



REPUBLIC OF KENYA



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**Oduor v Achieng (Civil Appeal E026 of 2023)  
[2023] KEHC 27162 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27162 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E026 OF 2023  
RE ABURILI, J  
DECEMBER 20, 2023**

**BETWEEN**

**BERNARD OMONDI ODUOR ..... APPELLANT**

**AND**

**ROSA ATIENO ACHIENG ..... RESPONDENT**

*(An appeal arising out of the Judgement of the Honourable S. Temu  
in the Senior Principal Magistrate's Court at Nyando delivered  
on the 7th February 2023 in Nyando SPMCC No. E168 of 2017)*

**JUDGMENT**

**Introduction**

1. The appellant herein Bernard Omondi Oduor was sued by the plaintiff Rosa Atieno Achieng for general and special damages for injuries sustained by the respondent following a road traffic accident that occurred on the 12<sup>th</sup> July 2017 along the Ahero – Kisumu road while she was travelling as a fare paying passenger in motor vehicle registration no. KCG 182V where the said motor vehicle lost control and rolled off the road leading to the injuries sustained by the respondent.
2. The appellant file his defence denying liability and attributed the occurrence of the accident to the negligence of the respondent.
3. This suit was part of a series before the trial court including Nyando SPMCC No. 171 of 2017 and 168 of 2017. Liability was determined in SPMCC 166 of 2017 where the appellant was found 100% in negligence.
4. The trial magistrate in her judgement awarded the respondent general damages of Kshs. 80,000 and special damages of Kshs. 2,000 as well as costs of the suit.



5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 10<sup>th</sup> February 2023 on the 17<sup>th</sup> February 2023 raising the following grounds of appeal:
- a) That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the defendant without considering the circumstances of the case.
  - b) That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the defendant whereas the police abstract was only marked for identification by the plaintiff and never produced the same to confirm he was involved in the accident.
  - c) That the learned trial court erred in failing to sufficiently appreciate that it was not open to him to rely upon documents marked for identification but not produced as evidence.
  - d) That the learned trial magistrate erred in law and in fact in finding in favour of the respondent against the appellant when there was totally no credible evidence or proof of negligence on the part of the appellant.
  - e) That the learned magistrate erred in law and misdirected himself to the extent and value of the respondent's injuries and thereby erred in law in his assessment of damages as there was no treatment documents produced by the plaintiff.
  - f) That the learned resident magistrate erred in law and in fact in failing to find that the special damages pleaded had not been specifically proved as provided for by the law.
  - g) That the learned magistrate erred in assessing damages and failed to apply the trite principles in awarding damages and especially on general damages and comparable awards for analogous injuries.
  - h) That the learned trial magistrate erred in fact and in law and in failing to consider the appellant's submissions on both liability and quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on quantum.
6. The parties filed written submissions to canvass the appeal. However, it appears that the appellant only filed submissions in Civil Appeal E028 of 2023 that was part of this series alongside Civil Appeal E027 of 2023 whereas the circumstances of all the three cases as far as the appeal is concerned are slightly different. This is because in HCCA E028 of 2023, the plaintiff was a minor and no witness testified in that case for the minor on liability unlike in this case and in HCCA E027 of 2023 where the plaintiffs were adults and they testified on their own behalf on how the accident occurred.

### **The Respondent's Submissions**

7. It was submitted that the appellant failed to call a witness in support of his case and now seeks to retry his case afresh. The respondent submitted that the findings of the trial magistrate were within range in every respect and were based purely on evidence and material placed before the trial magistrate.
8. The respondent herein submitted that the instant appeal was devoid of merit and was designed to frustrate the respondent from enjoying the fruits of his judgement and thus ought to be dismissed.

### **Analysis and Determination**

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok*



eKLR, 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 reanalyze 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.”

10. Thus, 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 *Mkuba 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.”

11. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, it appears to this court that the issues that are for its determination are:
- i. Whether or not the finding on liability against the appellant at 100% was fair and reasonable in the circumstances of this case.
  - ii. Whether or not the award of quantum was unjustified in the circumstances of this case so as to warrant interference by this court.
12. The above two issues are discussed and determined herein below.

### **Liability**

13. On liability, In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

14. That was the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principles.
15. The law is clear that he who alleges must prove. The question therefore is whether the respondent herein discharged the burden of proof that the appellant was liable in negligence for the occurrence of the accident wherein the respondent was allegedly injured. The standard of proof required in civil cases is that of on a balance of probabilities.
16. The respondent testified as PW1 stating that she was a passenger in the suit motor vehicle wherein she had fastened her seat belt. She testified that the said vehicle was being driven very fast and it started going in a zig zag manner and eventually caused the accident. It was her testimony that she was treated at APS Dispensary and that she eventually managed to establish that the appellant owned the suit motor vehicle. The respondent was firm in cross-examination and reiterated her testimony in chief.



