



REPUBLIC OF KENYA



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**Tabitha v Omar & 2 others (Civil Appeal E020 of 2020)  
[2022] KEHC 10401 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E020 OF 2020  
RN NYAKUNDI, J  
JUNE 24, 2022**

**BETWEEN**

**AWINO LINDA TABITHA ..... APPELLANT**

**AND**

**MAUA OMAR ..... 1<sup>ST</sup> RESPONDENT**

**ALI MWENYA ..... 2<sup>ND</sup> RESPONDENT**

**WATU CREDIT ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgement/Decree of Honourable S.D.Sitati – Resident Magistrate delivered on the 23rd November, 2020 in Kilifi RMCC No.381 of 2019)*

**JUDGMENT**

1 This is an appeal by the appellant on both liability and assessment of damages against the judgment of Hon Sitati delivered on November 23, 2020 in Kilifi RMCC No. 381 of 2019 in that judgment the learned trial magistrate made a finding to the effect that liability from the evidence was established to be 70:30% whereas damages payable is stated at a quantum of Kshs. 2,600,000/= plus costs and interests. Being aggrieved with the entire judgement the applicant filed her memorandum of appeal couched in the following grounds; -

1. That the learned trial magistrate erred in law and in fact and misdirected himself in finding the appellant 30% liable notwithstanding the evidence on record to the contrary.
2. That the learned trial magistrate erred in law and in fact in failing to properly analyse the evidence before him which clearly established that the rider of motor cycle registration number KMEN 339L was substantially to blame for the subject accident by venturing into the road unclear in assessing liability in a claim for negligence.



3. That the learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in assessing liability in a claim for negligence.
4. That the learned trial magistrate erred in law and in fact in exonerating the 1<sup>st</sup> respondent from liability despite having willingly boarded an overloaded motor cycle.
5. That the learned trial magistrate erred and misdirected himself in law by assessing damages that was manifestly excessive and incomparable to the current judicial awards for analogous injuries.
6. That the learned trial magistrate erred in law in failing to appreciate the applicable principles in assessment of damages for pain and suffering.
7. That the learned trial magistrate erred in law and fact in failing to take into account relevant factors in evaluating the evidence on record to determine the issue of quantum.

## Background

2. This is a claim in negligence filed by one Oma Ngonyo, the 1<sup>st</sup> respondent arising out of an accident which occurred on June 19, 2019, in which he was a lawful passenger on board motor cycle registration number KMEN 339L along Kilifi Malindi road. It was alleged that the appellant was the driver of aforementioned motor cycle drove it recklessly, or negligently occasioning a collision between the motor cycle and motor vehicle registration number KCM 356M. It was the 1<sup>st</sup> respondent's case that as a result of the accident he suffered injuries to the forehead, amputation of the left leg, below the knee, chest injuries and mild swelling. The appeal was canvassed by way of written submissions provided for by learned counsel for the appellant and the respondents. In the matter at hand these submissions forms the basic structure to delve into the issues for and against the appeal.

## Analysis and Determination

3. The issues to be determined in brief are;
  - a) Whether the learned trial magistrate erred as to the issues surrounding liability on causation of the accident and blameworthiness.
  - b) Secondary to issues (a) whether the assessment on contributory negligence was properly conceived and analysed by the trial court.
  - c) Whether the quantum of damages was against the probative value in the evidence and the guiding principles in past awards. The continual principles in cases of this nature is that the applicant has the onus to prove that the learned trial magistrate was wrong in this findings and that onus is a heavy one.
4. As indicated in *Sumama & another v Allied Industries Ltd* [2007]2 KLR and *Seete & another v Associated Motor Boat Co. Ltd* [1968] EA 123 an appeals court has the jurisdiction to re-evaluate the evidence and at the end of it come up with its own conclusions in that role, However the court has to bear in mind that it should not interfere with the findings of the trial court, witness, there is overwhelming evidence that the final decision making process was based on Misc. Application evidence in principles of law. (See also [R v Francis Otieno Oyter](#) CR Appeal No. 158 of 1984).
5. In this respect the appellant on liability relied on grounds 1, 2, 3 and 4 in the Memorandum of Appeal; in the court below on liability, evidence from (PW1) Maua Omar Ngunya presented an over view of the occurrence of the accident and particulars of negligence against the Appellants.



