



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gacunji v Gacheha (Civil Appeal E045 of 2021)  
[2023] KEHC 25654 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25654 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E045 OF 2021  
CW GITHUA, J  
NOVEMBER 22, 2023**

**BETWEEN**

**NATHAN KAMAU GACUNJI ..... APPELLANT**

**AND**

**DAVID NJOROGE GACHEHA ..... RESPONDENT**

*(An Appeal from the judgement of Hon. P.M. Kiama (S.P.M) delivered on 18th August 2021 in Kangema's Senior Principal Magistrate's Court Civil Case No. 17 of 2020)*

**JUDGMENT**

1. The genesis of this appeal is the accident that occurred on December 18, 2019 involving the respondent's motor vehicle Registration No KAX xxxJ ( the subject vehicle) and the appellants Motor Cycle Reg No KMCH xxx T.
2. In his plaint dated August 19, 2020, the appellant (then the plaintiff) solely blamed the respondent for occurrence of the accident claiming that the respondent negligently drove the subject vehicle causing it to collide with his motor cycle as a result of which he sustained personal injuries.
3. In his statement in defence dated September 30, 2020, the respondent denied the appellant's claim in toto and put him to strict proof thereof.  
  
In the alternative, he averred that if the accident occurred which was denied, it was caused or substantively contributed to by the appellant. The particulars of the appellant's alleged contributory negligence were pleaded in paragraph 8 of the defence.
4. After hearing both parties, the learned trial magistrate in his judgment delivered on August 18, 2021 apportioned liability in the ratio of 50:50 and awarded the appellant general damages in the sum of Kshs 300,000; special damages amounting to Kshs 7,360 together with costs of the suit and interest.
5. The appellant was dissatisfied with the trial court's decision hence this appeal.



In his memorandum of appeal dated August 30, 2021, the appellant advanced seven grounds in which he challenged the trial court's decision on both liability and quantum.

In summary, he principally complained that the learned trial magistrate erred in law and fact in apportioning liability between the parties in ratio of 50:50 in view of the evidence placed before the court. On quantum, he faulted the trial court for awarding him general damages of Kshs 300,000 which in his view was inordinately low given the injuries he had sustained and also for failing to allow his claim for future medical expenses and loss of earnings. He urged this court to allow the appeal and to re-assess the general damages payable to him.

6. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed and which I have duly considered together with the authorities cited by both parties.

This being a first appeal, I am conscious of my duty as the first appellate court which as enumerated in several authorities is to revisit and exhaustively re-evaluate the evidence presented before the trial court in order to arrive at my own independent conclusion on whether or not to uphold the impugned decision. In doing so, I should bear in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses.

See: *Selle & another v Associated Motor Boat Co Ltd & another* [1968] EA 123; *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR.

7. It is also important to note at this juncture that a trial court is legally empowered to exercise its discretion in making a determination and unless it is demonstrated that the court misdirected itself leading to a wrong decision; or took into consideration irrelevant matters or failed to consider relevant ones, its decision should not be disturbed by an appellate court.
8. That said, after my analysis of the evidence presented before the trial court and the parties written submissions, I find that the twin issues arising for my determination are whether the learned trial magistrate erred by apportioning liability at 50: 50 and in his decision on quantum.
9. Starting with the issue of liability, the record shows that the appellant testified in support of his case and called one additional witness. The respondent also testified in support of his defence but did not call witnesses.
10. In his evidence, the appellant testified that he was lawfully riding his aforesaid motorcycle along the Kiriaini – Kangema road when the appellant's motor vehicle which was being driven in the opposite direction made a 'U' turn and despite swerving off the road for about 7 feet in abid to avoid a collision, the vehicle proceeded to hit him and pushed him to a metal rail. He sustained a fracture on his right leg which was treated at Kiriaini Mission Hospital as shown in exhibit 6. The accident was reported at Kangema police station.

A Police Abstract was issued which was produced as Pexhibit 1 by PW2 P.C Eunice Ndichu .

