



REPUBLIC OF KENYA



**Mueni v Muthini (Civil Appeal 111 of 2018)
[2022] KEHC 227 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 111 OF 2018**

**MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

MUSUSYA PENNINAH MUENI APPELLANT

AND

NICODEMUS KASYULA MUTHINI RESPONDENT

*(Being an appeal from the judgment of Hon. A. Opanga (SPM) in Kangundo
Senior Magistrate's Court in PMCC No. 20 of 2016 delivered on 31/07/2018)*

JUDGMENT

Background:

1. The Plaintiff's Complaint dated 21st February, 2016 and filed in Court on 22nd February, 2016 the Plaintiff/ Respondent herein was on 21/05/2015 as a lawful pedestrian off the road at Joska area, Ruai when the motor vehicle registration number KBQ 128 P driven by defendant or her authorized agent/servant and/or driver negligently, carelessly and dangerously caused the said motor vehicle lose control and veered off the road knocking down the plaintiff causing the accident that seriously injured the Plaintiff/ Respondent.
2. As a result of the accident the Plaintiff/Respondent sustained serious injuries and was taken to Ruiru Hospital and was referred to Kenyatta National Hospital where he was admitted for about 2 months or so for treatment and is still undergoing treatment. As per the P.3 form filled in respect to the Respondent the doctor confirmed that he had suffered a fractured pelvis bone and a cut wounds to his ear.
3. The Plaintiff incurred expenses and special damages as a result of his injuries amounting to Kshs.82,836/-. He prayed for the general damages for pain and suffering and future medical expenses, special damages for kshs.82,836/- and costs of the suit.



Defense

4. The Defendant filed statement of defense dated 7th April, 2016 and filed in Court on 8th April, 2016. The Defendant denied that she was the registered owner and beneficial owner of the motor vehicle Reg. KBQ 128 P as alleged by the Plaintiff and put the plaintiff to strict proof thereof and stated that if any accident occurred at the place and date alleged (which is denied), the same was wholly caused by or substantially contributed to by the negligence of the Plaintiff. She also stated that no demand and/or notice of intention to sue have been served upon the defendant.

Evidence

5. The Plaintiff called three (3) witnesses in support of his case.
6. PW.1 Nicodemus Kasyula Muthini (The plaintiff) stated that on the 21st May, 2015 he was lawfully standing off the road at Joska area when the driver of the Motor vehicle KBQ 128P who was speeding veered off the road and knocked him down; that he was injured, lost consciousness and was taken to Kenyatta National Hospital by well-wishers and was admitted for 2 months, that he sustained injuries being cut wounds to his ear, bruises on both hands and a fractured pelvis. He reported the incident at Kangundo police station where he was issued with a P.3 Form which was filled at Kangundo District hospital and he produced a P.3 form.
7. PW.2 Dr. Ndeti stated that he was a doctor that he had examined the plaintiff and prepared a medical report in respect of the plaintiff which he produced as exhibit. The injuries the plaintiff sustained were Head injury with loss of consciousness, cut ear, bruises on both hands and both legs fractured pelvis.
8. Pw.3 No. 84370 PC Michael Abel Osoro stated that he was attached to Kangundo Traffic Base carrying out traffic duties. A report was made to the station on 21/05/2015 about an accident involving motor vehicle reg. no. KBQ 128P that had knocked down one Nicodemus Kasyula Muthini (PW.1), and he issued the plaintiff with a Police Abstract that he produced in court as exhibit.
9. The defence did not call any witness.

Judgment of the trial Court

10. The Trial Court in its judgment delivered on 31st July, 2018 as awarded the Plaintiff as follows:-Liability assessed equally at the ratio of 50:50General damages awarded kshs.1,300,000/-Special damages kshs.82,836/-Total Award kshs.732,836/-The Plaintiff will also have the costs of the suit with interest thereon.

