



REPUBLIC OF KENYA



**Michengechi Enterprises Limited v Ngiri (Civil Appeal 485 of 2019)
[2023] KEHC 26043 (KLR) (Civ) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 485 OF 2019

DAS MAJANJA, J

NOVEMBER 30, 2023

BETWEEN

MICHENGECHI ENTERPRISES LIMITED APPELLANT

AND

CLEMENT MWAI NGIRI RESPONDENT

(Being an appeal from Judgment and Decree of Hon. L. Gicheha, CM dated 26th July 2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 2532 of 2010)

JUDGMENT

1. Before the Subordinate Court, the Appellant, CFC Bank Limited and James Njoroge, were sued by the Respondent for damages for injuries he sustained as a result of a road traffic accident that occurred on 20.03.2007. On the material day, the Respondent was a fare paying passenger in motor vehicle KAX 026L Nissan Bus which collided with KAR 577T Scania Lorry Trailer along owned by the Appellant along the Nairobi -Mombasa Road.
2. According to the plaint, the Respondent suffered the following injuries: compound fracture right radius and ulna of the right hand, deep cut on the chest, neck right shoulder and left hand, Angulation of the had resulting in wrist drop and generalized body pain and trauma. Upon consideration of the evidence presented before court and authorities relied on by parties, the trial court found both motor vehicles to be liable for causing the accident and apportioned liability at the ratio of 50:50. The court awarded the Respondent Kshs. 700,000.00 as general damages for pain and suffering.
3. The Appellant was dissatisfied by the trial court's decision both on liability and quantum of damages. In the Memorandum of Appeal dated 21.08.2012, the Appellant raises three grounds of appeal. First, the trial magistrate erred in law and fact in finding the Appellant 50% to blame for the accident. Second, the trial magistrate failed to properly analyze the evidence on liability and last, the trial magistrate erred



in law and fact in awarding Kshs. 700,000.00 general damages. The appeal was disposed off by way of written submissions.

4. Whether and to what extent the Appellant is liable is a question of fact. In resolving this issue, I am cognizant of the role of the first appellate court which it to re-evaluate and re-assess the evidence before the court of first instance. At the same time, keeping in mind the fact that the trial court interacted first hand with the parties (see *Selle v. Associated Motor Boat Co.* [1968] EA 123).
5. The Appellant has questioned the apportionment of liability at 50:50 as between it and the owner of motor vehicle KAX 026L. In his Statement of Defence dated 08.07.2010 before the Subordinate Court, the Appellant, as the 1st Defendant, blamed the driver of the motor vehicle KAX 926L for negligence. The 2nd Defendant, CFC Bank Limited, in its Statement of Defence filed on 16.08.2010 blamed the Appellant's driver. The 2nd Defendant though denied liability on account of only having financed the purchase of the motor vehicle through a loan facility that was advanced to the 3rd Defendant. The 3rd Defendant failed to enter appearance and consequently the court entered interlocutory judgment entered against him.
6. As the hearing on the suit, the Respondent (PW 1) testified. He told the court that he was asleep when the accident occurred and he could not tell how it happened. The Appellant called Fransisca Wambua (DW 1), a Senior Executive Officer in Machakos Law Courts who produced proceedings and judgment in Machakos CMCC 300 of 2008, *James Njoroge Mwangi v Anthony Ngugi Ngunjiri* where the driver of motor vehicle KAX 026L was held fully liable for causing the material accident. He was charged in Machakos Traffic Case no. 7 of 2007 *Republic v. Elid Maina Waweru* and found not guilty for causing death by dangerous driving.
7. The trial court however observed that the proceedings in CMCC 300 of 2008 were not binding on the court. She did not thus consider them in making her determination on liability. She also did not consider the proceedings and judgment of the Traffic case. The Appellant submitted that the trial court ought to have taken into consideration the proceedings in CMCC 300 of 2008 which was a test suit on liability before the court in Machakos.
8. The Appellant submits that trial magistrate having found the there was a test suit in respect of the matter arising out of the accident, the court was found to follow the findings therein. In his submissions, the Respondent admits that CMCC 300 of 2008 was a test suit and a judicial determination on liability lawfully made.
9. Having accepted that CMCC 300 of 2008 was a test suit, was the trial court at liberty to depart from this finding? The purpose of a test suit is it to try issues affecting a series of similar cases against a defendant or several defendants for the purpose of convenience. Once the issue of determined, that determination applies to all the other cases. In this case, the parties agree that CMCC 300 of 2008 was a test hence the judgment on liability in that suit applied in all the other matters subject of the test suit involving the collision between motor vehicles registration number KAR 577T and KAX 926L. In *Amos Muchiri Ndung'u v Chinga Tea Factory and David Muthumbi Mathenge* [2016] eKLR, the court held as follows:

