



**Kihara & another v Chebon (Civil Appeal 35 of 2018)
[2022] KEHC 15667 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 35 OF 2018
RM MWONGO, J
NOVEMBER 17, 2022**

BETWEEN

RUTH WAIRIMU KIHARA 1ST APPELLANT

KIHARA RAGAE 2ND APPELLANT

AND

SAMMY KIPROTICH CHEBON RESPONDENT

*(Being an Appeal arising from the judgement and Decree of the Honourable E.
K. Nyutu, P.M. delivered on 17/04/2018 in Engineer CMCC No. 150 of 2015)*

JUDGMENT

Background

1. The claim in the lower court arose from a road traffic accident that occurred on August 12, 2015 along the Nairobi-Naiyasha road at Kariko area at around 8.00am. The Plaintiff/Respondent in the case that relates to this appeal (CMCC No 150 of 2015) was lawfully driving motor vehicle xxxx Toyota Land Cruiser, when the Defendants' vehicle Reg No xxxx Isuzu Canter, was allegedly driven so negligently and recklessly by their driver, that he caused it to collide with the said xxxx. This resulted in the plaintiff sustaining serious injury, loss and damage. The Plaintiff alleged that the Defendant's driver was charged in Traffic Case No 7003 of 2015 where he pleaded guilty and was fined KShs 25,000/-.
2. The Respondent was the driver of vehicle Reg No xxxx and the other passengers, namely: Chief Inspector Victoria Mutuku; Inspector Rukia Wamaswa; Sgt Sarah Situma; and Wilson Ndolo Mwangangi, were also injured and sued. The suits in the series were CMCC Case Nos 151, 152, 153 and 165 of 2015. It was indicated in the lower court that CMCC No 150/2015 was lead file. Mr Khayega was for all the plaintiffs and Mr Ombui was for the defendants. The trial magistrate rendered individual judgments on each file rather than formally consolidating the suits, but liability was determined in CMCC no 150/2015.



3. At the hearing, the plaintiffs in case Nos 150; 151; 152; 153 and 165 tendered their evidence. It was agreed that the evidence of PC Meshack Ngugi and the driver Sammy Kiprotich Chebon would apply to all the suits. Dr W M Wokabi filed a medical report in respect of each plaintiff, which was produced as an exhibit by the respective plaintiff in their testimony without objection.
4. Since parties agreed that the finding on liability would apply to all the suits therein, it makes sense that in the appeals, the determination on liability will therefore apply to all the appeals in the series.
5. In the present case, the defendants' defence was that: the Plaintiff was not travelling in the said motor vehicle, and the injuries sustained were denied. Further the Defendants denied that the alleged accident occurred and if so, whether it was caused solely by the negligence of the driver or owner of the motor vehicle xxxx or by the plaintiff. A third party who was sued, Tsusho Capital Kenya Ltd did not enter appearance.
6. At the hearing in the lower court, the defendants closed their case without calling any witnesses, including their driver who had a witness statement. The lower court's Judgment entered on April 17, 2018 in favour of the Plaintiff/Respondent was as follows: Liability at 100% was found against the Appellants who were held to be vicariously liable; General damages were awarded at Kshs 300,000/-; Future medical expenses were awarded at Kshs 20,000/- and special damages were awarded at Kshs 47,258/- together with costs and interest.

The appeal

7. The determination of the lower court precipitated the instant appeal and the appellant lodged 5 grounds of appeal, to wit:
 1. That the Learned Trial Magistrate erred in law and in fact in finding the Appellant liable contrary to the evidence on record.
 2. That the Learned Trial Magistrate erred in making a finding and arriving at an award of damages which is inordinately high as to represent an erroneous estimate of damages payable.
 3. That the Learned Trial Magistrate erred in applying wrong principles and failing to take into account material facts arriving at an erroneous award.
 4. That the Learned Trial Magistrate erred in law and in fact in disregarding the Appellant's submissions and on all points of fact and law in as far as the award of damages is concerned.
 5. That the Learned Trial Magistrate erred in law and in fact in awarding Kshs 300,000/= as general damages, special damages of Ksh 47,258/= and future medical expenses at Kshs 20,000/= which are excessive and unrealistic in circumstances against the injuries allegedly sustained.
8. The applicable principles for determination of this matter as a first appeal are set out in the case of *Peters v Sunday Post Limited (1958) EA 424* where Sir Kenneth O'Connor stated as follows:

' It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.'



