**Mwangi & another v Mwangi (Civil Appeal 533 of 2015)**
**[2022] KEHC 14214 (KLR) (Civ) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14214 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 533 OF 2015**

**CW MEOLI, J**

**OCTOBER 21, 2022**

**BETWEEN**

**JOHN KAMAU MWANGI ..... 1ST APPELLANT**

**JAMES KINUTHIA ..... 2ND APPELLANT**

**AND**

**NELSON GACHANJA MWANGI ..... RESPONDENT**

***(Being an appeal from the judgment of Hon. M. Chesang, (Mrs.) (RM) delivered on 16th October 2015 in Nairobi Milimani CMCC No. 1334 of 2014)***

## JUDGMENT

1. This appeal emanates from the judgment delivered on October 16, 2015 in Nairobi Milimani CMCC No 1334 of 2014. The suit was commenced by a plaint filed on March 17, 2014 by Nelson Gachanja Mwangi the plaintiff in the lower court (hereafter the Respondent) against John Kamau Mwangi and James Kinuthia the defendants in the lower court (hereafter the 1st & 2nd Appellant/Appellants). The Respondent's claim was for damages on account injuries sustained in a road traffic accident that occurred on August 10, 2013. It was averred that the 2nd Appellant was the driver of motor vehicle registration number KAH 889S in his capacity as an agent of the 1st Appellant who was the registered owner of the said vehicle. That the Respondent was crossing Kangundo Road near Kayole slaughterhouse when the 2nd Appellant so negligently drove, managed or controlled motor vehicle KAH 889S (hereafter suit motor vehicle) that it knocked down the Respondent who sustained injuries and has suffered loss and damage.

2. The Appellants filed a joint statement of defence on May 19, 2014 denying the key averments in the plaint and liability, in the alternative alleging contributory negligence on the part of the Respondent.

The suit proceeded to full hearing during which the parties adduced evidence in support of their respective cases. In its judgment, the trial court proceeded to apportion liability in the ratio of 90:10 in favour of the Respondent and thus awarded him damages plus interest & costs of the suit as hereunder:

a. General Damages - Kshs 550,000/-.

b. Special Damages - Kshs 107,630/-.

Total- Kes 657,630/-

3. Aggrieved with the outcome, the Appellants preferred this appeal which is based on the following grounds: -

> " 1. The learned trial magistrate erred in law and in fact in holding that the Occurrence Book Report and the subsequent Police Report amounted to hearsay evidence where in fact the said documents are police documents hence public documents within the provisions of the *Evidence Act* and failure to call the maker thereof could not amount to the said hearsay evidence as held by the court.
>
> 2. The learned trial magistrate erred in fact and law in finding that the Respondent was entitled to general damages that were too high and without considering the provisions set out in the Insurance (*Motor Vehicle Third Party Risks) (Amendment) Act 2013* cap 405 which gives a guideline on how compensation ought to be compensated and the available authorities on similar cases.
>
> 3. The learned trial magistrate erred in law and misdirected herself when she failed to consider the Appellants submissions on both liability and quantum.
>
> 4. That the learned trial magistrate's judgment was unjust against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice.
>
> 5. The learned trial magistrate erred in law and fact in holding that the Defendants are 90% liable yet the facts and circumstances of the case did not support such a finding.
>
> 6. The learned trial magistrate erred in law and fact in failing to give due weight to the evidence by the Appellants vis a vis the circumstances of the accident and indeed hold the Respondent substantially to blame for the accident.
>
> 7. The learned trial magistrate erred in law and in fact in awarding general damages of Kshs 550,000/= that were excessive and unjust in the circumstances of the accident the nature of injuries and the conventional authentication in relation to such injuries.
>
> 8. The learned trial magistrate erred in awarding costs of the suit and interest to the Plaintiff." (sic)

4. The court directed that the appeal be canvassed by way of written submissions. The Appellants failed to file written submissions despite being given ample opportunity to do so. The Respondent duly filed his submissions.

5. The Respondent naturally defended the trial court's decision. Counsel argued from the outset that the learned magistrate's finding concerning the relevant entry in the Occurrence Book tendered at the trial was sound because Section 63 of the *Evidence Act* requires oral evidence to be direct. Citing *Jimnah Munene Macharia v John Kamau Erera* Civil Appeal No 218 of 1998 counsel asserted that the court did not err on that account. Addressing the Appellants second ground of appeal, while relying on the Court of Appeal decision in *Justus Mutiga & 2 Others v Law Society of Kenya* [2018] eKLR counsel asserted that the amendments to the *Insurance (Motor Vehicles Third Party Risks) Act* (cap 405) which introduced structured compensation and a schedule thereto were declared null and void hence the said grounds of appeal were misconceived.

