



**Holiday Cars & Tours Ltd v Lubanga & 2 others (Civil Appeal
28 of 2018) [2023] KEHC 24583 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 28 OF 2018
SC CHIRCHIR, J
OCTOBER 26, 2023**

BETWEEN

HOLIDAY CARS & TOURS LTD APPELLANT

AND

BLASIO ESHITEMI LUBANGA 1ST RESPONDENT

G4S SECURITY SERVICES 2ND RESPONDENT

ISAAC WANJALA WANYONYI 3RD RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment of M.I Shimenga, Resident Magistrate in Butere PMCC No. 34 of 2016 delivered on 1st September 2018.
2. I wish to first highlight circumstances surrounding this Appeal:
 - a). Being dissatisfied with the aforesaid Judgment, the Appellant filed the memorandum of Appeal on 3rd April 2018, and an amended one on 16th October 2018.
 - b). On 14th March 2019 the 1st Respondent filed a Notice of motion dated 11th March 2019 praying that the court admit additional evidence and further sought leave to amend the plaint, limited to introduction of an additional injury namely, amputation of the right lower limb
 - c). The court declined the application on grounds that the respondent had not filed a cross-petition and therefore the Application had no legs as there was no Cross-petition on record.
 - d). Next, the 1st Respondent filed an Application dated 14th September 2020 seeking for leave to file a cross-petition out of time. The court allowed that Application through the ruling delivered on 14th September 2020.



- e). On 19th March 2021, the 1st respondent filed yet another application dated 13th September 2021 seeking that the orders made on 27th September 2019 which had dismissed their earlier application dated 11th march 2019 be substituted with an order allowing the said Application. That Application was compromised by consent of the parties. This was the Application seeking for leave to admit additional evidence
- f). The court then referred the parties to the trial court for the taking of the additional evidence.
- g). The Respondent filed a further Amended plaint in the lower court and as additional evidence, the trial court took new evidence from DR. Charles Andayi and the additional evidence from the 1st respondent.
- h). Thereafter the additional evidence was admitted to record by way of supplementary record of Appeal.

Memorandum of Appeal.

- 3. The Amended memorandum of Appeal set out the following grounds;
 - a. That the learned trial magistrate erred in law and in fact in awarding general damages that was excessive in the circumstances occasioning miscarriage of justice
 - b. That the learned trial magistrate erred in law and in fact in failing to appreciate that the injuries suffered by the 1st respondent should not attract the damages that were awarded.
 - c. That the learned trial magistrate erred in law and in fact in using wrong principles in the assessment of damages leading to miscarriage of justice
 - d. That the learned trial magistrate erred in law and in fact in finding the appellant 100% liable for the accident
 - e. That the learned trial magistrate erred in law and in fact in finding the 2nd and 3rd respondent strangers to the suit yet all evidence was pointing to them.
 - f. That the learned trial magistrate erred in law and in fact by failing to consider the pleadings and evidence on record rendered by the appellant.
 - g. That the learned trial magistrate did not establish or set down proper grounds for his findings
 - h. That the learned trial magistrate misconceived the evidence on record as well as all the issues for determination.

Cross- Appeal

- 4. In his Memorandum of cross- Appeal the 1st Respondent set out the following grounds:
 - a). That the Trial Magistrate erred in law and fact by making an award which was ordinarily(sic)low
 - b). The learned Magistrate erred in making an award on quantum which was not commensurate with the injuries sustained.

Summary Of The Evidence

- 5. PW11was Dr, cleophas Wekesa Kubasu . He told the court that he examined the 1st respondent on 19.05.2016 for the injuries that he had sustained on 4.11.2015. He found that the respondent had



sustained following injuries; Blunt injuries to the chest, Compound and comminute fracture of the right tibia and fibula. He was admitted at St. Mary's hospital on 4.11.2015 and discharged on 6.5.2016. He was discharged on crutches. He further stated that plaintiff needed more medical follow up and another operation to remove the plates.