9. The court's duty is further amplified in *Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123*, pursuant to which the court is essentially required to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not hear or see the witnesses who testified. If the court comes to different conclusions, it must state them and consider whether the trial court relied on wrong legal principles or applied principles that were inappropriate.

Liability

10. The trial court found that the accident occurred when the driver of Reg xxxx was overtaking a series of vehicles; that the driver was charged with reckless driving in a criminal trial; and that the said driver was wholly liable. The trial court also found the owners of the said accident vehicle, Reg xxxx, were vicariously liable as the driver was using the vehicle at the owners express or implied instructions in a task delegated by the owners.
11. In their appeal, the appellants asserted that the trial magistrate found liability against them contrary to the evidence on record. In their submissions they argue that the driver of the motor vehicle contributed to the accident since he testified that he saw the defendants' vehicle when it was 50 metres away overtaking. He thus had opportunity to avoid the accident but failed to do so.
12. On his part, the plaintiff/respondent relied on Section 47A of the *Evidence Act* to found his claim that the defendants are liable vide Traffic Case No 7003 of 2015 in that the Act provides that final judgment in criminal matters is conclusive evidence that the convicted person is guilty of the charge. The plaintiff also alleges vicarious liability on the part of the Appellants herein and relied on the Court of Appeal authority of *Kenya Bus Services Ltd v Humphrey [2003] eKLR* and *Tabitha Ndubi Kinyua v Francis Mutua Mbuvi & Another [2014] eKLR* where the owner of a car is liable for the careless driving of its agent/driver.
13. I have carefully perused the record. PW2 the respondent herein stated that at 7.00am he was driving his vehicle xxxx downhill in clear visibility at about 70 kmph. There was a slight drizzle and he had his parking lights on. Suddenly he saw a canter about 50 metres away overtaking in the opposite direction. He stated that he took evasive action by braking and swerving to the left off the road, but the canter followed him and collided with his vehicle. The canter then rolled and the impact caused it to turn and face the direction it had come from.
14. The Respondent later did a search (PExb 2a) on the vehicle and produced a copy of the vehicle records (PExb 2b) which showed that the vehicle was registered in the names of the defendants/appellants. His cross examination merely reinforced his testimony that the canter was overtaking many vehicles at a go; that the accident was head on despite the fact that he swerved to the left; and that there were traffic police officers merely 100 metres away.
15. PW1, who was not an eyewitness, testified that the driver of the police Land Cruiser was the plaintiff, whilst the driver of the Isuzu canter was to blame for the accident and was charged with careless driving. The canter driver pleaded guilty and was convicted and fined 25,000/- in Traffic Case No 7003/2015 at Naivasha Law courts. A police abstract was produced as PExb 1a-d in respect of each injured passenger, including the plaintiff who was the driver of the police vehicle. The charge indicated in the abstracts is careless driving. The abstracts indicated the 1st appellant as the policy holder and the vehicle registration record confirmed the ownership.
16. Reference was made in the trial court to the Court of Appeal case *Nandwa v Kenya Nazi Ltd (1988) 1 KLR 488 [1988] eKLR* (the respondent therein was wrongly described by the present appellant as



Kenya Kazi Ltd) for the holding adopted from *Henderson v Henry E Jenkins & Sons* [1970] AC 282 at 301 wherein Lord Pearson stated:

' 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 giving judgment at the end of the trial the judge had 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 so satisfied the plaintiff's action fails. The formal burden of proof does not shift.

But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants.'

