



REPUBLIC OF KENYA



KENYA LAW
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**Luhangala v Jemeli (Civil Appeal E013 of 2021)
[2022] KEHC 16814 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL E013 OF 2021
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

HELLEN MABESE LUHANGALA APPELLANT

AND

VIOLA JEMELI RESPONDENT

*(Being an Appeal from the judgment and decree of Hon. Jacinta Orwa
(SPM) delivered on 30/7/2021 in Kapsabet Senior Principal Magistrate Civil
Suit No. 171 of 2019 between Viola Jemelo and Hellen Mabese Luhangala)*

JUDGMENT

Coram: Hon. Justice R. Nyakundi

M/S Mwinamo Lugonzo & CO. Adv

M/S Onyinkwa & CO. Adv

M/S G.K Okara & CO. Adv

1. The Appellant was the defendant in Kapsabet SPMCC NO 171 OF 2019 wherein The Respondent filed a road traffic accident claim. The Respondent was a lawful pillion passenger of motorcycle registration number xxxx TVS when at Henry Kosgei Junction within Nandi Hills area, the Appellant's motor vehicle registration number xxxx was caused to knock the said motorcycle. The Respondent resultantly suffered injuries.
2. The matter proceeded for hearing and judgment was entered against the Appellant who was condemned to 100% liability for the occurrence of the accident. The term of the said judgment were in the following terms:-
 - a. Liability at 100% as against the defendant



- b. General damages Kshs 700,000
 - c. Special damages Kshs 6,000
 - d. Costs and interest
2. Being dissatisfied with the decision of the trial court, the Appellant instituted the present appeal on the following grounds;
1. That the learned trial magistrate erred in law and fact in holding the Appellant 100% liable for the accident in view of the evidence adduced.
 2. That the learned trial magistrate erred in law and fact in adopting the wrong principles in making a determination on damages payable to the Respondent thereby arriving at an erroneous decision.
 3. That the learned trial magistrate erred in law and fact in awarding damages which were excessive in the circumstances in view of the evidence adduced.
 4. That the learned trial magistrate erred in law and fact in failing to take into account the Appellant's submissions on the quantum thereby awarding excessive damages in the circumstances.

Appellant's Case

3. The Appellant submitted that the Respondent did not prove her case on a balance of probability and therefore, the Respondent's suit should have been dismissed with costs.
4. PW1 produced a police abstract as Pexh1. And the same did not blame the driver of the subject motor vehicle. From the evidence of the police officer PW1, it is crucial to note that he testified that the driver was not charged of any traffic offence as at the time he was testifying in court. He confirmed that the police investigations are still on going and thus there was no basis of blaming the Appellant. PW1 was not the investigating officer and his testimony was strategically brief. He was only led to merely confirm the place of the accident and that the accident involved a motorcycle carrying the Respondent as a pillion passenger and the subject motor vehicle. The police officer having not been the investigating officer could not help the court determine which party may have caused the accident.
5. Learned counsel for the Appellant submitted that it was DW1's statement that as she was driving along the subject road where there were two motorcycles riding ahead of her. The first one was not carrying any passenger but the second one was carrying a passenger. Further, the first motorcycle turned right as indicated and the second motorcycle that was ahead of her started to turn right then all over sudden swerved back into her lane. She hooted to warn the cyclist and the said motorcycle swerved back again onto the right lane and in the process of all that confusion and due to the close proximity the accident ensued. Therefore, the Respondent failed to put forward a cogent case to prove that it was more probable than not that the driver of the subject motor vehicle committed acts of negligence that led to the occurrence of the accident.
6. The Appellant's case is that awards given by courts must be within limits and must take into consideration the comparable or similar injuries and awards. Further, that the award for damages was excessive in light of the injuries sustained. Learned counsel for the Appellant cited the cases of *Civicon Limited Vs Richard Njomo Omwacha & 2 others (2019) eKLR*, *BK (suing through his mother and next friend EM Vs Wilson Gitari Mburungu (2020) eKLR* and *Titus Mburu Chege & another Vs JKN*



Ɖ another (2018) eKLR as cases with comparable injuries and awards and proposed that an award of between Kshs 400,000/= - Kshs 425,000/= would be reasonable compensation for the Respondent.

