



REPUBLIC OF KENYA



**Kidiavayi v Omutimba & another (Civil Appeal E060 of 2023)
[2023] KEHC 26763 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E060 OF 2023
SC CHIRCHIR, J
DECEMBER 19, 2023**

BETWEEN

GAYNUT MULENGWA KIDIAVAYI APPELLANT

AND

RAMADHANI OLUNGA OMUTIMBA 1ST RESPONDENT

PATRICK MALALA 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. G.A
Ollimo SRM delivered on 6/4/2023 in Butere PMCC no 23 of 2020)*

JUDGMENT

1. The 1st respondent sued the appellant seeking for damages for injuries sustained as a result of a road traffic accident which occurred on 20th December 2019 along Mumias – Kakamega Road between motor vehicle Reg. No KBP 277 X and a Motorbike. The first respondent was a pillion passenger in the motorbike and the 2nd respondent was the Rider.
2. In its judgment, delivered on 6.4.2023, the trial court found the Appellants fully liable for the accident and awarded the 1st Respondent Ks. 3,000,000 in general damages.

Memorandum of Appeal

3. The appellant was aggrieved by the Judgment and proffered this Appeal, while setting out the following grounds:
 1. The learned magistrate erred in law and in facts in disregarding the evidence of the appellant's witness and gave undue weight to the evidence of the 1st respondent and police officer who did not produce the police OB report or police file.



2. The learned magistrate erred in law and in fact in failing to evaluate and make a determination to the effect that the testimony of the 1st respondent was not credible owing to the glaring contradictions between his testimony and the pleadings filed by the third party in Mumias MCCC 29 of 2000 yet both were on the same motorcycle.
3. The learned magistrate erred in law and in fact by failing to find that the 2nd respondent caused or materially contributed to the accident.
4. The learned magistrate erred in law and fact by holding that the 1st respondent had proved his case to the required standard of proof against the appellant.
5. The learned magistrate erred in law and fact by assessing damages excessively and contrary to well-known principles and authorities.
6. The learned magistrate erred in law and fact in finding that the appellant was 100% liable which is contrary to the evidence on record.
7. The learned magistrate erred in law and in fact in finding that appellant testimony against the third party (the 2nd respondent) was uncontroverted and therefore the respondent's case against the said third party was proved.
8. The learned magistrate erred in law and fact by failing to give weight to consider and fathom the appellant's written submissions and authorities before her.
9. The learned magistrate erred in law in awarding costs of the suit to the Respondent.
4. The Appellant prays that judgment of the trial Magistrate be set aside ; that the suit against the appellant in the lower court be dismissed in its entirety; that judgment be entered on liability at 100% in favour of the 1st respondent as against the 2nd respondent; that the court re-assess and reduce damages assessed by the lower court and finally, that the costs of the appeal and lower court be borne by the respondent.
5. The appeal was canvassed by way of written submissions.

Appellant's submissions

6. The Appellant submits that the court was presented with the evidence of the 1st respondent and the appellant only, since the 2nd respondent (third party) never testified.
7. It is further submitted that the trial court was faced with the two varying versions of how the accident occurred and the trial court favoured the respondent's evidence even when the Appellant's evidence was more plausible .
8. The Appellant has faulted the evidence by PW2 stating that he was not a credible witness since he did not produce any police file, sketch or photographic evidence from the accident scene. The Appellant relied on the case of David Kajogi M'Mugaa versus Francis Muthomi (2012)eKLR to buttress his submission to the effect that the testimony of a police officer is not binding on the court.
9. The Appellant proposes a sharing ratio of 50:50 apportionment of liability between the Appellant and the 2nd respondent.
10. On the quantum, the appellant submits despite the court setting out the guiding principles , the award was excessive.



11. The Appellant further submits that whereas the injuries sustained by the 1st respondent were serious, there was no permanent disability; that the medical report was prepared a month after the accident and the said report could not have been a good indicator of the injuries sustained.
12. The Appellant asserts that the 1st respondent was not in need of crutches or wheel chair and there was no prayer for any future medical expense and that the general damages of Kshs. 3,000,000/= was in excess. In support of their claim, the appellant had relied on the case of David kimathi Kaburu versus Dionisius Mburunga Itirai (2017) and Florence Njoki Mwangi versus peter Chege Mbitiru (2014).
13. It is the Appellant's final submission that the trial court was only guided by the authorities of the 1st respondent, and disregarded those of the appellant.

1st Respondent's submissions.