Appeal

11. Aggrieved by the Trial Court judgment the Appellant herein filed her Memorandum of Appeal dated 27th August,2018 and filed in Court on 29th August, 2018 based on the following grounds:
 - (a) That the Trial Magistrate erred in both law and fact when she awarded a sum of kshs.1,300,000/- as general damages which amount is unreasonably excessive in the circumstances.
 - (b) That the Trial Magistrate erred both in law and fact in failing to consider the Appellants' submissions thus arriving a wrong finding.
12. The Appellant sought for the following orders:



- (a) That the Trial Magistrates award on damages set aside in its entirety and this court makes its own finding on the same.
- (b) That the costs of this appeal and the Court below be borne by the Respondent.

Cross Appeal

13. The Respondent was/is dissatisfied by the judgment of the Trial Court cross appealed on the following grounds;
 - (a) The Trial Court erred in apportioning liability to the Plaintiff despite all facts and evidence exonerating the Plaintiff from liability.
 - (b) The Trial Court erred and apportioned liability against the Cross Appellant Nicodemus Kasyula Muthini and the Defendant did not call any witness in their case.
 - (c) The Trial Court failed to consider submissions of the plaintiff and arrived at wrong decision on liability.

Appellant Submissions:

14. The Appellant submitted that amount awarded at the Trial Court is inordinately high and further the Trial Court did not consider the defendants' submission on quantum. Reference was made in the Case of *Kemro Africa Limited t/a "Meru Express Services" & Another –vs- Lubia & Another* [1985] eKLR Court of Appeal in Nairobi it was stated 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, in 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

15. The Appellant further submitted that the injuries sustained by the Respondent did not occasion any form of permanent incapacity to the Respondent or prevent him from engaging in gainful employment and therefor submitted a sum of kshs.600,000/- as general damages and relied on the decision of the Wakiaga – J in *Anthony Keriga Mogesi –vs- Florence Nyomenda Tumbo* [2015] eKLR where the Judge reduced an award of Kshs.1,500,000/- to Kshs.600,000/- for open book pelvic fracture, cut wound on left upper eye lid, facial cut wound, contusion to lower limbs and cut wound on sacroiliac joint which injuries were more severe compared to the instant case. The judge in his judgment relied on the following cases of *Julius Kiprotich –vs- Eliud Mwangi Kiholia* Nakuru High Court Civil Case No. 207 of 2004 where Kimaru J awarded Ksh 450,000/- fracture of pelvic bone internal abdominal injuries and head injuries and *Kiru Tea Factory & another –vs- Peterson Wathaka Wanjohi – Nairobi High Court Civil Appeal No. 1045 of 2004* where Waweru J awarded Ksh 800,000/- for Plaintiff who sustained degloving injury on right hand, fracture of radius and ulna bone, fracture of right iliac bone and pelvis.



Respondent Submissions

16. The Respondent submitted that on whether the respondent is entitled to the general damages of KShs.1,300,000/- the case of *Butt –vs- Khan* [1981] KLR 349 when it held as per law, J.A that:-

“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 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.”
17. The Respondent submitted that he had fractured pelvis and that his left ear was totally severed the evidence that was never challenged by the Appellant and that no doctor from the Appellant ever testified to state that the Respondent did not suffer the injuries as averred by the Respondent. The Trial court was guided by the Respondent evidence and demeanor in arriving at the award given to the Respondent considering this his life was forever changed by the accident.
18. As to whether the defendant’s submissions were disregarded, the Court of Appeal stated in *Joshua Shitawa –vs- Kishan Builders Limited* Eldoret Civil Appeal No. 32 of 2012 [2015] eKLR that final submissions are only for the guidance of the Court hence not a requirement that each and every submissions or authority tendered should be analyzed in the judgment.
19. The Respondent also cited the following the case of Marsabit HCCA 2 of 2019 *board of Trustees Anglican church of Kenya Diocese of Marsabit –vs- Naomi Galma Galgalo* [2019] eKLR and Nakuru HCCA 18 of 2013 *Jericho Furniture Ltd T/A George Wood funeral society –vs- Norah Chepngetich Bett* [2015] eKLR

