



REPUBLIC OF KENYA



KENYA LAW
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**Ogero & another v Osoro (Civil Appeal 15 of 2019)
[2022] KEHC 641 (KLR) (17 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL 15 OF 2019
SN MUTUKU, J
FEBRUARY 17, 2022**

BETWEEN

BERNARD AMENYA OGERO 1ST APPELLANT

PETER KINYANJUI 2ND APPELLANT

AND

NICODEMUS ORANGI OSORO RESPONDENT

*(Being an appeal from the Judgment of the Honorable Court delivered on 21st May, 2019
at the Chief Magistrate's Court at Kajiado by Hon B. Cheloti; Senior Resident Magistrate.)*

JUDGMENT

Background

1. The Respondent sued the Appellants in the lower Court seeking general and special damages arising from an accident that occurred on 3rd July 2018 along Kitengela/Isinya Road involving the Respondent's Motor Cycle registration number KMDC 452E and the Motor Vehicle Registration Number KBM 989U belonging to the 1st Appellant and driven by the 2nd Appellant. The Respondent blamed the 2nd Appellant for recklessly and negligently driving said Motor Vehicle as a result of which the Respondent sustained bodily injuries and damages to his motor cycle. He held the 1st Appellant vicariously liable for the said accident.
2. The trial court found the appellants liable and awarded the Respondent Kshs 400,000 general damages, Kshs 6,930 special damages and Kshs 10,695 for the repair of the motor cycle. The court also awarded the Respondent costs of the suit with interest at 12% from the date of the decree.



Memorandum of Appeal

3. The Appellants were aggrieved by the trial court's decision and lodged this appeal. In their Memorandum of Appeal dated 3rd June, 2019, they have raised four (4) grounds of appeal as follows:
 1. That the learned Magistrate erred in law and in fact in awarding the Respondent damages when they had failed to prove his particulars of negligence against the Appellant.
 2. That the learned Magistrate erred in law and in fact in finding that the Respondent was entitled to special damages that were too high in view of the fact that they were not proven by the Plaintiff.
 3. That the learned Magistrate erred in law and in fact in holding the Appellants 100% liable and that the Respondents had proved their case on a balance of probabilities which finding was against the weight of the evidence on record.
 4. That the learned Magistrate erred in law and in fact in finding that the Respondent was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff.
4. It is proposed to ask court for the following Orders that;
 - a. This appeal be allowed with costs.
 - b. The judgment delivered on 21st May, 2019 by Hon. B. Cheloti, Senior Resident Magistrate be set aside.
 - c. That this Honorable Court be pleased to dismiss the suit based on the facts of the case and evidence on record as submitted by the Appellants.
 - d. That cost of this appeal be borne by the Respondents.
5. In addition to the Appeal, the Appellants filed Notice of Motion dated 3rd June 2019 seeking stay of execution pending hearing and determination of the application and the appeal. On the 28th October 2019 both parties entered into a consent compromising the Notice of Motion on the terms that stay of execution do issue on condition that the Applicants deposits Kshs 500,000 in an interest earning account in the joint names of the advocates for the parties with 45 days from the date thereof and in default the respondent be at liberty to execute.
6. Directions were given that the appellants to file a record of appeal and serve on the Respondent. Further that this appeal be canvassed by written submissions. Parties were allowed time to exchange written submissions.

Appellants' Submissions

7. The Appellants filed their submissions dated 12th March, 2021. They submitted on various issues. On the issue of evidence, it was submitted that while it is not disputed that there was an accident involving the Respondent's motor cycle and the Appellants' motor vehicle, the Respondent did not prove negligence on a balance of probabilities on the part of the Appellants. They submitted that the evidence adduced must support existence or non-existence of facts in issue and if not so, then the party with the burden of proof should fail. It was submitted that all Respondent's documents were marked for identification but were not produced in evidence. It was submitted that the trial magistrate erred in finding the Appellants liable because failure to produce the documents was a fatal error for the Respondent.



8. The Appellants cited *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR to support their submissions that the a document that is only marked for identification but not produced as an exhibit does not form part of the evidence that is properly before the court and that the court cannot use such a document as evidence. It was submitted that the Respondents documents should not be considered as evidence and that this court should find that the trial magistrate erred in principle in allowing the Respondents against the Appellants.
9. The Appellant submitted on the issue of quantum of damages that the Respondent sustained soft tissue injuries and that assessment of quantum of damages is discretionary but this discretion should be exercised judicially. The Appellants cited the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete*, Civil Appeal No 284 of 2001 [2004] eKLR where the Court of Appeal stated as follows:

...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 simple 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 wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived a figure so inordinately high or low as to represent an entirely erroneous estimate.”
10. It was submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and awarding Kshs 400,000 as general damages that is inordinately high and excessive. The Appellants cited *Maimuna Kilungya v Montrex Transporters Ltd* (2019) eKLR; *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR and *PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & another* [2018] eKLR which they said had comparable injuries to this case and in which the general damages awarded ranged between Kshs 50,000 to Kshs 350,000. It is submitted that compared to this case, an award of Kshs 100,000 would be adequate compensation.
11. The Appellants urged this court to set aside the judgment of the trial court, reassess the quantum based on the submissions of the Appellants herein. They also ask that the appeal be allowed with costs to them.

