



REPUBLIC OF KENYA



**Biwott v Pamba (Civil Appeal 130 of 2003)
[2023] KEHC 26651 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 130 OF 2003
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

JULIUS BIWOTT APPELLANT

AND

VINCENT ONGERA PAMBA RESPONDENT

*(Being an Appeal from the Judgment in CMCC 513 of
2020 before Hon. D. Milimu delivered on 18.8.2022)*

JUDGMENT

1. The Appeal herein arises from the judgment and decree of Hon. D Milimu in Eldoret CMCC E513 of 2020 delivered on 18/8/2022. The Respondent instituted the suit in the trial court vide a plaint dated 7th July 2020 against the Appellant seeking general damages, special damages and costs. The cause of action arose from an accident that occurred on 26/06/2020 wherein the Respondent was riding his motorcycle registration no. KMFB 335Y along the Webuye Eldoret road when the defendant or his agent recklessly drove vehicle registration number KAC 230W negligently that he knocked down the plaintiff and as a result, the plaintiff sustained severe injuries.
2. The plaintiff sustained the following injuries;
 - i. Bruises on the right part of the hand
 - ii. Fracture on the right clavicle bone
 - iii. Blunt trauma on the right scapula bone
 - iv. Blunt injury on the right elbow joint
 - v. Bruises on the right elbow joint



3. He prayed for special damages of Kshs. 6,750/, general damages for pain, suffering and loss of amenities, costs and interests on the same.
4. PW1, PC Cheserek Kiptoo testified that around 6.30 pm on 26/06/2020 an accident occurred involving motor vehicle reg no, KAC 230W and motorcycle reg no. KMFB 335Y. The motor vehicle was heading towards Maili Nne when it collided with the motor cycle which was heading towards the same direction. It was his testimony that the vehicle hit the motorcyclist from behind. He produced the police abstract as evidence and stated that the motor vehicle was to blame. In cross examination he stated that he was not the investigating officer as the IO was transferred. He also stated that he did not have the inspection or investigation report.
5. The Plaintiff testified as PW2 and stated that he was involved in an accident on 26/06/2020 when he was at the Eldoret Webuye road riding towards Webuye. A trailer was turning and he overtook it, as he proceeded, the motor vehicle was also overtaking him at a high speed and the side mirror entered under his arm. The impact of the accident was on his left side and he became unconscious. He was treated at Cedar hospital and then transferred to Moi Teaching and Referral Hospital. He produced the treatment notes and the P3 form. He also produced the medical report by Dr. Sokobe and a receipt for the Kshs. 6,000/- he was charged for the medical report. He testified that his body was damaged and he needed an operation.
6. PW3 was Dr. Rono who produced the attendant card, prescription forms, radiology request form, x ray form, referral request form as exhibits in the case. He produced them on behalf of the treating doctor who was away on postgraduate studies. Further, that the plaintiff was seen as an out patient and came four times. Because of the nature of the injuries, he had not fully healed. In re examination he laid down the injuries that the plaintiff had sustained.
7. PW5, Dr. Joseph Sokobe, testified that he examined the Plaintiff and charged him Kshs. 6,000/- for the medical report. He saw the treatment notes from Cedar Hospital and an x-ray from Moi teaching and referral hospital and that the x-ray were not listed as any of the referees on his report. He stated in cross examination that he had not conducted another examination. In re-examination, he stated that the major injury was the fracture of the right clavicle.
8. DW1 was Nicholas Kibet who was the driver of the motor vehicle. It was his testimony that on 26/06/2019 along Eldoret-Webuye road he was driving KAC 230W when he abruptly saw Motor cycle registration no. KMFB 335Y trying to overtake and he swerved to avoid the motor cycle. He blamed the plaintiff wholly for the accident.
9. Upon considering the pleadings, testimonies and evidence on record, the trial court entered judgement apportioning liability at 80/20 in favour of the plaintiff. General damages – Kshs. 400,000/- Special Damages – Kshs. 6,750/- Subtotal – Kshs. 406,750/- Less liability – Kshs. 81,350/- Total Net Award – Kshs. 325,400/-
10. Being aggrieved with the judgment and decree in the trial court, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 16/9/2020 premised on the following grounds;
 1. That the learned trial magistrate erred in law and in fact by failing to dismiss the Respondent's suit whereas the evidence adduced during trial did not meet the threshold for sustaining the suit in the trial court.
 2. That the learned trial magistrate erred in law and in fact by holding the Appellant 80% liable for the accident.