6. Counsel further pointed out that unlike the Respondent who gave a first-hand account of the accident, the Appellants relied on hearsay evidence. Relying on *Selle v Associated Motor Boat* (968) EA 123 counsel urged the court to be slow to disturb the findings of fact made by the trial court unless the findings were based on no evidence or misunderstanding of evidence. The decisions in *Zarina A Shariff v Noshir P Sethna* (1963) EA 239 and *Vyas Industries v Diocese of Meru* (1982) KLR were cited to support the contention that the Respondent's evidence was not controverted, and that apportionment of liability was a matter of discretion which ought not to be disturbed without proper basis. Concerning the assessment award on general damages, counsel relied on the evidence and submissions before the lower court and the decision in *Sosines Orindo v Emkay Builders Ltd* [2019] eKLR to argue that the trial court did not commit any discernible error in the exercise of its discretion. The court was thus urged to dismiss the appeal with costs.

7. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –v- Associated Motor Boat Co*. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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."

8. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Upon review of the memorandum of appeal, the original record of proceedings and submissions before this court it is the court's view that the appeal turns primarily on two issues, namely, whether the finding of the trial court on liability was well founded; and secondly whether the award on general damages was justified.

9. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a AF Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

10. The Respondent by his plaint averred at paragraph 4 that:

> "4. On or about August 10, 2013 the Plaintiff was crossing Kangundo Road near Kayole Slaughter when the 2nd defendant acting for the 1st defendant's gain so negligently drove, managed or controlled motor vehicle KAH 889S that it collided with the plaintiff who sustained injuries and has suffered loss and damage.
>
> Particulars of Negligence
>
> The 2nd defendant was negligent in that he:
>
> a. Drove at a very high speed in the circumstance.
>
> b. Overtook or attempted do so when it was usafe.
>
> c. Drove off the lawful lane onto the pavement or off the road.
>
> d. Failed to keep any or any proper look out or have due regard for other road users.
>
> e. Failed to take any or any reasonable avoiding action.
>
> f. Overtook vehicle at a stage by the wrong side.
>
> g. Caused the accident by driving recklessly and or dangerously.
>
> h. Failed to exercise any or any effective control or lost control over the vehicle." (Sic)

11. The Appellants filed a statement of defence denying the particulars of negligence meanwhile attributed negligence on the part of the Respondent by stating at paragraphs 3, 4 and 5 that:

> "3. The Defendants deny the contents of paragraph 4 of the plaint and more specifically deny the occurrence alleged in the said paragraph 4 as well as the

particulars of negligence enumerated there under and put the Plaintiff to strict proof thereof.

4. Further and in the alternative and without prejudice to the foregoing the Defendants aver that any such occurrence as the Plaintiff may prove was caused solely and or substantially contributed to by the negligence of the Plaintiff.

   Particulars of negligence

   The Plaintiff was negligent in:

   a. Failing to have any or any due regards to his own safety by using the phone while crossing the road.

   b. Failing to keep to the pedestrian walk.

   c. Failing to heed warning by hooting of motor vehicle registration number KAH 889S.

   d. Failing to jump, move or in any other way so as to avoid the accident.

   e. Walking carelessly and dangerously on the road.

   f. Failing to heed warning by the public not to dash into the road.

   g. *Res Ipsa Loquitor*.

5. Further and in the alternative and without prejudice to the foregoing the defendants aver that any such occurrence as the Plaintiff may prove occurred without any negligence on their part and was due to an inevitable accident.

   and the defendants deny that the Plaintiff should rely on the doctrine of *Res Ipsa Loquitor* herein." (sic)

12. The trial court after restating and examining the respective parties' evidence stated in its judgment concerning liability that:

> " There has been great contest over whether the plaintiff was talking on phone as he crossed the road or not and consequently whether he should be held liable for the accident or not.
>
> .....entry on the occurrence book (OB) was made by a police officer who was not called as a witness, despite he still working within the jurisdiction of the court. It is also not known who reported this fact to the police and caused it to be entered in the OB. The obvious inference herein is that the averment that the Plaintiff was crossing the road while talking on the phone is hearsay evidence as it was not stated by a person who saw such an incident take place. It cannot therefore form the basis of apportioning liability. Since the plaintiff was at the edge of the road when he was knocked by the 2nd Defendant's vehicle, I once apportion liability at 90% to 10% in favour of the plaintiff against the defendant." (Sic).

13. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the Respondent. In *Karugi & Another v. Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended

and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

14. The mere occurrence, of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in *Eastern Produce (K) Ltd Christopher Atiado Osiro* [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of *Kiema Mutuku v. Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

15. In *Gideon Ndungu Nguribu & Another v Michael Njagi Karimi* [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in *Stapley v Gypsum Mines Ltd* (2) [1953] AC 663 at p 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

16. The Respondent testified as PW1 and adopted his witness statement as his evidence in chief. The sum of his evidence was that while he was crossing Kangundo Road near a stage, the 2nd Appellant in a bid to overtake another vehicle knocked him when he had almost completed crossing the road. Under cross-examination he re-affirmed that the suit motor vehicle was overtaking another motor vehicle that was partially on the road and not in motion. He testified that he did not see the 2nd Appellant's motor vehicle approach and denied that he was talking on phone when the accident happened. He further blamed the driver of the suit motor vehicle for not hooting to warn of his approach.