17. The evidence of the two witnesses remained uncontroverted as the defendants did not call their driver or any other witnesses. The trial court relied on this evidence to find full liability as against the driver. As for vicarious liability of the defendants, the trial court found that based on the doctrine expounded in *Morgan v Launccbury* (1972) All ER 606, it had been shown that the vehicle belonged to the defendants and their driver was using it for lawful purposes.
18. The only issue is whether the respondent should share blame for the accident. He said in oral testimony that he was driving at 70Kmph, a fairly fast speed; that he was driving downhill meaning that kinetic energy and gravity naturally worked against him. There is no evidence that he was exceeding the speed limit. He said he applied brakes and swerved off the road to the left, and that the point of impact was in fact off the road.
19. It is true that in his statement, PW2 stated that he was driving at about 60 kmph; that there was some mist, and that he saw the canter 15 metres away. Those contradictions were seized upon by the appellants to show that PW2 was unsure of his speed, the degree of visibility, and his estimate of how far the canter was away from him.
20. Despite these contradictions, the enduring overall situation is that the canter was overtaking a series of vehicles without regard to the oncoming traffic; that the plaintiff swerved to the left to avoid the canter; and that the collision occurred on the plaintiff's side of the road.
21. I therefore do not think that the trial court can be impugned in its determination on liability in light of the abundant and uncontested evidence presented in court. The evidence of the witnesses was tested through cross examination and remained intact. Nothing was presented by the defendants to contradict or counter the evidence presented. The fact of cross examination is significant for had the evidence been untested, its weight and value would be that much reduced.
22. In *Theodore Otieno Kambogo v Norwegian People's Aid Nairobi (Milimani) HCCC NO 774 of 2000* Warsame, J (as he then was) indicated the importance of cross-examination to the value of evidence when he stated:

' The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same.'



23. Indeed, it may be that the defendants or their driver was not solely to blame for the accident. It was for them to make out such a case on balance of probability. Hence the result is that the plaintiff made out a case showing that the defendant's driver was overtaking in his lane, that the plaintiff braked and swerved off the road, and that notwithstanding, the collision occurred. The plaintiff's case was however not met by the defence.
24. On the evidence availed, therefore, a prima facie case was definitely established that negligence lay wholly at the feet of the driver of the canter; that the said vehicle belonged to the defendants/appellants; and that, in the absence of evidence to the contrary, they are liable for the driver's actions and are thus vicariously liable for his negligence.
25. I therefore agree with the trial court in its finding on liability and would not interfere with the said finding.

Quantum of damages

26. In determining the question of quantum on appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v AM Lubia and Olive Lubia (1987) KLR 30*, where it was held:

' 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.'
27. Other authorities on this point are: *Butt v Khan (1981) KLR 349*; *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414*; and [*Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No 284 of 2001; \(2004\) eKLR*](#).
28. In the present case, the evidence as to the injuries suffered by the respondent was set out in the medical report of Doctor Wokabi availed at the hearing as PExb 5(a). There was also a defence medical report referred to and marked for identification as (DMFI 1) but which was not produced. I would point out that Dr Wokabi's medical report was admitted without objection by counsel for the defence ,and that defence counsel opted not to call for cross examination of the doctor.
29. The medical report by Dr Wokabi indicates the injuries as:
 - Broken upper incisor tooth (partially broken over the crown)
 - Cut wound to the lower lipThe doctor further opined that the broken tooth could undergo:

' A crowning procedure at a cost of 20,000/- If not crowned in good time its condition could deteriorate and predispose it to premature loss'
30. The plaintiff proposed an award of damages of 600,000/- relying on the Malindi case of [*Abmed Mzee Famau & Batodo Hangab v Veronica Ngii Muia HCCA No 1 of 2015*](#) and [*Paul Kipsang Koech & Global Trucks Ltd v Titus Osue Osore Bungoma HCCA*](#). The defendant proposed 100,000/-. The court awarded 300,000 guided by the case of Margaret Muthoni v David Namu Muthoni HCCC No 148 of 2000.



