



**Dreamline Express Limited & another v Wakesho (Civil Appeal
E071 of 2023) [2025] KEHC 595 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E071 OF 2023
AN ONGERI, J
JANUARY 17, 2025**

BETWEEN

DREAMLINE EXPRESS LIMITED 1ST APPELLANT

RICHARD MAINA NDATHI 2ND APPELLANT

AND

GRACE WAKESHO ALIAS GRACE KATO RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. A. M. Obura
(CM) in Voi CMCC E058 of 2023 delivered on 7th December 2023)*

JUDGMENT

1. The Respondent Grace Wakesho Kato alias Grace Kato filed Voi CMCC No. E058 of 2023 against the Appellants Dream Express Ltd and Richard Maina Ndathi following a Road Traffic Accident (RTA) that occurred on 27th October 2022.
2. The accident occurred at Taita village along Mombasa - Nairobi Highway when motor vehicle registration KCJ 890E in which the Respondent was travelling lost control and violently rammed into the rear of motor registration number KBZ 744 A/ZE 8051 causing serious bodily injuries to the Respondent.
3. The trial court found that the driver of motor vehicle registration number KCJ 890E was overtaking when he realized there was an oncoming motor vehicle. He tried to return to the left lane and rammed into the rear of motor vehicle registration number KBZ 744A/ZE 8051.
4. The Appellant did not adduce any evidence to rebut the Respondent's testimony.
5. The trial court found the Appellants 100% liable and assessed damages at Kshs. 800,000/= and special damages of Kshs. 3,850/= making a total of Kshs. 803,850/=



6. The Appellants have appealed to this court against the award on the following grounds:-
- i. The Learned trial Magistrate erred and misdirected herself by relying on wrong principles when assessing damages that were awarded to the Respondent.
 - ii. The Learned trial Magistrate erred and misdirected herself and failed to apply precedents and tenets/principles of the law applicable in awarding damages.
 - iii. The Learned trial Magistrate erred and misdirected herself by in awarding a sum in respect of damages which was inordinately high in the circumstance which was excessive in the circumstances occasioning a miscarriage of justice.
 - iv. The Learned Magistrate erred in law and in fact by failing to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.
 - v. The Learned trial Magistrate erred and misdirected herself by ignoring the defendant's submissions on record hence arriving at a wrong decision on both liability and quantum.
 - vi. It is proposed to ask the court for the following orders that:-
 - a. This appeal be allowed with costs.
 - b. The Judgment delivered by Honourable Magistrate A. M. Obura Chief Magistrate in Voi Chief Magistrate's Court Civil Suit No. E058 of 2023 on 7.12.2023 be set aside and costs be assessed again.
 - c. That cost of this appeal be borne by the Respondent.
7. The parties filed written submissions as follows in the appeal:- the appellant submitted that the respondent pleaded the following injuries; Fracture 2nd, 3rd and 4th metatarsal Left foot, puncture wound right foot plantar aspect, blunt injury to left foot and Permanent incapacity of about 5%. It appellant contended that the injuries pleaded in the plaint are soft tissue in nature which are expected to heal with no permanent disability. The general damages awarded by the lower court was therefore inordinately high considering the injurie sustained and the appellant proposed Kshs 250,000 as adequate compensation for the same and in support relied on the following cases;
- A. Savanna International Ltd v Muka (Civil Appeal 31 of 2018) [2022] KEHC 675 (KLR) (14 June 2022) (Judgment) where the claimant sustained fracture medial malleolus of the left ankle joint and severe soft tissue injury. The appellate Court awarded Kshs. 400,000/= as general damages for pain and suffering.
 - B. Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna [2022] eKLR where the Respondent herein sustained Fracture of the right zygoma (facial bone) among other injuries. The appellate Court substituted an award of Kshs. 850,000/= and awarded Kshs. 350,000/=.
8. The respondent alternatively submitted that from the testimonies of PW2 and PW3 it is clear that the accident was wholly cause by the 2nd appellant as the respondent was a passenger and could not be blamed for the accident. There was also evidence that the 2nd appellant was over speeding and lost control and rammed KBZ 744/ZE 8051. The circumstances of the accident showed that the 2nd appellant and/or authorize driver did nothing to avoid the accident and in fact instigated the same by over speeding.
9. On quantum the respondent submitted that the damages awarded were not excessive. The respondent was injured and to prove the same he provided a bundle of treatment notes and the appellants did



not dispute the same. The respondent contended that the cases that have been cited by the appellants herein do not have comparable injuries and that the respondent sustained more severe injuries. The respondent argued that the lower court was correct in its award and cited the following cases

- A. Pestony Limited & Another -V- Samuel Itonye Kagoko [2022] eKLR the plaintiff therein suffered a fracture of the midshaft femur and permanent incapacity of 5% and was awarded Kshs.800, 000/= on 24/03/2022.
- B. Razi Amin Kulaten-V- Claus Kruger And Rosemart Nyakinyua [2004] eKLR the respondent sustained a fracture of tibia/fibula and patella on the right leg, potts fracture on left ankle and was awarded Kshs. 600,000/= by Justice Khaminwa.

10. This being a first appeal the duty of the first appellate court are as follows:- In *Selle -vs- Associated Motor Boat Co.* [1968] EA 123 where the Court held: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.

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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

11. The issues for determination in this appeal are as follows:-

- i. Whether the award of damages was erroneous.
- ii. Whether the same should be reassessed.
- iii. Who pays the costs of the appeal.

12. The issue of liability is not contested since there is evidence that the driver of motor vehicle registration number KCJ 890E rammed into the rear of motor vehicle registration number KBZ 744A/ZE 8051.

13. I have considered the submissions filed herein together with the authorities relied upon by both parties.

14. I find that the trial court relied on comparable authorities to assess the quantum of damages;

- a. In *China Wu Yi Company Ltd vs Stephen Muniu Kinyanjui* (2021) eKLR, the court upheld the award of Kshs 800,000/= for a fracture and dislocation of tarsal-metatarsal joint right foot and a Degloving injury medical aspect right foot.
- b. In *Moses Kirimi & another v GKJ* (suing as the next friend of JK minor) [2019] eKLR where the respondent sustained bruises and fracture right upper 1/3 tibia and fibula and disability assessed at 5%, the court awarded Kshs 800,000/-.

15. I find no reason to tamper with the award of the trial court.



16. There is no evidence that the trial court applied the wrong principles or that irrelevant factors were taken into account.
17. The only time an appellate court can interfere with the award of the trial court is when the award is too high or too low as to warrant interference or where irrelevant factors or wrong principles were taken into account in the assessment of damages.
18. I find that the appeal lacks in merit and dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina/Trizah