11. In his evidence, the respondent admitted having been the driver of the subject vehicle at the material time as well as occurrence of the accident. He denied having negligently caused the accident and claimed that he was turning to enter a petrol station when he suddenly noticed a motorcycle ahead of his vehicle and his efforts to brake and swerve to avoid hitting it did not bear fruit.
12. In making his finding on liability, the learned trial magistrate stated as follows:

“It was noted during the trial that the plaintiff could not avail a driving licence to confirm he was authorised to ride the said motor cycle. It was further noted that the officer called by the plaintiff one PC Eunice Ndichu was not a traffic officer or investigating officer to enlighten



the court on how the accident occurred. It was further noted that the defendant was never charged with any offence under the Traffic Act, cap 403 over the accident.

Consequently, liability is hereby apportioned at 50:50%.”

13. After my own independent appraisal of the evidence on record, I find that in making his determination on liability, the learned trial magistrate misdirected himself and thereby arrived at an erroneous decision. Whereas I agree with him that PW2’s evidence amounted to hearsay as she did not visit the scene nor did she witness the accident, the fact that the appellant may not have been a licensed Motor cycle rider was not by itself proof that he was to blame for the accident in any way. In my view, this was an irrelevant consideration in determining who between the appellant and the respondent was responsible for causing the accident and to what extent.
14. In a claim for damages for personal injuries, the issue of liability ought to be determined on the basis of evidence which showed the person whose negligent acts or omissions caused the accident. Granted, it is a traffic offence to ride a motor cycle without a license but this is not automatic evidence of negligence. I say this because it is possible for an unlicensed motor cyclist to carefully ride a motor cycle without committing an act or omission that would constitute negligence.
15. In addition, the learned trial magistrate’s finding that the respondent had not been charged with a traffic offence was not supported by the evidence on record. The respondent in cross –examination admitted PW2’s claim that after the accident, he was charged with the traffic offence of careless driving; that he was convicted on his own plea of guilty and was fined Kshs 30,000.  
  
This admission coupled with the further admission by the respondent in his evidence in cross-examination that he is the one who had hit the motorcycle makes the appellant’s claim that it is the respondent who solely caused the accident plausible.
16. It is also pertinent to note that the respondent did not adduce any evidence to prove the particulars of contributory negligence pleaded against the appellant in his statement of defence. In my view, there was no factual basis for holding that the appellant was in any way to blame for the accident. Consequently, the learned trial magistrate’s finding on liability at 50:50 is hereby set aside. It is substituted with this court’s finding that the respondent was liable for the accident at 100%.
17. Turning to the issue of quantum, let me start with the appellant’s complaint that the award of Kshs 300,000 general damages was inordinately low given the injuries he sustained and previous awards for similar injuries.

It is worth noting that an award of damages is dependent on the trial courts discretion and an appellate court ought to be slow in interfering with such an award.

The parameters in which an appellate court can interfere with an award of damages was stated by the court of appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan*(1982-88) eKLR as follows:

“ 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”.

See also: *Kemfro Africa (ltd) t/a Meru Express Services & another v Lubia & another*[1987] KLR 30.

