



**Mutisya v People Media Group Limited & another (Civil Appeal
51B of 2017) [2022] KEHC 226 (KLR) (24 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 51B OF 2017
MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

SHADRACK MBITHI MUTISYA APPELLANT

AND

PEOPLE MEDIA GROUP LIMITED 1ST RESPONDENT

HENRY GITHINJI WANJAU 2ND RESPONDENT

*(An Appeal from the judgement of the Principal Magistrate Hon. C.A
Ocharo delivered on 7th of November 2017 in Machakos CMCC 274 of 2014)*

JUDGMENT

1. The Plaintiff

The Plaintiff, now Appellant commenced the suit by filing a plaint dated 19th of February 2014 I which he averred that as a result of the car accident that took place on 10th of October 2013 along Nairobi – Mombasa Road at Kyumvi Trading Centre where the 2nd Appellant who was driving, controlling and managing motor vehicle registration Number KBP 571Q negligently veered of the road and hit the Appellant causing him to sustain the following injuries;

- a. Blunt injury to the neck
- b. Fracture of right Fibula
- c. Blunt Injury to both lower limbs.

2. He further averred that the 2nd Appellant had been charged in Machakos Traffic Case number 99 of 2014 where he was found guilty and sentenced to pay Kshs. 20,000 in default three (3) months imprisonment. He therefore sought the following prayers;



- a. Special damages in the sum of Kshs. 6,670/-
- b. General damages for pain, suffering and loss of amenities
- c. Costs of the suit
- d. Interest on a, b and c above
- e. Any other relief as this Honourable court may deem fit to grant.

The Defence

3. The 1st Respondent while asking that the suit be dismissed with costs filed a Defence dated 24th of April 2014 denying being the registered owner of motor vehicle registration Number KBP 571Q and the contents of the Plaintiff and he put the Appellant to strict proof thereof. He averred that it was the Appellant who was negligent.
4. The 2nd Respondent filed a Defence dated 6th of June 2014 denying being the registered owner of motor vehicle registration Number KBP 571Q and the contents of the Plaintiff and he put the Appellant to strict proof thereof. He averred that it was the Appellant who was negligent. He asked the court to dismiss the suit be with costs.
5. The Appellant filed a reply to Defence dated 11th June 2014 reiterating the contents of the Plaintiff and asking that judgement be entered as prayed in the Plaintiff.
6. The Appellant called three witnesses while the Respondents called one witness.
7. PW1, Shadrack Mbithi Mutisya testified that on 10th of October 2013 as he was standing off the road on the side facing Mombasa at his place of work where he works as a guard, a car stopped 50 metres away and two people alighted when suddenly the vehicle registration Number KBP 571Q turned around and veered off the road, hitting him. He stated that the driver suddenly pulled off and drove at a speed and disappeared. He was treated at Machakos level 5 hospital and later he reported the matter to the police who charged the 2nd Appellant with careless driving. He was convicted and fined Kshs. 20,000 in default three (3) months imprisonment. He saw Dr. Mutunga and Dr. Mwaura who prepared reports. He produced the following documents while asking for the prayers as per his Plaintiff;
 - a. Machakos Level 5 Hospital treatment notes
 - b. P3 dated 3rd January 2014
 - c. Report by Dr. Mutunga dated 16.01.2014
 - d. Report by Dr. Mwaura dated 15th July 2014
 - e. Copy of Search dated 5th of Feb 2014
 - f. Receipts
 - g. Demand letter dated 22nd January 2014
8. In Cross Examination, he acknowledged his identity card and stated that he was employed at Kyumbi by Muendo to guard vehicles in the Parking lot. He stated that he turned to look at the opposite direction only to see the vehicle crushing his feet and he did not move. He stated that the vehicle was moving at high speed and he was hit by the front wheel and he screamed while holding the mud guard. That when it drove off, he fell and managed to see the number plate. He said that the accident took place at 11.30 PM, there were no street lights and he reported the incident to Kyumbi and Machakos



police station. He also stated that he had healed and that Benard had recorded a statement with the police.

