



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL APPEAL NO. 169 OF 2016**

**AHMED SAID AMADI.....APPELLANT**

**-VERSUS-**

**JACOB FUNDI MUGO.....RESPONDENT**

(An Appeal from the Judgment of Hon. H. Nyakweba, Principal Magistrate, delivered on 4<sup>th</sup> November, 2016 in Mombasa Chief Magistrate's Court Civil Cause No. 950 of 2013).

**JUDGMENT**

1. The respondent was the plaintiff in the lower court. He filed suit against the appellant who was the defendant in the lower court and claimed that as he was riding his bicycle at Kengeleni along Mombasa-Malindi road, he was knocked off the road by motor vehicle registration number KAY 127M Nissan Diesel Tipper owned by the appellant, which was in the control of the appellant, his authorized driver, servant and/or agent. That as a result of the said accident, he sustained serious injuries.
2. As per the amended plaint dated 23<sup>rd</sup> September, 2013, the respondent attributed the accident to the negligence and carelessness of the appellant.
3. The appellant filed his statement of defence dated 12<sup>th</sup> August, 2013. He later filed an amended statement of defence dated 15<sup>th</sup> April, 2014, where he denied that the respondent while riding his bicycle, was knocked off the road by motor vehicle registration number KAX 127M Nissan Diesel Tipper. The appellant refuted the claim that the respondent sustained serious injuries. The appellant further averred that in the event the said accident occurred, then the same was due to circumstances beyond the control of the appellant and also due to the respondent's contributory negligence.
4. The Trial Magistrate entered Judgment for the respondent as against the appellant for the sum of Kshs. 300,000/- in general damages, less 5% contribution, leaving a balance of Kshs. 285,000/-. The respondent was also awarded special damages of Kshs. 2,000/=, costs of the suit and interest. The fees for the Doctor's attendance in court was regarded as costs.
5. The appellant was dissatisfied by the decision of the Trial Magistrate and on 2<sup>nd</sup> December 2016, he filed a memorandum of appeal raising the following grounds of appeal-
  - i. That the learned Trial Magistrate erred in law and fact in finding the appellant/defendant 95% liable for causing the accident in total disregard of the weight of evidence on record;
  - ii. That the learned Trial Magistrate erred in law and fact in applying wrong principles and awarding inordinately high and exorbitant damages that are incomparable to the injuries sustained by the plaintiff/respondent; and
  - iii. That the learned Trial Magistrate erred in law and fact in disregarding the submissions made by the appellant.
6. The appellant's prayer is for this Court to set aside the Judgment delivered by the Principal Magistrate and substitute the same with an order for dismissal of the suit in its entirety and for the respondent to pay costs of the appeal.
7. The appeal herein was canvassed by way of written submissions. On 13th October, 2020, the law firm of Miller & Co. Advocates filed written submissions on behalf of the appellant. The respondent's submissions were filed on 30<sup>th</sup> October, 2020 by the law firm of Gachiri Kariuki & Co. Advocates.

8. The appellant's Counsel, Ms Kaguri, in her submissions stated that the Trial court in finding the appellant 95% liable failed to consider the fact that the respondent failed to call an independent eye witness to corroborate his version of events. That he did not call a police officer to the stand to shed light as to circumstances that led to the accident and the party who was to blame.

9. She also submitted that the Trial Court in its decision failed to consider the evidence of DW2, Mr. Mohamed Saleh Said, the driver of the subject motor vehicle who testified that the respondent hit the appellant's motor vehicle's left hand side mirror when he joined the main road at Kengeleni traffic lights when he did not have the right of way.

10. Ms Kaguri stated that the said evidence was corroborated by PC Mumo who testified as DW1. That in re-examination, he stated that he was satisfied with the initial report which indicated that the respondent was to blame for the accident. The appellant's Counsel placed reliance on Section 107 of the Evidence Act Cap 80, Laws of Kenya as to the burden of proof in civil cases.

11. On quantum of damages, the appellant's Counsel submitted that in a medical report dated 14<sup>th</sup> August, 2012, Dr. Ajoni Adede noted that the respondent sustained soft tissue injuries with no expectation of permanent disability. Counsel cited the case of **M.A Bayusuf & Sons Limited vs Grace Adhiambo Opondo** [2008] eKLR, where the plaintiff who had more serious injuries than the respondent herein, was awarded Kshs. 200,000/-. She further submitted that the Trial Court's award of Kshs. 300,000/- to the respondent herein was inordinately high and was based on the wrong principles.

