



REPUBLIC OF KENYA



KENYA LAW
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**Mbugi v Muthee (Civil Appeal 014 of 2021)
[2023] KEHC 21348 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 014 OF 2021
LM NJUGUNA, J
AUGUST 9, 2023**

BETWEEN

GEOFFREY KATHURI MBUGI APPELLANT

AND

JONATHAN MUGENDI MUTHEE RESPONDENT

*(An Appeal from the Judgment of the Hon. T.K. Kwambai SRM in
Embu CMCC No. 213 of 2018 delivered on 17 th February 2021)*

JUDGMENT

1. The appellant has filed a memorandum of appeal being dissatisfied with the judgment of Hon T.K Kwambai SRM in Embu CMCC No 213 of 2018 delivered on February 17, 2021 and seeking that (i) the appeal be allowed and the orders issued in the judgment be varied and/or set aside and (ii) costs of the appeal be borne by the respondent. The grounds for appeal are that the trial magistrate erred in law and fact by:
 - a. Holding that it was the appellant’s motor vehicle that caused the accident;
 - b. Awarding the respondent a sum of Kshs 707,430/= being general damages;
 - c. Allowing the respondent’s evidence when he did not identify the motor vehicle which hit him;
 - d. Relying on the evidence of PW2 who did not witness the accident;
 - e. Failing to consider that at the time when the accident occurred, the appellant’s motor vehicle was badly damaged and at the garage;
 - f. Failing to appreciate the appellant’s evidence; and



- g. Failing to record the contradicting evidence of the respondent on identification of the motor vehicle that knocked him down.
2. The particulars of the case are that July 25, 2018 along Embu-Kiritiri Road, the plaintiff was lawfully walking off the road when the defendant's authorized driver drove motor vehicle registration number KCM 760T recklessly- and negligently and that the said motor vehicle lost control and caused an accident thereby occasioning serious injuries to the plaintiff. That as a result of the accident, the plaintiff suffered compound fracture left tibia fibula. He claimed special damages of Kshs 7,430/=, general damages, costs of the suit and interests.
 3. The defendant filed his written statement of defence wherein he denied the averments made in the plaint and stated that when the alleged accident happened, his motor vehicle was being held at Siakago Police Station after it was involved in an accident the previous day. That after the said motor vehicle was released from the police station, it was taken to the garage right away where it stayed for 7 days and could not have been involved in any other accident owing to the extent of damage it had. He termed the suit as malicious, frivolous and aimed at imposing blame on the defendant for an accident he knows nothing about.
 4. The case went to full hearing and the court took viva voce evidence from 3 plaintiff's witnesses and 1 defense witness. The court noted that the accident happened on July 25, 2018 at around 9pm. On the other hand, the motor vehicle involved is reported to have been involved in a different road accident on July 24, 2018, as a consequence of which it was impounded and taken to Siakago Police Station where it was held until July 25, 2018 at around 4:40pm in the evening. The court also noted that from the evidence adduced, the vehicle was positively identified by PW2 when it overtook him on the same road before the accident. That he had seen it earlier and when the people at the scene of the accident said it was "KCM" he knew it was the motor vehicle registration number KCM 760T he had seen earlier. That no other motor vehicle had overtaken him after that until he reached the scene of the accident. The court found the defendant 100% liable. The trial court considered the nature of injuries sustained and the evidence of PW3 who produced the medical report and P3 form in awarding the plaintiff general damages of Kshs 700,000/=, special damages of Kshs 7,430/=, costs and interests at court rates.
 5. In the present appeal, the court directed that the parties do file their written submissions and only the respondent complied.
 6. In his submissions, the respondent stated that when PW2 testified about the make/ model and registration number of the motor vehicle, the appellant did not controvert the same at trial. That at the time when the motor vehicle was booked for inspection on July 25, 2018 at around 10pm, the said motor vehicle had pre-accident defects on the headlamps, even though in the statement which was adopted as his evidence in chief for DW1 it was stated that the motor vehicle did not have any defects prior to the said accident. That the appellant even confirmed that it was his motor vehicle although he was not the one driving it at around 8:50pm on the night of the accident. That the testimony given by the appellant in his statement and in court are contradictory and it goes to show that he is being untruthful.
 7. The respondent cited the case of *Kanyangu Njogu v Daniel Kimani Maingi* (2001) eKLR to urge the court to uphold the trial court's findings which were based on the balance of probabilities as the case should be. He also cited the case of *Savana Saw Mills Ltd v George Mwale Mudomo* [2005] eKLR in emphasizing that the award of general damages was discretionary and the court was right in awarding Kshs 700,000/=. That keeping in mind the nature and extent of the injuries, the trial court was guided by the cases of *James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another* [2015] eKLR, *Frankline Chilibasi Spii v Kirangi Linson* [2017] eKLR, *Alphonse Muli Nzuki v Brian Charles*