Determination

20. The Court considered pleadings submissions and evidence on record by parties through respective Counsel. The issues for determination arising from both appeals are with regard to liability and quantum.
21. This being a first appellate court, the Court’s role is well captured in the case of *Selle vs. Associated Motor Boat Co* [1986] EA 123 as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
22. In *Gitobu Imanyara & 2 Others vs AG* (2016) eKLR quoted in *Jackson Kaio Kivuwa vs Penina Wanjiru Muchene* [2019] eKLR to buttress the point;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though



it should always bear in mind that it has either seen nor heard the witness and should make due allowance in that respect.”

Liability

23. The evidence presented before the Trial Court by the Plaintiff was that on 21/5/2015, the Plaintiff was walking along Joska area, the motor vehicle lorry Reg KBQ 128 P veered off the road and he was hit and lost consciousness. He found himself at Kenyatta Hospital, he was treated for 3 months he suffered head injury, fracture of the pelvis, bruises on hands and his ear was cut out. He was treated and produced medical records as exhibits PEX2 in Court. He went to Kangundo Police station and was issued with a P3 Form which was filled and Police Abstract was filled in too and both were produced as PEX 3 & 4. The Plaintiff's Advocate conducted search and obtained copy of records as PEX 5. The Demand Notice and Statutory Notice were issued and produced as PEX 6 & 7 and the 2 Medical Reports were produced as PEX 8 & 9. He told the Court he paid through his family the medical bills totaling Ksh 76836/-.
24. The Doctor and Traffic Officer testified on what task each undertook with regard to the case.
25. The Defendant through Counsel on 3/4/2018 opted not to call any witness and closed its case.
26. The Trial Court in the Judgment on liability took the view,

“ the Defendants submitted that the Plaintiff contributed to the accident because he alighted from another truck and came to the opposite lane without checking. No eye witness was called to give evidence and neither did the Investigating Officer who visited the scene of the accident testify as to who was to blame for the accident. No sketch drawing of the scene of the accident was produced as exhibit to show the point of impact. As is it is a matter still pending investigations and no one was blamed for the same I stand persuaded by the Defense submissions and apportion liability equally in the ratio 50:50.”
27. The court in *Khambi & Another vs. Mahithi and Another* [1968] EA 70, 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”
28. In the instant case, the Defendant /Appellant was represented throughout the Trial and cross-examined the Plaintiff the Doctor and Traffic Officer. When it came to the Defense case the Defendant opted not to tender any evidence by calling any witness to testify. No reasons were advanced to the Trial Court to consider either on availability of witnesses or extension of time due to special circumstances. The Defendant opted not to tender any evidence.
29. Therefore, at this stage, the plaintiff's case remained uncontroverted as there was/is no evidence to contradict, challenge the Plaintiff's case.



30. The Defendant by the written submissions filed on 8/5/2018 introduced evidence by the Defendant at Pg 2 as follows;

“The Defendant maintains that it was the Plaintiff who caused the accident by crossing the road without ensuring that it was safe to do so and that the driver of KBQ 128P was not negligent while driving the said motor vehicle.”

31. The evidence outlined above was not tendered in the Court proceedings but for the first time in the Written Submissions. With respect written submissions are not prepared and filed in Court to introduce new evidence that was not produced in Court proceeding but they are a summary of evidence on record of a party's case and claim and the applicable statute and case law to aid or persuade the Trial Court on the just and fair decision/outcome of the case. Any new evidence introduced in the Written Submissions is expunged from the record or not considered as to do otherwise would prejudice the other party that had no notice of the evidence and opportunity to interrogate and/or rebut it and would be against the tenets of fair hearing provided by Article 50 of CoK 2010.