6. It is clear from the record, that (Pw 1) never witnessed the accident she also alluded to the issue as to the number of passenger expected to board any motor cycle. She also admitted not to have worn a helmet or a reflective jacket. According to (Pw 1) she did not witness the accident because she covered herself with a lesso. In furtherance to proving negligence, the respondent/plaintiff adduced evidence of (Pw 3) Pc Stephen Wandera of Kilifi Police Station apparently investigated the accident.
7. On occurrence of the accident to his evidence (Pw 3) told the court that the subject motor cycle had on board pillion passengers when it collided with motor vehicle registration number KCM 356M, (Pw 3) also revealed that on visiting the scene he drew a sketch plan and later filled the police abstract in which a recommendation was made that the motor cycle rider was to blame for the accident.
8. In the impugned judgment it also revealed conflicting accounts of how the accident occurred. In that in one instance, a finding was made that the motor cycle had joined the highway from a feeder road without due care and attention. Similarly, in the same context, it is alleged that the motor vehicle hit the motor cycle from the rear resulting in a collision which killed the pillion passenger instantly.
9. In the submissions by learned counsel for the appellant, in this appeal he sought some clarifications of these inconsistencies which on account of it the judgment on liability was founded by the trial court. The learned trial magistrate also indicated that neither, the motor cycle rider or driver of the motor vehicle turned up to give tactical evidence in rebuttal to circumstantial evidence on causation of the accident.

## Resolution

10. The law and application as it relates to this appeal, as a general guideline principle all road users of the road owe a common law duty of care to other road users; that drivers of motor vehicles have a statutory duty to take necessary action to avoid an accident and to exercise reasonable care to avoid causing injury to persons or damage to property. Reasonable care which the ordinary skillful driver would exercise under all the circumstances are incidents of avoiding excessive speed and keeping a proper look out (*Eso Standard Oil SA Ltd & another v Ian Turnover* [1991] 28 JLR 553 *Bounheur Young* [1943]AC 92. It is trite that in proving negligence and breach of duty care, it is the plaintiff/respondent to this appeal who bore the greatest responsibility to proof her case against the appellant on the balance of probabilities. The evidence on negligence came from (Pw 1) and (Pw3) respectively. In that context the two witnesses did not come out clearly as to who between the motor cycle rider and motor vehicle driver was the proximate cause of the accident. In *Stephen Wasike Wakitu & another v Security Express Ltd* [2006] eKLR the court sated this; -

A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum that he who alleges must prove.”

11. Whereas it is true that an accident occurred involving motor cycle rider in which the claimant Maua Omar was a pillion passenger and motor vehicle registration number KCM 356M, there is under evidence particularly on causation and blame worthiness. The best evidence deductible from the record on negligence came from (Pw 3) the police officer who apparently investigated the accident. A police abstract being a public document captured the contents on the interim findings placing culpability of the accident on the motor cycle rider. In so far as the appellant was concerned her case rested with the averments made in the statement of defence. There was no quality evidence from the appellant which demonstrated on how the accident occurred. It is also clear from the record of the trial court that the motor cycle rider joined the highway from a feeder road. As fate would have it, the motor vehicle hit the motor cycle from the rear in specifics which are not crystal clear, going by the surrounding factors



as to time, lighting and whether, the motor cycle rider made a decision to join the highway when it was safe to do so.

12. The respondent Maua Omar (Pw 1) testimony did not tell the court how the driver of the motor cycle was negligent or as to breach of duty attributed to the appellant's motor vehicle.
13. It is not in dispute that the two drivers were driving in the same direction along Kilifi – Malindi Road. Although, the respondent's evidence and that of her witness may have been taken to be honest and credible, albeit as much as this court is not the primary court on demeanour, or truthfulness of witnesses that admitted recorded evidence casts doubt to the threshold to prove the element on apportionment of 70:30% as founded by the learned trial magistrate.
14. Negligence as known in law is careless conduct that ends up causing harm to another person. In this scenario the negligent act is what the motor cycle rider did or the motor vehicle driver failed to do that is failing to yield, not to stop at a pedestrian crossing forgetting to turn on the lights, or hitting another from the rear and as consequence damage and injury is occasioned. The aspect of vigilance and keeping proper look out is a responsibility of each driver using the road. Lord Brenman J stated in *Sutherland Shire Council V Heyman* [1985] 157 ELR 424;

It is impermissible to postulate a duty of care to avoid one kind of damage say, personal injury, and finding the defendant guilty of failing to discharge that duty, to hold him liable for the damage actually suffered that is of another independence kind, say economic loss. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual habit of the damage suffered is refundable to the existence and extent of any duty to avoid or prevent it.”
15. I am of the considered opinion that questions of causation are normally concerned with indemnifying the consequences which flow from the breach of duty of care. In this appeal I pause the question what particular negligence act of the motor cycle rider or motor vehicle driver's conduct which made it wrongful to cause the 1<sup>st</sup> respondent's loss and injury.
16. On scrutiny and evaluation of the evidential analysis by the learned trial magistrate, there is a sense of difficulty due to the intrinsic vagueness of counterfactual propositions in order to yield a determinative answer on apportionment of liability. That approach preferred by the learned trial magistrate is traceable to assignments in various ways on the scope of the duty of care and liability for consequences arising one of the accident in *Henderson v Harry E Jendens* [1969] 3 AER 756 the court held that; -

