court’s judgement dated 19/5/2021 is hereby set aside and substituted with judgement being entered for the Appellant against the Respondent as follows:



a. Liability.....50% to 50%

b. General damages..... Kshs 550,000/

c. Special Damages.....Kshs 8,105/

d. Total..... Kshs 558,105

Less 50% contribution..... Kshs 279,052/50

Net Damages.....Kshs 279,052/50

e. The Appellant is awarded the costs of this appeal and in the lower court. Interest shall commence from the date of this judgement

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.

D.KEMEI

JUDGE

In the presence of:

Wamalwa for Mukisu for Appellant

Miss Mutua for Respondent

Kizito Court Assistant