32. This Court notes that the Record of Appeal contains the Written Statement of Collins Katuu Mutisya the driver of Motor vehicle KBQ 128P and deposed that the accident was caused by the carelessness of the Plaintiff who failed to watch out for oncoming vehicles and alighting a vehicle while the same was on the road and in motion.

33. The typed Court proceedings confirm that the Defendant opted not to call any witness to testify in Court. So where did the evidence of the Plaintiff's carelessness and negligence come from? Why was he not allowed the opportunity to cross-examine the author of the said evidence the driver of motor vehicle KBQ 128P?

34. The Court has considered the probative value weight and import of statements pleaded but where no evidence is adduced as follows;

35. In the case of *M'nkiria Petkay Shen Miriti vs Ragwa Samuel Mbae and 2 others*, Election Petition No. 4 of 2013, it was observed that:

“[42] In relation to the allegations that the affidavits are bad in law for being false, I take the view that as section 109 of the Evidence Act provides, the burden of proof of particular facts lies on the person who alleges those facts.The veracity of the contents of affidavits can only be tested when the witnesses of either side take the stand. This makes the issue unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The Applicants are therefore asking the court to make a decision on the basis of untested evidence which this court cannot do. As was noted by Kimondo J in Nairobi Election Petition 2 of 2013 *Steven Kariuki v. George Mike Wanjohi & Others* at page 16: Ideally, cases should be determined on tested evidence at a full hearing.” (Emphasis added)

36. In the case of *Theodore Otieno Kambogo vs Norwegian People's Aid Nairobi (Milimani) HCCC 774 of 2000 Warsame J* where medical reports were produced and the doctors did not testify; the Court had this to say;

The fact that the Defendant would not get an opportunity to cross-examine the deponent greatly reduces the value and weight of that evidence. The Court is not in any way saying that the Affidavit evidence is not good but is saying that the failure to test that evidence



through cross examination may reduce its relevance or probative value to the person relying on the same.

37. The case-law illustrates the importance of subjecting evidence be it in affidavits, expert reports or statements to cross examination by the adverse party/parties so that the Trial Court to test the veracity of the evidence and/or credibility of the witness(s).
38. The Court in conducting proceedings allows parties to discharge their burden and standard proof as required by law as stipulated in Section 107-112 of Evidence Act that encompasses the cardinal rule of Evidence that he who alleges must prove.
39. The Court recognizes that there are instances where the evidence shall be tendered in Court without cross- examination; where parties to the proceedings agree through their respective Counsel to produce affidavits statements documents or reports by Consent before Court. See *Nesco Services Limited vs CM Construction [E.A.] Ltd* [2021] KLR & *Ephantus Mwangi & Anor vs Duncan Mwangi* Civil Appeal No 77 of 1982 [1982-1988] 1KAR 278 where it was held;

“Where documents are put in by Consent, as for example and agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document).”

40. Other instances, where the probative value of the statement, document or report will not diminish without oral/direct evidence includes where under Section 35 of the Evidence Act the document or report is produced without calling the maker to adduce evidence and be subjected to cross examination, based on circumstances of the case, the Court will allow the production on these circumstances and on agreement of the parties.
41. See *Rosemary Wanjiru Kungu vs Elijah Macharia Githinji* [2014] eKLR where G.V.Odunga J relied on *Mohammed Musa & Anor vs Peter M. Mailanyi & Anor* Civil Appeal 243 of 1998 where the Respondent failed to call the doctor who wrote the report did not prove his case and the finding of the Trial Court could not stand; & *David Ndungu Macharia vs Samuel K Muturi & Anor* Nbi No 125 of 1989; where Ringera J held that mere exchange of medical reports did not render such report(s) admissible without calling the maker(s) unless one or both of them have been agreed on.
42. Therefore, applying the above cited principles to the instant appeal, the Statement by the driver of Motor vehicle KBQ 128P could not be relied on as it was not admitted by consent of parties through Counsel and the evidence was irregularly introduced through written submissions.
43. The Trial Court ought not to have considered the evidence adduced in submissions in arrival of liability at 50%/50%.
44. In *Akiba Micro Finance Ltd vs Ezekiel Chebii & 14 Others* [2012]eKLR
The Court held;

“Where a party has custody or is in control of evidence which the party fails or refuses to tender or produce, the Court is entitled to make adverse inference that if such evidence was produced was produced it would be adverse to such a party.....”

