



**Ndii & another v Njeru (Civil Appeal 59 of 2018)
[2022] KEHC 12020 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 59 OF 2018
RM MWONGO, J
JUNE 27, 2022**

BETWEEN

DORCAS WANJUGU NDII 1ST APPELLANT

JOSEPH MUNYI 2ND APPELLANT

AND

RICHARD MWAI NJERU RESPONDENT

*(Being an appeal against the Judgment of Hon D. Nyaboke
dated 8th October, 2018 in Wanguru PMCC No 21A of 2017)*

JUDGMENT

1. The appellants appeal is against both the lower court's finding of liability and quantum in respect of a judgment for personal injuries following a collision between the plaintiff's motor cycle Reg No KMDF377B and the Reg No KBS 210J Toyota Station Wagon. The accident occurred on July 24, 2015 at Kwa Njoki Area along along Makutano-Mwea road.
2. The learned trial magistrate found the appellant 100% liable for the accident, and awarded general damages of Kshs 1,000,000/-, plus costs and interest, after hearing the testimony of the plaintiff and one of his witnesses. The defence availed no witnesses.
3. The appellant's grounds of appeal are as follows:
 - i. That the Learned Magistrate erred in law and in fact by failing to appreciate that no negligence was established as against the appellants and as such no liability could attach.
 - ii. That the learned magistrate erred both in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the respondent and against the appellants.



- iii. That the learned magistrate erred in both law and in fact when she awarded a sum of Kshs 1,000,000/= as general damages which amount is manifestly excessive and high in the circumstances and connotes an erroneous estimate of the damages suffered.
 - iv. That the learned magistrate erred both in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the appellants on the record and the authorities annexed there in support of their case.
 - v. That the learned magistrate erred both in law and in fact by failing to follow rules of precedents in finding the Appellants liable.
 - vi. That the learned magistrate erred both in law and in fact for considering for considering irrelevant matters in arriving at the said decision in favour of the Respondents as against the appellants.
4. The appellants seek the setting aside, with costs, of the lower court judgment.
 5. The plaintiff/respondent's claim in his plaint against both appellants filed on February 20, 2017, was for general damages for pain and suffering and loss of amenities as well as costs and interests of the suit. Interlocutory judgment was entered against the 2nd appellant for non-appearance.
 6. The appellant's injuries are as set out in the medical report of Dr Peter Olyam (PExb 3) which was admitted by consent of the parties. The medical report indicates the injuries sustained by the respondent as: Fractures of the right mandible, premaxilla Left radio-ulnar, and Dislocation of the right wrist joint
 7. In the doctor's opinion, the injuries led to disfigurement of the jaw, inability to masticate some solid food like maize, and limited range of motion to both wrist joints. The degree of impairment was placed at 19%.
 8. It is trite that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions (see Court of Appeal for East Africa in *Peters -vs- Sunday Post Limited* [1958] EA 424.

On liability

9. I have carefully perused the appellant's four page submissions. I do not see in them any submission on the issue of liability despite criticizing the lower court's finding on liability in the grounds of appeal. This makes it impossible for this court to examine the aspects of the finding on liability that the appellant challenges. It is the obligation of the party challenging any aspect of a judgment or award to clearly identify it and make substantive arguments thereon. The appellant must not merely throw the pleadings at the Judge and expect the Judge to obtain the arguments out of thin air. In this regard the appellant's criticism on liability remains unknown.
10. Be that as it may, this court notes that the trial magistrate relied entirely on the evidence presented before her in reaching her conclusions on liability. She evaluated the evidence of PW1, an eyewitness, and PW2, the investigating officer. She noted that the plaintiff was riding in his lawful lane, when the appellant's vehicle emerged without warning causing the respondent to swerve to the edge of the road where the collision occurred. She found that the plaintiff had placed enough evidence on negligence before her to require the appellant's rebuttal. He provided no evidence to explain the negliget acts that were foisted on him by the plaintiff.



11. Further, the learned magistrate took guidance from authorities such as *Francis Njoroge Njonjo & another v Irene Muriuki & others* [2007] eKLR that held that everyday proof of collision is held to be sufficient to call on the defendants for an answer. The appellants provided no witnesses to answer and avail an alternative story; or avail information showing that the facts given by the plaintiff were too ridiculous or irrational or incredulous to be believed.
12. The respondent argued on this issue that section 107 and 108 *Evidence Act* Cap 80 provides who bears the burden of proof in a case. Those two sections provide:

“ 107.

- (1) Whoever 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. That the police officer did not find who was to blame may not be of great relevance to this case. This is not a traffic case which is criminal in nature where for the police to change the driver, the threshold of proof is beyond reasonable doubt.

13. Further, he submitted that in Machakos HCCA No 70/18 *Techarad Steam & Power Ltd v Mutio Muli & anor* the court cited with approval *William Kabogo Gitau v George Thuo & 2 others* (2010) 1 KLR 526 that:

...”in ordinary civil cases, a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49 % of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred...”