6. On cross examination, he stated that he examined the patient 7 months after the accident. He relied on the P3 form, the X-rays treatment notes and the physical exams notes from St. Mary's hospital.
7. PW2 was police constable Fred Odaba. He testified that the accident occurred on 4.11.2015 at Mayoni along Mumias- Bungoma road involving Motor vehicle reg no. KBU 088E owned by the Appellant.
8. He testified that the driver of the motor vehicle one Isaac Wanjala wanyonyi was charged before Mumias Law courts with the offence of careless driving and the case was pending Judgment. He produced the police abstract.
9. On cross examination, he testified that he was not the investigations officer in the case and he did not have the police file.
10. He stated that the point of impact was on the right side of the road facing Bungoma direction . He did not have the sketch plan. He said that he happened to be passing along the same road when the accident occurred. He blamed the driver for the accident whom he stated was overtaking a another motor vehicle when he knocked the motorcycle.
11. PW3 was the In-charge of St. Mary's hospital. He told the court that the plaintiff was admitted at the facility for 6 months from 4.11.2015 to 5.5.2016. He testified that the 1st respondent was brought to the hospital while unconscious and covered in mud. That he sustained multiple injuries , the details of which he provided.
12. Pw4 was the 1st Respondent herein. He told the court that on 14.5.2015, he was riding a Motor cycle from Bungoma towards the general direction of Mumias when motor vehicle Reg. KBV 088E , which was approaching from the opposite direction hit him. The said vehicle was trying to overtake another motor vehicle when it lost control and swerved towards him. He stated that he moved further off, but the collision could not be avoided.
13. He sustained injuries on the right leg, on the thigh, below the knee and his right wrist; he had plates and nails in the leg; he walking with the assistance of crutches.
14. On cross examination he told the court that he had his helmet on and that he had a valid driving licence.
15. By consent of the parties the Appellant's witness written statement was adopted without being called .
16. The trial court delivered its judgment on 1st March 2018. On liability the court found that 2nd and the 3rd Respondents to have been strangers in the suit, while the Appellant was held fully liable for the accident.
17. On the quantum, ksh.1,800,000/= was awarded as general damages, Kshs. 525,549 as special damages and Kshs. 500,000/= for future medical expenses . The total award came to Kshs. 2,825,549.
18. Upon the order of the high court as aforesaid ,additional evidence was taken from Dr. Charles Andayi as PW5.
19. The Doctor told the court that on examination, he found that the 1st respondent had sustained a brain concussion leading to loss of consciousness for some hours. That he had a blunt injury to the chest and right hip, compound fracture to the right femur, fracture on the fibula and fracture of the right ulna.



20. He further testified that the respondent was treated at St. Mary's Hospital where he was admitted for one month and underwent internal fixation of the fractures. Upon discharge, he was found to have a problem with the implantation in the right lower limb and was admitted to Kakamega Orthopaedic hospital .The limb was amputated.
21. He assessed the 1st respondent's permanent physical disability at 50%. He also testified that the Plaintiff would need an artificial leg at a cost of about Kshs. 500,000/=.
22. On cross examination, he confirmed that he did not treat the plaintiff in the year 2016 and that the amputation was done after 2016. He confirmed the only fractures that he sustained when he examined him in 2016 was those of the right ulna and the right femur .The fractures had united.
23. The 1st Respondent herein was also recalled. He adopted his statement filed on 16.8.2022.
24. He testified that his right leg was amputated on 26th November 2018, after he had already testified. He told the court that before the accident, he was an employee of County Government Kakamega, working as a Junior market- master . He was in charge of market revenue collection. He was suspended from work, but later reinstated as a data clerk at Makunga Health centre. He produced his payslip for the month of January 2022.
25. On cross examination, he admitted that his position at work did not change after reinstatement. He was designated as a data clerk but the payslip showed he was a junior master and the gross salary had not changed.
26. On the special damages, respondent added the cost of the artificial limb at the cost of Kshs. 500,000/= . He further claimed for loss of income at Kshs. 72,000/=, monthly.