7. The Appellant sought that the appeal be allowed.

Respondent's Case

8. The Respondent submitted that from the circumstances of the accident the Respondent was lawfully being carried as a Pillion Passenger on Motorcycle Registration xxxx TVS at the Henry Kosgei Junction within Nandi Hills when the Appellant negligently, carelessly and or recklessly drove, managed and or controlled Motor Vehicle Registration Number xxxx U that she caused the Motor Vehicle to knock down the Motorcycle xxxx from behind. The evidence of the Respondent and the Police Officer which are found at page 50-53 corroborated as to the circumstances that led to the accident.
9. The court made a finding that a Motorist travelling along the Road must keep distance of 70 metres and the purpose of this rule is to enable a cyclist or motorist to avoid an abrupt entry on the road by another road user or avoid occasioning expected accident whilst on the road. Further, that the court made a finding as to why the Appellant was held 100% liable as:-
 - a. The Appellant admitted having been behind the cyclist it was her duty to exercise due care and diligence whilst in control of Motor Vehicle Registration xxxx
 - b. Had the Appellant kept the recommended distance whilst driving along the Nandi-Hills - Chemilil Road she would have avoided knocking down the cyclist.
 - c. The Appellant was close to the Motor Cycle hence could not avoid the occurrence of the accident
10. The Inspection Report of Motor Vehicle Registration xxxx confirms that it is the front part of the Motor Vehicle which was damaged an indicator that it rammmed into Motorcycle Registration xxxx from behind. In the cross examination of the Appellant she admitted to have knocked down the Motorcycle from behind and having been close to the Motorcycle hence the accident. The Appellant having come from behind it was incumbent upon her to exercise utmost care and skill so as not to knock down the Motorcycle.
11. The Appellant tried to shift blame to the owner of Motorcycle Registration xxxx
12. The Rider and or the Owner of Motorcycle Registration xxxx were not enjoined to the suit as a Co-Defendant and or neither were third party proceedings instituted to enjoin the owner of the Motorcycle and or the Rider. The Appellant cannot seek to shift liability to a party who has not been enjoined to the suit and non-suited.
13. On quantum, the Respondent submitted that the sum of Kshs 700,000 as general damages was reasonable and commensurate to the injuries sustained by the Respondent. She relied on the cases of *Nairobi Hcca No 134 of 1998 - Texcal House Service Station Ltd Ɖ Anor Vs Timo Kalevi Jappinen Ɖ Anor*, and *Mombasa HCCCNo 30 of 1993 Humphrey Kaingu vs KPA* in support of the award.
14. She urged that the court dismiss the appeal with costs to the Respondent.

Issues for Determination

1. Whether the trial court erred in its finding on liability
2. Whether the award for damages was excessive



Whether the trial Court erred in its finding on Liability

15. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123*, this principle was enunciated thus:

this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.'

16. DW1 admitted that the cyclist was ahead of her when she hit the motor cycle. The defendant being behind the motorcyclist had a duty of care while in control of the vehicle. The Appellant was a pillion passenger on the subject motorcycle when the accident occurred. Being a pillion passenger, she was not in control of how the motorcycle was being managed or controlled and she could not have contributed in any way to the occurrence of the accident. A driver is expected to take due care of the other road users while driving.
17. In *Secilina Gatawi Peter v Jasper Gitonga Mugambi [2020] eKLR* where the trial court had apportioned liability at 50/50%, the appellate court set aside the judgment and substituted with a finding on liability in favour of the Appellant against the Respondent at 100%. The trial court had failed to take into account that the Appellant was hit from behind by the Respondent.
18. By virtue of being behind the Respondent the Appellant had a duty of care to other road users including the Respondent. It is my view that the trial court did not err on its finding on liability.
19. The trial court did not err in its finding on liability.

Whether the award for damages was excessive

20. The principles that govern an appellate Court in considering whether to review an award of general damages were stated by the court in the case of *Butt v Khan (1977) KAR 1* as follows;

'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 as either inordinately high or low.'

21. It is trite that in awarding damages courts are required to consider comparable injuries and damages awarded in similar cases. The Respondent sustained the following injuries;
- a. Cut wound on the occipital scalp
 - b. Blunt injury to the head
 - c. Bruises on the face
 - d. Cut wound on the left leg
 - e. Fracture (open) left tibia/fibula the same were reiterated in Dr Sokobe and Dr Gaya's medical reports and it was established that the Respondent had fully healed. The nature of the injuries are soft tissue in nature save for the fracture.



22. I have considered the authorities cited by the parties on the issue of damages. I note that the Respondents' authorities are from the years 1993 and 1995 and the injuries that were sustained therein were more severe than those suffered by the Respondent. The authorities cited by the Appellant are more recent and the injuries in *Civicon Limited vs Richard Njomo Omwacha & 2 others (2019) eKLR* where the Respondent sustained a deep cut to the left ear lobe, tender lateral chest wall, a swollen and tender left arm, bruises on the left hand, swollen and tender elbow, fracture of the left tibia and 30% permanent disability. These were more severe than the injuries sustained by the Respondent and the court awarded Kshs 450,000/-
23. In the case of *Gabriel Kariuki Kigathi & Anor vs Monica Wangui Wangechi [2016] eKLR*. The court in that case awarded the Respondent a sum of Kshs 400,000/= for a fracture of the neck, bilateral rib fractures, bilateral lung contusion, injuries to both hands, injuries to both legs.
24. In the case of *Stephen Macharia & another v Veronica Wanjiru Kimani [2021] eKLR* where the respondent sustained the following injuries;
- a. Fracture of the right tibia
 - b. Deep cut wound on the right knee supraorbital region
 - c. Deep cut wound on the right knee
 - d. Soft tissue injuries of the right side of the chest
 - e. Lacerations on the hands.
25. The appellate court held set aside an award of Kshs 850,000/- and substituted it with an award of Kshs 650,000/-
26. It is trite that special damages must be specifically pleaded and proved. The receipt for the medical report was produced in court therefore the issue of special damages was proved to the required standard.
27. I however note that the Respondent pleaded for costs for future damages and the trial court did not address itself to the same. Keeping in mind that no injuries can be completely similar, and taking into consideration that as per the medical report the Respondent would require Kshs 150,000/- for future medical treatment, I substitute the judgment of the trial court in the following terms. Liability apportioned at 100% as against the Appellant Damages awarded as follows; Special Damages – Kshs 6,000/- General Damages - Kshs 550,000/- Costs for future medical expenses – Kshs 150,000/- The costs of this appeal be shared equally by the parties.

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

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R. NYAKUNDI

JUDGE

