



REPUBLIC OF KENYA



KENYA LAW
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**Hillspark Investment Company Limited v Murimi (Civil Appeal
E006 of 2021) [2022] KEHC 10622 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E006 OF 2021**

**F GIKONYO, J
MAY 24, 2022**

BETWEEN

HILLSPARK INVESTMENT COMPANY LIMITED APPELLANT

AND

CHACHA SABASTIAN MURIMI RESPONDENT

*(Being an appeal from the Judgement of Hon.G.N. Wakabiu (C. M)
Delivered on 28th April 2021 in Narok CMCC No. 206 of 2018)*

JUDGMENT

1. The Memorandum of Appeal dated 4th May 2021, challenges liability and quantum of damages in the judgment of the trial court which was delivered on the 28th April 2021 in the following terms: -
 - i. The defendant is 100% liable for the accident
 - ii. General damages Kshs. 1,500,000/=
 - iii. Special damages Kshs. 217,874/=Total Kshs. 1,771,874/=
Plus, costs of this suit

Submissions

2. The appeal was canvassed by way of written submissions.

Appellant's submissions

3. The appellant submitted that this court should consider the injuries indicated in the discharge summary from Naivasha district hospital where the respondent was first treated.



4. According to the appellant. the lower court award of Kshs. 1,600,000/= is inordinately high considering the injuries sustained by the respondent. The appellant proposed an award ranging between Kshs. 400,000/= and Kshs. 500,000/=.
5. The appellant urged this court to set aside the judgment of the trial court and reassess the quantum based on their submissions herein and in the trial court.
6. The appellant prayed that the appeal be allowed as prayed and the appellant be awarded costs of this appeal based on Section 27(1) of the C.P.A.
7. The appellant relied on the following authorities;
 - i. [*Timsales Ltd v Wilson Libuywa*](#) [2008] eKLR
 - ii. [*Power Lighting Company Limited & Another Versus Zakayo Saitoti Naingola & Another*](#) [2008] eKLR cited in the case of [*Jennifer Maathenge v Patrick Muriuki Maina*](#) [2020] eKLR
 - iii. [*Civicon Limited v Richard Njomo Omwancha & 2 Others*](#) [2019] eKLR
 - iv. [*Aloise Mwangi Kahari v Martin Muitya & Another*](#) [2020] eKLR
 - v. [*Mohammed Younis Quereshi & Another v Christ Maina Mathu*](#) [2020] eKLR

Respondent's submissions

8. The respondent submitted that the record of appeal is incomplete, incompetent and fatally defective and ought to be struck out for lack of certified copy of the decree, order and /or judgment appealed against.
9. The respondent submitted that the appellant has not submitted on liability or seems to have abandoned that ground of appeal and therefore that issue should be left to rest.
10. The respondent submitted that the learned magistrate took into consideration all relevant factors and applied the applicable principles in awarding the respondent Kshs. 1,500,000/= general damages and special damages of Kshs. 271,874/= which is commensurate to the injuries sustained.
11. The respondent submitted that the medical report by Doctor Wanjeri Njoroge, discharge summary from Naivasha hospital, P3 form issued and filed by the first treating doctor at Naivasha hospital among other documents produced as exhibits in the trial court indicates the injuries the respondent sustained as pleaded in the plaint.
12. The respondent submitted that this appeal lacks merit, is incompetent and should be dismissed and / or struck out with costs to the respondent.
13. The respondent relied on the following authorities;
 - i. Nairobi Supreme Court Petition No. 15 of 2014 [*Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others*](#)
 - ii. Nairobi CA No. 12 of 1987 *Chege v Suleiman*
 - iii. Voi HCCA No. 16 of 2017 [*Kilonzo David t/a Silver Bullet Bus Company vs Kyalo Kiliku & Another.*](#)
 - iv. Nyeri HCCA No. 51 of 2013 [*Ndegwa Kamau t/a Sideview Garage vs Fredrick Isika Kalumbo*](#)



- v. Kiambu HCCA No. 31 of 2018 *Rachael Wambui Nganga & Another vs Rabab Wairimu Kamau*
- vi. Order 42 CPR
- vii. Order 42 Rule 13 (4) (6) CPR.
- viii. Mombasa Ca No. 148 of 2010, *Jackson Murerwa vs Jaimbe Enterprises* [2011] eKLR
- ix. *Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia & Another (No.2)* [1982-88] KAR 727

Analysis And Determination

Duty of court

- 14. As first appellate court, I should re-evaluate the evidence and come to own conclusions, except, giving allowance of the fact that I neither saw nor heard the witnesses; matters of demeanor are best observed by the trial court. See: *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123.

Issues for Determination

- i. Whether the record of appeal should be struck out for being incompetent;
- ii. Who is to blame for the accident: and
- iii. Whether the quantum of damages by the trial court is inordinately high.
- iv. Who pays costs?