9. In Re- examination, he confirmed that it is the motor vehicle in question that hit him.
10. PW2, Benard Sila Nzivo told the court that while he was working as a guard, he saw the Appellant get hit on 10th October 2013 by Motor vehicle with a hard body registration Number KBP 571Q at Kyumbi, off the road. He stated that he has never gone to the police station to date.
11. In Cross-examination, he averred that the accident took place at 11.30AM, that there was light from the shops and he has a torch. He stated that he was 70meters from the scene and when he arrived at the scene, the motor vehicle was on the Plaintiff's feet and the driver sped off. That the motor vehicle was carrying newspapers and two passengers with sacks of maize who alighted from the rear compartment.
12. Upon Re-examination he stated that he had said the truth and his identity card number was 8060263 which was in the statement.
13. PC Emmanuel Mungaro, No xxxxx was PW3, He averred that the Appellant was hit by vehicle registration Number KBP 571Q, reported under OB No. 6-14-10-2013 and upon investigation Henry Gichuki was charged with the offence of driving without due care or concern and fined Kshs. 20,000 in default three (3) months imprisonment. He relied on a statement from PC Isichen and produced the police abstract and a receipt of Kshs .5,000/- that he was paid to attend court.
14. Upon Cross-Examination, He stated that the investigating officer PC Menya was transferred to Bungoma and he could not trace the police file, that the report was made on 14th October 2013 by the Appellant and the accident took place on 10th October 2013.
15. In re-examination, he stated that the driver was charged after the investigations and the plaintiff could not have been lying. He also stated that he did not expect a person to blame any vehicle but the one that ran over him.

Defence Hearing

16. Henry Githinji Wanjau, the only Defence witness told the court that a driver at Media Max, the People media group and he adopted his statement filed on 24th of June 2014 in which he states that on 10th of October 2013 at 11.00pm while in motor vehicle registration Number KBP 571Q with Hawkins Lavadza ferrying newspapers to Mombasa, they stopped at Malili Market. He averred that in January 2014, Nelson Mutua his supervisor told him that he had knocked down a pedestrian at Kyumbi junction and disappeared without making a report and were required to report at Machakos police station which he did. He opined that his supervisor told him to plead guilty to a charge on 20th January 2014 to avoid prolonged court case and he was fined Kshs. 20,000 or in default three months imprisonment. He said that he did not knock anyone, he has been a driver for ten years and the case should be dismissed.
17. Upon cross examination he state that he has never complained nor appealed the conviction and stated that he passed Kyumbi area at about 12.30 to 1.00pm. He stated that he know that it was wrong to collude and lie in court.
18. There was no re- examination.
19. Parties filed submissions.

Trial Court Judgement



20. The Court in dismissing the suit with costs to the defendant and Kshs.6,670/- in special damages to the Plaintiff found that the testimony of PW1 and PW2 was contradictory and the Appellant was not sure of who or what vehicle had caused him the injuries that he suffered that day. The court also found that PW2 should not have been a witness as he did not write a statement that police and even wondered why he was a witness. The trial magistrate noted that 11.30pm, the climate was not favorable for both witnesses to see the number plate and for them to see the vehicle that inflicted harm on the Appellant furthermore and the Appellant was on the ground in pain. The police officer did not conduct investigations and neither did he have the police file and while reading from the occurrence book said that the Appellant was run over by KBP 579Q.
21. The court therefore found that the Appellant was not clear as to how the was not clear as to how the accident happened. The trial court stated,
- “On the one hand he states that the vehicle stopped for persons to alight then it suddenly turned and veered off the road. To where? Yet he had indicated that he was standing off road on the left as one faces Mombasa and it is the same direction the vehicle is alleged to have been facing.
- Taking the above into account, I do find that and accident indeed occurred but it may not have been caused by the 2nd Defendant as alleged by the fact that he pleaded guilty to an offence notwithstanding.”
22. The Court intimated that it would have awarded Kshs 250,000 as general damages in the circumstances. In the end, the Trial Court only awarded the Appellant special damages.

