



**Wahinya v Imbwaka (Civil Appeal 044 of 2021)
[2022] KEHC 14096 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 044 OF 2021
RN NYAKUNDI, J
OCTOBER 21, 2022**

BETWEEN

JOSEPH WAHINYA APPELLANT

AND

PHILYPINE MUSILIV IMBWAKA RESPONDENT

*(Being an appeal from the Judgment/Decree of the Honourable E. Kigen
(SRM) delivered on 16th April, 2021 in Eldoret CMCC No. 382 of 2019)*

JUDGMENT

1. The appeal challenges the judgment and decree of Hon E Kigen delivered on April 16, 2021 in Eldoret CMCC No 382 of 2019 wherein the appellant herein was the defendant whereas the respondent herein was the plaintiff.
2. The plaintiff's claim against the defendant was for general damages and special damages allegedly suffered by the plaintiff following a road traffic accident which occurred on April 23, 2019 involving motorcycle registration number KMxx 1xxx in which the plaintiff was being carried as a pillion passenger and motor vehicle registration No Kxx xxx belonging to the appellant was said to have been carelessly and negligently driven by the appellant's driver along Eldoret- Uganda Road.
3. In its judgement dated April 16, 2021, the trial court found the appellant 100% liable for the accident and awarded the respondent general damages of Kshs 250,000/= and special damages of Kshs, 6,000/- plus interest and costs.
4. Aggrieved by the trial court's award on both liability and quantum, the Appellant filed his memorandum of appeal dated May 7, 2021 on the May 10, 2021 setting out the following grounds:



1. That the learned trial magistrate erred in law and in fact in failing to appreciate the reasonable and sufficient evidence tendered in court hence erroneously holding the defendant/appellant 100% liable.
 2. That the learned trial magistrate erred in law and in fact in failing to appreciate the reasonable and sufficient evidence tendered in court when assessing and awarding damages.
 3. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's statement of defence against the weight of the evidence tendered by the plaintiff.
 4. That the learned trial magistrate erred in law and in fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the appellant.
 5. That the learned trial magistrate erred in law and in fact in awarding Kshs, 250,000/= (Kenya Shillings Two Hundred and Fifty thousand only) to the respondent which award when viewed against comparable claims is manifestly excessive and inordinately high as to amount to a miscarriage of justice.
 6. The said award of damages is out to keep with other Kenyan awards for comparable/similar claims.
 7. That the learned trial magistrate failed to exercise her discretion judiciously in awarding general damages and failed to apply the settled principles of the law and thus there was no good or proper basis for the said assessment of damages.
5. Parties agreed to dispose of this appeal through written submissions. The Appellant filed his submissions dated April 11, 2022 while those of the respondent were dated on March 8, 2022.

Appellant's submissions

6. On liability, the appellant submitted that it is not in doubt that the respondent sustained bodily as result of the accident that occurred on April 23, 2019. The appellant however maintains that it was the evidence PW3 that she and her husband had boarded motor cycle registration number KMxx 1xxx and were heading to Moi Teaching and Referral Hospital when they were hit from behind by the appellant's motor vehicle at Eldoret main stage and the said motor vehicle was heading towards Kitale. The appellant further submitted that the evidence of PW2 to the effect that the police abstract he produced did not contain any further details as to the circumstances of the accident. The appellant submitted that PW2 had told court that the accident had occurred along Uganda road near the main stage entrance and hat both drivers were from Nakuru and heading towards Kitale. The appellant further submitted that the motor cycle had been hit from behind and that the driver of motor vehicle registration number Kxx xxx was to blame for the accident. The appellant submitted that at the trial court he had testified as DW1 where he told court that he was driving along Uganda road heading towards Kitale when at the Eldoret main stage entrance motor cycle registration number KMxx 1xxx entered the highway from the main stage entrance on the left side of the road as one faces Kitale direction and recklessly attempted to cross to join the opposite lane heading toward Nakuru direction. The appellant further testified that the motor cycle's movement was abrupt and that as much as he applied brakes, he could not avoid colliding due to the narrow proximity.
7. The appellant maintains that there were the following inconsistencies from the plaintiff's evidence; that it is not true that the plaintiff was heading to Kitale general direction as the hospital she mentioned is Moi Teaching and Referral hospital is located on the opposite direction; that is not true that the motor



cycle was hit from behind but rather it was hit while attempting to enter the highway and lastly that it not true that the appellant is to blame for the accident since the said assertion lacked any supporting evidence. The appellant also contends that the police abstract produced as exhibit PEXH7 does not clearly indicate who is blame for the said accident.

8. The appellant argued that there is no reason why the appellant should shoulder 100% liability when it can be shown that the rider was reckless in the manner in which he entered the highway. The applicant further contends that if can be established that the rider was liable then respondent shoulder his liability as he was never enjoined to the proceedings. The appellant further contends that there can never be liability without fault and the respondent herein failed to establish fault on the part of the appellant. The appellant urged Court to dismiss the suit and, in the alternative, apportion liability at 50:50 since there is no incline of balance of probability.
9. On the issue of quantum, the appellant faulted the learned trial magistrate for awarding the respondent general damages of Kshs 250,000/=. The appellant termed the award as inordinately high and called upon his court to disturb the same. The appellant contends that as a result of the accident the appellant suffered soft tissue injuries which at the time of the hearing were fully healed. The appellant further contends that the respondent was treated as an out-patient where painkillers were administered for the injuries sustained. The appellant's main contention is that the award of Kshs 250,000/= was without any basis and that the learned trial magistrate did not issue any reasons in the exercising her judicial direction in making the said award. The appellant prayed that the award of Kshs 250,000/= should be disturbed and in place be replaced with an award of Kshs 100,000/=. In support of his submissions the appellant cited the following cases; *Jyoti Structures Limited & Another v Truphena Chepkoech Too & Another [2020] eKLR*, *Maimuna Kilungwa v Motrex Transporters Ltd [2019] eKLR*, *Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR*, *John Wambua v Matthew Makau Mwololo & Another [2020]* and *Justine Nyamweya Ochoki & Jared Nyangau Obino v Juma Karisa Kipingwa alias Juma Karisa Kipingwa*.