17. PW2 Hamisi Benard testified that he examined the respondent at Migosi City Medical Clinic on the 2.8.2017 and prepared a medical report and further noted that the respondent had sustained the following injuries:
- i. Neck
  - ii. Chest
  - iii. Back
  - iv. Left/Right hands
18. PW2 classified the injuries as soft tissue injuries.
19. The appellant did not call any witness in support of his defence where he attributed the occurrence of the accident to the negligence of the respondent. Where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that:
- “In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.
20. The fact that a defence is held as mere allegations in no way lessened the burden on the plaintiff to prove her case. The court in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR the court stated:
- “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.
- (See *Kirugi and Another v Kabiya and Others* [1983] e KLR).
21. Thus, respondent, despite the absence of evidence from the appellant, was obligated to prove her case on a balance of probabilities. In this case, the respondent was only a passenger in the appellant's motor vehicle. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident unless it is demonstrated on how negligent she was say, jumping out of the motor vehicle or hanging on the said motor vehicle while it is in motion. See *Rosemary Wanjiku Kungu –Vs- Francis Mutua Mbuvi & Another* (2014) eKLR. Further to this, the respondent testified, and this was not controverted by the appellant even in cross-examination, that she had fastened her seatbelt and that the suit motor vehicle was being driven in a speeding manner so as to cause it to zig zag on the road.
22. Accordingly, the respondent passenger cannot be held liable for occasioning or contributing to the occurrence of the accident. I thus find no reason to interfere with the trial court's finding on liability.



## Quantum

23. Regarding the circumstances under which an appellate court will disturb a lower court's assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself 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 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.”

24. 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.”

25. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

26. The respondent testified that she sustained injuries to the head, neck, chest and back. The same was corroborated by the testimony of PW2, Hamisi Benard who testified that he examined the respondent at Migosi City Medical Clinic on the 2.8.2017 and noted that the respondent had sustained the following soft tissue injuries;

Neck

Chest

Back

Left/Right hands

27. PW2 testified that he prepared a medical report dated 2.8.2017 which he produced as PEX7. However, the said report was signed by Dr. Okombo and not PW2.

28. The law as I understand it is that a document can only be produced by its maker except with leave of court and the circumstances prevailing under section 33 of the *Evidence Act* being established. PW2 alleged testified that he aided in examination of the respondent leading to the preparation of the aforementioned medical report and that Dr. Okombo only signed the said document. However, no evidence has been adduced in support of this allegation. It was thus the respondent's obligation to call Dr. Okombo to produce the aforementioned medical report as it was his signature that was on the



- report especially given that PW2 did not say that the doctor was unavailable and could not be called to testify and produce the said medical report.
29. That aside, I note that the appellant did not object to the production of the medical report and further, the non-production or lack of a medical report is not fatal to a case where compensation is being sought for injuries sustained following a motor vehicle accident.
  30. I have considered the injuries sustained by the respondent. In recent matters with comparable injuries, the Courts have held as follows:
  31. In *Jyoti Structures Limited & another v Truphena Chepkoech Too & another* [2020] eKLR, the Respondent had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at Kshs. 250,000/=. For the Respondent who had sustained bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand, general damages were assessed at Kshs. 200,000/=. On appeal, the court set aside both awards and substituted them with Ksh. 125,000/= each.
  32. In the case of *Maimuna Kilungwa v Motrex Transporters Ltd* [2019] eKLR Makeni Civil Appeal No. 11 of 2017, the court awarded Kshs. 125,000/= for injuries to the neck, left ear and left shoulder.
  33. Similarly, in the case cited by Counsel for the Appellant, Civil Appeal No. 54 of 2016: *Ndung'u Dennis v Ann Wangari Ndirangu & another* (2018) eKLR where the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands, the trial court awarded Ksh. 300,000/= which was reduced to Ksh. 100,000/= on appeal.
  34. In *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR the Plaintiff sustained blunt injury to the right shoulder and a blunt injury to the right big toe. He was treated as an outpatient and was put on painkillers. The trial court assessed general damages for pain and suffering in the sum of Ksh. 120,000/- and this was affirmed by the High Court.
  35. In the case of *Ndungu Dennis v Ann Wangari Ndirangu & Another* (2018) eKLR, Joel Ngugi J. awarded Kshs. 100,000/- for soft tissue injuries to the lower right leg and soft tissue injuries to the back (trunk). In the case of *Philip Musyoka Mutua -Vs- Mercy Ngina Syovo* (2018) eKLR, Edward M Muriithi J. awarded Kshs. 120,000/- for injuries to the lower limbs and right knee.
  36. Taking into account the cases above, I find that the award by the trial court was within the comparable awards for similar injuries and as there was no cross appeal, I shall not interfere with that award.
  37. On special damages, the respondent pleaded special damages of Kshs. 2000 but only provided receipts amounting to Kshs. 1,500. The law on special damages being specifically pleaded and strictly proved is well settled. Accordingly, I interfere with the trial court's award on the same and set aside the award of kshs 2000 and substitute it with an award of Kshs. 1,500 proved.
  38. The upshot of the above is that I hereby dismiss the appeal challenging liability and quantum of general damages awarded to the respondent and only set aside the trial court's judgement of the 7<sup>th</sup> February 2023 on the award of special damages of kshs 2,000 and substitute it with kshs 1,500 as proved.
  39. I award the respondent costs of the appeal assessed at kshs 20,000.
  40. General damages shall earn interest at court rates from date of judgment in the lower court until payment in full. Special damages shall earn interest at court rates form the date of filing suit until payment in full.



41. Final orders:
- a. Liability 100% against the appellant
  - b. General Damages Kshs. 80,000
  - c. Special Damages Kshs. 1,500
  - d. Costs of the appeal Kshs 20,000
42. File closed.
43. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023**

**R.E. ABURILI**

**JUDGE**