Respondent’s Submissions

12. The Respondent filed his submissions on 9th March 2021. It is his submission that the appeal herein lacks merit and should be dismissed; that the appellants did not call any witnesses at the trial to counter the Respondent’s evidence; that the Respondent proved the appellants’ negligence through his testimony in court which was corroborated by PW2 and that he produced documentary evidence, the police abstract, which showed that the driver of motor vehicle KBM 989U was blamed for the accident.
13. On the 2nd ground on special damages it was submitted that it is trite law that special damages must be specifically pleaded and proven and that the respondent specifically pleaded special damages in his plaint and produced receipts for the same. It was submitted that the Respondent produced and marked these documents as Plaintiff exhibit 4, 5, 6, & 7. The Respondent argued that the second ground of appeal should be dismissed as the Respondent has proved special damages.
14. On the 3rd ground it was submitted that the appellants did not tender any evidence to absolve them from any liability, that they didn’t call any witnesses nor produce any documents to counter the Respondent’s claim; that they didn’t even call the 2nd appellant herein who was driving the vehicle to



testify and that the police abstract which was marked as plaintiff exhibit 2 shows that the appellants' vehicle was to blame for the accident.

15. On the 4th ground it was submitted that the amount of Kshs. 400,000/- awarded as general damages was reasonable and commensurate with the injuries suffered by the Respondent. The Respondent relied on *Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi* [1998]eKLR where injuries suffered by the 1st and 3rd Plaintiff were similar to those of the Respondent herein and where the court awarded Kshs. 300,000/- and 350,000/- as general damages respectively. He further relied on the case of *Kara Roadways Limited v Peter Kivuva Nyamai* [2018] eKLR, where the Respondent in the above suit suffered multiple blunt injuries and where the court awarded him Kshs 175,000. He argued that in this case he suffered more injuries with multiple blunt injuries and a cut wound on his left leg.
16. It was further submitted that the Respondent produced a bundle of documents at the trial court to prove ownership of motor cycle KMDC 452E. They included receipts confirming purchase of the said motor vehicle from Varsha Auto parts, copy of his driving license, a certificate of insurance for the said motor cycle from Xplico Insurance Company limited and an accident report form duly filled at the said insurance company. They submitted that the Respondent proved his case at the trial and hence the appeal should be dismissed.

Analysis and Determination

- 17 This being a first appeal, I remind myself that it is the role of this court sitting as the 1st appellate court to re-evaluate the evidence tendered before the trial court and come up with its own independent finding. Section 78(2) *Civil Procedure Act* that provides that:

Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

18. The duty of the 1st appellate court to re-evaluate, re-consider and re-analyze the evidence adduced in the lower court is also stated in several authorities including the case of *Abok James Odera T/A Odera & Associates v John Patrick Muchira T/A Muchira & Co. Advocates* (2013) eKLR where the Court of Appeal stated that –

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-analyse 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.”

19. The Court of Appeal further summarized that duty in the case of *Kenya Power & Lighting Company Limited v E.K.) & another* (2018) eKLR as follows:-
 - a. “ First on first appeal, the court is under a duty to re-consider and re-evaluate the evidence on record and draws its own conclusions;
 - b. In re-considering and re-evaluating the evidence, the first appellate court must bear in mind and give the due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her,
 - c. It is not open to the first appellate court to review the findings of the trial court simply because it would have reached different results if it were hearing the matter for the first time”. See *Sake v Associated Motor Boat Company* (1908) EA 123.



20. I have taken time to read the record of appeal, specifically the proceedings and the judgment of the lower court. I have also read with care the submissions by both parties. The main contention in this appeal is the claim by the Appellants that the Respondent did not prove his case on a balance of probabilities. The Appellants fault the trial magistrate for finding them 100% liable and finding that the Respondent had proved his case to the required standard. The main issue is that the Respondent did not produce his documents in support of his case but only marked them for identification. Their main arguments centre on the issue of liability and the amount awarded as damages both general and specific.
21. From what can be seen on the record of the court, two witnesses testified for the Respondent. The Respondent, Nicodemus Orangi Osoro testified as the first witness while Police Constable Washington Akuom was the second witness. Led by learned counsel Ms Chebon, the Respondent gave his evidence. He testified and marked his documents as follows:

- i. Medical report from Top Care Hospital was marked as PMFI - 1.
- ii. Police abstract was marked PMFI - 2.
- iii. P3 Form was produced as PMFI-3
- iv. Report issued at the Kitengela Sub-County hospital and a bundle of documents were marked as PMFI - 4.
- v. Assessment report of the damages to his motor cycle was marked as PMFI- 5.
- vi. Report dated 6th August, 2019 prepared by Dr. Ndeti was marked as PMFI - 6.
- vii. Motor vehicle search was marked PMFI- 7.
- viii. Demand letter was marked PMFI-8.
- ix. Statutory notice to Direct line Assurance marked PMFI - 9.
- x. Copy of the motor cycle's log book and bundle of documents which were marked PMFI- 10.
- xi. Driving license was marked as PMFI-11.

