



**Danimma Agencies Limited v Napa (Civil Appeal E182 of 2021)
[2023] KEHC 25646 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E182 OF 2021
MW MUIGAI, J
NOVEMBER 22, 2023**

BETWEEN

DANIMMA AGENCIES LIMITED APPELLANT

AND

LEONARD AYODO NAPA RESPONDENT

(Being an appeal arising out of the Decree emanating from the judgment of Hon. H. Onkwani (PM) delivered on 6th October, 2021 in Mavoko CMCC NO.269 OF 2017)

JUDGMENT

Background

Proceedings In The Trial Court

The Plaintiff

1. By a plaint dated 23rd February, 2017 against the Appellant in which the Respondent claimed that at all material times to the Appellant was the registered owner of motor vehicle registration number KBV 587A. Contending that on or about the 15th September, 2014 the Respondent was lawfully riding his motorcycle registration number KMDB 995A along Nairobi-Mombasa Road when the Appellant's motor vehicle registration number KBV 587A was so recklessly and negligently driven managed and/or controlled by the Appellant driver, agent, servant and or employee causing the vehicle to lose control and hit the Respondent's motorcycle, as a result of which the Respondent sustained severe bodily injuries, loss and damage Particulars of the injuries to Respondent were:
 - a. Lacerations on the scalp
 - b. Bruises on both knees.
 - c. Bruises on both lower limbs



2. The Respondent claimed special damages and the particulars of damages were:
 - a. Medical report Kshs- 1,000/=
 - b. Police Abstract Kshs - 200/=
 - c. Motor vehicle Kshs- 500/=Total 1,700/=
3. Respondents prayed for judgment to be entered against the Appellant for:
 - a. General damages
 - b. Special damages- Kshs. 1,700
 - c. Costs of the suit
 - d. Interest on (i) (ii) (iii) above

The Defence

4. The Appellant in his defense dated 24th July,2019 admitted the accident occurred 15/9/2014 but denied that the same did not occur in the manner and/or in the circumstances as pleaded by the Respondent.
5. Further, Appellant denied the Allegations of negligence as was pleaded. Averring that the accident was solely caused and/or substantially contributed to by the negligence of the Respondent in the manner that he rode, managed and/or controlled motorcycle registration number KMDB 995A.
6. The Appellant denied in entirety the contents of the plaint including particulars of injuries and special damages save for the jurisdiction the Court which was admitted, averring that it has been inappropriately sued and the suit herein was bad in law, fatally defective and should be struck out. The Appellant claimed that it will raise a preliminary objection on a point law and/or make an application seeking to strike out this suit. It finally prayed that the Respondent's suit against it be dismissed with costs.

Hearing in the Trial Court

7. PW1 was Leonard Ayodo Napa. He testified that he recorded a statement which he relied on as evidence in chief. Further that he filed a list of documents dated 23/2/2021- PEXH 5. It was his testimony that on 15/9/2014 he was from Mlolongo old road headed to Nairobi town on board a motorcycle Registration Number KMDP 995A; that driver of motor vehicle registration number KBV 587A hit him from behind.
8. According to PW1 it was in a high speed and he was near the Weighbridge on the old road. PW1 lost consciousness; he was taken to hospital; he had seen the motor vehicle through the side mirror. Testifying that he was taken to Shalom Hospital and he was transferred to Aga Khan. He claimed that he sustained injuries on the head and thigh, face, ribs and knees. PW1 was treated at Aga Khan and discharged and attended clinic for two months. It was his testimony that he reported at Athi River Police Station; he was given an abstract (PEXB 1 and PEXH 3. A medical doctor examined him Dr. Oketch (medical report PEXH 2) was prepared, treatment notes from Aga Khan Hospital (PEXH. 4). A search was done (PEXH 5). He testified that he still experiences headache; he had healed; he prayed to be compensated; he prayed for damages.



9. In cross-examination, he testified that he was headed to Nairobi General direction from Mlolongo and he was on the left lane. The speed was 20km/hr. He told court that he had seen the motor vehicle coming from behind. He was on his lane. Testifying that motor vehicle was on high speed and that he lost consciousness. He was told police took him to hospital. He was given the O.B. The driver was charged and pleaded guilty. PW1 had a helmet on and that the fell off and cracked. He claimed the scars be seen and that he had healed.
10. In re-examination, he told court that motor vehicle hit him at high speed and the helmet fell off. He told court that he was careful driver. He claimed he was hit from behind. They were headed same direction. He was in front.
11. The matter was canvassed by written submissions in the trial court.

Trial Court Judgment

12. By a judgment dated 6th October,2021 the trial court entered judgement for the Respondent Plaintiff as against the Appellant/defendant and found the Appellant/Defendant to be 100 percent liable for causing the said accident. The Trial Court went ahead and entered judgment in the following terms:
 1. General damages Kshs 200,000/=
 2. Special damages Kshs 1,700/=
 3. Cost and interest of the suit.