Appellant's Submissions

27. In its submission dated 2nd May 2023, the appellant faulted the trial court for not holding the 2nd and 3rd respondents liable and declaring them strangers in the suit. It argued that though the suit vehicle was owned by the appellant, it was under management of the 2nd respondent and it was being driven by the 3rd respondent at the material time, and the two should have been held fully liable for the accident.
28. He further submitted that each party should bear its costs for the appeal considering that the injury that led to the amputation occurred at the appeal stage following the 1st respondent's amendment of his pleadings.
29. They pray that the lower court award be retained

1st Respondent's Submissions.

30. On the issue of liability, the 1st respondent submitted the statement of Hudson Ilakula, which was admitted in evidence contained an admission as to the ownership of the vehicle by the Appellant
31. The respondent further submits that the appellant did not bring out the relationship between the then three defendants and as such, he agrees that the two were strangers to the suit. They however urge the court to find the appellant, the 2nd and the 3rd respondents jointly and severally liable for the accident.
32. On the issue of quantum, it is the Respondent's submission that the trial court did not apply the wrong principle in the assessment of damages and relied on the principles set out in Charles Oriwo Odeyo vs, Appollo Justus Andabwa &another (2017) eKLR.



33. On whether the damages awarded were inordinately high in the circumstances. They relied on the case of Bashir Ahmed Butt vs. Uwis Ahmed Khan (1982-88) KAR and Gitobu Imanyara & 2 others vs. Attorney General (2016) eKLR where it was held that the Appellate court should not disturb the award by the trial court unless it was erroneous or it was inordinately high or low.
34. In regard to his cross- appeal, it is the 1st respondent's submission that that the trial court had awarded general damages in the sum of Kshs. 1,800,000/= based on the original assessment of the injuries sustained but further evidence undertaken had shown that the 1st respondent had suffered more serious injuries.
35. He has consequently proposed an award of Kshs. 4,000,000/= on general damages. He has relied on the case of Joseph Mwangi vs. Davis Nyakenyana Onsare (2019) eKLR where the court awarded Kshs. 2, 5000,000/=.
36. On the loss of earning capacity, it is submitted that the 1st respondent was an employee of the county of Kakamega earning Kshs. 72,000/= and that after the accident, he no longer served as the junior market master. He urges the court to adopt the salary of Kshs. 72,000/=. He further submits that he would have worked for another 11 years , and proceeded to calculate his claim under this head as follows: Kshs. 72,000/= x12 x11= Kshs. 9,504,000/=
37. On future expenses, he proposes an award of Kshs. 500,000/= and urged the court to rely on the medical report produced by Dr. Charles Andai which indicates the cost of an artificial leg.
38. It is further submitted that the first respondent will need an Assistant for the better part of his life and relied on the case of Jackson Wahome Ngatia vs. Agriduti (K) Ltd & 2 others where the court awarded the plaintiff Kshs. 2.59 million. He pleads that the court considers the minimum wage of Kshs. 15,201.65 for the said Assistant being the earnings as per the Regulation of wages (amendment) order, 2022.
39. On special damages, they submitted that the 1st respondent had proved a total of Kshs. 525,549/= .
40. The respondent proposes an award of Kshs. 17,629,549 being the aggregate of all the above heads of damages.

Determination

41. This is a first appeal and this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for the fact that the trial court had the advantage of hearing the parties. (see Gitobu Imanyara vs A.G (2016) e KLR)
42. There are only two issues in this Appeal , namely:
 - a. Who was liable for the accident
 - b. What is the appropriate award in damages

Who Was Liable For The Accident?

43. The first 1st Respondent told the court that while he was riding his motor cycle, the motor vehicle being driven by the 3rd respondent left its lane, veered to the lane of the motor cycle and collided with it. That there was a collision is not denied. It is also not denied that the motor vehicle veered towards the other lane where the accident occurred. The 3rd respondent in this regard did not offer any evidence in rebuttal and hence the 1st respondent's evidence on how the accident occurred remained unchallenged.