My careful reading of the record of proceedings shows that the documents shown above were marked for identification but there is no indication that they were marked as exhibits although the record, in some instances, shows as follows:

A bundle of documents from Vashe Auto Pecks produced and marked as PMFI10.
My motor cycle insurance and a driving license marked as PMFI 11”.

22. The Respondent in his submissions is categorical that he produced these documents as exhibits. The record does not reflect that. As I have shown above, the record of the trial court is confusing in the manner the documents have been marked. With that kind of record, it is not clear whether the trial magistrate meant that the documents were produced as exhibits or just marked for identification. It is clearly confusing especially when the record shows that the trial court did not address the issue of these documents even in her judgment. The evidence of PC Washington Akuom testified as follows:

I have brought an extract of OB where the matter in question was reported and confirmed that it was reported. P3 issued to that effect and accident abstract given to the complainant. It is before the court and I wish to produce it as evidence in this case.” The record does not show how the learned trial magistrate marked that document although the witness was clear that he produced it in evidence.



23. With respect, the learned trial magistrate adopted a very casual way of recording evidence. With this casual manner of recording of the evidence, it could have been that the documents were wrongly marked for identification instead of marking them as produced as exhibits. If this was an oversight by the Respondent to produce his own documents as exhibits, the trial court would have surely picked it up in its judgment and comment on the failure of the Respondent to produce the documents or even find out on its own motion why the Respondent was not producing the documents as exhibits since there is no indication that anyone objected to their production.
24. The record of proceedings does not show anywhere where the Respondent and his witness were ever cross-examined about the documents he was relying on. It is my finding therefore, given the circumstances I have shown, that the Respondent produced his documents but the trial magistrate wrongly marked them for identification instead of exhibits. I find the learned trial magistrate at fault in this failure. It impacts on the Respondent's rights as a litigant.
25. The Appellants did not defend the case against them. They were represented at the trial and their counsel cross-examined the Plaintiff and his witness. To my mind the Appellants were not interested in adducing evidence. I cannot fault them for that. It was their choice and in any case, they do not raise any ground of appeal in that respect. The record shows that after the Respondent who was the Plaintiff closed his case, counsel for the Appellants informed the court that he too wished to close his case upon which the court directed the parties to file submissions to pave the way for the judgment. It is clear to me therefore that this case was not contested at the trial level. The driver of the motor vehicle No. KBM 989U did not testify and therefore the evidence of the Respondent on the liability of the Appellants is uncontroverted. It does not surprise me that the
26. Appellants are asking this court to, among others, re-assess the quantum of damages payable to the Respondent.
27. On the issue of negligence it is my finding that the Appellants have not adduced any evidence to counter that of the Respondent. Other than claiming that the Respondent did not produce his documents as exhibits, which issue I have addressed above, there is nothing else from the Appellants to controvert the evidence of the Respondent on who is to blame for the accident and the injuries suffered by the Respondent. On this point I uphold the findings of liability and hold the Appellants liable for the negligence that led to the accident resulting in the injuries suffered by the Respondent.
28. On the issue of quantum of damages payable, I have read the authority cited by the Appellants to the effect that assessment of general damages is at the discretion of the trial court and an appellate court is not justified in interfering with that quantum unless it is satisfied that the trial court applied the wrong principles. I have noted that the Respondent suffered soft tissue injuries as shown in the medical report prepared by Dr. Ndeti. The doctor's conclusion is that:
- Nicodemus suffered harm. He sustained soft tissue injuries of moderate severity which caused him pain, blood loss and suffering. Complete healing is anticipated with a residual scar on the left leg."
29. My considered view is that general damages awarded to the Respondent given comparative injuries in similar cases is on the higher side. I will therefore re-assess general damages downwards and award the Respondent Kshs 350,000 for general damages. The award in special damages remain as Kshs 6,930 for special damages and Kshs 10,695 for repair costs of the motor cycle. The interest of 12% per annum from the date of the decree also remains unchanged.



30. The upshot of this is that the appeal succeeds only in as far as revising the award of general damages downwards as I have done above. The appeal fails in all other aspects.
31. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 17 TH FEBRUARY 2022.

S. N. MUTUKU

JUDGE