31. The appellants allege that the trial court did not properly consider their submissions and authorities and the award should have been no more than 200,000/- in line with the case of *James Nganga Kimani & Anor v Giachagi Njoroge & 2 Ors* [2019] eKLR. There, the plaintiff sustained a broken right upper central incisor tooth; cut wounds on the left leg; blunt injury on chest wall; bruises on forehead; cut wound on left eyebrow and deep cut wound on the nasal bridge, which are more serious than those suffered by the respondent.
32. The respondent maintained reliance on the Ahmed Mzee case and introduced the case of *Paul Kipsang Koech v Titus Osule Osore Bungoma HCCA No 6 of 2012* [2013] eKLR where the High Court reduced an award of 300,000/- to 200,000/- in 2013 for fracture of the right upper lateral incisor tooth, bruises and blunt injuries.
33. The appellant also relied on [*James Nganga Kimani & Anor v Giachagi Njoroge & 2 Ors* \[2019\] eKLR](#) where the Judge at Kiambu reduced an award of Kshs 300,000/- to 200,000/- for injuries stated as: deep cut wound- nasal bridge; cut wound -left eyebrow; bruises-forehead; tender blunt injury -anterior chest wall; swollen tender left wrist; cut wounds -left leg and broken right upper central incisor.
34. I note that in James Nganga's case, the evidence showed that the broken incisor was a late inclusion by the doctor which was not contained in the P3 form or original treatment notes; and that the doctor in cross-examination, was unable to explain inclusion of the broken tooth.
35. Having carefully perused the authorities, I am not convinced that the trial court over assessed the injuries or over compensated the damage; He was well within the range of awards for the type of injury suffered, and the award was well within the reasonable estimate of compensation given for similar injuries. I therefore see no basis for interfering with the same

Future Medical Expenses

36. The trial court awarded Kshs 20,000/- as future medical expenses. the appellant argues that this was not pleaded and proved as required in law.
37. I have perused the proceedings and judgment of the trial court. In paragraph 7 of the plaint the special damages are pleaded to be the future medical expenses to crown the broken tooth. This is noted in the Doctor's report where he opined that future costs will include 'a crowning procedure at a cost of 20,000/- If not crowned in good time its condition could deteriorate and predispose it to premature loss'
38. Sine the doctor's report was admitted without objection, this amount cannot now be contested, unless evidence shows the figure to be inordinately high.

Special Damages

39. On special damages, the principle is that they must be specifically pleaded and proved. The appellant argues that the trial court wrongly awarded Kshs 47,258/- when it was clear that only an amount of Kshs 17,928/- was proved. The appellant argues that the figures for expenses at Reale Hospital were not proved, and instead that figure was a statement of the type of service offered.
40. In his judgment, the trial magistrate took all the documents availed as 'a bundle of receipts', and awarded the full amount of Kshs 47,258/- represented by the same.
41. I have carefully perused the receipts and expense bills presented as proof of special damages. I agree with the appellant that the Reale Hospital documents are not receipts. They are in fact invoices made out to



NHIF. There is no evidence that they were paid by the respondent, despite having been addressed to NHIF. They amount to Kshs 29,330/- which amount I shall deduct from the award of special damages.

42. Accordingly, $47,258/- - 29,330/- = 17,928/-$ That is the amount I find should be awarded as special damages, and I so award.

43. The total award on appeal will therefore be:

General damages awarded KShs 300,000/-;

Future medical expenses awarded Kshs 20,000/- and

Special damages awarded Kshs 17,929/-

Total: Kshs 337,929 /-

44. Interest and costs on the award are also awarded, as in the trial court.

45. In the result, the appeal partially succeeds as stated herein, and each party shall bear its own costs of the appeal.

46. Orders accordingly.

DATED AT KERUGOYA, THIS 17TH DAY OF NOVEMBER, 2022.

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R. MWONGO

JUDGE

In the presence of:

Mr. Ombui for the Appellants

Mr. Khayega for the Respondents

Quinter Ogutu Court Assistant