The Application For Stay Of Execution

13. Vide a Notice of motion dated 16th November,2021 and filed in this court on 17th November,2021 brought under Sections 1A,3A and 63 (e) of the *Civil Procedure Act*, Orders 42 Rule 6 (1) and 51 Rule 1 of the Civil Procedure Rules,2010, which application was supported by a Supporting Affidavit of Danson Ndungu, Director of the Appellant herein. In the said application the Appellant herein sought orders that:
 - a. The Application be certified urgent and the same be heard ex-parte in the first instance.
 - b. There be a temporary stay of execution of the decree emanating from the judgment that was delivered on 6th October,2021 pending inter- parties hearing and determination of this application.
 - c. There be a stay of execution of decree emanating from the judgement that was delivered on 6th November,2021 pending hearing and determination of this Appeal.
 - d. This Honorable Court does issue such further orders or directions that it may deem fit to grant in the interest of justice.
 - e. The cost of this application be in the cause.
14. The grounds under which the above application is premised are on the body of the Application and Supporting Affidavit respectively.
15. The orders sought by the Applicant were dispensed with vide this court order dated 18th November,2021. Wherein court granted interim/temporary stay of execution pending further directions and ordered that the Application/Appeal be served to the Respondent who shall respond.



The Appeal

16. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated and filed in court on 5th November,2021, the Appellant sought the following relief that:
 - a. This appeal be allowed and the judgment of the learned Trial Magistrate be set aside.
 - b. This Court does proceed and determine the issue of liability and quantum finally.
 - c. This Court issues such further orders or directions as it may deem fit.
17. The appeal is brought on the grounds that:
 - a. The learned Trial Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident despite the absence of evidence to support such a finding.
 - b. The learned Trial Magistrate erred in law and in fact in the manner that she assessed general damages and in awarding damages that were excessive in the circumstances.
 - c. The learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's submission on liability and quantum and in so doing she arrived at an erroneous decision.
18. The appeal was canvassed by way of written submissions.

Submissions

The Appellant's Submissions

19. The Appellant in its submissions dated 28th November,2022 and filed in court on 29th November,2022, wherein counsel for the Appellant submitted sequentially on the grounds raised on the body of the Memorandum of Appeal as follows:
20. On the ground that the learned trial Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident despite the absence of evidence to support such a finding, Counsel submitted that on cross examination the Respondent stated that he had put on his helmet, but it fell off and that it was the Respondent's testimony that the Appellant's motor vehicle was being driven at a high speed.
21. Counsel averred that it was evident that the Respondent was not wearing a helmet considering that he sustained injuries on the head hence had he put on protective gear, he would not have sustained the injuries. Further, it was Counsel's submission that the Respondent was in full control of his motor cycle and he failed to demonstrate what evasive measures he took to avoid the occurrence of the accident and further it was opined that had the Appellant's vehicle been speeding, the Respondent would have sustained soft tissue injuries on the scalp, knees and lower limb.
22. He contended that the Respondent also contributed to the occurrence of the accident and the injuries sustained and urged the court to set aside the finding of the lower court that the Appellant was 100% liable and find that the Respondent was equally to blame for the accident.
23. Regarding the ground that the learned Trial Magistrate erred in law and in fact in the manner that she assessed general damages and in awarding damages that were excessive in the circumstances, it was submitted that the Respondent/ Plaintiff would be adequately compensated by an award of Kshs 40,000 subject to 50% contribution. Reliance was placed on the case of Chemelil Sugar Co. Limited & Another vs Samson Odthiambo Onyaka [2018] eKLR, wherein, the award of 80,000/= was set aside and substituted with an award of Kshs. 40,000/= on appeal



24. Similarly, counsel relied on the case of Eldoret H.C.C.A NO. 5 OF 2013 Eastern Produce (k) Limited vs Joseph Mamboleo Khamadi, in which Kshs. 50,000/= was considered as adequate to compensate the plaintiff for soft tissue injuries.
25. As to the ground that the learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's submission on liability and quantum and in so doing she arrived at an erroneous decision, counsel opined that the trial court did not critically analyzed or considered the Appellant's submissions hence according to counsel the trial court rendered an erroneous judgment.
26. Counsel prayed that this appeal be allowed and the trial courts judgment be set aside and substituted with this Honorable Court's judgement.

