



REPUBLIC OF KENYA



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**Oduor v GOO (Civil Appeal E027 of 2023)
[2023] KEHC 27018 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E027 OF 2023
RE ABURILI, J
DECEMBER 20, 2023**

BETWEEN

BERNARD OMONDI ODUOR APPELLANT

AND

GOO RESPONDENT

*(An appeal arising out of the Judgment 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 respondent GOO for general and special damages for injuries sustained by the respondent following a road traffic accident that occurred on the 12th July 2017 along the Ahero – Kisumu road wherein the respondent was a fare paying passenger in motor vehicle registration no KCG XXXV, where the said motor vehicle lost control and rolled off the road leading to the injuries sustained by the respondent.
2. In his defence, the defendant denied 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 166 of 2017. Liability was determined in SPMCC 166 OF 2017 and the trial court found the appellant to be 100% liable for the accident.
4. The trial magistrate in his judgement awarded the respondent general damages of ksh 100,000 and special damages of ksh 2,000.



5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 10th February 2023 on the 17th 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 but the appellant only filed submissions in Civil Appeal EO28 of 2023 that was part of this series alongside Civil Appeal E026 of 2023 whereas the circumstances of all the three cases are slightly different especially on the injuries that each of the respondents in the series files sustained and the fact that in HCCA E028 of 2023, the plaintiff was a minor and no evidence was tendered on disputed liability by the next friend or other witness.

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, keep 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. In addition, 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 *Mkubee 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, I find that the issues for determination are:
- i. Whether or not the apportionment of liability 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 issues are discussed below:

Liability

13. On liability, in *Khambi and Another v Mabithi 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 principle.
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 plaintiff minor was allegedly injured.
16. The respondent testified as PW1 stating that he was a passenger in the suit motor vehicle wherein he had fastened his seat belt. He testified that the said vehicle was being driven very fast and started going in a zig zag manner and eventually caused the accident. It was his testimony that he was treated at Aga Khan Hospital and that he eventually managed to establish that the appellant owned the suit motor vehicle. The respondent was firm in cross-examination and reiterated his testimony.



17. PW2 Hamisi Benard 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 injuries;
- i. Head Injuries with a cut wound
 - ii. Injury to the neck
 - iii. Chest
 - iv. Back
18. In cross-examination, he stated that he had not produced the treatment notes used in preparing the report.
19. The appellant did not call any witness in support of his defence case. 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 1st 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 lessens 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 in unchallenged or not.
- (See *Kirugi and Another v Kabiya and Others* [1983] eKLR).
21. The respondent was obligated to prove its case on a balance of probabilities, notwithstanding the fact that the appellant did not adduce any evidence in rebuttal.
22. 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 – See *Rosemary Wanjiku Kungu v Francis Mutua Mbuvi & Another* (2014) eKLR. Further, the respondent testified, and this was not controverted by the appellant even in cross-examination, that he had fastened his 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.
23. Accordingly, the respondent cannot be held liable for occasioning the accident. I thus find no reason to interfere with the trial court's finding on liability.



Quantum

24. 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.

25. 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.”

26. In *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal no 6 of 2017 [2018] eKLR the court 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.”

27. The respondent testified that he sustained injuries to th 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 injuries;

Head Injuries with a cut wound

Injury to the neck

Chest

Back

28. PW2 testified that he prepared a medical report dated 2.8.2017 and produced the same as PEX7 however the said report was signed by Dr. Okombo and not PW2.

29. The law as I understand it is that a document can only be produced by its maker. PW2 alleged to have aided in examination of the respondent leading up to the preparation of the aforementioned medical report and that Dr. Okombo only signed the said document. However, no evidence was 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 production of the



- medical report. Nonetheless, I observe that the appellant did not object to the production of the medical report.
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 for a Respondent that had sustained blunt injury to the head, neck, chest, back, both thighs, the trial court assessed general damages at ksh 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 ksh 200,000/=. On appeal, the court set aside both awards and substituted them with ksh. 125,000/= each.
32. In *Maimuna Kilungwa v Motrex Transporters Ltd* [2019] eKLR Makueni Civil Appeal no 11 of 2017, the court awarded ksh 125,000/= for injuries to the neck, left ear and left shoulder.
33. Similarly, in the matter referenced 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, Prof Joel Ngugi J. awarded ksh 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 v Mercy Ngina Syoyo* (2018) eKLR, Edward M Muriithi J. awarded ksh 120,000/- for injuries to the lower limbs and right knee.
36. Taking a cue from the cases above, I find no reason to interfere with the trial court's award as it falls within the range of comparable awards.
37. On special damages, the respondent pleaded special damages of ksh 2000 and provided receipts of the same. The same is thus upheld.
38. The upshot of the above is that I find no reason to interfere with the judgment of the trial court both on liability and on quantum. I find this appeal is devoid of merit and is hereby dismissed with costs to the respondent assessed at ksh 20,000 to the respondent.
39. This file is closed.

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

R.E. ABURILI

JUDGE

