



REPUBLIC OF KENYA



KENYA LAW
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**Kerich v Lelei (Civil Appeal 42 of 2021)
[2022] KEHC 16796 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL 42 OF 2021
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

DAVID KIPTOO KERICH APPELLANT

AND

JONAH KIPROP LELEI RESPONDENT

*(Being an appeal against the judgment of Hon. B.W. Wachira R.M) at
Kapsabet SPMCCC No. 14 of 2018 delivered on 21st February, 2018)*

JUDGMENT

Introduction

1. The Appellant filed an appeal against the Judgment delivered by Hon BW Wachira in Kapsabet SPMCC civil case no 14 of 2018 on February 21, 2012.

The appeal is against apportionment of liability and quantum of damages.

2. The plaintiff's claim against the defendant was for general damages for pain and suffering and special damages allegedly suffered by the plaintiff following a road traffic accident which occurred on December 17, 2017 involving motorcycle registration number KMDR 399B TVS Star which he was rider and motor vehicle registration number KCB 978F belonging to the appellant was said to have been carelessly and negligently driven by the appellant's driver along Wilfred Bungei road within Kapsabet Township.

The appellant had filed a statement of defence wherein he denied liability and prayed that the suit be dismissed with costs.

3. The parties adduce evidence before the learned trial Magistrate and he proceeded to pronounce his Judgment.



The judgment was as follows: -

- a. Liability - 10%:90%
 - b. General Damages – Kshs 600,000/=
 - c. Special damages – Kshs 272,295/=
 - d. Less 10% liability
 - e. Costs and Interest on the award.
4. Aggrieved by the trial court's award on both liability and quantum, the appellant filed his undated memorandum of appeal on March 19, 2020 setting out the following grounds:
1. That the learned magistrate erred in law and fact in awarding Kshs 872,295/= as general and special damages which was not consistent with the injuries sustained submissions of the counsels for all the parties.
 2. That the learned magistrate erred in law and fact in arriving at the said general damages and amount not supported by the evidence on record.
 3. That the learned magistrate erred in law and fact in considering extraneous issues while arriving at the said general damages a decision, contrary to the evidence on record.
 4. That the learned magistrate erred in law and fact in awarding quantum of damages that is manifestly excessive in the circumstances.
 5. That the learned magistrate erred in law and fact in awarding quantum of damages without having regard to the injuries sustained by the Respondent.
 6. That the learned magistrate erred in law and fact in failing to consider the evidence tendered by the appellant.
 7. That the learned magistrate erred in law and fact in failing to consider the evidence the submissions tendered by the appellant.
 8. That the learned magistrate erred in law and fact in applying wrong principles of law on arriving at the said several damages.
 9. That the learned magistrate erred in law and fact in finding the appellant 90% liable contrary to the evidence on record.
 10. That the learned magistrate erred in law and fact in holding the plaintiff 10% liable yet the accident was caused by the plaintiff.
5. Parties agreed to dispose of this appeal through written submissions. The appellant filed his submissions on July 19, 2022 while those of the respondent were filed on August 16, 2022.

Appellant's Submissions

6. On liability, the appellant submitted that during cross-examination, the respondent testifying as PW1 conceded that he was not wearing a helmet when the accident occurred. The appellant further submitted that PW2 PC Christopher Kosgei, the investigating officer in this matter testified that the accident occurred when the driver of the suit lorry was trying to negotiate a corner when he hit the motorcycle that the respondent was riding on as pillion passenger. The appellant argued that on cross-



examination, PW3 told the court that he was not aware whether the motorcycle that the respondent was riding had an issue and further conceded that the motorcycle was not licensed and conceded that he was not the investigating officer in this matter. The argued that PW3 also told the court that he did not have the police file, and the sketch map/plans of the scene of the accident. The appellant further submitted that PW3 also told the court that he did not know who was to blame for the accident and that the matter was still pending investigations.

