



**Pillar Africa International Limited v Njirai (Civil Appeal
E044 of 2021) [2022] KEHC 348 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E044 OF 2021
LM NJUGUNA, J
APRIL 26, 2022**

BETWEEN

PILLAR AFRICA INTERNATIONAL LIMITED APPELLANT

AND

REGINA MUTHONI NJIRAI RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment delivered by Hon. T.K. Kwambai on the 6th day of February, 2021 in Embu CMCC No. 148 of 2019.
2. By way of a plaint dated the 14th day of August, 2019, the respondent who was the plaintiff in the lower court sought both general and special damages arising out of an accident that is said to have occurred on the 27th day of April, 2019 within Embu Township.
3. In the plaint, the respondent alleged that on the material date, she was a lawful pillion passenger on motor cycle registration No. KMEH 153V within Embu Township when the appellant's driver, agent or employee negligently drove motor vehicle registration No. KCP 106F that it hit motor cycle KMEH 153V as a consequence of which, the respondent sustained injuries, suffered loss and damage for which she held the appellant responsible of.
4. The particulars of negligence, injuries and special damages are set out in paragraphs 6 and 7 of the plaint. She prayed for judgment as pleaded in the plaint.
5. The appellant denied the claim in its statement of defence filed on the 20th April, 2020. It denied having been the registered owner of the subject motor vehicle and that the respondent was a lawful pillion passenger on the motor cycle registration No. KMEH 153V on the material day and on the said road. The particulars of negligence, loss and damage were also denied.



6. In the alternative and without prejudice, the appellant averred that if any accident occurred on the 27th April, 2019 but which was otherwise denied, the same was caused and/or substantially contributed to, by negligence on the part of the respondent and the owner or agent of motor cycle registration No. KMEH 153V. The particulars of negligence against each of them are set out in paragraph 6 of the defence.
7. At the hearing the respondent testified in support of her case and called one witness while the appellant closed its case without calling any witnesses.
8. After analyzing the evidence, the learned magistrate, in his judgment delivered on the 2nd day of June, 2021 found the appellant 100% liable for the accident and awarded the respondent general damages in the sum of Kshs. 900,000/=, special damages of Kshs. 550/= plus the costs of the suit. He made no award on loss of earnings.
9. The appellant has moved this court vide a memorandum of appeal dated the 25th October, 2021 wherein he has listed two grounds of appeal as follows;
 1. That the learned magistrate erred in law and in fact by finding the defendant 100% liable.
 2. That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the respondent due regard being had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
10. When the appeal came up for hearing the court gave directions on filing of submissions but only the respondent complied with the said directions.
11. The court has considered the said submissions and the grounds of appeal. The court has also re-evaluated the evidence that was adduced before the trial court. This being a first appeal, the court is guided by the principles as laid out in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123. The duty of this court being to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect. Further that 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.
12. The appeal herein is against both the liability and quantum of damages. In her evidence the respondent adopted her witness statement which was to the effect that on the 27th April, 2019 she was a pillion passenger on motor cycle KMEH 153V from the direction of Jatomy heading to Runyenjes and on reaching around Blue Line, motor vehicle KCP 106F diverted on the left without due care and attention and knocked the said motor cycle from behind as a consequence of which she fell from it and was dragged on the ground. She blamed the driver/owner of the said motor vehicle for reckless driving and lack of due care. It was her evidence also that the motor vehicle was being driven at a high speed.
13. In cross examination she stated that she was wearing a helmet and a reflective jacket and denied that the motor cycle caused the accident.
14. On his part, PC Stanley Kosgei who gave evidence as PW2 confirmed the occurrence of the accident involving both the subject motor vehicle and the motor cycle. It was his evidence that the driver was trying to park the motor vehicle at Nice Hardware before knocking down the motor cycle. In cross examination he stated that he was not the investigating officer and could not tell who was to blame for the accident.



15. His evidence was based on what was recorded in the OB which according to him is true and authentic.
16. As earlier stated, the appellant closed its case without calling any witnesses and in a judgment delivered on the 2nd day of June, 2021, the learned magistrate found the appellant 100% liable for the accident and awarded her damages as earlier stated.
17. On liability, the respondent's cause of action is based on the tort of negligence. Under Section 107 of the *Evidence Act* she had the burden of proof. The said Section provides;
 - (1) Whomever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
18. As pointed out, the appellant did not call any witnesses. The respondent in her submissions contended that the respondent's evidence was not controverted and relied on the case of *Linus Ng'ang'a Kiongo & 3 others v Town Council of Kikuyu* [2021] eKLR on the consequences of a party's failure to adduce evidence and in which the case of *Motex Knitwear Limited v Gopitex Mills Limited* (HCCC No. 834 of 2002 Milimani) was quoted and the court stated;

“Although the defendant had denied liability in an amended defence and counter-claim, no witness was called to give evidence on his behalf.

That means that not only does the defence rendered by the 2nd plaintiff's case unchallenged but also that the claims made by the defendant in the defence and counter claim, are unsubstantiated”.
19. Whereas this may seem to be the position, prima facie, it is trite that the burden placed on a party to prove his/her case under Section 107 does not shift simply because the defendant fails to call any evidence. This is because the legal burden does not shift from the plaintiff. It is only the evidential burden that shifts.
20. Upon perusal of the evidence that was adduced before the trial court by both the respondent and PW2, it is clear that the driver of motor vehicle KCP 106F hit motor cycle KMEH 153V from behind. This evidence was confirmed by PW2 who though not the investigating officer gave evidence as was captured in the OB by the officer who investigated the accident and this was to the effect that the vehicle hit the motor cycle. This evidence was not controverted by the appellant in any way.
21. On the quantum of damages, it is now settled law that an appellate court will only interfere with an award of damages if the award is inordinately high or low or that it represents an entirely erroneous estimate. See the case of *Butt v Khan* (Civil Appeal No. 40 of 1977).
22. The award of general damages is also discretionary and an appellate court would not be 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 in the first instance.
23. The respondent herein suffered a fractured pelvis on the Ischium and soft tissue injuries to the lower back left elbow joint, right leg and neck muscles which left her with a permanent disability scale at 10%.
24. In her submissions filed at the trial court, the respondent urged the court to make an award of Kshs. 1,800,000/= and relied on the cases of *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v*



Naomi Galma [2019] eKLR and that of Winfred Ndunge Musyoka v Martin Mugo Gatiti & another [2020] eKLR.

25. On its part the appellant urged the court to award Kshs. 750,000/= as general damages.
26. In his judgment the trial magistrate awarded general damages in the sum of Kshs. 900,000/=. The court has considered the injuries sustained by the respondent and also the submissions of the parties on the quantum of damages. I note that the respondent was left with a permanent disability scale at 10% which she has to live with, the rest of her life. In my view, the award of Kshs. 900,000/= is reasonable and this court would not have a reason to interfere with the said award.
27. On liability, it is also noted that though the appellant attributed negligence to both the respondent and the owner of the motor cycle, no evidence was adduced before the trial court to prove the particulars of negligence against each of them.
28. Further, the appellant did not take out third party proceedings against the owner of the motor cycle and therefore no liability could attach to him as he had not been joined as a party to the suit.
29. On lost earnings, the same is a special damage claim which ought to have been specifically pleaded and strictly proved. The respondent did not plead nor proof the same.
30. In the end, I find that the learned magistrate analyzed the law and the facts correctly and arrived at a sound decision. This court would not have a reason to interfere with his decision.
31. The appeal is hereby dismissed with costs to the respondent.
32. The respondent shall also have the costs of the lower court.
33. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

