Sifuma v Irungu & another (Civil Appeal E1137 of 2023)
[2025] KEHC 431 (KLR) (Civ) (21 January 2025) (Judgment)

Neutral citation: [2025] KEHC 431 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1137 OF 2023

LP KASSAN, J

JANUARY 21, 2025

BETWEEN

STEPHEN NAMISI SIFUMA ..... APPELLANT

AND

CYRUS MAINA IRUNGU ..... 1ST RESPONDENT

SAMWEL MWANGI KARONGO ..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. G.A. Omodho, PM, delivered on 28th September, 2023 in Nairobi Milimani CMCC No. E2389 of 2022)

JUDGMENT

1. This appeal emanates from the judgment delivered on 28th September, 2023 in Nairobi Milimani CMCC No. E2389 of 2022. The suit originated from the plaint dated 5th May, 2022 and filed by Stephen Namisi Sifuma being the plaintiff in the lower court (hereafter the Appellant) and against Cyrus Maina Irungu and Samwel Mwangi Karongo, the 1st and 2nd defendants in the lower court (hereafter the 1st and 2nd Respondents). In the suit, the Appellant sought for reliefs in the nature of general and special damages, as well as damages for loss of income to the tune of Kshs. 339,204/- and damages for future/diminished earning capacity plus costs of the suit, arising out of a road traffic accident which occurred on or about 15th March, 2022 in Lower Kabete Road along Farasi Lane. The 1st and 2nd Respondents were sued in their respective capacities as the driver and owner of the motor vehicle registration no. KCM 563U (hereafter the subject motor vehicle). It was pleaded in the plaint that on the material date, the Appellant was lawfully riding the motor cycle registration number KMFG 213V (the motor cycle) along the above mentioned road at around 7:18 pm when the subject motor vehicle was so negligently and/or carelessly driven and managed that it hit the Appellant, causing him sustain serious bodily injuries. The particulars of negligence were set out in the plaint.

2. It was further pleaded in the plaint that as a result of the accident, the Appellant who was at all material times employed as a Supervisor at Securex Kenya Limited, lost his employment and therefore his livelihood. That furthermore, the Appellant would require a period of 12 months within which to recover from his injuries, during which time he would be unable to earn an income.

3. Upon service of summons, the 1st and 2nd Respondents entered appearance and filed their joint statement of defence dated 11th August, 2022 denying the key averments in the plaint and liability. Alternatively, the Respondents pleaded contributory negligence on the part of the Appellant.

4. At the hearing of the suit, the Appellant testified and called an additional witness, while the 1st Respondent testified for the defence. Upon close of submissions, the trial court delivered judgment in the manner hereunder:

    1. Liability 50%:50%

        a. General damages for pain and suffering Kshs. 500,000/-

        b. Loss of income Kshs.113,068/-

        c. Loss of future earnings/Diminished earning capacity NIL

        d. Special Damages Kshs. 11,000/-

        Total Kshs. 624,068/-

        (Less 50% contribution)

5. Aggrieved with the outcome, the Appellant preferred this appeal vide the memorandum of appeal dated 25th October, 2023 which is premised on the following grounds:

    1. That the Learned Principal Magistrate erred on facts and in law when it found that the Appellant was 50% to blame for the occurrence of the accident when she disregarded testimony that:

        a. The Appellant had the right of way at the time of the accident;

        b. The 1st Defendant was joining Farasi Lane from Lower Kabete road and ought to have done so when the road was clear;

        c. The 1st Defendant testified that when he was joining Farasi Lane, he could see the motor cycle approaching but neglected to let it pass hence causing the accident;

        d. The 1st Defendant disregarded the traffic rules and hence caused the accident;

        e. The Investigating Officers who visited the scene of the accident after the occurrence of the accident blamed the 1st Defendant for causing the accident.

    2. That the Learned Principal Magistrate erred in her judgment when it held that the Appellant contributed to the accident by speeding contrary to the Appellant's testimony that he was not speeding;

    3. That the Learned Magistrate erred in her judgment by totally disregarding the testimony of the Appellant and that of the police officer regarding the occurrence of the accident;

    4. That the finding of the court on liability regarding who caused the accident is erroneous and the same ought to be set aside and varied;

5. That the finding of the court regarding the damages awarded is erroneous and the same ought to be set aside.

6. The appeal was canvassed by way of written submissions.

7. The court has considered the record of appeal, the supplementary record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties plus the authorities cited therein. This is a first appeal. The Court of Appeal for East Africa set out the duty of a first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " 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 circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> 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.
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> 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."

8. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

9. Upon review of the memorandum of appeal and the rival submissions, it is the court's view the appeal turns on two issues, namely, whether the apportionment of liability made by the lower court is proper; and whether the award made on general damages is justified. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

10. As earlier mentioned, the Appellant by way of his plaint set out the pertinent facts and particulars of negligence against the Respondents, whereas the Respondents pleaded contributory negligence against the Appellant.

11. At the hearing, the Appellant first called Corporal Maranga Evans as PW1 and who produced the police abstract relating to the accident as P. Exhibit 1. The police officer proceeded to confirm the occurrence of the accident in question and involving the subject motor vehicle and the motor cycle. In cross-examination, he stated that he was not the investigating officer to the said accident, neither did he visit the scene on the material date. He further stated that while he had the Occurrence Book (OB) in court, the same was not produced as an exhibit. This position was restated in his re-examination.

12. The Appellant followed as PW2, thereby adopting his signed witness statement as part of his evidence-in-chief and producing his bundle of documents as exhibits. The Appellant blamed the 1st Respondent for directly causing the accident, adding that as a result of the injuries sustained therein, he cannot perform all work duties. The Appellant further stated that though he had healed as at the time of giving his testimony, he cannot run. In cross-examination, the Appellant testified that on the material date, he was enroute from the Kenya School of Government, riding the motor cycle along Lower Kabete Road, when the subject motor vehicle which was being driven on the opposite side of the road, knocked him down, causing him to land in a ditch. That as a result, he sustained a fracture injury to his right leg. In re-examination, he gave evidence that there was no other motor vehicle travelling in front of him prior to the accident.

13. On his part, the 1st Respondent who was DW1 similarly adopted his signed witness statement as part of his evidence-in-chief and produced the medical report dated 21st September, 2022 as D. Exhibit 1. He went on to state that he was headed to Farasi Lane from Lower Kabete Road on the material date, when the motor cycle hit the subject motor vehicle. That he had previously indicated that he would be taking a turn. During cross-examination, the 1st Respondent's testimony is that while he had his headlights on, the motor cycle was being ridden without headlights. It was equally his testimony that the said motor cycle was being ridden at a high speed and that the rider made an unsuccessful attempt at braking, thereby resulting in the accident. That on his part, he applied brakes to the subject motor vehicle, which reduced the impact of the accident.

14. In her judgment, the learned trial magistrate reasoned that both parties contributed to the accident. On that basis, she proceeded to apportion liability between the parties in the ratio 50:50.

15. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

16. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

17. From the foregoing, it is clear that the duty of proving the averments contained in the plaint lay squarely with the Appellant. In the present instance, it is not in dispute that an accident occurred on the material day involving the motor cycle being ridden by the Appellant on the one hand, and the subject motor vehicle being driven by the 1st Respondent and owned by the 2nd Respondent on the other hand, the result of which the Appellant sustained bodily injuries. From a reading of the grounds of appeal, it is apparent that what is in issue is the apportionment of liability made against the Appellant.

18. As earlier observed, neither the Appellant nor the Respondents called any eyewitness to the material accident to corroborate their respective testimonies. It is noted that this abstract was produced as an exhibit without any objection. Its correctness or authenticity was not questioned and so the contents therein including a blame upon the motor vehicle shall be relied on by this court. The police abstract which was tendered listed the subject motor vehicle as blameworthy. In any event, the police abstract was prepared by a police officer who visited the scene after the fact.

19. The defendant said that he slowed down and indicated his intention to turn right so as to join Farasi lane. There is a huge difference between turning right and left. In our Kenyan roads, the territory of

any vehicle is always the left side. A decision to turn right must be done with utmost care because that amounts to venturing into the "territory" of oncoming vehicles rightfully on their lane. It does not matter that the oncoming vehicle is speeding or not. The material motor vehicle was hit on the right side of its bumper buttressing the evidence that it was indeed turning to its right side. Farasi lane as per the evidence was on the right side of the motor vehicle and the left side of the motor cycle. Between the motor vehicle and the motor cycle, who has the right to turn to Farasi lane? The answer is simple; it is the motor cycle. The motor vehicle ought to have given way event though the motor cycle was over speeding. This is correct and indeed, the police abstract weighs down the balance in favour of the motor cycle rider. To this extent, I find that the motor vehicle is liable at 100%

20. In view of these circumstances, the decision by the learned trial magistrate in apportioning liability equally between the parties, is incorrect and replaced with the finding that the motor vehicle is liable at 100%.