In an action for negligence, the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in granting judgment at the end of the trial, the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied, the plaintiff action fails” See also *Equator Bottlers Co. Ltd V Sozi Tadayo Musumbu* [2005] LLR 829 [2006].”
17. Here in this appeal various allegations on negligence were pleaded by the 1<sup>st</sup> respondent in support of the prayers on liability and damages. The trial court heard, the evidence of Pw 1 and Pw 3 which was also subjected to rigorous cross-examination by the appellants. The evidence was neither direct but purely circumstantial, unfortunately even (Pw 1) confronted her failure to explain how the accident happened.
18. In view of the insufficiency contributory negligence of probative evidence I am unable to agree with the learned trial magistrate with regard to the determinants of 70:30% liability for that accident. I am



more inclined to follow the principles in Paul Luwi Lokate vs Auto Industries Ltd & Jonathan Charo Kalama. HCCA No. 3 of 2020 to the effect that for the motor cycle, to have joined the highway from a feeder road at night and bearing in mind that the motor vehicle was also being driven on the same road and did collide with it from the rear, each of them either way in absence of concrete evidence contributory negligence, are equally to blame for the accident.

19. What does this mean? This court has the power to interfere with the findings of the trial court as they were based on no concrete evidence to support apportionment of failure of the duty of care at ratios of 70:30% between the appellant and respondent. See (Mwangi v Wambugu (1984) KLR 453.
20. In that regard the court in Hussein Omar Farah v Lento Agencies CA No 34 of 2005[2006] eKLR held that; -

Where it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident, in this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

21. My take obviously on contributory negligence in a particular instance within which in the wider doctrine of “tort” negligence, operates that a court of law will not give redress to a plaintiff whose case shows a wrong in himself or herself in the very matter whereof he or she complains. In my understanding a case involving contributory negligence presents to the trial court the question of what a person ought or ought not to have done under the circumstances of the particular case. Hence to warrant a verdict of contribution against the plaintiff, the law merely requires that his or her negligence be affirmatively shown by preponderance of the evidence and is therefore does place the burden upon the defendant to show that the negligence of the plaintiff contributed to the accident. In this view the absence of contributory negligence becomes a part of the plaintiff’s case against the defendant. A casual observation of this language, infused across the record and impugned judgment, it appears to me that the apportionment of 70:30% was not well thought of within the criteria outlined on contributory negligence.
22. In my able and concise opinion this was a case in which a proposition of both drivers being equally to blame should have carried the day. To that extent I disagree with the findings on liability apportionment by reversing the decision as both of them are equally guilty of negligence. None of the drivers can be said to bear greater responsibility than the other. That therefore settles the issue on liability.
23. As to quantum question on appeal, the law is now well settled as indicative of the principles in Sigh v Kumlan [1948] 15 EACA 21 Obongo v Municipal Council of Kisumu [1971] EA 91 Kemfro & another VAM Lubia & another [1987] KLR 27. On account of these, an appellate court will not interfere with the findings on damages awarded by the trial court unless, it is satisfied that the award was based on some wrong principle or is so manifestly excessive or inadequate that a wrong principle may have been involved.
24. The effect of inflation is a factor in calculation of damages to preserve the real value of money to compensate the claimant on the law. Further on principles governing assessment of damages its trite that the objective is to compensate the claimant as nearly as possible for the injuries suffered.
25. In the case of Chidule v Medi CA No 12 of 1993 by the Supreme Court of Malawi – in assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered. That is the decisive factor. There is the aspect of loss of amenities of life and general disfigurement.



26. In view of the facts before the court and the guiding principles, I am satisfied that the exercise of discretion on assessment of damages of the trial court rested on the reasoning which is sound not arbitrary whether, the appellant believes that the level of damages for non-pecuniary loss is too high has not been supported by any cogent evidence.
27. All along the law reiterates that an award of general damages falls within the realm of judicial discretion. There is a presumptive dictate in adjudication of damages that it be limited to once for all sum fixed by the trial court, and an aggrieved party may only prefer an appeal in exceptional circumstances. Under the guise of an appeal the court in *Davies v Powell Duffryn Associated Collieries* [1942], ALLER 657 stated;-
- That it is a grave move for an appellant court to interfere with an award of damages made by the trial court unless evidence shows wrong application of the law to the facts of the case, or in arriving at the award the anchor reasons were all erroneous to culminate in punitive or low damages.”
28. As noted above the appeal has not surmounted those hurdles.
29. The general rule of restitution in *intengrum* was applied correctly by the learned trial magistrate.
30. In that case and for these reasons the appeal on quantum fails. It is to that extent I allow the appeal partially with costs being shared equally.

**RULING READ, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>th</sup> DAY OF JUNE, 2022.**

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**R. NYAKUNDI**

**JUDGE**

This Judgment is dispatched electronically to the respective emails of the advocates in the matter.