17. The Appellants called one witness PC Zawadi Ruwa who testified as DW1. She tendered an extract of the Occurrence Book (OB) as (DExh1) and proceeded to state that the Appellants' motor vehicle was being driven towards Kayole along Kangundo Road by the 2nd Appellant and that the Respondent was hit while crossing the road while talking on his phone. She confirmed she was not the investigating officer of the accident but claimed that the Respondent was blamed for causing the accident for

crossing the road while making a phone call. Under cross-examination she stated that investigating officer was the one who made the particular entry in the Occurrence Book and that the additional information on the face of the police abstract purporting to blame the Respondent for the accident was not countersigned; and moreover that the Respondent was not charged for a traffic offence. Further the police abstract P. Exh.1 states the name of the 2nd Appellant who was never charged for careless driving, and finally admitting that apart from the Occurrence Book she had no other evidence as to how the accident occurred. On re-examination he confirmed that no information could be added on the police abstract without being countersigned and that the matter is still pending under investigation.

18. Evidently DW1 did not witness the material accident. Her evidence was entirely gleaned from the Occurrence Book extract (DExh1). She was not involved in the investigations concerning the accident. The contents of (DExh1) comprise an entry made after the fact at the police station. The trial court correctly considered the evidence and rightly concluded that the evidence before it "cannot therefore form the basis of apportioning liability" and that DW's evidence merely confirmed occurrence of the accident, but her account did not contain admissible and credible evidence as to how the accident occurred.

19. The Respondent was the sole eyewitness to the accident, and his evidence was not controverted by any eyewitness account. His evidence further established on a balance of probabilities that the 1st Appellant' vehicle was largely responsible for the accident. The trial court did not misdirect itself in holding the Respondent partially liable as his evidence was to the effect that he was hit just as he was about to finish crossing the road and that he did not see the suit motor vehicle. These findings were well founded, and consequently there can be no basis to interfering therewith.

20. Regarding quantum, the Court of Appeal stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] I KAR 5 that:

> " An appellate court will not disturb an award of 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".

21. In *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v AM Lubia and Olive Lubia* (1987) KLR 30, it was held that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages." see also Butt v Khan (1981)KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No 284 of 2001; (2004)eKLR."

22. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that "an appellate court is not 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. There is no dispute that the Respondent sustained a fracture of the socket of the right hip as a result of the accident as confirmed by the P3 form (PExh2) and Case Summary from Kenyatta National

Hospital (PExh3). The medical report by Dr WM Wokabi (PExh5) documented the injuries as comprising fracture of the socket of the right hip joint (acetabulum). It was his opinion at the time of examination of the Respondent that "he suffered a lot of pain from the major injury sustained on the right hip joint causing a fracture of the socket. With the conservative treatment he was given the fracture will heal. The pain and restriction of movements of the hip will also decrease in intensity..... fracture to the socket of the right hip joint will predispose this joint to developing arthritis".

24. The trial magistrate awarded Kshs 550,000/- as general damages after observing that:

> "Considering the authorities submitted by both parties the current trends and the rate of inflation, the serious injury (fracture) suffered by the plaintiff and the shortening of the plaintiff's leg as a result of the accident, the plaintiff is awarded Kshs 550,000/= in general damages."

25. There is no reference to the shortening of the affected leg in the medical report by Dr Wokabi and the trial court did not indicate the source of that detail that was included in the judgment. Be that as it may, keeping in mind the principles enunciated in *Kemfro Africa Limited t/a Meru Express Service and Gathogo Kanini v AM Lubia and Another* (supra), this court has considered the award of general damages. Although the Respondent must have suffered a great deal of pain and extended periods of morbidity due to the fracture to the acetabulum, he eventually recovered without any severe sequela save for the predisposition to arthritis.

26. In the court's opinion the authorities which the Respondent cited before the trial court were not exactly on all fours with the instant case. However, this court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and a court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. On the part of the Appellants, they relied entirely on the impugned Insurance *(Motor Vehicle Third Party Risks) (Amendment)* Act No 50 of 2013. As correctly argued by the Respondent the said amendment Act has since been declared unconstitutional by the High Court and the decision subsequently upheld by the Court of Appeal in Justus Mutiga & 2 Others (supra). It is also unacceptable for parties to cite new authorities on appeal as the Respondent has done here; the case of Sosines Orindo (Supra) was not cited by the Respondent in the lower court and this Court will disregard it.

27. That said, this court is of the view that sum of Kshs 550,000/- awarded by the trial court and supported by the Respondent on this appeal, is not inordinately high and ought not to be disturbed. Consequently, this appeal is found to be without merit and is accordingly dismissed with costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF OCTOBER 2022**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Appellants: Mr. Nganga

For the Respondent: Mr. Kaburu

C/A: Carol