7. The appellant submitted that at the trial court he testified that at the time of the accident he was the one driving the suit motor vehicle. He told the court that the motorcycle came from the opposite direction of the road and the rider was at a high speed, he lost control and hit the rear tire of his lorry occasioning the accident. The appellant submitted that after the accident the matter was reported to the police station and his vehicle was inspected and found to have no defects whereas the motor cycle was found to be defective. The appellant blamed the motorcyclist for the accident.
 8. The appellant contends that at the trial court the particulars of negligence were never proved. the appellant relied on the following cases to buttress his submissions. Evans Mogire Omwansa V Benard Otieno Omollo & Another and the case of Postal Corporation of Kenya & Another V Dickens Munayi [2014].
 9. The appellant wants the court to dismiss the case against him and in the alternative the appellant wants to be apportioned at 20%:80% as opposed to 10%:90%.
 10. On the issue of quantum, the appellant submitted that damages awarded ought to correspond with the injuries sustained. The appellant relied on the decision in Tayab V Kinanu [1983] eKLR.
 11. The appellant submitted that the respondent had sustained the following injuries; right tibia fibula, his 1st phalanges of the 3rd finger, cut wound on the forehead and fracture on the 3rd and 4th metacarpal.
 12. The appellant submitted that PW2 Dr Joseph Sokobe testified that he had examined the respondent and had prepared the medical report. PW2 told the court that the respondent had sustained a cut wound on the forehead, fracture right fibula, fracture the 3rd and 4th metacarpal and fracture the 1st phalange of the 3rd finger. On cross-examination the appellant submitted that PW2 told the court that he was not the treating doctor and that no disability was assessed and that the respondent should have healed by the time he was testifying.
 13. The appellant faulted the trial magistrate for awarding Kshs 600,000/= as general damages which the appellant maintained was inordinately high and an erroneous estimate of the loss that had been suffered by the respondent.
 14. The appellant relied on the findings in the following cases; Jitan Nagra V Abidnego Nyandusi Oigo [2018] where the court set aside general damages of Kshs 1,000,000/= and substituted it with Kshs 450,000/=, In the case of Hassan Farid & Another V Sataiya Ene Mepukori & 6 Others [2018] eKLR where Kshs 450,000/= was awarded as general damages and in Civicon Limited V Richard Njomo Omwancha & 2 Others [2019] eKLR where the court on appeal revised the award on general damages from Kshs 1,000,000/= to Kshs 450,000/=.
- The appellant urged the court to set aside the award of Kshs 600,000/= and replace it with comparable awards.
15. On special damages the appellant submitted that special damages must not be pleaded but also strictly proved. The appellant cited the case of Wakim Sodas Limited V Sammy Aritos [2017] eKLR. The appellant submitted that in his amended plaint the respondent pleaded for the following special damages: -



- a. Medical report – Kshs 6000/-
 - b. Treatment expenses – Kshs 176, 320/=
 - c. Further treatment expenses – Kshs 89,925/=
 - d. Motor Vehicle search fees Kshs 89,925/=
- Total - Kshs 272,795/=
16. The appellant maintains that during the hearing the respondent testified that after the accident he was treated at Mediheal Hospital where he used Kshs 266, 245/= as treatment expenses. Further the appellant submitted that Dr Sokobe produced a receipt of Kshs 6,000/= and that the respondent also produced a bundle of receipts totalling to Kshs 2666,245/=.
 17. The appellant argues that the bundle of documents produced as payments receipt were tiled as “Provisional-in patient bill break up” the documents therein totalled to Kshs 210,933/=. The appellant contends that invoices cannot be termed as prove of payment and that original receipts of payments are the only ones to be produced in court as proof of payment.
 18. In light of the foregoing, the appellant argues that only Kshs 6,000/= and Kshs 500/= should be awarded to the respondent, the same being payment for the medical report and the medical search. The appellant maintains that Kshs 272, 295/= was therefore not proved.
 19. The appellant urged the court to re-look and re-evaluate the trial magistrate’s decision under this heading and thus make a proper finding on the award of special damages.
- The appellant prayed for costs and prayed that the appeal be allowed.

Respondent’s Submissions

20. On liability, the respondent submitted that at the trial court he testified that he was lawfully riding the suit motorcycle on the left lane heading to join Eldoret-Chavakali main highway. He told the court that he maintained his left lane when all of a sudden, the appellant while driving the suit lorry without considering his presence caused his lorry to veer onto his lane and in an effort to avoid being hit by the lorry, he swerved to his extreme left but since the lorry was at high speed he was hit by the right hand rear tyre. The respondent that on impact he and his pillion passenger were thrown off the motorcycle and landed on the verge of the tarmac road. The Respondent submitted that members of the public then came to their aid and they were taken to Kapsabet County Referral but he was later transferred to Mediheal Hospital due to the seriousness of his injuries. The respondent maintains that he produced all the crucial documents in support of his case being the discharge form, the bundle of receipts, the P3 form filled by Dr Sokobe, the police abstract, the motor vehicle search and the medical report.
21. The respondent submitted that in support of his case, Dr Sokobe testified that as a result of the said accident, the respondent sustained the following injuries; cut wound on the forehead, open comminuted fracture right tibia/fibula, fracture right 3rd and 4th metacarpal and fracture on the 1st phalange of the 3rd finger. The Respondent maintains that PW2 also told the Court that he had suffered soft and bony tissue injuries and that he needed future surgery to remove implants that was estimated at Kshs 200,000/=.
22. The respondent submitted that on cross-examination the appellant admitted that he was the owner of the suit motor vehicle. He was not aware that his vehicle did not have breaks.