14. The 1st respondent submits the finding on liability was based on evidence as presented and the trial court should not be faulted in that regard.
15. On the evidence of PW2, the 1st respondent submits that the appellant had the opportunity to recall the witness and request to be supplied with the sketch map of the scene and the police file which he failed and faulted him for not calling for the said documents.
16. On quantum, it is submitted that the 1st respondent suffered the following injuries;
 1. Fracture of the left clavicle
 2. Contused right lung
 3. Open fracture of the right humerus
 4. Fracture of the right ulna
 5. Fracture of the right radius
 6. Fracture of the right femur
 7. Cut wound to the right knee
 8. Abrasion to the right shin
17. He averred that evidence show that he was admitted in hospital from 21/12/2019 to 9/1/2020 and had to undergone reconstructive surgeries.
18. He submits that the award of ksh. 3,000,000 on general damages of was fair . He relied on the following decided cases to support his submissions:- Penina waithira kaburu vs. L.P (2019) eKLR;- David Kimathi Kaburu vs. Dionisus Mburugu Itirai (2017) eKLR;- Florence njoki Mwangi vs. peter Chege Mbitiru (2014) eKLR.
19. He further submits that the authorities quoted by the appellant were of less severe injuries compared to the injuries sustained by the 1st respondent
20. It is further submitted that the medical report by Dr. Andai confirms that the 1st respondent had sustained permanent disability and that he is yet to heal from the injuries.

2nd Respondent submissions

21. The 2nd respondent in his submission raised 2 issues for determination which are;



- a. Whether the 2nd respondent (3rd party) was liable in any way for the accident
 - b. Who should bear the costs of the appeal
22. On whether the 2nd respondent was liable for the accident, the 2nd Respondent submits that the evidence of the 1st respondent and the police clearly showed that the accident occurred on the lawful lane of the motorcycle; that the police officer who testified was the investigations officer and who told the court that he was privy to the circumstances of the accident.
 23. On who should bear the costs of the appeal, they relied on section 27 of the [civil procedure Act](#) and that the court should award the costs to the respondents.

The summary of evidence

24. PW1 was the first Respondent herein. He adopted his witness statement dated 5.3.2020 as his evidence in chief. He testified that on the material day, he was a pillion passenger on a boda boda along the Mumias-kakamega road, heading towards kakamega direction. He recalled that there were two motor vehicles approaching from the opposite direction ; that the second vehicle tried to overtake the first vehicle and in the process collided with the motor bike. They fell off the road.
25. He blamed the driver of the motor vehicle KBP 277 X for overtaking the other vehicle when it was not safe. He stated that he was still undergoing treatment.
26. On cross examination by Mr. Wambani, he stated that the accident happened on 20.12.2019 at around 2.00pm; that it was not raining ; that he was the only pillion passenger and was wearing a reflector jacket and a helmet
27. PW2 was PC Moses Euroi. He told the court that the accident occurred on 20.12.2019 and was between motor vehicle KBP 277X and a motor cycle registration number KMEF 764 E. He told the court that he was the investigating officer; that the plaintiff was a pillion passenger on the motorcycle that was driven by the 2nd respondent. He stated that the motor vehicle failed to keep to its lane, that it crossed to the motor cycle lane resulting in the collision. He blamed the motor vehicle for the accident.
28. On cross examination, he told the court that to he visited the scene of the accident. He did not have the police file or a copy of the occurrence book (OB). He produced the police abstract. He stated that the matter was still under investigation and that no one had been charged with a traffic offence in relation to the accident.
29. DW1 was Joash Okecha Nyonje, adopted his statement dated 19.10.2020 as his evidence -in- chief. He told the court that on the material date, he was driving from kakamega headed to Mumias and that there was a motor cycle ahead of him. The said motorcycle turned right to join a feeder road on the right side of the road. The 2nd Respondent who was approaching from the opposite direction swerved to avoid hitting the motorbike that had turned. In the process, the 2nd Respondent motorbike swerved to his lane and hence the collision. He denied that he was overtaking another vehicle, insisting that there was no Motor vehicle ahead of him.
30. He produced photographs of motor vehicle KBP 277X after the accident, photographs of scene of accident Dexh 3, a copy of the police abstract and summons and pleadings from SPMCC 29 of 2020 and a certificate for the electronic evidence Dexh 7.
31. On cross examination, he confirmed that he was headed to mumias while the 2nd Respondent motor cycle was heading to the opposite direction. He stated that the motor cycle fell on the right side of the road as one faces Mumias; that the point of impact was on the left lane



32. He stated that he tried to avoid the collision; that the motorcycle was being driven at a high speed and that there was nowhere to swerve to .

