



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

**CIVIL APPEAL NO. 93 OF 2014**

1. MUTUKU STANLEY )

2. MARTIN MWANGI MACHARIA ).....APPELLANTS

VERSUS

STEPHEN MWONGELA MAWEU .....RESPONDENT

*(Being an appeal from the judgment of Principal Magistrate's Court at Kilungu delivered by **Honourable H. Nyakweba, (Principal Magistrate)** on 29<sup>th</sup> May, 2014 in **KILUNGU PM.CC. NO.61 OF 2012**)*

**JUDGMENT OF THE COURT**

1. The Appeal herein arose from the judgement of Hon. Nyakweba Principal Magistrate delivered on the 29<sup>th</sup> May, 2014 in **Civil Suit No.61 of 2012 at Kilungu Law Courts**. In the judgement the Appellants were ordered to pay to the Respondent a total sum of Kshs.1,004,800/= plus costs and interest.

2. The Appellants were dissatisfied by the said judgment and filed a Memorandum of Appeal dated 18/06/2014 which raised the following grounds of appeal:-

*(i) That the learned magistrate erred in law and fact by misdirecting himself that the driver was 100% liable for the accident.*

*(ii) That the learned magistrate erred in law and fact as no direct evidence was adduced to establish liability.*

*(iii) That the learned magistrate erred in law and in fact by failing to consider contributory negligence on the part of the Plaintiff and finding the Appellants 100% liable.*

*(iv) The learned magistrate erred in law and in fact by failing to scrutinize and or evaluate the evidence tendered in support of the Appellants thereby failing to apportion liability in view of the evidence on record.*

*(v) The learned magistrate erred in law and in fact by failing to appreciate the totality of the evidence before him and in not considering submissions on behalf of the Appellants.*

*(vi) That the learned magistrate erred in law and in fact by failing to take into account the evidence and the submissions on quantum of damages given on behalf of the Appellants while considering his judgment.*

*(vii) That the judgment arrived at on general damages by the Learned Magistrate was not supported by enough evidence.*

*(viii) That Plaintiff did not adduce the legal evidential burden as required under the law.*

*(ix) That the learned magistrate erred in law and in fact by making an award on general damages which was manifestly excessive and inordinately high and a departure from decided cases.*

*(x) That the learned magistrate erred in law and in fact by failing to properly consider the injuries sustained by the Plaintiff and as a result erred on the award of general damages which was manifestly excessive and inordinately high and a departure from decided cases.*

*(xi) That the learned magistrate erred in law and in fact by awarding future medical expenses which was manifestly excessive and without corroboration by enough evidence nor a medical quotation of an independent hospital.*

*(xii) That the learned magistrate erred in law and in fact by awarding future medical expenses whereas the injuries suffered were soft tissue in nature and had healed with scars and thus no need for future medical expenses.*

*(xiii) That the learned magistrate erred in law and in fact by disregarding the evidence of the Appellants and considering extrinsic matters thereby basing his judgment on the same thus failing to judiciously exercise his discretion.*

3. The Appellants therefore seeks that the appeal be allowed as follows:-

*(a) The lower court's judgement on liability be reversed and suit therein be dismissed with costs.*

*(b) The lower court's judgment on general damages be re-assessed.*

*(c) The lower court's judgment on future medical expenses be re-assessed.*

*(d) Costs of the Appeal be awarded to the Appellants.*

4. With the leave of the court, parties agreed to dispose this appeal by way of written submissions. However it is only counsel for the Respondent who filed submissions while the Appellants counsel did not. Counsel for the Respondent. submitted that the lower court's judgment be upheld and that the Appellants appeal be dismissed with costs to the Respondent.

5. This being a first appeal, the court is duty bound to re-evaluate, analyze the evidence presented before the trial court and come to its own independent conclusion bearing in mind that it neither saw nor heard the witness testify but to make an allowance for that (see SELE & ANOTHER =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123).

6. The Respondent herein had testified in the lower court and stated that he was traveling to Mombasa aboard motor vehicle Registration No. KBL 315 L when its driver who was then driving at high speed lost control of the said vehicle which rolled and as a result the Respondent sustained injuries. He was rushed to Makindu District Hospital before being referred to Bishop Kioko Hospital where he was admitted for about three weeks. Upon discharge, he reported the incident at Makindu Police station where a P. 3 form and police abstract were issued. He was later examined by Dr. Kimuyu. He blamed the driver for over speeding. The Respondent was examined by Dr. Kimuyu who discerned the following injuries:-

*(i) Cut wound on occipital region.*

**(ii) Laceration of right palm**

**(iii) Cut wound on right elbow**

**(iv) Degloving injury to left hand with deformed fingers.**

**(v) Blunt injury to left shoulder with laceration**

The said doctor opined that the Respondent would require reconstructive surgery to correct the deformity at an estimated cost of Kshs.300,000/=. The Respondent after calling the doctor closed his case. The Appellants did not tender evidence and closed their case. Submissions were thereafter filed and the trial court concluded that the Respondent had proved his case against the Appellants and attributed 100% liability against the Appellants. The trial court awarded general damages of Kshs.700,000/= for pain and suffering and a further Kshs.300,000/= for future medical expenses. Special damages of Kshs.4,800/= was also awarded. This then triggered the present appeal.