44. What is in dispute is the liability of 2nd and 3rd respondents. Section 8 of the Traffic Act states as follows: “ The person in whose name a vehicle is registered shall, unless the contrary is proved , be deemed to be the owner of the vehicle”
45. In this case, a copy of records from the Registrar of vehicles was produced showing that the vehicle was owned by the Appellant. The 1st respondent had discharged the burden of proof and the onus was on the Appellant to rebut the presumption of ownership .It was the Appellant’s evidence that the vehicle had been leased to the 2nd respondent but no such evidence was brought out at the hearing. There is a letter dated 31/10/20212 addressed to the 2nd defendant requesting for supply of vehicles by the Appellant. The letter is however not an agreement. Indeed paragraph 6 of the letter states “the hiring arrangement are on terms and conditions specified in the attached annexure”, But the annexure which presumably contained the terms, is missing. The Appellant therefore failed to prove that the motor vehicle was not within its control at the material time . In other words, the Appellant failed to rebut the presumption of ownership envisaged by section 8 of the Traffic Act.
46. On the liability of the 2nd and 3rd respondents, the 1st Respondent did produce a police abstract, showing that the driver of the vehicle was the 3rd respondent herein. Thus, there was evidence identifying the 3rd Respondent as the primary tortfeasor and the trial court’s finding that the 3rd respondent was a stranger to the case was therefore erroneous. Further it is apparent that the trial court failed to consider the fact that the 2nd and 3rd respondents failed to enter appearance or file defence and due to that default the 1st Respondent applied for , and obtained Judgment against the two in default of appearance. The Judgment in default was entered on 2nd September 2016. There was already Judgment in place against the 2nd Respondent and 3rd Respondents therefore at the time the hearing.
47. In the case *Kansa vs. Solanki* [1969] EA 318 it was held ;“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See *Bernard V Sully* [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances.....”
48. To the extent that the 2nd respondent did not make any rebuttal to the 1st respondent’s pleading, resulting in judgment in default, then liability attaches .
49. I have considered the Appellant’s submission in this regard. Unfortunately, submissions or surrounding circumstances can never take the place of evidence. It had the responsibility of demonstrating that the vehicle was under the exclusive control of the 2nd respondent at the material time. It failed to do so.
50. Consequently, the trial court finding on liability to this extent should be disturbed. The 3rd respondent is liable for the negligent Acts while the Appellant and 2nd respondent were variously liable. This court therefore holds the Appellant, the 2nd and 3rd respondents liable for the accident, jointly and severally.
51. On the issue of quantum, it was the Appellant’s contention that the award was too excessive. The 1st respondent by way of cross- appeal contends that the award was too low.
52. From the evidence of the medical experts , that is PW1, PW3 and PW5 it is evident that the 1st respondent sustained the following injuries:
 - a). compound and communitated fracture of the right fibula
 - b). Fracture of the right fibula
 - c). compound fracture of the right femur