23. The respondent maintains that he had proved his case on a balance of probability and that he had been injured while on his rightful lane and that the appellant was to blame for the accident. The respondent argues that the appellant rebuttal evidence was less than convincing. The respondent relied on the decision in *Peter Wafula Juma & 2 Others V Republic*.
24. On the issue of quantum, the respondent submitted that an appellate court should not interfere with the discretion of the trial court in assessing damages unless it is demonstrated that award was inordinately high or low as to present an entirely erroneous estimate of compensation to which the respondent was entitled to or, the court took into account irrelevant factors. The respondent cited the case of *Peter Nanu Njeru V Philemone Mwagoti* [2016], *Gitobu Imanyara & 2 Others V Attorney General* [2016].
25. The respondent submitted that the respondent failed on his part to rebut the respondent's claim. The respondent maintains that he was injured as a result of the appellant's reckless driving, the appellant had no regard to other road users.
26. The respondent argue that the appellant has not demonstrated that the award of damages is inordinately high as to be a wholly erroneous estimate of the damages suffered or that the learned Magistrate applied wrong principles in assessing damages. The respondent relied on the decision in *Joseph Henry Rubui V Attorney General* (Nairobi HCCA NO 701 of 2001).

The respondent argued that the appeal lacks merit and should be dismissed with costs.

Determination

27. Being a first appeal the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123: "...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 into account of particular circumstances or probabilities materially to estimate the evidence."

Liability:

28. The liability was apportioned in the ratio of 90%: 10% against the appellant.

In *Stapley v Gypsum Mines Limited (2)* (1953) AC 663 at P 681 Lord Reid reasoned that: "To determine what cause 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 fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally."

29. The facts speak for themselves that an accident indeed occurred on September 29, 2018 involving motor vehicle registration number KMDR 399B driven by the appellant and a motor cycle registration number KMDR 399B controlled by the respondent.



30. On the one hand, the appellant blames the respondent for the accident, whilst on the other hand, the respondent blames the appellant. In this instance to determine where liability lies, the court will draw upon the evidence at the trial court.
31. The account narrated by the respondent was that he was that he was riding the suit motorcycle on the left exiting lane along Wilfred Bungei road joining Eldoret- Chavakali road when suddenly the appellant's lorry veered onto his lane. To avoid the collision the respondent testified that he swerved the motorcycle to the extreme left but due to the closeness and speed of the lorry he was hit by the at the right side and was taken to hospital due to the injuries he had sustained. On cross-examination however, the respondent conceded that he was not licensed and that the suit lorry had damaged brakes.
32. PW2, Dr Joseph Sokobe testified that he had examined the respondent and that the respondent had sustained the following injuries; a cut wound on the forehead, fracture right fibula, fracture the 3rd and 4th metacarpal and fracture the 1st phalange of the 3rd finger. He stated that the plaintiff needed future medical expenses of Kshs 200,000/=. On cross-examination he told the court that he was not the treating the doctor and had seen the respondent after three weeks.
33. By consent the evidence of PW3 in PMCC No 19 of 2018 was adopted in this case. The police officer told the Court that on December 17, 2017 a road accident occurred when motor vehicle registration number KCB 978F Isuzu lorry collided with motorcycle KMDR 399B at Kobil station. The rider and the pillion passenger were seriously injured. He stated that he was the investigating officer and that the lorry was trying to negotiate a corner when it hit the pillion passenger.
34. On cross-examination he told the court that the respondent was not licensed and that the impact was on the right rear tyre of the truck and that the accident was not a head on collision.
35. By consent the evidence of the defence witnesses in PMCC NO 19 of 2018 was adopted in this case. DW1 testified that on the material date he was driving along Kapsabet-Kisumu road and he joined a roundabout to Kapsabet. DW1 told the court as he was leaving the road a motorcycle came from the opposite direction and it hit the rear tyre of the vehicle. He blamed the rider for the accident.
36. On cross-examination he told the court that he was the owner of the suit lorry. He also told the court that he was not aware that the (OB) had stated that he was turning to enter Kobil and conceded that he did not have any documents to show the motor cycle did not brakes.
37. When I place the evidence on legal scale of balance of probabilities, it is more probable than not that the appellant was driving on the wrong side of the road when he veered onto the respondent's lane. PW3 told the court that the appellant was trying to negotiate a corner when it hit the motorcycle. I do not find evidence to disapprove the account of the PW3 testimony in the circumstances therefore, the lorry driver bears the bigger proportion of liability.

