



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CIVIL APPEAL NO 16 OF 2015**  
**BADAR HARDWARES LIMITED....APPELLANT**  
**AND**  
**JAMES AMWOMA OIKO.....RESPONDENT**

**(Being an appeal from the whole Judgment of the Principal Magistrate's Court at VOI of Hon. Kadima M. Eugene delivered on 10<sup>th</sup> June 2015 in Voi Principal Magistrates Court civil Suit No 133 of 2013)**

**BETWEEN**  
**JAMES AMWOMA OIKO .....PLAINTIFF**  
**VERSUS**  
**BADAR HARDWARES LIMITED....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his judgment delivered on 10<sup>th</sup> June 2015, Hon E.M. Kadima, Resident Magistrate at Voi Law Courts entered judgment in favour of the Respondent against the Appellant herein in the following terms:-

General Damages	Kshs 600,000/=
Special Damages	Kshs 1,500/=
	Kshs 601,500/=
Less 30% contribution	Kshs 180,450/=
	<b>Kshs 421,050/=</b>

Plus costs and interest thereon.

2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, on 12<sup>th</sup> August 2015, the Appellant filed a Notice of Motion application dated 10<sup>th</sup> August 2015 in which it sought amongst other prayers, that time be enlarged to enable it file its Appeal out of time.

3. On 16<sup>th</sup> September 2015, counsel for the Appellant and counsel for the Respondent filed a consent in which they agreed that the decretal sum of Kshs 502,650/= would be deposited in an interest earning account in their joint names within thirty (30) days from the date of the said Consent whereafter the aforesaid application would proceed for hearing.

4. However, when the matter came up in court on 28<sup>th</sup> September 2015, counsel for the Respondent indicated that he would not oppose the said application and consented to the time for the Appellant filing its Memorandum of Appeal enlarged to 12<sup>th</sup> October 2015.

5. As had been agreed in the Consent filed on 16<sup>th</sup> September 2015, the Appellant filed its Memorandum of Appeal dated 8<sup>th</sup> October 2015 on 12<sup>th</sup> October 2015. The grounds of appeal were as follows:-

**1. THAT the Learned Trial Magistrate erred both in law and in fact in apportioning liability in the ratio of 30% against the Respondent/Plaintiff and 70% against the Defendant/Appellant when the Respondent/Plaintiff had failed to discharge the burden of proof by adducing credible evidence that proved the subject Motor Vehicle was defective at the time of the accident.**

**2. THAT the Learned Trial Magistrate erred both in law and in fact by awarding exorbitant and excessive quantum of damages not based on any judicial authorities and precedence.**

**3. THAT the Learned Trial Magistrate erred in law and fact by disregarding the authorities of the Appellants/Defendants (sic) which stipulate the rational for arriving at the appropriate quantum of damages.**

6. The Appellant's Record of Appeal was dated 3<sup>rd</sup> October 2016. Its Written Submissions were dated 10<sup>th</sup> January 2017 and filed on 12<sup>th</sup> January 2017 while those of the Respondent were dated and filed on 20<sup>th</sup> February 2017.

7. When the matter came up on 21<sup>st</sup> February 2017, counsel for both parties asked this court to deliver its Judgment based on their respective Written Submissions, which they did not highlight but relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

## **LEGAL ANALYSIS**

8. Being a first appeal, an appellate court is called upon to evaluate the evidence afresh and come at its own conclusion but keeping in mind that it did not have the advantage of seeing the demeanour of witnesses. This was a position that was held in the cases of **Sumaria & Another vs Allied Industries Ltd (2007) KLR 1** and **East African Portland Cement Company Ltd vs Tilikia Kelo [2016] eKLR**.

9. In the case of **East African Portland Cement Company Ltd vs Tilikia Kelo** (Supra), it was held as follows:-

**“...The position of the law as regards a first appeal is that as the first appellate court, this court has a duty to re-consider the evidence, evaluate it and draw its own conclusions while appreciating that it did not have the advantage, like the trial court had, of seeing and hearing witnesses...”**

10. Having looked at the Appellant's grounds of appeal, it was evident that the following were really the issues that had been placed before this court for its determination:-

**1. Whether or not the Learned Trial Magistrate was justified in awarding the said of Kshs 600,000/= as general damages; and**

**2. Whether or not the apportionment of liability at 70%-30% in favour of the Respondent**

**herein was fair and reasonable.**

11. This court therefore dealt with the two (2) issues under the heads shown hereinabove.

## **I. LIABILITY**

12. The Appellant submitted that the Respondent did not allude to the fact that Motor Vehicle Registration Number KBQ 194S/ZD 6202 (hereinafter referred to as “the subject Motor Vehicle”) in which he was travelling in in the course of his duty was defective or even adduce documentary evidence to prove his assertion.