12. On the issue of liability, the respondent's Counsel submitted that the respondent was hit from behind by the appellant's motor vehicle after he had been cleared to move by the traffic officer manning the junction when he got into the highway. He further submitted that the respondent's evidence was not controverted by any of the appellant's witnesses, hence the Trial Magistrate was not at fault in finding that the respondent proved his case on a balance of probabilities.

13. On quantum of damages, the respondent's Counsel submitted that the respondent sustained a cut to the head, lacerations on both the upper and lower lip, and an abrasion on the right elbow, therefore a sum of Kshs. 300,000/= was justifiable. The respondent's Counsel similarly placed reliance on the case of **M.A Bayusuf & Sons Limited vs Grace Adhiambo Opondo** (supra) where the court gave an award of Kshs. 200,000/- as general damages for injuries, which the Counsel said were similar to those sustained by the respondent in this case. The respondent's Counsel submitted that the Trial Court was right to award Kshs. 300,000/- after it factored inflation. He urged this court to dismiss the appeal with costs.

#### **ANALYSIS AND DETERMINATION.**

14. This being a first appeal, the duty of the 1<sup>st</sup> appellate court is to analyze and re-examine the evidence adduced before the lower court and reach its own independent decision, while bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. The above principles were set out in **Selle vs. Associated Motor Boat Co.** [1968] EA 123 where it was held that-

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”**

15. The issues for determination in this appeal are-

**i. Who was to blame for the accident and to what extent; and**

**ii. What quantum of damages, if any, is payable to the appellant?**

#### **Who was to blame for the accident and to what extent?**

16. The evidence adduced was that on 11<sup>th</sup> July, 2012, an accident occurred along the Mombasa-Malindi road involving motor vehicle registration number KAX 127M Nissan Diesel Tipper and a pedal cyclist. As a result of the said accident, the respondent sustained injuries.

17. The respondent, Jacob Fundi Mugo, in his testimony testified that he was riding his bicycle towards mshomoroni from Nyali and that when he got to the junction he stopped. That he was later cleared to move by a Traffic Officer. He further testified that he was hit from behind by motor vehicle registration No. KAX 127M Nissan Diesel Tipper which was heading towards Mombasa.

18. No. 82903, Corporal Mumo Mbungu a Police Officer attached to Nyali Traffic Base, testified as DW1. In his evidence confirmed that the said accident occurred at about 11.00 am. He further stated that motor vehicle registration number KAX 127M had the right of way and that the pedal cyclist who was the respondent herein, was to blame for the occurrence of the said accident. DW1 stated that the driver of the said vehicle was on the highway and that he had the right of way but the respondent failed to give way to the traffic on the highway.

19. During cross-examination, DW1 confirmed that he was not the Investigating Officer. He did not produce a sketch plan of the scene of the accident but he testified that according to the police abstract which he produced as P. exhibit 1, the pedal cyclist (respondent) was to blame.

20. DW2, Mohamed Swaleh Said, was the driver of the subject motor vehicle. He testified that on 11<sup>th</sup> July, 2012 at Kengeleni junction, a

Traffic Officer signaled that they could proceed, then a pedal cyclist emerged from Kongowea towards Kisauni and hit his lorry on the left side. He stated that he had the right of way.

21. From the evidence adduced in support of each party's case, it is clear that the respondent and the appellant's driver have two different explanations on how the accident occurred, having been both at the scene of the accident it was necessary to have the testimony of an independent witness to shed light on the true position in regard to the flow of events. It is the finding of this court that DW1 was an independent witness as he relied on the information he obtained from the police abstract and the Occurrence Book.

22. In the cases of **Mount Elgon Hardware v Millers**, C.A. No. 19 of 1996 and **Mwaura Mwalo v Akamba Public Road Services Ltd**, HCC No 5 of 1989 it was held that the burden of proving claims anchored on torts of negligence or breach of statutory duty of care rests on the claimant throughout the trial on a balance of probabilities.