18. In this case, the injuries sustained by the appellant as pleaded in the plaint were not disputed. These were;



1. A laceration on the right knee joint.
  2. Compound fracture of the right distal tibia and fibula bones.
19. In the trial court and in his written submissions in support of his appeal, the appellant proposed an award of Kshs 1,400,000 relying on the following authorities:
- i. *George William Awuor v Beryl Awuor Ochieng* (2020) eKLR where the respondent was awarded Kshs 1,200,000 for fractures of the right femur and left tibia fibula.
  - ii. *Kornelius Kweya Ebichet v C & P shoe Industries ltd*(2008) eKLR where the plaintiff was awarded Kshs 1,000,000 as damages for a blunt trauma on the forehead and compound fracture left tibia and fibula bones.
20. The respondent on the other hand proposed an award of Kshs 300,000 relying on the following authorities:
- i. *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* (2019) eKLR where the High Court upheld the trial courts award of Kshs 300,000 as damages for soft tissue injuries and a fracture of lower tibia and fibula.
  - ii. *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* (2020) eKLR where the High Court reduced an award of Kshs 600,000 to Kshs 400,000 in a case where the claimant had sustained multiple soft tissue injuries and fracture of the tibia and fibula.
21. In making his award on quantum, the learned trial magistrate clearly stated that he had considered the authorities submitted by both parties but he appears to have been more persuaded by the authorities cited by the respondent which he was entitled to do in the exercise of his discretion. From the record, I am unable to find any indication that the learned trial magistrate applied wrong legal principles or abused his discretion in arriving at the award. Given that there is evidence that the appellant had recovered from his injuries and that the award was made in the year 2021, I am satisfied that the award was reasonable to compensate the appellant for his pain and suffering and was not inordinately low as submitted by the appellant.
22. It must be remembered that the purpose of awarding damages is not to enrich the victims of road accidents but to fairly compensate them for the pain and suffering they had endured as a result of injuries sustained in an accident.
- For the foregoing reasons, I am unable to fault the learned trial magistrate for making the impugned award. The same is upheld.
23. Regarding the complaint that the learned trial magistrate erred in failing to award the appellant future medical expenses and loss of earnings, both parties have submitted and I fully agree with them, that these two claims are in the nature of special damages which must be specifically pleaded and proved.
24. Although it is not disputed that both claims were specifically pleaded, I am unable to agree with the appellants submissions that the same were also specifically proved.

To start with, though the appellant produced in evidence a medical report prepared by DR Eunice Mugweru stating that he would incur future medical costs estimated to cost Kshs 5,000 per month for an estimated period of six months, it is important to note that this report was prepared on July 22, 2020. At the time the appellant testified before the court about a year later on June 16, 2021, he did not adduce either oral or documentary evidence to prove that he had in fact incurred the medical expenses that were contemplated in Dr Mugweru's report.



25. It is a cardinal principle of the law of evidence that he who alleges must prove. In order to prove his claim, it was incumbent upon the appellant to prove that he had expended money towards his further treatment after his examination by Dr Mugweru. No such evidence was availed before the trial court. He thus failed to discharge his burden of proof and he cannot blame the trial court for not making any award for future medical expenses.
26. Lastly, the appellant's claim that the learned trial magistrate erred by failing to award him damages for loss of earnings is not merited. It is not contested that the claim was specifically pleaded but my reading of the evidence on record does not show that the claim was proved. The Court of Appeal in *Cecilia W Mwangi & another v ruth W Mwangi* [1997] eKLR which was cited by the appellant emphasized that for such a claim to succeed, it must be pleaded and strictly proved. The court rendered itself as follows :
- “In her plaint the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just "throw figures" at the judge and ask him to assess such damages.”
27. The appellants testimony that prior to the accident, he had been employed as a lorry driver earning a daily wage of Kshs. 800 was not substantiated by any other evidence. He did not, for instance, call his alleged employer, one Mr Herman Mukuna as his witness to confirm that he had in fact employed him as a driver. In effect, the wages the appellant claims he was earning prior to the accident were just figures thrown at the court and could not have formed a basis for assessing damages. I therefore find that the learned trial magistrate was right in his finding that the appellant was not entitled to damages for loss of earnings as he had failed to prove the claim.
28. For all the above reasons, I am satisfied that the appeal on quantum lacks merit and it is hereby dismissed. The award of general and special damages made by the trial court are thus maintained. The award of general damages will attract interest at court rates from date of judgement of the trial court while the award of special damages will earn interest at the same rate from date of filing of the suit.
29. Costs follow the event and are at the discretion of the court. Since the appeal has partially succeeded, the appellant is awarded costs of the suit in the lower court but each party shall bear his own costs of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 22<sup>ND</sup> DAY OF NOVEMBER 2023.**

**C.W GITHUA**

**JUDGE**

**In the presence of :**

Ms. Mwenja holding brief for Mr. Murai for the appellant

Ms. Amaya holding brief for Ms. Kimani for the respondent

Mr. Quinteen Court Assistant.