45. The finding of liability cannot stand and is substituted by liability at 100% against the Appellant in the Appeal for the Appellant in the Cross Appeal.



Quantum

46. The Doctor's Report of 29/10/2015 by Dr. T.Ndeti indicated the plaintiff sustained were head injury with loss of consciousness, cut ear, bruises on both hands and both legs fractured pelvis.
47. Apart from the fractured pelvis the other injuries were classified as soft skeletal injuries whose complete healing was anticipated. The loss of the earlobe did not interfere with hearing
48. The Appellant relied on the following cases of *Julius Kiprotich –vs- Eliud Mwangi Kiholia* Nakuru High Court Civil Case No. 207 of 2004 where Kimaru J awarded Ksh 450,000/- fracture of pelvic bone internal abdominal injuries and head injuries and *Kiru Tea Factory & another –vs- Peterson Wathaka Wanjohi* – Nairobi High Court Civil Appeal No. 1045 of 2004 where Waweru J awarded Ksh 800,000/- for Plaintiff who sustained degloving injury on right hand, fracture of radius and ulna bone, fracture of right iliac bone and pelvis. The appellant proposed the reasonable amount would be Ksh 450,000 – Ksh 800,000/-.
49. The Respondent relied on the Appellant's Insurance Doctor's Report Dr. Wambugu who assessed incapacitation of the Respondent at 4% together with other injuries sustained as highlighted above.
The Respondent relied on the following case-law for comparison;
Marsabit HCCA 2 of 2019 *Board of Trustees Anglican Church of Kenya Diocese of Marsabit –vs- Naomi Galma Galgalo* [2019] eKLR where the Plaintiff was awarded Ksh 1,400,000/- for pelvic fracture and open back facial bruises she complained of pain when walking or running and it was possible she would have complication during pregnancy and delivery.
50. In Nakuru HCCA 18 of 2013 *Jericho Furniture Ltd t/a George Wood funeral society –vs- Norah Chepnetich Bett* [2015] eKLR,
Where the Plaintiff sustained fracture of pelvic of left superior ramus a large deep degloring injury wound on the left gluted region- over left buttock and soft tissue sprain injuries of lower back was awarded as per parties consent Ksh 586,862/-.
51. In *Boniface Njiru vs Tobel Agencies & Anor* [2011] eKLR, the Plaintiff sustained blunt head injury, loss of 4 teeth, fracture of shaft and right tibia was awarded Ksh 1,000,000/-.
52. In *Michael Maina Gitonga vs Serah Njuguna* [2012] eKLR multiple fractures to the pelvis and was awarded Ksh 1,500,000/-.
53. The Court has considered the injuries inflicted on the Plaintiff from the accident, was unconscious and admitted in hospital and from the sustained injuries there is projected incapacity at 4%. In light of 100% liability, and taking inflationary trends the court awards the general damages of Ksh 800,000/-

Disposition

1. The appeal is dismissed and cross appeal upheld with interest and costs
2. Liability is substituted at 100% for the Plaintiff against the Defendant.
3. General damages are at Ksh 800,000/-.
4. Special damages as pleaded and proved Ksh 76836/-.

DELIVERED SIGNED & DATED IN OPEN COURT THIS 24TH MARCH 2022 (VIRTUAL CONFERENCE)



M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

NO APPEARANCE - FOR APPELLANT

NO APPEARANCE FOR RESPONDENT

GEOFFREY - COURT ASSISTANT