13. It pointed out that the Respondent had in fact admitted in his Cross-examination that he did not even know whether the subject Motor Vehicle was inspected after the accident that occurred on 26<sup>th</sup> June 2012 along Mombasa- Nairobi Road. It stated that No 52061 PC Benard Ndungu (hereinafter referred to as “PW 3”) had in fact contended that the Respondent may have lost control of the subject Motor Vehicle due to fatigue or a mechanical problem.

14. It argued that whoever alleges a fact must prove the same. It contended that Section 107 of the Evidence Act Cap 80 (Laws of Kenya) stipulates that it was incumbent on the Respondent to have discharged the burden of proof that the subject Motor Vehicle had a pre-accident defect prior to the accident which caused the steering wheel to lock and thus overturn which he could have done by adducing in evidence, the Certificate of Motor Vehicle Inspection that is issued by the Traffic Police after inspection of motor vehicles.

15. In this regard, it referred this court to the case of **Charlesworth & Percy on Negligence 9<sup>th</sup> Edition at P.387** as cited in the case of **Treadsetters Tyres Ltd vs John Wekesa Wepukulu [2010] eKLR** where it was stated as follows:-

**“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonable inferior (sic) and (2), whether, assuming it may be reasonably inferred, negligence is in fact inferred.”**

16. It therefore argued that in the absence of the said Certificate of Inspection, the Learned Trial Magistrate erred by misinterpreting the law of negligence when he shifted the burden of proof to it to prove that the subject Motor Vehicle was not defective as had been contended by the Respondent. It urged this court to find that the Respondent was 100% liable for having caused the accident and for the injuries that he sustained.

17. It referred this court to the case of **Treadsetters Tyres Ltd vs John Wekesa Wepukulu (Supra)** where it was held as follows:-

**“...I do find that the trial magistrate erred in fact and law on the question of negligence...On a balance of probabilities I do find on analysis of the evidence on record that the cause of the injury was not due to negligence of breach of Statutory duty of the respondent. There was proof of a broken steering wheel which could have led or caused the accident. There is no evidence of causation whatsoever. The trial court ought not have found in favour of the plaintiff in respect of liability...”**

18. On its part, the Respondent contended that the Appellant opted not to adduce evidence and that the Learned Trial Magistrate therefore analysed the evidence that was adduced before him and correctly apportioned liability at 70%-30% in his favour. He submitted that apportionment of liability is an exercise of judicial discretion and averred that the Appellant was merely seeking a re-assessment of the said apportionment and not a dismissal of the sur herein.

19. However, this court understood the Appellant's submission on apportionment of liability to be that the Respondent's suit ought to have been dismissed because he had not proved his case on liability. Be that as it may, the end result would be the same as it was definitely going to analyse the said evidence afresh with a view to making a determination on the question of liability.

20. According to the Plaintiff that was dated 23<sup>rd</sup> October 2013 and filed on 24<sup>th</sup> October 2013, the Respondent stated that he was in the lawful course of business as a driver of the subject Motor Vehicle along Mombasa Road at Taita Village when the steering wheel locked causing the said Motor Vehicle to overturn as a result of which he sustained injuries.

21. In Paragraph 4 of his Plaintiff, he particularised negligence against the Appellant as follows:-

- 1. Failing to ensure that the vehicle was in good condition.**
- 2. Exposing the plaintiff to dangerous working conditions without prior warning.**
- 3. Exposing the plaintiff and other road users to dangerous work conditions without adequate training.**
- 4. Failing to take adequate precautions and/or measures for the safety of the driver while in the course of his duties.**
- 5. Permitting the Plaintiff to drive a defective vehicle.**

22. In his Written Statement that he adopted as his Examination-in Chief, he was emphatic that the accident occurred as a result of negligence on the part of the Appellant who failed to ensure the subject Motor Vehicle was in good condition. In his Cross-examination, he stated that he asked the Appellant's Transport Manager if the said Motor Vehicle was in good condition to which he responded in the affirmative. It was his testimony that at the material time of the accident, he was driving at a speed of 40-45 kilometres.

23. During his Cross-examination, PW 3 who adduced the Police Abstract Report filled on 15<sup>th</sup> April 2013 stated that the Occurrence Book (OB) did not confirm findings of the investigations but it showed that the Respondent may have lost control due to fatigue or the said subject Motor Vehicle may have had a mechanical problem. He also stated that the Inspection Report had not been furnished. In his Re-examination, he confirmed that the accident was self-involving.

24. Notably, the Appellant did not call any witnesses to testify in support of its case. In his Judgment, the Learned Trial Magistrate dismissed PW 3's assertions that the Respondent lost control of the subject Motor Vehicle because of fatigue on the ground that it was incompatible or outrageous and observed that if it was indeed true that the Respondent was fatigued, then it was while he was in the employment of the Appellant.