7. I have considered the Appellants grounds of appeal as well as the submissions presented herein. the following issues are necessary for determination:-

**(i) Whether or not the Appellants were solely to blame for the accident**

**(ii) Whether the award of the damages are commensurate with the Respondent injuries.**

**(iii) Whether or not the cost for future medical expenses were merited.**

**(iv) Whether the awards made by the trial court were manifestly excessive.**

Before embarking on the above issues, it is imperative to take note of the fact that the Appellants have urged this court to interfere with the decision of the lower court. This court is guided by the principles established in the case of **BUTLER VS BUTLER C.A. NO. 49 OF 1983** where the court laid down certain principles upon which an appellate court will interfere with an award of damages and are as follows:-

**(I) If the lower court acted on wrong principles.**

**(II) If the lower court has awarded damages which are so excessive or so low as to represent an erroneous estimate of damages.**

**(III) If the lower court has taken into consideration matter it ought not to have considered or not taken into consideration matters it ought to have considered and in the result arrived at a wrong decision.**

8. As regards the first issue, I note that the Appellants are aggrieved at the lower court's decision in finding them wholly liable for the accident at 100% and further that the trial court should have ruled that the Respondent contributed to some extent. I have analyzed the evidence tendered by the Respondent in the lower court and find that he had been a passenger in the Appellants motor vehicle registration Number KBL 315 L travelling from Nairobi to Mombasa. He stated that the 2<sup>nd</sup> Appellant who was the driver was driving at high speed and before the accident occurred was making a speed of 130 Kph. He stated that the driver lost control and which rolled around Makindu area. He was rushed to Makindu District Hospital and later Bishop Kioko Hospital where he was admitted for about three weeks. The Respondent upon discharge was issued with a police abstract and P. 3 form. The police abstract produced as exhibit showed that the 2<sup>nd</sup> Appellant was charged with an offence of careless driving. The Respondent was cross – examined by the Appellant's counsel at length and his testimony remained unshaken especially on the aspect that the 2<sup>nd</sup> Appellant was over speeding prior to the accident. The Respondent had been a passenger and therefore was not in control of the vehicle and hence he could not have contributed to the accident in any way. The Respondent's pleadings raised the issue of "**Res Ipsa loquitur**". The

Appellants statement of defence raised the issue that the accident was unavoidable and were caused by factors beyond the control of their driver. However, it is noted that the Appellants opted not to call any witnesses who would give their version as to how the accident occurred. The 2<sup>nd</sup> Appellant who was the driver could have been called so as to shed further light on how the accident occurred but instead the Appellants closed their case without presenting evidence. The accident took place around 2 pm and it was clear that the Respondent saw it happening. In fact the Respondent stated that the passengers got alarmed by the high speed and had pleaded to no avail to the 2<sup>nd</sup> Appellant to slow down before the accident. The fact that the vehicle left the road and rolled showed that the 2<sup>nd</sup> Appellant had not properly managed and or controlled the same. Indeed properly managed and controlled vehicles do not ordinarily leave the road and roll. I am therefore satisfied that the Respondent had given the correct version of how the accident took place. The Appellants were clearly to blame for the said accident and therefore the trial court's decision in attributing 100% liability upon the Appellants was properly arrived at hence the Appellant's ground of appeal on liability fails and is dismissed.

9. As regards the second issue, the Respondent stated that he sustained injuries on the head, shoulder and both hands and was first treated at Makindu District Hospital before being referred to Bishop Kioko Catholic Hospital where he was admitted for about three weeks. The Respondent was later examined by Dr. Kimuyu on two occasions and medical reports prepared. Dr. Kimuyu testified before the lower court and confirmed that the Respondent sustained a cut wound on back, head, right hand, lacerations, cut wound on right elbow, Degloving injury of left hand with deformity of the 3<sup>rd</sup> and 4<sup>th</sup> fingers, blunt injury to the left shoulder. She further stated that the Respondents would require to undergo reconstructive surgery on fingers on both hands at cost of Kshs.300,000/=. The said doctor confirmed that the Respondent had lost his grip on the hands. The Respondent had testified and stated that he no longer uses his right hand as he has lost grip and cannot now perform his previous job of a driver. The Respondent was also examined by the Appellant's doctors one Dr. Maonga Phanice but report was not availed by the Appellants and neither did they call their doctor to testify. The record of Appeal shows that both counsels for the Respondent and Appellants presented submissions on quantum of damages. Counsel for the Respondent had proposed a sum of Kshs.700,000/= as general damages for pain and suffering and relied on two authorities namely **MARTIN M. MUGI =VS= ATTORNEY GENERAL – NBI HCCC NO. 791 OF 1999** and **SARINA SULEMAN OMAR =VS= COMBONI MISSIONARIES – MSA HCCC NO.105 OF 1996.**