14. The respondent’s submissions are wholly persuasive to me. In addition, the plaintiff’s evidence is sufficient. In the absence of any controverting evidence or other explanation, I find that there is no basis to interfere with the trial court’s judgment. Accordingly, I uphold the finding on liability.

On quantum

15. The appellants submit that the amount awarded was inordinately high thus setting bad precedent. A reasonable amount ought to have been awarded taking into account the injuries and any long term effect envisaged. He argued that the plaintiff testified that he had fully recovered and was only experiencing small pains at the time of the hearing.
16. Further, he argued that should the court be inclined to sustain an award of general damages, the court must ensure that the awards make sense and result in fair compensation. Astronomical awards must be avoided (see *Ugenya Bus Service v Gachoki* NKL/ CA Civil Appeal No. 66 of 1981 [1982] eKLR and *Jabane v Olenja* [1986] KLR 661).
17. He also referred to the Court of Appeal holding in *Sospbinaf Company Limited v James Gatiku Ndolo* NRB CA Civil Appeal No. 315 of 2001 [2006] eKLR that:

The assessment of damages for personal injury is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards and principles developed by the courts,



ultimately what is a reasonable award is an exercise of discretion by the trial judge and will invariably depend on the peculiar facts of each case.

18. The appellants submit that the respondent should be awarded Kshs 300,000/-: guided by the following authorities:*Maselus Eric Atieno v United Services Limited* [2017] eKLR: Where court on appeal upheld an award of Kshs. 250,000/- for fractures of the right leg tibia/fibula bones, Bruises on the right elbow joint, Tenderness and swelling on the right knee, Injury on the pelvic region, Injury on the right thigh, injury on the right elbow joint and Pain on the abdomen. The injuries prima facie far much more serious.*Harun Muyoma Boge v Daniel Otieno Agulo* [2015] eKLR; Where plaintiff was awarded Kshs. 300,000/- for blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia and fibula and soft tissue injuries *Isaac Mwenda Micheni v Mutegi Murango* NRB HCCC of 2004 [2004] eKLR Where the Plaintiff suffered a fracture of the left tibia and fibula together with soft tissue injuries including a wound on the scalp, cut wound on the knee and bruised right forearm in 2004. An award of Kshs. 100,000/- was issued in the matter. *Jitan Nagra v Abidnego Nyandusi Oigo* [2018] eKLR where Majanja, J. substituted an award of Kshs 1,000,000/- with an award of Kshs 450,000/- where the plaintiff had sustained lacerations of the occipital area, deep cut wound on the back, right knee and lateral knee, bruises at the back extending to the right of the lumbar region, blunt trauma to chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental fracture of right femur. The injuries here were more serious than those sustained by the respondent in the present case.
19. The respondent on his part submitted that the honorable court can only interfere with the award of damages if the same is too high or too low as to occasion miscarriage of justice. He reiterated the injuries suffered, his admission to Kerugoya Hospital for 1 week and later at Nyeri Provincial General Hospital. He urged that the award should not be interfered with.
20. Further, the respondent cited section 107 and 108 *Evidence Act* cap 80 provides who bears the burden of proof in a case. Those two sections provide:-

“ 107(1) Whoever 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. That the police officer did not find who was to blame may not be of great relevance to this case. This is not a traffic case which is criminal in nature where for the police to charge the driver, the threshold of proof is beyond reasonable doubt.
21. He argued that the doctor’s opinion was that the injuries led to disfigurement of the jaw, inability to masticate some solid food like maize, limited range of motion on both wrist joints. The degree of impairment is 19%. With all these, he relied on the following case: *Zachary K Ariithi v Jasbon Otieno Ochola* (2016) eKLR: Where the plaintiff sustained chest pains, injuries to the waist, compound fracture of right tibia/fibula, compound fracture of the left and right femur bones, fracture of the 3rd, 4th, 5th right ribs, injuries to the forehead hip joint and left toe was awarded Kshs 1,500,000.
22. In the present case, the injuries sustained by the respondent were: Fractures of the right mandible, premaxilla; Left radio-ulnar, and Dislocation of the right wrist joint, according to Dr Olyam’s report. His injuries were slightly less serious than those in the Zachary Ariithi Case.
23. The respondent pointed out that he had not healed on his left hand. He could not work for long as the hand pained. His teeth had not healed and he could eat hard, hot or cold food. He only ate rice and ugali; all of which resulted in impairment of 19%.



24. I am persuaded that the trial magistrate did not take into consideration any criteria or factors which she should not have, nor omitted to take into account any relevant considerations. Thus an award of Kshs 1,000,000 was sufficient: neither too high nor too low.
25. Accordingly, having carefully considered all the evidence and documentation availed, and having taken into account the authorities and submissions of the parties, I am persuaded by the respondent that there is no basis for interfering with the damages awarded.
26. Accordingly, the appeal fails and is hereby dismissed with costs.
27. Orders Accordingly.

DELIVERED AT KERUGOYA ON THIS 27TH DAY OF JUNE 2022

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R MWONGO

JUDGE

Delivered in the presence of:

1. Rigaga for the Appellants
2. Githaiga holding brief Theuri for the Respondent
3. Murage Court Assistant