The Appeal

23. Dissatisfied with the judgement, the Appellant vide Memorandum of Appeal dated 23rd November 2017 sought to have the Appeal allowed, lower court judgment set aside and judgment and costs awarded in his favour on the grounds that;
- i. The learned trial Magistrate erred in law and in fact by failing to appreciate the Appellant’s evidence on record
 - ii. The learned trial Magistrate erred in law and in fact by finding that the Respondent had proved his case on a balance of probability.
 - iii. The learned trial Magistrate erred in law and in fact by taking irrelevant factors into account
 - iv. The learned trial Magistrate erred in law and in fact by failing to take into account the relevant factors on the issues at dispute especially that the driver was charged for the accident and convicted.
 - v. The learned trial Magistrate erred in law and in fact by failing to consider the Appellant’s submissions on record and the witness testimony on record.
 - vi. The learned trial Magistrate erred in law and in fact by delivering a judgement that was erroneous as a whole given the circumstances given the dispute between the Appellant and the Respondent.
 - vii. The learned trial Magistrate erred in law and in fact in failing to find that the Appellant had proven his case on a balance of probabilities as is required in law.



- viii. The learned trial Magistrate erred in law and in fact in placing undue weight on irrelevant issues and failing to give sufficient weight to relevant factors.
24. The Appellant filed submissions dated 20th September 2021 in which he asked the court to re-evaluate the evidence and asked the court to award Kshs 1,200,000 as general damages. Reliance was placed on the case of *Njenga Karanja vs Transami Transporters (K) Limited* HCCC No. 28 of 1996 and *OMN vs Jasper N. Chonga Magari & another* [2020] eKLR.
25. The Respondents filed submissions dated 1st December 2021 contended that the Appellant's evidence was incurably contradictory and therefore failed to discharge his burden of proving the case. Reliance was placed on the case of *Kirungi & another vs Kabiya & 3 Others* [1987] KLR 347 and *Nkuba vs Nyamiro* [1983] KLR 403 and urged the court not to interfere with the trial court decision.
26. As regards quantum, while relying on Dr. John Mutunga's medical report, they submitted that the Appellant had sustained soft tissue injuries but had fully healed with no temporary nor permanent incapacity. He submitted that an award of Kshs 250,000 would be reasonable.

Analysis and Determination

27. I have considered the Memorandum of Appeal, the lower court record and the submissions of the parties and noting that this is a first appeal, I am guided by the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 where it was stated that:

“The Appellate Court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

28. I am also guided by the case of *Peters vs. Sunday Post Limited* [1958] EA 424, where it was held that;

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.”

29. It is not in dispute that an accident occurred on 10th of October 2013 along Nairobi –Mombasa Road at Kyumbi Trading Centre as a result of which the Appellant sustained the following injuries according to the Plaintiff and the medical report dated 16th January 2014;

- a. Blunt Injury to the back



- b. Fracture of right fibula
 - c. blunt injury to both lower limbs
30. It is not in dispute that the motor vehicle registration Number KBP 571Q alleged to have caused the accident belongs to the 1st Respondent from the copy of records dated 5th of February 2014 and by the Defendant's own admission. Further, it is not in dispute that the 2nd respondent was charged and upon pleading guilty was convicted in Machakos Traffic Case number 99 of 2014 where he was sentenced to pay Kshs. 20,000 in default three (3) months imprisonment.
 31. The Appellant alleged that it was a hit and run at Kyumbi area while it was the evidence of the 2nd Respondent that his supervisor, Nelson Mutua had told him that he had knocked down a pedestrian at Chumvi junction and disappeared without making a report.
 32. The Respondent stated that the accident was solely caused by the negligence of the Plaintiff and particularizes negligence of the Plaintiff as follows;
 - a. falling to keep a proper look out,
 - b. encroaching on the path of motor vehicle Registration number KBP 571Q,
 - c. Failing to see the said motor vehicle in sufficient time or at all to avoid the accident,
 - d. failing to have regard for other road users and especially to the driver of motor vehicle registration Number KBP 571Q,
 - e. remaining on the path of the 1st Defendant's oncoming motor vehicle registration Number KBP 571Q.
 33. Section 107 – 112 of *Evidence Act* encompasses the cardinal principle that; he who alleges must prove.
 34. In order for the Respondents to have known that the Applicant was negligent, they must have been at the same place at the same time and in particular, at the time of the accident to witness the occurrence of the said accident.
 35. The dispute according to the trial court is the manner in which the accident occurred not being clear. I find that on a balance of probabilities, the Appellant has been able to prove that the accident occurred and that he sustained injuries as a result of the same. The accused was charged, convicted and fined for traffic offence whose conviction was not set aside/varied or appealed against.
 36. The Court of Appeal in the case of *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988- 92] 2 KAR 288; [1990-1994] EA 47, held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, in *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & another* [2017] eKLR the court stated:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court