25. The said Learned Trial Magistrate observed that PW 3 never visited the scene of the accident and that no Pre-accident Report was furnished to the Trial Court. He stated that there was no other reason other than a mechanical fault that would have caused the steering wheel of the subject Motor Vehicle to lock and thus cause it to overturn and that no diligent person would have been able to control it despite exercising due diligence. He then apportioned liability at 70%-30% in favour of the Respondent.

26. This court found that the Learned Trial Magistrate misdirected him in his conclusion of how liability was to be apportioned. If he had found that the subject Motor Vehicle had a mechanical problem which caused its steering wheel to lock and then overturned, then there was no justification whatsoever for having found the Respondent liable to the extent of thirty (30%) per cent as he would have not been to blame unless of course there was evidence that he failed to take all precautions to control the said Motor Vehicle.

27. The assertion that the subject Motor Vehicle had a mechanical problem was an assertion that was made by the Respondent and which he ought to have proved. The Learned Trial Magistrate ought not to have accepted the Respondent's version of events hook, line and sinker without analysing documentary proof, which the Appellant rightly pointed out would have been proven by a Certificate of Inspection.

28. From the evidence that was adduced by the Respondent, it was evident that he had not discharged his burden of proof that the subject Motor Vehicle had a mechanical fault because he did not provide any documentary evidence to support his contention. The Appellant exercised its discretion in not calling any witnesses and was under no obligation to assist the Respondent prove his case. This court thus agreed with the Appellant's submission that the Respondent did not prove his case against it.

29. In the circumstances foregoing, this court found Ground of Appeal No (1) of the Appellant's Appeal to have been merited.

## II. QUANTUM

30. Having found that the Respondent did not prove his case on a balance of probability, it was not necessary to delve into the submissions relating to the quantum that was awarded by the Learned Trial Magistrate. However, assuming that this court has erred on the issue of liability, it found it prudent to pronounce itself on the question of quantum.

31. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

32. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

33. In the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

**“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”**

34. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR**, on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screws.

35. *In the case of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR, the Court of Appeal referred to the cases of Antony Mwangi vs Martin Muiruri (2008) eKLR, where the plaintiff therein sustained a fracture of the femur and was awarded Ksh.400,000/= as general damages and the case of Joseph Suri Nyateng vs H.P. Mashru (1999) eKLR where the plaintiff therein sustained a fracture of the femur and a dislocation of the shoulder and was awarded Ksh.450,000/=.*

36. Bearing in mind the aforesaid cases, it was the view of this court that award of General damages in the sum of Kshs 600,000/= for cut wounds on the left lip and forehead, cut on the tongue, multiple bruises on the face, three (3) broken teeth, loss of four (4) teeth both upper and lower and a tender and swollen mid back, arms and forearm at the shoulder joint that was awarded by the Learned Trial Magistrate was manifestly excessively.

37. It was therefore the opinion of this court that a sum of Kshs 250,000/= general damages as had been proposed by the Appellant would have been fair in the circumstances of the case herein. In arriving at the said figure, this court had due regard to several cases.

38. In the case of **Ahmed Mzee Famau t/a Najaa Coach Ltd & another vs Veronica Ngii Muia aka Veronica Muiya aka Veronica Ngui Muiya [2017] eKLR** Chitembwe J upheld a lower court's finding that a sum of Kshs 500,000/= general damages where the Plaintiff therein had sustained a fracture of the lower jaw (right mandible), deep cut on the left forearm, blunt object injury to the right ear (per-auricular region) and to the chest (sternum) was reasonable.

39. In the case of **Paul Kipsang Koech & Another vs Titus Osule Osore [2013] eKLR**, Gikonyo J awarded a sum of Kshs 200,000/= where the Plaintiff therein had sustained bruises to the *lower lip, right cheek, left elbow, left knee, blunt injuries to the neck and abdomen*, fracture of the right upper incisor tooth, loosening of other two teeth and post-accident pains on the left elbow and the abdomen.

## **DISPOSITION**

40. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal was merited and the same is hereby allowed. The judgement that had been entered in favour of the Respondent herein in the sum of Kshs 600,000/= being General damages, Kshs 1,500/= being Special damages subject to 30% contributory negligence on his part plus costs and interest is hereby set aside in its entirety. In its place, this court orders that the Plaintiff's Plaint that was dated 23<sup>rd</sup> October 2013 and filed on 24<sup>th</sup> October 2013 be and is hereby dismissed with costs to the Appellant herein.

41. It is also hereby directed that the sum of Kshs 502,650/= deposited in an interest earning account in the joint names of the advocates for the Appellant's/Defendant's and Respondent's/Plaintiff's plus interest thereon be and is hereby released to the Appellant's/Defendant's advocates forthwith.

42. In view of the economic disparity between the Appellant and the Respondent herein, this court orders that each party will bear its own costs of the Appeal herein.

43. It is so ordered.

**DATED and DELIVERED at VOI this 20<sup>th</sup> day of April 2017**

**J. KAMAU**

**JUDGE**