The Appellants counsel had proposed a sum of Kshs.90,000/= and cited the cases namely **FREDRICK TENDWA =VS= ELLAM SAISI MWEMA [2004] eKLR and ELDORET STEEL MILLS LTD =VS= LAWI ODHIAMBO AWENDA [2011] eKLR.** The trial court considered the said cases and arrived at an award of Kshs.700,000/= as general damages for pain and suffering. I have re-looked at the said authorities and note that the cases cited by the Respondent had plaintiffs who sustained mainly soft tissue injuries without any permanent disability and awards ranged between Kshs.200,000/= - 250,000/=. The other cases cited by the counsel for the Appellants appear to have been more relevant. For instance in the **FREDRICK TENDWA =VS- ELLAM SAISI [2004] EKLR** the Plaintiff was awarded Kshs.90, 000/= for blunt injury to the head, broken collar bone, lacerated left abdominal wall, deformed little finger. This was on 29/07/2004 and Angawa J awarded Kshs.90, 000/=. In second case cited by the Appellants counsel at the trial court Azangalala J awarded Kshs.100,000/= to a Plaintiff who had sustained multiple cuts on left radiu-ulna, cut wound on left finger and multiple cuts on all fingers of the left hand. The trial court was therefore expected to use comparable cases with comparable injuries and awards. As Respondent sustained mainly injuries on both hands which require reconstructive surgery as opined by his doctor, the court was to rely on authorities which had Plaintiffs with similar injuries. I am therefore satisfied that the award of Kshs.700,000/=to the Respondent was not commensurate with the injuries. In the case of **KILIFI PLANTATIONS LTD =VS= SETH AWUOR ODAWA – MSA. HCCA NO.31 OF 2002** Maraga J confirmed an award of Kshs.160,000/= to a Plaintiff who had sustained cuts on the first and second metacarpophalanged joints of the first and second fingers of the left hand and in which the doctor observed that the Plaintiff had reduced movement of the 2<sup>nd</sup> finger of left hand resulting in reduced grip of the left hand. The injuries herein are almost similar to those of the Respondent whose hands were affected in that the 3<sup>rd</sup> and 4<sup>th</sup> fingers on left hand were deformed while the right hand had loss of grip. The Respondent stated that he could no longer drive vehicles due to the

loss of grip on the right hand. The doctor had recommended reconstructive surgery. Even though the trial court had ruled that it had factored inflation. I find the award of Kshs.700,000/= to be excessive. I would find that a sum of Kshs.300,000/= would have been adequate having factored the effects of inflation hence the Appellants ground of appeal against quantum partly succeeds.

10. As regards the second issue, the Respondents doctor testified on two occasions and opined that the Respondent's hands would require a sum of Kshs. 300,000/= to cater for reconstructive surgery. Indeed the Respondent was taken for a second medical examination by the Appellant's doctors but such report was neither availed nor their doctors called to testify. The Respondent's right hand having been rendered incapacitated by loss of grip, it meant that unless reconstructive surgery is undertaken so as to enable him drive vehicles as that was his profession and the source of his livelihood. The sums for reconstructive surgery was defended by the Respondents doctor who was cross – examined at length. My considered view is that the sum of Kshs.300,000/= in regard to future medical expenses is merited hence the Appellants grounds of appeal against award for future medical expenses fails.

11. As regards the last issue and as observed above, the awards on general damages for pain and suffering was manifestly excessive thereby representing an erroneous estimate of damages.

In the result, I proceed to make the following orders:-

***(a) The Appellants appeal on liability lacks merit and is dismissed.***

***(b) The Appellants appeal against quantum of damages partly succeeds. The lower courts award of Kshs.700,000/= is hereby substituted with an award of Kshs.300,000/=.***

***(c) The Appellants appeal against award of future medical expenses of Kshs.300,000/= lacks merit and is dismissed.***

***(d) Award of special damages of Kshs.4,800/= remains undisturbed.***

***(e) As appeal has partly succeeded, the Appellant is awarded half cost of appeal. The Respondent shall have the full costs in the lower court.***

It is so ordered.

Dated, signed and delivered at Machakos this.....27<sup>th</sup>.. day of ...APRIL...2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Mbulo for Respondent.....

C/A: Kituva .....