23. In this case, the Trial Court apportioned 5% liability to the respondent for failing to file a reply to the defence to deny contributory negligence which was attributed to him in the defence filed by the appellant. The evidence on record leaves no doubt that the appellant had the right of way as he was driving along the highway. Even if the respondent was cleared by a Traffic Officer to join the highway, he still owed a duty of care to himself and other road users. On the other hand, the appellant though having the right of way had an obligation to keep a proper look out for other road users.

24. The law is clear that he who alleges must prove hence it was incumbent upon the respondent to prove negligence or negligent acts on the part of the driver of the suit motor vehicle. In **Haji vs Murair Freight Agencies Ltd [1984] eKLR**, the Court of Appeal held that where it is proved by evidence that both parties are to blame but there is no means of distribution of liability between them, the blame can be distributed equally.

25. In this court's view, this case calls for equal apportionment of liability. I therefore hold that the Trial Magistrate erred in apportioning liability in the ratio of 5:95 as against the respondent. I therefore proceed to apportion liability between the appellant and the respondent in the ratio of 50:50.

#### **What quantum of damages, if any, is payable to the appellant?**

26. It is the appellant's case that the award of damages made by the Trial Magistrate was excessive given the nature of the injuries. Citing the case of **M.A Bayusuf & Sons Limited vs Grace Adhiambo Opondo** (supra) the appellant contended that the Trial Magistrate erred by relying on wrong principles to arrive at the award.

27. The respondent submitted that the amount awarded was not exaggerated or excessive but was fair under the circumstances as it was within the boundaries of awards for similar injuries and should not be disturbed. Reliance by the respondent was also placed on the case of **M.A Bayusuf & Sons Limited vs Grace Adhiambo Opondo** (supra), where no permanent disability was noted and the sum of Kshs. 200,000/= was awarded for similar injuries. The respondent's Counsel justification for the award of Kshs. 300,000/= made to the respondent was that the Trial Court considered the issue of inflation.

28. In considering whether the Trial Magistrate erred in arriving at the award in this case, this court bears in mind the decision in **Butt v. Khan [1981] KLR 349**, Law, J.A stated as follows:

**“An appellate court will not disturb an award of damages unless it is 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.”**

29. This court has considered other decided cases of claimants who suffered injuries which are almost similar to those suffered by the respondent. In **Simon Muchemi Atako & another v Gordon Osore** [2013] eKLR, the Court of Appeal awarded Kshs. 120,000/= for blunt chest injury, cut wound on the left leg, bruise wound on the right knee, blunt injury to the left shoulder, cut wound above the right elbow, cut wound over the occipital part of the head; and cut wound on the palmas aspect of the left thumb.

30. In **George Kinyanjui T/A Climax Coaches & another v Hussein Mahad Kuyale** [2016] eKLR, the court awarded Kshs. 120,000/= for soft tissue injuries.

31. The respondent herein was medically examined on 11<sup>th</sup> July, 2012. He sustained a cut to the head, lacerations on both the upper and lower lip, and an abrasion on the right elbow. PW2 indicated that the respondent would recover fully with no disability.

32. It is apparent that the respondent did not suffer serious injuries. It is my considered view that the award of Kshs. 300,000/= was inordinately high for the kind of soft tissue injuries sustained by the respondent. Going by the 2 cases I have referred to, which were decided in the years 2013 and 2016. It is my considered view that an award of Kshs. 150,000/= is adequate compensation for the injuries sustained. The award of Kshs. 150,000/= takes into account the element of inflation since the 2 cases were decided. I set aside the sum of Kshs. 300,000/= awarded to the respondent as general damages. I hereby substitute it with an award of Kshs. 150,000/=. The award for special damages in the sum of Kshs. 2,000/= is not in dispute and is hereby upheld.

33. The resultant award is made out as follows:-

i. General damages..... Kshs. 150,000/=

Less 50% contribution.....	Kshs.	75,000/=
Balance .....	Kshs.	75,000/=
ii. Special damages.....	Kshs.	2,000/=
Gross award.....	Kshs.	77,000/=

34. The appeal succeeds to the above extent. The respondent is awarded costs of the lower court case, he is also awarded interest at court rates. The costs of this appeal are awarded to the appellant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26TH DAY OF FEBRUARY, 2021. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Ms Kaguri for the appellant

Mr. Origi holding brief for Mr. Gachiri Kariuki for the respondent

Mr. Oliver Musundi – Court Assistant.