I have underlined liability because in my understanding, the only finding that was to bind the other suits is only the question whether or not the Respondents were liable for the accident. In other words, as far as liability is concerned, the only thing the claimants were required to do was to wait for the court to hear the test case and determine whether or not the Respondents were liable for the accident and the outcome would then bind the other suits. After the issue of liability was determined, the outcome would be recorded in the other



files and then if the Respondents were found to be liable in the test case, the other suits would proceed individually to resolve the other issue, that is quantum of damages.

10. I therefore hold that the trial magistrate erred by ignoring the findings on liability in the test suit. In the judgment dated 11.03.2009, the trial magistrate made the following finding on the issue of liability:

The Plaintiff and his witness (PW 2) blame the driver of the first defendant vehicle registration number KAX 026L. He overtook the car in front of him without ensuring it was safe to do so. The 2nd defendant vehicle KAR 577T was on its correct lane when the accident occurred. It is the driver of the 1st Defendant's vehicle who was responsible for the accident. I find the 1st Defendant vicariously liable for the acts of his driver. I therefore enter judgment for the plaintiff against the first defendant on full liability.

11. Following the decision in the test suit, the Respondent was clearly not liable and judgment could not be entered against it. I would therefore allow the appeal to this extent.

12. Notwithstanding the finding on liability, the court is obliged to consider the appeal on the issue of quantum for completeness of the record and to enable the Court of Appeal appreciate the reasoning of this court in the event the Appellant or Respondent prefers a second appeal to that court. The Appellant contends that the sum of Kshs. 700,000.00 awarded as general damages was inordinately high.

13. According to the plaint, the Respondent sustained a compound fracture of the proximal ulnar and radius of the right hand, deep cut on the chest, neck, right shoulder and left hand, angulation of the hand resulting in a wrist drop and generalized pain and trauma. As part of the material evidence, the reports of Dr. Moses Kinuthia dated 25.09.2010 and Dr. Wambugu dated 26.07.2011 were admitted in evidence. Both doctors confirmed the Respondent injuries as pleaded. The point of departure is the extent of permanent disability suffered. Whereas Dr. Kinuthia assessed disability at 40%, Dr. Wambugu assessed disability at 15%. Both reports indicated that the right hand was shorter than before and that the Respondent could not effectively use it for manual work. There is therefore some degree of permanent disability that was suffered. Suffice it to say that the medical report indicated that the Respondent is right-handed.

14. Before the trial court, the Respondent prayed for an award of Kshs. 1,000,000.00 relying on Charles Mwanja & another v Balty Hassan [2008] eKLR where the court awarded Kshs. 800,000.00 for bruises on the forehead, wound on the right thumb and left wrist joint, wound on the second right finger and fracture of the right tibia and fibula. The Appellant on the other hand submitted that an award of Kshs. 300,000.00 would be sufficient. He relied on Gogni Payapa Construction Company Limited v Francis Ojok [2015] eKLR in which the High Court reduced an award of Kshs. 800,000.00 to Kshs. 350,000.00 where the Plaintiff suffered dislocation of the left elbow joint, fracture of the left radius and ulna.

15. The general principle upon which an appellate court can interfere with an award of damages was stated in the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 as follows:

An appellate court will not disturb an award of 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 inordinately high or low.

16. I have considered the decisions cited by the parties. In Gogni Payapa Construction Company Limited v Francis Ojok (Supra), the plaintiff suffered a fracture of the radius and ulna and dislocation of the



left elbow, and was simply managed by plaster of paris for 6 weeks. In the present case, the severity of the fracture required implantation of metal plates. The Respondent sustained more serious injuries resulting in permanent disability although the doctors were unable to agree on the extent. Obviously, the case cited by the Respondent was an outlier and taking into account the rate of inflations, I would not consider that the sum of Kshs. 700,000.00 excessive or based on irrelevant factors.

17. Given the finding on liability, I allow the appeal, set aside the judgment of the Subordinate Court and substitute it with an order dismissing the suit with costs to the Appellant. The Respondent shall bear the costs of the appeal assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023.

D.S. MAJANJA

JUDGE

Mr Ngechu instructed by C. W. Githae and Company Advocates for the Appellant.

Ms Omamo instructed by Namada and Company Advocates for the Respondent.