Respondent's submissions

10. The respondent argued that it is not in dispute that the alleged accident occurred and that the trial magistrate having heard the parties found the appellant 100% liable for the accident. The respondent submitted that PW1 testimony about the occurrence of the accident was confirmed by PW2 who stated that motor vehicle Kxx xxx knocked down motor cycle registration KMxx 1xxx from behind and that the motorcycle was ahead of the said motor vehicle when the accident occurred. The respondent maintains that had the appellant's motor vehicle not knocked the motorcycle herein from behind the accident would have not occurred. The respondent contends that the rider of the said motor cycle cannot be blamed for the accident as the appellant had during cross examination told court that he rammed into the motorcycle from behind.
11. On the issue of quantum, the respondent submitted that the finding by the trial court on quantum is not inordinately too low or high so as to amount to a wholly erroneous estimate to warrant this court to disturb the same. The respondent maintains that the trial magistrate applied the proper principals in arriving at the said award. The respondent further submitted that from the medical record the plaintiff sustained the following injuries; bruises and blunt injury to the right elbow and forearm, blunt injury to the chest, blunt injury to the neck, blunt injury to the back, bruises and blunt injury to the right leg, bruises and blunt injury to the left knee and deep lacerations and blunt injury to the left ankle. The respondent contends that in view of the injuries sustained the award of Kshs 250,000/= made by the trial court sufficed as just and adequate compensation to the respondent for the injuries sustained.



Determination

12. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to re-evaluate, re-assess and reconsider the evidence presented before the trial court to reach its own determination bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage. See: *Selle v Associated Motor Boat Co Ltd (1968) EA 123*
13. I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the cross appellant together with all the authorities cited. Having done so, I find that only two key issues emerge for my determination. These are;
 - a. Whether the learned trial magistrate erred in her finding on liability.
 - b. Whether the trial magistrate erred in arriving at her decision on quantum of damages.
14. From onset I must mention that, the motor cycle rider was not a party to the suit as he had not been sued by the respondent nor had he been enjoined to the proceedings as a 3rd party by the appellant. In his evidence, DW1 appeared to fault the motor cycle rider for the accident saying that he abruptly entered the highway from the main stage's entrance on the left side of the road and he recklessly attempted to cross to join the opposite lane causing the accident. If this was the appellant's position, then he ought to have joined the rider as a 3rd party under order 1 rule 15 of the *Civil procedure Rules 2010* so that the issue of who between the 1st appellant, the rider and the respondent was to blame for the accident could be determined by the trial court.
15. It is not in dispute that the respondent was a pillion passenger. Authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident from carrying since he does not have control over the motor cycle. This court agrees as much.
16. In the instant case, it not in dispute that the respondent was lawful fare paying pillion passenger, who was hit by appellant's motor vehicle causing him to suffer soft tissue injuries. The evidence by the respondent was uncontroverted by the appellant. The appellant admitted he hit motor cycle registration number KMxx 1xxx as it was attempting to enter the highway.
17. In view of the foregoing, this court finds no reason to disturb the findings of the trial court on liability.
18. On quantum of damages, according to Dr Sokobe's report (PEXH 2), the respondent sustained the following injuries: -
 - i. Bruises and blunt injury to the right elbow and forearm.
 - ii. Blunt injury to the chest.
 - iii. Blunt injury to the neck.
 - iv. Blunt injury to the back
 - v. Bruises and blunt injury to the right leg.
 - vi. Bruises and blunt injury to the left knee.
 - vii. Deep lacerations and blunt injury to the left ankle.



19. According to the doctor, upon examination, of the respondent he was of the opinion that the respondent sustained soft tissue injuries which he was recovering well. The appellant submitted that the award of Kshs 250,000/= was high considering the injuries sustained by the respondent. The appellant's case is that an award of Kshs 100,000/= would have been most appropriate.
20. The award of general damages is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law. The mandate of an appellate court to interfere with damages awarded by a trial court is not unlimited. It is confined to certain circumstances.
21. An appellate court can only disturb an award of damages made by a trial court if it was satisfied that it was either inordinately high or low as to justify an inference that it represented an erroneous estimate of the damage suffered; or that the trial court took into account irrelevant factors or omitted to take into account relevant ones or acted on wrong legal principles in arriving at the award.
22. On my part, I have read the authorities availed by both parties to the trial court supporting their respective proposals on quantum. I note that the injuries sustained by the respondent were soft tissue injuries. I further note that learned trial magistrate in her judgment clearly indicated that she had considered the submissions made by each of the parties, the nature of the injuries sustained and cost of inflation in awarding Kshs 250,000/= as sufficient compensation for the injuries sustained.
23. Given the evidence on record, I am unable to fault the learned trial magistrate's award of Kshs 250,000/= as general damages, considering the injuries that were suffered by the respondent in the instant case.
24. The award of special damages was not contested by any party and therefore the same is affirmed.
25. For the foregoing reasons, I do not find any merit in the appellant's appeal. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

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R. NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

Mose Mose & Mose Adv for appellant

M/S Mwinamo & CO. Adv for respondent