has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler vs Butler* [1984] KLR 225.

The assessment of damages in personal injury case by court is guided by the following principles: -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high (See *Boniface Waiti & another v Michael Kariuki Kamau* [2007] eKLR.’ excess or insufficiency.

37. In the case of *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:

“The Appellate Court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

38. The Court of Appeal in the case of *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* CA 142/2003 held that:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principle”

39. The Court of Appeal observed in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR that –

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

40. PW.1 Plaintiff – Shadrack Mbithi Mutisya testified that as guard on the night of 10/10/2013, he was standing on the side of the road and motor vehicle Reg. No. KBP 571 Q came and sped off at high speed after it stopped and 2 people alighted from the vehicle.



41. PW.2 Benard Sila Nzivo corroborated PW.1's testimony that he saw the accident but admitted he did not report to the police such and he did not record a statement.
42. PW.3 – PC Emmanuel Mungaro produced statement of PC Isicheni on the investigations conducted on the accident that occurred on 10/10/2013. Henry Githinji was charged with the traffic offence fined Kshs.20,000/- I/D 3 months imprisonment.
43. DW.1 Henry Githinji Wanjau in cross – examination stated that on 10/10/2013 he drove motor vehicle KBP 571Q along Mombasa road and was at Kyumbi Area – 12.30 – 1.00 P.M. The witness denied the accident and blamed pleading guilty to the Traffic charge or being inclined to do so by his Boss one Mr. Nelson Mutua. The Court finds that it is more than a coincidence the plaintiff was in an accident on 10/10/2013 along Kyumbi area and was hit by KBP 571Q and by coincidence the defendant was driving the said vehicle on the said day in the same area. The logical and reasonable conclusion is that the road accident occurred between motor vehicle KBP 571 Q that hit the plaintiff.
44. Even disregarding PW.2's testimony, PW.1's evidence is sufficient and the evidence of PW.3.
45. PW.1 presented original medical card from Machakos Level 5 Hospital and confirmed treatment on 14/10/2013. On examination lower limbs were swollen and he was put on bed rest and limbs elevated and analgesics and POP application.
46. On 3/1/2014 he went back to the hospital for further treatment. The P.3 Form of 3/1/2014 confirms injures as fracture on right fibula by blunt object injury on both lower limbs and the decree of injury was harm. Medical report by Dr. Waithera Mwaura of 17/07/2014 confirmed blunt injuries and an displaced fracture on the right fibula. Medical Report by Dr. John Mutunga of 6/01/2014 confirmed blunt injury to the back, fracture right fibula and blunt injury on lower limbs. All this evidence was/ is not controverted by any other cogent and tangible evidence coupled by traffic offence conviction which the Defendant did not appeal against.
47. The totality of the evidence of PW.1 and DR evidence confirms the accident of 10/10/2013 by motor vehicle KBP 571Q inflicted injuries on the plaintiff and therefore the court finds liability at 100% against the Defendant
48. While I find that an award is not supposed to be commensurate with the injuries sustained, the Appellant's proposal is on other hand, on the higher side. Having considered the injuries sustained by the Appellant it is my view and I find that an award of Kshs 450,000.00 is reasonable as general damages.
49. Consequently, this appeal succeeds, the judgement of the trial court is hereby set aside and is substituted therefor an award of Kshs 450,000.00 in general damages.
50. Costs of the Appeal are awarded to the Appellant.

It is so ordered.

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

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Musyimi For The Applicant

Mr. Mulwa For - The Respondent