3. That the learned trial magistrate erred in law and in fact by failing to take into account the relevant facts relating to the suit thus arriving at a decision that is wholly erroneous.
 4. That the learned trial magistrate erred in law and in fact by holding the Appellant 100% liable for causing the accident contrary to the evidence on record and/or adduced during trial.
 5. That the learned trial magistrate erred in law and in fact by holding the Appellant 80% liable for causing the accident despite conceding that the Respondent was overlapping when the accident occurred.
 6. That the learned trial magistrate erred in law and in fact by awarding Kshs. 400,000/- as general damages which award is excessive in view of the injuries sustained by the Respondent thereby deviating from the principle of stare decisis requiring comparable awards being made for comparable injuries sustained.
 7. That the learned trial magistrate erred in law and in fact by failing to consider the Appellants' written submissions and legal authorities or precedents on both quantum and liability thereby arriving at a determination which is wholly erroneous.
11. The parties were directed to file submissions on the appeal.

Appellants' Submissions

12. The Appellant was afforded an opportunity to file submissions but elected not to do so.

Respondents' Submissions

13. Learned counsel for the Respondent filed submissions on 13th October 2023. Counsel urged that it is clear from the record that the Respondent was riding his motor cycle on his rightful lane when the Appellant's motor vehicle knocked him down. The Respondent called PW1 a Police Officer PC Kiptoo Cheserek from Eldoret Police Station Traffic Section. The evidence of the Police Officer confirmed that an accident occurred on 29/06/2020 along Eldoret-Webuye road at Bakri Petrol Station area and it involved motor vehicle Reg. No. KAC 230W Matatu and Motor Cycle Reg. No. KMF 335Y that the Respondent was riding. PW1 testified that the motor vehicle knocked down the Respondent's motorcycle from behind and as a result he sustained injuries. PW1 Blamed the motor vehicle for causing the accident as it did not keep safe distance. PW1 produced the Abstract as PEXh No. 1
14. Upon the Police Officer testifying, the Respondent testified as PW2. He stated that he was involved on a Road Traffic Accident on the 29/06/2020 while he was executing his duties as a security agent, while riding the company's motorcycle. He stated that he was on his left-hand lane riding towards Webuye direction from Eldoret town. He also stated that the suit motor vehicle was trying to overtake him and its side mirror entered his armpit hence the accident. He reported the accident at Eldoret Police Station where he was issued where he was issued with a Police Abstract earlier produced as PEXH No.1 that confirmed the occurrence of the accident.
15. In his Defence, the Defendant called the driver of the suit motor vehicle one Nicholas Kibet Kosgei who testified as DW1. He admitted that the left sliding door of the suit motor vehicle is the one that hit the Plaintiff. On cross-examination, he confirmed that he was involved in an accident on 29/06/2020 while he was driving the suit Motor Vehicle Reg. No. KAC 230W Matatu belonging to the Appellant, one Julius Biwott. He further stated that the rider who is the Respondent herein was knocked and landed in a ditch. DW1 also confirmed that his motor vehicle and the rider were heading in the same direction and that the motorcycle was on his rightful lane when the accident occurred. Further, DW1



was at pains to explain why he did not take photos of the scene upon occurrence of the accident to confirm his unfounded allegations. The Appellant did not file a counterclaim against the Respondent herein neither did he enjoin the owner of the motor cycle for causing the accident, an indication that he was the one who was wholly liable for causing the accident. Similarly, the driver did not call an independent witness and an expert witness to support his evidence but stated clearly that it is only the Traffic Police Officers who can state correctly the person to be blamed for the accident. The Traffic Police Officer earlier testified that that the Appellant was the one to be blamed for causing the accident.