Determination

33. This is a first appeal and the role of this court is to review the evidence afresh , re- evaluate it and arrive at its own finding, without ignoring the findings of the trial court . (see *Selle & Ano vs Associated Motor Boat Co. Ltd & others*(1968) E.A 123)

Liability

34. On liability the only issue for determination is who was to blame for the Accident.
35. The 1st Respondent was a passenger in the motor cycle driven by the 3rd party and which motor cycle collided with the Defendants vehicle. He told the court that the Appellant's vehicle was overtaking another vehicle when it swerved to the motor bike's lane and hit them. They fell off to on their lawful lane, according to the Appellant's witness (DW1) .No attempts was made by the Appellant to discredit or interrogate this piece evidence during cross- examination.
36. The defence witness, when his turn came gave his own version of what took place. He told the court that in fact it is the Motor cycle that swerved to his lane in an attempt to avoid another motorbike which was making a right turn into a feeder road. He told the court even after witnessing an impending collision between the two motorbikes he did not break. Either the witness was admitting to an act of recklessness on his part or he was not being candid. Further if he was driving at a speed of 50 km/ hr as he stated, and the vehicle was in good condition as, again by his testimony, he ought to have slowed down . That is the expected reaction from a prudent driver.
37. While I agree with the Appellant that there were two varied versions of how the accident occurred, the Trial Magistrate heard both versions first hand, observed the witness's demeanour and made a choice on whom to believe. I have no reason to fault the magistrate.
38. Nevertheless, the point of collision, which would have shade light on who abandoned his lane would have been easily resolved by availing the sketch plan of the accident scene. The parties have cast blame on each other for the failure to produce this sketch plan.
39. However, it bears pointing out that the Appellant's case was against the third party, not the plaintiff. Once the Appellant shifted blame to the third party as he did, the Appellant bore the burden of proving negligence on the part of the third party. It was a mistake of the Appellant to think that the plaintiff, in the circumstances of this case, bore greater responsibility than him in proving negligence against the third party. The plaintiff never sued the third party. The burden was on the Appellant. The collision was between the vehicle and the motorbike. The 1st Respondent was a passenger. He played no role in the causation of the accident.
40. I have seen the photographs produced by the Appellant, but the photographs are not helpful in establishing the point of collision.
41. I find that the Appeal against the finding on liability is without merit, and I dismiss the same.

Quantum of damages

42. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms: "It is trite law that the assessment of general damages is



at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

43. The injuries suffered by the respondent are not in dispute. They are as indicated on paragraph 16 of this Judgement.

44. The guiding principles when assessing damages are well settled. In the case of *Morris Mugambi & Ano vs Isaiah Gituru* (2014) e KLR the court of Appeal held:

“..... We wish to state that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.”

45. In the case of *Florence Hare Mkaha Vs Pwani Tawakal Miwi Coach & Another; Mombasa HCCC NO. 85 of 2012*; the Plaintiff suffered a fracture of her right superior and inferior ramus, fracture of right acetabulum, fracture lateral Condyl of femur, dislocation of the left knee with tendon collateral ligament, skin grafting of the left leg and shortening of the leg by 4cm The claimant was awarded ks. 2.4 million.

46. In *Marsabit HCCC No. 9 of 2017 - Hussein Ali Shariff Alias Hussein Ali vs. A L L* (Minor suing through F T L, the Plaintiff sustained closed left humerus mid – shaft fracture, right clavicle medial end fracture, left calcaneal fracture, right superior and left inferior pelvic rami fracture, fracture left toe and chip fracture left upper central incisor. He complained of pain in the left humerus especially during cold weather and occasional low back pains on sitting for long and occasional ankle pain, scars on the incision wounds and chronic pain with a limping gait in the left foot especially during the long distances. The left ankle joint was not swollen or deformed and had pain free movement. The plaintiff was predisposed to post traumatic osteoarthritis. Permanent incapacity was assessed by Dr. Wambugu at 6%. The court revised the award of General damages to Kshs. 2,000.000/=

47. Taking into consideration the aforesaid decisions and matters inflation I still find that the award by the trial Magistrate to be on the higher side to warrant the intervention of this court.

48. Based on the same Authorities and taking into consideration inflationary trends, I consider an award of ksh. 2,500,000 a fair compensation.

49. In conclusion I hereby proceed to make the following orders:

- a). The Appeal Against liability is dismissed
- b). The lower court award of ks. 3,000,000 is hereby set aside and substituted with ksh. 2,500,000.
- c). The Appeal has been partially successful and consequently each party to meet own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER 2023.

S. CHIRCHIR

JUDGE

In the presence of :



E. Zalo- Court Assistant.

Ms. Kagoni for the Appellant

Mr. Wandallah fro the 1st Respondent

Mr. Omwani for the 2nd Respondent

