



**Orange v Munyao (Civil Appeal E799 & E812 of 2021 (Consolidated))
[2023] KEHC 27115 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27115 (KLR)

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

CIVIL

CIVIL APPEAL E799 & E812 OF 2021 (CONSOLIDATED)

DAS MAJANJA, J

DECEMBER 22, 2023

BETWEEN

BENARD OYUNGE ORENGE APPELLANT

AND

DANIEL KISELI MUNYAO RESPONDENT

(Being appeals from the Judgment and Decree of Hon. Kagoni, PM dated 18th November 2021 at the Nairobi Magistrates Court, Milimani in Civil Case No. E3958 of 2020)

JUDGMENT

1. Both parties have appealed against the judgment rendered by the Subordinate Court on 18.11.2021 where the court found the Respondent fully liable for the accident that caused the Appellant's injuries. The court awarded the Appellant Kshs. 1,500,000.00 and Kshs. 531,050.00 as general and special damages respectively. The court dismissed the claim for future earnings and awarded the Appellant costs of the suit.
2. Before I deal with the issues in this appeal a background of the case is necessary. The Appellant's case as set out in the Amended Plaintiff dated 09.11.2020 is that on 24.02.2020, he was driving his motor vehicle registration number KCE 915T along the Eastern Bypass when at Capital Hill area, the Respondent's driver negligently drove his motor vehicle registration number KBT 822X causing it to veer off its lane and crash into the Appellant's motor vehicle thereby causing him severe injuries.
3. Apart from denying the accident, the Respondent in his Statement of Defence dated 28.10.2020 blamed the Appellant wholly and or substantially for causing the accident as he tried to overtake the Respondent's vehicle when it was unsafe to do so. The Respondent also blamed the driver of an unknown third-party for causing the accident by joining the main road from a feeder road when it was



- unsafe to do so without giving notice to the other traffic users on the said road and thereby causing the collision.
4. The Appellant has preferred this appeal on the basis of the Memorandum of Appeal dated 29.11.2021. He challenges the award of damages in his appeal. He contends that the trial court misapprehended the evidence and came to a wrong conclusion on the quantum of damages and that the amount awarded was inordinately low as to constitute a miscarriage of justice. That the trial magistrate erred by failing to award him damages for loss of future earnings which had been pleaded and proved.
 5. The Respondent in his Memorandum of Appeal dated 09.12.2021 challenges the trial court's findings on liability and quantum of damages. In particular, he assails the finding that he was 100% liable when the Appellant had not in fact proved his case on a balance of probabilities. He further contends that the trial court erred in failing to find that the Respondent contributed to the accident. In the Respondent's view, the award of Kshs. 1,500,000.00 as general damages was inordinately high taking into account the evidence and judicial authorities placed before the court.
 6. The parties filed written submissions in support of their respective positions. The court is called upon to determine whether and if so, to what extent the Respondent was liable for the accident and the quantum of damages. In resolving these issues, the court is guided by the principal that the first appellate court must reconsider the evidence, evaluate it and draw its own findings keeping in mind that the trial court interacted first hand with the parties thus had the advantage of observing their demeanor and general conduct during the trial (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
 7. At the trial, the Appellant (PW 4) testified and marshalled three witnesses; PC Samuel Shauri (PW 1) a police officer from Ruai Traffic Sub-base, Josphat Kamau (PW 2), a motor vehicle assessor and Dr George Mwaura (PW 3). The Respondent did not call any evidence to support his case.
 8. The Appellant's testimony was that on the material day, he was driving motor vehicle KCE 915T descending along the Eastern Bypass when the motor vehicle registration number KBT 822X being driven from the opposite side suddenly veered off its path and into his lane and before he could react, the collision took place. DW 1 confirmed that on the material day an accident occurred when motor vehicles KBT 822X and KCE 915T collided. He stated that KCE 915 was heading towards Kangundo Road when he collided with KBT 228 X which was overtaking a chain of vehicles. PW 1 stated that he was not the investigating officer and did not witness the accident.
 9. In concluding the Respondent was liable, the trial magistrate held that since the Respondent did not call any witnesses, his evidence remained unchallenged. That it was incumbent on the Respondent to explain how the accident occurred and since it failed to do it was fully liable.
 10. In his submissions, the Respondent challenges the findings on liability on the ground that the Appellant failed to prove his case on the balance of probabilities by failing to call evidence to show the connection between the accident and the injuries he sustained. That the Appellant did not tender any evidence to show that the Respondent was negligent as PW 1 did not witness the accident and was not the investigating officer in the matter hence he could not testify as to the circumstances of the accident. That although several persons were named in the police abstract none of them were called as witnesses to corroborate the Appellant's testimony.
 11. I am constrained to agree with the Appellant that the trial court came to the correct conclusion on the evidence. First, the fact of the accident was proved. The Appellant's testimony was corroborated by the police abstract produced by PW 1. It has been held that a police abstract only sets out the particulars of the accident including the location of the accident, the people and vehicles involved and is prima facie evidence that an accident took place as reported to the police (see *Catherine Mbithe Ngina v Silker*



Agencies Limited [2021] eKLR). In addition, PW 2 examined the Appellant's motor vehicle KCE 915T and confirmed that it had indeed been involved in an accident.