21. The second limb of the appeal concerns itself with quantum, specifically the damages awarded under the head of general damages for pain, suffering and loss of amenities. The Appellant's grievance is that the award made is inordinately low in comparison to the nature and extent of injuries sustained here, and hence the relevant award ought to be revised upwards.

22. In considering the foregoing, this court will therefore be guided by the principles enunciated by the Court of Appeal in the case of Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30. It was held in that case that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

23. The same court stated in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 that:

> " 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 was either inordinately high or low".

24. In that respect, the Appellant on the one part proposed before the trial court an award in the sum of Kshs. 1,000,000/- with reliance on the case of Charles Mwania & Another v Batty Hassan [2008] KEHC 2611 (KLR) where the court awarded a sum of Kshs. 800,000/- on general damages to a plaintiff who had suffered a fracture to the right tibia and fibula coupled with multiple bruises and wounds; and the case of Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Anthony Irungu Macharia [2015] KEHC 5180 (KLR) in which a plaintiff with multiple injuries including soft tissue injuries, blunt injury to the head and compound fractures to the right and left tibia/fibula was awarded Kshs. 2,000,000/- under a similar head and which award was upheld on appeal. On the other part, the Respondents suggested a sum of Kshs. 300,000/- in line with the case of Savanna International Ltd v Muka [2022] KEHC 675 (KLR) where the court awarded a sum of Kshs. 400,000/- at the instance of injuries particularized as fracture medial malleolus of the left ankle joint and severe soft tissue injuries of the left ankle joint.

25. In the end, the learned trial magistrate awarded a sum of Kshs. 500,000/- under the relevant head, upon considering the decision in Maina Onesmus v Charles Wanjohi Githome [2019] KEHC 10177

(KLR) where a plaintiff was awarded a sum of Kshs. 350,000/- for various fracture injuries; as well as the decision in Patrick Marianya v Ronald Ondicho Mose [2021] KEHC 2630 (KLR) where the High Court sitting on appeal, awarded a sum of Kshs. 450,000/- to a plaintiff with fractures of the malleoli and right hip coupled with other injuries.

26. The medical evidence which was tendered at the trial confirms the Appellant's injuries particularized in the plaint as being a fracture of the right tibial malleolus. In the medical report dated 12th April, 2022 and prepared by Dr. W.M. Wokabi, it would take a period of between 8 to 12 months for the Appellant's fractured joint to rehabilitate. Permanent incapacity was assessed at 8%. Dr. Waithaka Mwaura subsequently examined the Appellant and prepared the medical report dated 21st September, 2022 which was tendered by the Respondents. Therein, the doctor confirmed the injuries sustained and stated that resulting from his injuries, the Appellant stood a higher chance of developing posttraumatic osteoarthritis. The doctor therefore assessed permanent incapacity at 2%.

27. I have considered the injuries suffered by the Plaintiff vis a vis the cited authorities. It is noteworthy that a leg carries the entire body weight and is frequently used. The Plaintiff has a chance of developing arthritis in future and there is no doubt that his normal life will be affected for ever given the permanent disability awarded. The Plaintiff will not have any choice but to avoid walking, running or generally using his right leg or risk more damage on his right leg. On the other hand, failure to walk, reduction of walking time or exercise has other serious health effects in the Plaintiff's life positioning him in a "catch – 22" situation. The award by the learned trial Magistrate is clearly not sufficient.

28. The award of loss of income by the learned Magistrate of Kshs113, 068 is based on the Plaintiff's testimony that he returned to work after 4 months although the doctor opined that the Plaintiff would return to work after 8 – 12 months. Returning to work earlier does not necessarily mean that the Plaintiff is able to give his maximum output as before. I find the award on this limp as reasonable.

29. The upshot of the above is that I shall replace the lower courts award with the following;

    1. General damages for pain and suffering Ksh 700,000/-.
    2. Loss of income Kshs 113,068/-
    3. Specials Ksh 11,000/-.
    4. Defendant liable at 100%
    5. Each party to bear on costs of appeal.

30. On interests, special damages shall attract interest from the date this suit was filed at the lower court while the rest shall attract interest from the date of this judgment.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

No appearance for the Appellant.

Ondunga for Respondent

Guyo - Court Assistant