Respondent's Submissions

27. The Respondent in his submissions dated and filed in court on 9th December,2022, wherein counsel for the Respondent averred that the Respondent had clearly testified that he was riding his motorcycle on the correct lane from Mlolongo heading to Nairobi direction when the Appellant's motor vehicle hit him from behind causing him lose consciousness and sustained bodily injuries.
28. Counsel submitted that on the Respondent's cross-examination he reiterated his testimony and added that he had his helmet on but it fell off on impact. Submitting that the argument about the helmet is defeatist as it supports the Respondent that had it not been for the helmet he could have sustained very severe injuries due to the impact as the Appellant was driving at high speed, according to counsel the helmet will not impact on liability but will reduce the impact and extent of the injuries.
29. It was the counsel's contention that the Respondent never contributed to the accident as he was not negligent as alleged hence the trial court was correct to hold that the Appellant was wholly negligent in causing the accident and urged the court not to interfere with trial court's finding on liability.
30. On the quantum of damages awarded by the lower court in the sum of Kshs. 200,000/= and special damages of Kshs. 1,700/= counsel affirmed that the judgement was commensurate to the injuries sustained. Reference was made to the authorities attached to the record of appeal at pages 26-43: HCA 61 OF 2017 Embu, Francis Ndun'gu Wambui & Others vs Benson Maina Gatia, HCA NO. 173 OF 2019 Machakos, H Young Construction Co. Ltd vs Richard Kyule Ndolo and HCA NO.25 OF 2015 Siaya, Rosaline Violet Akinyi vs Celestine Opiyo Wangwao.
31. It was submitted that the court considered the and found the authorities relevant and awarded a sum of Kshs. 200,000/= instead of Kshs. 400,000/= submitted by the Respondent. Opining that the Appellant's proposed sum of Kshs. 40,000/= was inordinately low and unreasonable in the circumstances and affirmed the award of Kshs. 200,000/= granted by the trial court and the same should not be interfered with.
32. Counsel relied further on the case of Kemfro Africa Limited t/a Meru Express Services [1976] & Another vs Lubia & Another [no. 2] 1982-88 LKAR. 727 at page 703, to buttress the point that the assessment of general damages is at the discretion of the trial court and the appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate court can only interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.
33. It was urged that the award of Kshs 200,000/= was not inordinately high as to call for any interference on the award. Counsel urged that the appeal be dismissed with costs.



Determination/Analysis

34. This Court have considered the Appeal, the lower court record and the submissions of parties.
35. This being a 1st Appeal, in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 it states that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions 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 the court is not bound 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

Liability

36. It is undisputed that an accident took place on 15th September 2014 where the Respondent was lawfully riding his motorcycle registration No KMDB 995A along Mombasa-Nairobi Road when he was hit from behind by a motor vehicle KBV 587A. As a result of which the Respondent sustained injuries.
37. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as;

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

38. The burden of proof is on the Appellant in this case. The Appellant contends that he should not have been found 100% liable for the accident as the Respondent failed to demonstrate what evasive measures he took to avoid the occurrence of the accident and that the respondent was not wearing a helmet considering that he sustained injuries on the head. Had he put on a protective gear he would not have sustained injuries The Appellant reiterated that the Respondent was the author of her own misfortune and he should be found 100% liable.
39. In determining liability and apportionment thereto, if any, the question of who is to blame for the accident is key. PW1 told the court that he was from Mlolongo headed to Nairobi on his motor cycle KMPB 995A when the driver of motor vehicle KBV 587A hit him from behind as it was on high speed.
40. The Appellant did not tender any evidence during trial to controvert the Plaintiff/Respondent’s case. In fact no evidence was tendered by the Defense as per Trial Court’s record.
41. Apportionment of liability in my view would only be plausible if there was some material evidence to show how the Respondent contributed to the accident.



42. There being no evidence to controvert the Respondent's evidence, this Court finds that the Trial Court did not err in apportioning liability in the judgment on liability at 100/% against the Appellant.

Quantum

43. As regards quantum, in *Woodruff vs. Dupont* [1964] EA 404 it was held by the East African court of appeal that: "The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."
44. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms: "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."
45. It was therefore held by the same Court in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that: "The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."
46. Similarly, in *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988- 92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that: "In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."
47. In this case, the Respondent sustained lacerations on the scalp, bruises on both knees, bruises on both lower limbs. The P3 Form and Aga Khan Hospital reports classified the bruises as harm. The medical



report by Dr Okoth Okere of 16/6/2016 found lacerations on the scalp bruises on knees and lower limbs. Clearly, the Respondent suffered multiple bruises. Dr Okoth corroborated the injuries sustained by the respondent and classified the injury as harm. The Respondent submitted that Kshs 400,000 would be sufficient compensation. The Trial Magistrate awarded Kshs 200,000 for general damages.

48. It is the Court's considered view that the award of Kshs 200,000 is manifestly high in the circumstances as the medical reports outlined above classify injuries as harm, the Plaintiff testified and stated he was rushed to hospital and was not admitted but was treated and discharged. Therefore, considering the minor bruises and lacerations General damages is exorbitant and is reduced to Ksh 120,000/- with interest and costs of the suit.

Disposition

1. In the upshot, this appeal is upheld on quantum now reduced to Ksh. 120,000/- and dismissed on liability which is upheld at 100% against the Appellant /defendant.
2. The cost shall abide the suit.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 22/11/2023. (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