16. Counsel urged that from the foregoing, it is clear that the Appellant's attempt to evade liability and shift blame to the Respondent cannot hold water. He submitted that apportioning of liability at 20% to 80% in favour of the Respondent was reasonable.
17. On general damages, he invited this Court to consider the fact that damages awarded to him actually corresponded with the injuries he sustained even though money cannot renew the physical frame of a body. He relied on the case of *Tayab v Kinanu* [1983] eKLR, NAIROBI HCCA NO. 29 OF 1982 in support of this submission and urged that the award given to him by the trial court was fair.
18. He restated the injuries and stated that the testimony and documents produced by Dr. Paul Rono from Moi Teaching and Referral Hospital where the Respondent was treated confirmed the injuries that had been suffered and pleaded by the Respondent. He stated that Dr. Sokobe's report stated that the Respondent sustained both soft and bony tissue injuries and would need the further treatment (open reduction and internal fixation of the fractured clavicle) at an estimated cost of Kshs. 150,000/=. This was buttressed by his testimony and therefore, in awarding the Respondent the Trial Magistrate did not address that limb of future treatment in her judgment.
19. He urged that it is worth to note that Dr. Jenipher Kahuthu who prepared the Second Medical Report and produced as D. Exhibit confirmed that the Respondent sustained the same injuries.
20. It is the Respondent's case that the award of Kshs.400,000/= as General Damages by the trial court was reasonable and commensurate to the injuries sustained by the Respondent. He cited *Narok Civil Appeal No.23 of 2019 Malik Boeki Company Limited & another v Michael M Peter* [2022] eKLR, where the High Court upheld the award of Kshs.750,000/= awarded at the lower court to the Plaintiff for injuries similar to those one suffered by the Respondent in this instant suit.
21. The Respondent submitted that at the trial court he pleaded Kshs.6,750/= for special damages which were pleaded and proved. Counsel urged the court to dismiss the appeal with costs.

Analysis & Determination

22. The duty of an Appellate court was set out in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
23. Upon considering the record of appeal, Memorandum of appeal and the submissions of the parties, the following issue arise for determination;
 1. Whether the trial court erred in its finding on liability
 2. Whether the trial court erred in its award for damages



Whether the trial court erred in its finding on liability

24. An appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

25. The driver to the appellant confirmed that the accident occurred and that he knocked down the respondent. He confirmed that he was unable to avoid the respondent and consequently he knocked him down. Further, that he blamed the rider for the accident. It is also clear that the respondent was knocked from behind by the driver. I am in agreement with the finding of the trial court on liability as the rider had some part to play in the accident. The appellant has not given this court any reason to interfere with the finding on liability by the trial court.

Whether the trial court erred in its award for damages

26. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;

“An appellate court will not disturb an award for damages unless it is 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”.

27. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:

The principles to be observed by this appellate court, in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are, that it must be satisfied that either, the judge is assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages”*

28. It is trite law that in awarding damages, comparable injuries attract comparable awards as the Court of Appeal stated in the case of *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR. In *Shabani vs City Council of Nairobi* [1985] KLR 516 the Court of Appeal had the following to say regarding the paramount need for Courts to attempt to give comparable awards in like cases:

There is no doubt that, some degree of uniformity must be sought in the award of damages and the best guide in this respect is...to have regard to recent award in comparable cases in the local courts.

The respondent sustained the following injuries;

- i. Bruises on the right part of the hand
- ii. Fracture on the right clavicle bone
- iii. Blunt trauma on the right scapula bone
- iv. Blunt injury on the right elbow joint



- v. Bruises on the right elbow joint
29. The respondent sustained soft tissue injuries and bony injuries which did not result in permanent incapacitation as per the assessment of medical report produced by Dr. Jenipher Kahuthu.
30. In **George Kinyanjui t/a Climax Coaches & another v Hassan Musa [2016] eKLR** an award of Ksh.800,000/= as general damages was reduced on appeal to Ksh.450,000/= for the following injuries:
- i. Two loose teeth.
 - ii. Blunt trauma to the neck and chest.
 - iii. Fracture of the left clavicle.
 - iv. Fractures of 4th and 5th left ribs.
 - v. Blunt trauma to the spinal column and right scapula area.
 - vi. Dislocation of the left shoulder joint.
31. In the court set aside the award of Kshs. 700,000/= general damages awarded to the Plaintiff/ Respondent by the trial court and substituted it with an award of Kshs. 300,000/= where the respondent had sustained the following injuries;
- i. cut wound on the forehead
 - ii. avulsion of the two 1st upper incisor teeth
 - iii. cut wound on the upper lip
 - iv. blunt injury to the neck
 - v. blunt injury to the chest
 - vi. blunt injury to both arms and
 - vii. bruises and blunt injury to the left knee.
32. Taking into consideration the comparable injuries and awards above, inflation rates and the discretion of the trial court, I find no reason to interfere with the award of general damages by the trial court. There is no dispute as to the award of special damages.
- I hereby dismiss the appeal with costs to the respondent.
- It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF DECEMBER 2023

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R. NYAKUNDI
JUDGE