Striking out the record of appeal

- 15. Of incompetent record of appeal, the Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR held as follows at paragraph 41 stated:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

- 16. The specific relevant rules which should guide the court on this issue is order is Order 42, Rules 2 & 13(4)(f) of the *Civil Procedure Rules*, 2010 Order 42 Rule 2 of the Civil Procedure Rules. Rule 2 provides as follows: -

“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”



17. Order 42, Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides;

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- (a) The memorandum of appeal;
- (b) The pleadings;
- (c) The notes of the trial magistrate made at the hearing;
- (d) The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) A translation into English shall be provided of any document not in that language;
- (ii) The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

18. I have perused the entire record as well as the original trial court’s record; there is duly certified typed proceedings and judgment. Accordingly, the objection on the competence of the appeal does not hold sway. I reject it.

Liability

19. The accident herein involved two motor vehicles registration numbers KBX 928R and KCD 623L-ZE5705. The respondent was a passenger in motor vehicle registration no. KBX 928R. Where does blame lie?

20. PW1 blamed the driver of motor vehicle registration No. KBX 928R for causing the accident, for overtaking at a corner- suddenly saw an incoming lorry and tried to get back to his lane, but in the process hit a lorry from behind thereby causing the accident. The police abstract P EXH 3 indicated that motor vehicle registration no. KBX 928R is to blame for the accident. His testimony was that there was no any other vehicle at the scene at the time.

21. The appellant did not call any witness to challenge or dispute the respondent’s evidence in the manner the accident occurred. The evidence is therefore uncontroverted.

22. On the basis of the evidence adduced, I find that the plaintiff proved his case on a balance of probabilities as required by law. The trial court rightly held that the appellant was 100% responsible for the accident which occurred as a result of its driver’s negligence of which the appellant is vicariously held liable. The appeal on liability fails.



Of Quantum

23. ‘An appellate court will not disturb an award for general 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...’ (*Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR)

Applying the test

24. The trial magistrate awarded Kshs 1,500,000/=in general damages. The appellants consider it to be inordinately high. The respondent; it is commensurate to the injuries sustained.
25. “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.” (*Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR)
26. What injuries were suffered?
27. According to the plaint dated 8th March 2018, the respondent sustained the following injuries: multiple deep cut wounds on the face, left eye and occipital region with generalized tenderness and swelling with associated impaired hearing; extensive laceration on the left side of the chest, deep cut wound on the left forearm; dislocation on the right wrist; deep extensive lacerated wound on the left leg; fracture on the left tibia and fibula bones; dislocation and sprain on the left knee joint; deep cut wound on the right leg and fracture of the 5th and 6th ribs.
28. The respondent adduced evidence to show that he sustained the injuries pleaded.
29. DW1 however, disputes the fracture of tibia and fibula bones. She however agrees that the respondent suffered degloving injury on the left leg, deep cut wound on the left forearm, left knee dislocation and hearing loss.
- Medical evidence should be taken together with all other evidence on record; except, the court is not bound to accept it where there is good reason not to (*Dhalay -vs- Republic* (1997) KLR, *Shah & Another -vs- Shah & Others* (2003) IEA 290). Further, medical reports may not override the evidence of a doctor who personally attended the patient in treatment whether in the first or subsequent instance. Thus, medical reports should be proved by the person giving them as they are ordinarily given with a bias; to support the case of the party who calls them (*Sentongo and Another vs. Uganda Railways Corp.* Kampala HCCS No. 263 of 1987).
30. There is conflict in opinion over some of the injuries (in particular, fracture of left tibia and fibula bones) between the doctors who prepared the medical reports herein on the respondent. Reconciliation of such conflict is the responsibility of the court; and is done by reference to the evidence as a whole, the medical reports as well as the initial treatment records on the respondent.
31. The medical report by Dr. Jennipher Kahuthu found that the respondent suffered degloving injury on the left leg, deep cut wound on the left forearm, left knee dislocation and hearing loss. DW1 did not dispute the fracture of 5th and 6th ribs.
32. Medical report from Naivasha county referral hospital revealed that the respondent suffered injuries pleaded.



33. Taking into account the evidence by the respondent and the medical evidence in totality, the respondent proved that he suffered injuries pleaded.
34. From the authorities cited by the parties, a sum of Kshs. 1,500,000 in general damages for such serious and extensive injuries, pain and suffering, is fair compensation. Therefore, the award by the trial court is not excessive as claimed by the appellants. I dismiss, the appeal on quantum.
35. In the upshot, I find that the appeal lacks merit and is dismissed. However, I note a mathematical error in the Judgment of the trial court on the subtotal and total of the general damages and special damages which I should correct as follows:
The sub total and total Kshs. 1,717,874/=.
36. Each party shall bear own costs of the appeal.
37. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION,
THIS 24TH DAY OF MAY, 2022**

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F. GIKONYO M.

JUDGE

In the presence of:

Obae for the Respondent

M/s Chuchi for Njuguna for Appellant

Mr. Kasaso – CA