12. As regards failure to call the other witnesses listed in the police abstract, I hold that there is no rule of law or practice that requires that the testimony of a plaintiff in a claim for negligence must be corroborated. Further, section 143 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that in the absence of a provision of law requiring a specific number of witnesses no particular number of witnesses is required to prove a fact. Thus, it was not necessary for the Appellant to call a multiplicity witnesses to prove the fact that the Respondent caused the accident. The Appellant's testimony on oath was sufficient in the circumstances.
13. The Appellant's testimony, which was clear and direct, was that the Respondent's vehicle left its lane and collided with the Appellant's motor vehicle. The Respondent having pleaded contributory negligence and attributed fault to an unknown third party was required to adduce evidence to support his contention. Section 107 of the *Evidence Act* provides that, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." Section 109 therein stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. It was therefore incumbent on the Respondent to show how the accident took place in the manner described in his statement of defence. By failing to call evidence, the Respondent's defence remained mere allegations (see *John Wainaina Kagwe v Hussein Dairy Limited* [2013] eKLR). The trial magistrate was therefore correct to conclude that the Appellant's testimony was uncontroverted. In any case, nothing was put to the Appellant in cross-examination that would entitle the court to make an adverse inference. Further, the Respondent did not join the unknown third party to the suit to support any element of his defence. I too, after evaluating the evidence, come to the same conclusion that the Appellant was 100% liable.
14. On the issue of damages, the Appellant pleaded that as a result of the accident he suffered a fracture at the neck of the femur, bruises on the left side of the head, blunt injuries on the left side of the neck with permanent disability assessed at 30%. The Appellant recalled that after the accident, he was taken to Kenyatta National Hospital where he was admitted for almost 3 months. He produced the Kenyatta National Hospital Discharge Summary dated 14.05.2020 and a Radiological report dated 03.03.2020. He was later transferred to St Peters Orthopedic Hospital where he was admitted on 12.05.2022 and discharged on 20.05.2023 after undergoing hip replacement. The Appellant produced the Hospital Discharge Summary dated 02.06.2020. He was examined by PW 3, who prepared and produced his report dated 29.07.2020.
15. Before the trial court, the Appellant urged the court to award him Kshs. 5,000,000.00 by calling in aid *James Njau Kariuki v Mary Goreti Wakwibubi and Another* [2007] eKLR where the plaintiff sustained a fracture dislocation of the left hip involving fracture of the femur, fracture of the femoral head, total replacement of the hip, laceration of the forehead of 7 cm, cut wound over the right nostril, deep cut wound on the left knee, soft tissue injuries on the left side of the chest and loss of libido and inability to perform conjugal rights. The court awarded Kshs. 3,000,000.00.
16. The Respondent contended that Kshs. 900,000.00 was sufficient to compensate the Appellant. He cited several cases. In *Edwin Otieno Japaso v Easy Coach Bus Company Limited* [2016]eKLR, the appellant sustained a fracture of the right little finger, soft tissue injuries to the chest, dislocation of the right hip with a fracture of the acetabulum, fracture of the pelvis involving both superior and inferior pubic rami bilaterally, lacerated cut wounds on the anterior right and left leg. He underwent hip replacement and was awarded Kshs. 1,500,000.00. In *Humphrey Okumu Odondi v Imperial Driving School* [2018] eKLR, the appellant suffered a crush injury on the right leg leading to comminuted compound fracture of the tibia and fibula and below the knee amputation of the leg with 50% -60%