- d). fracture of the right ulnar
 - e). Blunt injury to the chest
 - f). Blunt injury to the right hip.
 - g). The above fractures led to amputation of the Right Leg
 - h). Permanent disability was assessed at 50%
53. According to PW3 the 1st respondent went to the theatre several times. He was put on antibiotics and heavy painkillers and sedation and eventually discharged on crutches.; that there was shortening of the injured leg and that the plate and the nail would need to be removed in the future through major operation. He produced the treatment notes.
 54. On whether the general damages awarded by the trial court were inordinately low or high. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards.
 55. In the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the Court of Appeal held: “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 awards keeping in mind the correct level of awards in similar cases.”
 56. The Appellant has proposed ksh. 800,000 while relying on the case of Jitan Nagra vs Abednego Nyandusi- Kisii HCCA NO. 74 of 2016, while the 1st respondent has proposed ksh. 4,000,000 and cited several Authorities in support, which I have considered.
 57. In the light of the injuries sustained by the 1st respondent, the full extent and seriousness of which , the lower court did not have the benefit of knowing , I find that the award was too low , necessitating interference by this court.
 58. In the case of Ngure Edward Karega v Yusuf Doran Nassir [2014] eKLR the plaintiff therein became a quadriplegic and was unlikely to gain any further muscle power in his leg. Permanent physical disability was assessed at 100%. The plaintiff was awarded Kshs 5,000,000/- as general damages for pain and suffering.
 59. In Daniel Kosgei Ngelechei Vs. Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR the plaintiff suffered far worse than the instant plaintiff, however, there were some similarities as he suffered traumatic amputation of left lower limb above the knee, loss of two central incisors with lacerations of the lower lip, multiple abrasion dorsum of both hands, bruises and abrasions right leg and laceration right leg above the ankle, he was awarded the sum of Kshs. 2,100,000/= for pain, suffering, and loss of amenities.
 60. Further, in John Kipkemboi & another v Morris Kedolo [2019] eKLR the respondent sustained Injuries including amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury, and crush injury. The Court awarded him Kshs 2,500,000.00 as sufficient compensation for pain and suffering.
 61. I have compared the injuries sustained by victims in the cited authorities with injuries suffered by the appellant and also taking into consideration inflation factors an award of Kshs 3,000,000/= would fairly compensate the 1st respondent.



Special Damages

62. There was no appeal or cross- Appeal against the award on special damages of ksh. 525,549 and I will not therefore disturb it.
63. The cost of future treatment, namely the purchase of an Artificial limb, had already been awarded albeit without any specific plea or evidence. However evidence was provided by way of additional evidence and therefore the award of ksh. 500,000 under this head remains undisturbed.
64. The doctor's attendance fee is not part of damages. It is rather the costs of attendance and therefore forms part of costs. I decline to award it.
65. There is another claim for ksh. 626,000 on account of future expenses the basis of which has not been laid. I dismiss this item for want of proof.
66. On the ground of the domestic worker as proposed by the 1st respondent, there was no evidence adduced in court that the 1st respondent was in any way incapacitated to the extent that he would need a minder. None of the Doctors who testified stated that the respondent will need an assistant . This item is dismissed is also dismissed for want of proof.

Loss Of Income

67. The respondent further pleaded that he suffered loss of income. He stated that prior to his accident, he worked for the county of Kakamega as a junior market master earning Kshs. 72,000/= and was dismissed after the accident. In his cross examination,he testified that he had been suspended but was reinstated. His duties were changed from junior market master to a data clerk although his gross salary remained the same.
68. There was no evidence therefore that was tendered in court to show that the 1st respondent had lost his income. If anything, there is evidence that the respondent is working and earning the same income he did before the accident. This claim has no basis and the same is disallowed.
69. In conclusion both the Appeal and cross-appeal partly succeed and I proceed to make the following orders:
 - a). The lower court's finding on liability is hereby set aside and substituted with the order that the Appellant , 2nd and 3rd respondents are held fully liable for the accident , jointly and severally .
 - c). The lower court award of ksh. 1,800,000 in general damages is hereby set aside and substituted with ksh. 3,000,000
 - d). The lower court award of 525,549 on special damages is upheld
 - e). The cost of future medical expenses of ksh. 500,000 is upheld.
 - f). The claim for domestic hire is dismissed
 - g). The claim for loss of income is dismissed.
 - h) Total award is ksh.4,025,549
 - i). All heads of damages will attract interest at court rates from the date of Judgment at the trial court
 - j). Each party to meet their own costs in this Appeal.



k). For avoidance of doubt costs in the lower suit belongs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF OCTOBER, 2023

S. CHIRCHIR

JUDGE

In the presence of :

E. Zalo- Court Assistant

No appearance by the parties.