Ochuodho [2014] eKLR and Zipporah Nangila v Eldoret Express Limited & 2 others [2016] eKLR in awarding the damages.

8. From perusal of the pleadings, grounds of appeal and submissions, the issues for determination are as follows:
 - a. Whether the motor vehicle involved in the accident was positively identified;
 - b. Whether the trial court is right in relying on evidence of PW2 who was not an eye witness in the case; and
 - c. Whether the award of Kshs 707,430/= being general and special damages is just.
9. On the first issue regarding positive identification of the motor vehicle that caused the accident, the appellant stated that the motor vehicle had been involved in a different accident on July 24, 2018 and had been impounded at Siakago Police Station. It was stated that the vehicle was released on July 25, 2018 at around 4:40pm in the evening and DW1 further stated that the motor vehicle was plying the Embu-Kiritiri road at around 8:50pm being driven by his friend. The accident in question happened at around 9pm on July 25, 2018. PW2 confirmed that he captured the registration number of the vehicle when the driver of the motor vehicle overtook him earlier on the same road and before he came across the accident scene. Here, the balance of probabilities is based on two questions; whether the motor vehicle was actually on that road and whether it was the motor vehicle that was involved in the accident.
10. On the issue of the evidence of PW2, I do note that he may not have witnessed the accident firsthand but he was able to identify the motor vehicle because he was trailing it with his motor cycle. Further, the circumstances around which the accident happened, the time of the accident and the events before and after the accident were satisfactory for the trial court to make a finding.
11. On the issue of award of general damages in the sum of Kshs 700,000/=, I have noted that the trial court based its decision on the cases already mentioned above even though the plaintiff had prayed for Kshs 1,000,000/=. In the case of Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR where the court held as follows:

“It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavoring to award the plaintiff a just amount, so far as money can ever compensate, and entering a realm of very high award, which can only in the end have a deleterious effect.”
12. Previous courts have awarded amounts within the range of Kshs 500,000/= and Kshs 650,000/=. I am guided by the following cases where the plaintiffs suffered similar injuries:
 - a. In the case of Nahson Nyabaro Nyandega v Peter Nyakweba Omboga [2021] eKLR the court awarded Kshs 650,000/=;
 - b. In the case of Aloise Mwangi Kabari v Martin Muiya & another [2020] eKLR the court awarded Kshs 500,000/=; and
 - c. In the case of Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others [2022] eKLR the court awarded Kshs 600,000/=.
13. In my view, the award of Kshs 700,000/= in general damages for pain and suffering is not inordinately high or low but is within the range of award by previous courts, and factoring in economic servitude.



In the case of *Butt v Khan* [1981] KLR 470 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470 the court held:

“ Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the judges with expertise and knowledge on these areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low.”

14. Regarding special damages, I have perused the trial court file and I find that the sum of Kshs 7,430/= has been well proven and receipts provided.
15. Therefore, I do not find merit in the appeal and uphold the finding of the trial court.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF AUGUST, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