- incapacitation. The court awarded Kshs. 1,500,000.00 as general damages. While in *Cold Car Hire and Tours Limited and 2 Others v Elizabeth Wambui Matheri* [2015] eKLR the plaintiff was awarded Kshs. 1,400,000.00 on account of a comminuted fracture of the right acetabulum and dislocation of the right hip joint resulting in total hip replacement. The plaintiff suffered from deep vein thrombosis in both legs resulting in inability to squat, sit and stand for long periods of time. He permanent incapacity was assessed at 50% and she had to undergo a second hip replacement.
17. Dr G. K. Mwaura classified the Respondent's injuries as grievous harm. He noted that at the time the Respondent was on crutches, he was in pain and would, in the future, be unable to run, stand or walk for more than 20 minutes and lift heavy objects of more than 5kg. He assessed degree of incapacity at 30%. These injuries are less serious than those sustained in the cases cited by the parties. In *James Njau Kariuki v Mary Goreti Wakwibubi and Another* (Supra), cited by the Respondent, the plaintiff suffered more serious injuries than those in this case. In *Edwin Otieno Japaso v Easy Coach Bus Company Limited* (Supra), *Humphrey Okumu Odondi v Imperial Driving School* (Supra) and *Cold Car Hire and Tours Limited and 2 Others v Elizabeth Wambui Matheri* (Supra), cited by the Respondent, the claimants also suffered more serious injuries and their levels of disability higher.
 18. The trial court has discretion in awarding damages and the court will only interfere with an award if it is shown that the award is inordinately high or low as to represent an entirely erroneous estimate or that the trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low (see *Bashir Ahmed Butt v. Uwais Ahmed Khan*. [1982-88] KAR 5). Taking into account the nature and extent of the Respondent's injuries, the decisions cited, I find that the award of Kshs. 1,500,000.00 excessive. It is set aside and substituted with an award of Kshs. 1,000,000.00.
 19. The Appellant complained that the trial magistrate erred in dismissing his claim for loss of future earning on the ground that the claim was not pleaded. The trial magistrate relied on *Douglas Kalafa Ombewa v David Ngama* [2013] eKLR where the court stated, "Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved."
 20. The trial magistrate appears to have overlooked the fact that the Appellant had in fact pleaded the claim for loss of future earnings at paragraph 8 of the Amended Plaintiff as follows:
 - (8) Prior to the occurrence of the subject accident, the plaintiff was an energetic and hardworking business man in the Transport sector and a qualified PSV driver where he was earning an average monthly net income of Kshs. 100,000 which business/profession he had been unable to continue in due to the debilitating nature of the injuries that he sustained as well as the destruction of his vehicle occasioned by the defendant's negligence.
 21. The question then is whether the Appellant proved this aspect of the claim. The Appellant testified that his motor vehicle was the only source of income earning about Kshs. 100,000.00 monthly. That he would earn about Kshs. 3,000.00 - 4,000.00 daily from carrying fare paying passengers. He was charging about Kshs 50 – 70 per passenger and making 10 trips a day. He produced Mpesa statements from November 2019 to February 2020. He contended that he lost his ability to work as a driver due to the severity of his injuries and the fact that his vehicle was damaged and written off. He submitted that at the time of the accident he was aged 41 years and would have worked for another 10 years hence he was entitled to Kshs. 12,000,000.00.
 22. The Respondent disputed the claim for loss of future earnings. He urged that there was no legal basis for this claim as the Appellant has been compensated for the market value of his motor vehicle and that he was not 100% incapacitated. The Respondent also submitted that the evidence in support of the claim for future earnings was insufficient to support the claim.



23. Damages for loss of future earning is intended to compensate the claimant for the reduction of his ability to earn income as a result of injuries sustained following the accident. Thus, the phrase “loss of future earnings” refers to the specific amount of income the plaintiff would have earned if he or she had been able to continue working hence the requirement the amount be pleaded and proved (see *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR and *Butler v Butler* [1984] KLR 225). The standard approach to calculating future loss of earnings, which both parties had submitted on before the trial court, involves establishing the net annual loss referred to as the multiplicand and multiplying it by a factor effectively representing a number of years until retirement referred to as the multiplier to provide a lump sum award covering the loss of earnings over the claimant’s working life. However, the court may use the conventional approach where it is inappropriate or may produce unrealistic results. In such cases, the court may consider a lump sum award.
24. The Appellant’s case is based on the fact that he was a driver of a public service vehicle which he was unable to drive due to the injuries he sustained. The Respondent was right to point out that the Appellant was compensated for the motor vehicle hence he would be able to carry on business though not as a driver as he had suffered 30% incapacity. Given the nature of business, he would be in a position to employ a driver. This would obviously have an effect in reducing his own income. I therefore do not accept that he should be compensated for the entirety of his working life for these reasons. I would adopt a lumpsum approach in this case and award the Respondent Kshs. 600,000.00 under this head of damages.
25. In the final analysis, I affirm the trial court decision on liability and vary the trial court’s judgment on quantum of damages. Since both parties have won and lost in equal measure, each party shall bear his own costs. I therefore make the following orders:
- a. The Appellant’s appeal, HCCA No. E779 of 2021, is allowed to the extent that the Appellant is awarded Kshs. 600,000.00 for loss of future earnings.
 - b. The Respondent’s appeal, HCCA No. E812 of 2021 is allowed to the extent that judgment of the Subordinate Court dated 18.11.2021 is set aside in respect of the award of Kshs. 1,500,000.00 for general damages which is substituted with an award of Kshs. 1,000,000.00.
 - c. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2023.

D. S. MAJANJA

JUDGE

Mr Kibiku instructed by K. Kibiku and Company Advocates for the Appellants.

Ms Janmohamed, SC instructed by Archer & Wilcock Advocates for the Respondent.