Accordingly, the trial court did not err in apportioning liability at 90%:10% against the Appellant.

The appeal on liability fails and is dismissed.

Damages/Quantum:

38. The appellant argued that the award was inordinately high compared to the injuries the respondent suffered. It was the appellant's case that the injuries the respondent suffered namely; a cut wound on the forehead, fracture right fibula, fracture the 3rd and 4th metacarpal and fracture the 1st phalange of the 3rd finger could not attract the amount awarded. The appellant further argued that the doctor did not assess disability.



39. The respondent argued that he suffered severe injuries as a result of the said accident. The respondent blamed the appellant for causing the said accident as a result of his reckless driving. He submitted that an appellate court should not interfere with the discretion of the trial court on assessment of damages unless it is demonstrated that the award was inordinately high or low as to present an entirely erroneous estimate of the compensation.
40. It has long been held that an appellate court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.

In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v Am Lubia and Olive Lubia* [1985] Kneller JA, stated:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage. See *Ilango V Manyoka* [1961] EA 705, 709, 713; *Lukenya Ranching And Farming Co-operatives Society Ltd V Kavoloto* [1970] EA, 414, 418, 419. This court follows the same principles.”

41. The question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.
42. The trial magistrate awarded Kshs 600,000/= as general damages. The appellant regards the award as inordinately high. The respondent agrees with the trial magistrate that the award is commensurate to the injuries sustained.
43. Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained. The respondent herein sustained the following injuries.
44. The medical report by Dr Sokobe, dated January 6, 2018, confirmed the injuries the respondent sustained. The medical report by Dr Sokobe further gave an opinion that the respondent needed further surgical operation at an estimated cost of Kshs 200,000/= to remove the implants.

In *Denshire Muteti Wambua v Kenya Power and Lighting Co Ltd* [2013] eKLR, that:

[M]onetary awards can never adequately compensate a litigant for what they have lost in terms of bodily function especially where this is permanent. But awards have to make sense and have to have regard to the context in which they are made. They cannot be too high or too low but they have to strike a chord of fairness.”

45. Similarly, *Lord Morris of Borthy-Gest stated in West (H) & Son Ltd v Shepherd* [1964] AC 326 pg 345:
- But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must



be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

46. While appreciating that money cannot renew a physical frame that has been shattered or battered, the respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.
47. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that the trial court was properly guided by the authorities cited before him and arrived at a reasonable assessment of general damages. The learned trial magistrate cannot be faulted as the award is neither too low nor too high in the circumstances.
48. Turning to the award of special damages, the special damages particularized in the Respondent’s amended plaint were; medical report Kshs 6,000/=, treatment expenses Kshs 176,320/=, motor vehicle search fees Kshs550/= and further treatment expenses Kshs.89,925/=. The total amount was Kshs 272,795/=. A bundle of receipts totalling to Kshs 266,245/= was produced as exhibit 2, a receipt of Kshs.6000/- was produced as exhibit 6 (b) and a motor vehicle search receipt of Kshs 550/= was produced as exhibit 5 (b)

In *Hahn v Singh*, Civil Appeal No 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

49. I note that they were all specifically pleaded and strictly proved in evidence. I however note the trial Magistrate erred in his calculation under this heading and I therefore substitute the award of Kshs 272,295/= with the award of Kshs 272,795/= being the amount that was specifically pleaded and proved.
 50. In the end the court finds no merit in this appeal and therefore proceeds to enter judgment in favour of the Respondent in the following term;
 - i. Liability is apportioned in the ratio of 90:10 as against the appellant and the respondent.
 - ii. General damages – Kshs 600,000/=
 - iii. Special damages – Kshs 272,795/=
 - iv. Less 10% contributoryTotal Kshs 785,515.5/=
- Costs shall be for the respondent.
- It is ordered so.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDOR ET THIS 23TH DAY OF DECEMBER, 2022.

.....
R. NYAKUNDI
JUDGE

