Kan Travellers & 2 others v Trikol (Civil Appeal E023 of 2020)
[2025] KEHC 1919 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1919 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E023 OF 2020

JRA WANANDA, J

FEBRUARY 7, 2025

BETWEEN

KAN TRAVELLERS ..... 1ST APPELLANT

PEEJAY & SONS COMPANY LIMITED ..... 2ND APPELLANT

NORTH RIFT SHUTTLE ..... 3RD APPELLANT

AND

SHEILLA CHEMUTAI TRIKOL ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment delivered on 26/10/2020 in Eldoret CMCC No. 525 of 2019 in which the Respondent (as the Plaintiff) instituted a claim against the Appellants (as Defendants) seeking compensation for injuries allegedly suffered by her as a result of a road traffic accident. The Appeal is stated to be against the trial Court's decision on both liability and quantum.

2. The background of the matter is that by the Plaint filed on 226/06/2019 through Messrs Morgan Omusundi Law Firm, the Respondent pleaded that the Appellants were the owners of the motor vehicle registration KCC 096N, that she was a lawful passenger therein on 6/03/2019 along the Nairobi-Kitale road when the Appellants and/or their drivers, negligently drove, controlled and/or managed the said motor vehicle causing it to lose control and violently collide with another motor vehicle, thus causing an accident and occasioning the Respondent bodily injuries, pain and loss, and for which the Respondent held the Appellants jointly and severally liable. The Respondent then listed several particulars of negligence and also pleaded the doctrine of Res ipsa Loquitor.

3. The Appellants filed their statement of defence on 8/07/2019 through Messrs Wanjiku Karuga & Co. Advocates wherein they denied, inter alia, occurrence of the accident and the particulars of negligence and liability alleged. They also averred that the accident was due to the Respondent's own negligence

and also pleaded volenti non fit injuria. Subsequently, there was a Change of Advocates in respect to the Respondent whereof Messrs Kairu & McCourt Advocates came on record.

4. The matter then proceeded to full hearing whereof the Respondent called 4 witnesses while the Appellants did not call any.

Respondent's (Plaintiff) evidence before the trial Court

5. PW1 was Dr. Rono who produced medical treatment documents relating the Respondent's injuries as well as those demonstrating payment for medical costs incurred by the Respondent. He then stated that the Respondent suffered a fracture of the radius ulna bone

6. PW2 was Police Constable Felix Abel who testified that he was from the Tarakwa Traffic Records Office and referred the Police Abstract which indicated that the Respondent was involved in the accident, and which related to the motor vehicle alleged in the Plaint. According to him, the abstract blamed the driver of the Appellants' motor vehicle for causing the accident. He then produced the police abstract and P3 Form. In cross-examination, he stated that he is not the officer who prepared the police abstract and also that he did not bring the police file with him to Court.

7. PW3 was the Respondent. She adopted her Witness Statement and basically reiterated the fact that she was a passenger in the said motor vehicle and the manner of the occurrence of the accident as pleaded in the Plaint. She stated that she lost consciousness and was admitted in hospital for 3 days. She then produced further supporting documents. She blamed the driver for the accident. In cross-examination, she stated that she was asleep at the time of the accident

8. PW4 was Dr. Joseph Sokobe. He stated that he examined the Respondent and he, too, produced further medical treatment and payment documents. In cross-examination, he stated that the Respondent suffered a fracture

Trial's Court Judgment

9. After the hearing, as aforesaid, the trial Court delivered its Judgment on 26/11/2020 in favour of the Respondent. Liability was found at 100% against the Appellants and damages were awarded (plus costs and interest) in the following terms:

i)	General damages	Kshs 600,000/-
ii)	Special damages	Kshs 35,391/-
	Total	Kshs 635,391/-

Appeal

10. Dissatisfied with the Judgment, the Appellants filed this appeal on 17/11/2020, premised on the following grounds:

    i. That the Learned Magistrate erred in law and in fact by holding the Defendants 100% liable.

    ii. The Learned trial Magistrate erred in law and in fact by awarding the Plaintiff an excessive quantum of damages in relation to the injuries sustained.

    iii. The Learned trial Magistrate erred in law and in fact by an award which was excessive and unjustified.

iv. The Learned trial Magistrate erred in fact and in law by awarding Kshs 635,391/- which was excessive and an erroneous estimate of awardable damages in view of the lack of evidence tendered.

v. The Learned trial Magistrate erred in fact and in law by failing to consider the Appellant/ Defendant's submissions on general damages.

vi. The Learned trial Magistrate erred in fact and in law in awarding damages of Kshs 635,391/- which was not supported by any evidence.

Hearing of the Appeal

11. The Appeal was canvassed by way of written Submissions. The Appellants' Submissions is dated 6/03/2024 while the Respondent's was filed earlier and is dated 2/11/2023.

Appellants' Submissions

12. After setting out the principles applicable in determining Appeals challenging assessment of quantum of damages by a trial Court, Counsel for the Appellants submitted that PW1 testified that he was not the treating doctor, that the Respondent was fully healed from the fractures and that the trial Court's reliance on the medical report produced in assessing damages was a misconception of the true picture of the matter. He urged that Court awards must be within consistent limits and must take into account comparable/similar injuries and awards.

13. He cited the case of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR quoted, he submitted, in the case of Micheal Okello v Priscilla Atieno [2021] eKLR, the case of Kigaraari v Aya (1982) 1 KAR 768 as quoted, he submitted, in the case of Godfrey Wamalwa Wamba & another v Kyalo Wambua (2018) eKLR, and also the case of Parodi Giorgio v John Kuria Macharia [2014] eKLR. According to him, the injuries suffered herein are in the range specified above and that an award of Kshs 600,000/- is way excessive.

Respondent's Submissions

14. On his part, after also reciting the principles applicable in determining Appeals of the nature herein, in respect to liability, Counsel for the Respondent submitted that an appellate Court will be slow to interfere with a finding of facts by a trial Court and can only so interfere where there is demonstrated consideration of irrelevant facts or failure to consider relevant ones. He cited the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the case of Butt Khan (1981) KLR 349 and the case of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m Lubia and Olive Lubia (1982-88).

15. He then submitted that the police officer testified and confirmed that the suit motor vehicle had been parked on the road creating obstruction and which resulted to the accident, that this therefore implies that liability was solely borne by the Appellants who cannot now imply that the accident was as a result of contribution by the Respondent. He contended that there is no discernible error on the part of the trial Court in the assessment of both liability and the award of damages.

Determination

16. The duty of an appellate Court has been reiterated in a plethora of cases, including, for instance in the case of Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, where the Court of Appeal pronounced itself in the following terms:

> " On a first Appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

17. Since the award under the head of "special damages" has not been challenged, I find the issues that arise for determination in this Appeal, as per the Memorandum of Appeal, to be the following;

    i. Whether the trial Court erred in its determination of liability.

    ii. Whether the trial Court's award in damages was inordinately high or excessive.

18. I now proceed to determine the said issues

i. Whether the Court erred in its determination of liability

19. The Appellants' Counsel, in his written Submissions, did not at all address the issue of liability. It may be that they have abandoned that ground of Appeal. Since however, that presumable abandonment has not been expressly stated, I will still determine it.

20. I have considered the testimony of the Respondent and the Traffic police Officer who were the only witnesses before the trial Court in respect to the issue of liability. In her Witness Statement, the Respondent stated that she was a fare paying passenger in the Appellant's motor vehicle. This fact was corroborated by the Police Abstract produced in evidence. Although the Respondent did not clearly explain how the accident occurred, save that the Appellant's motor vehicle collided with another, the Appellants did not call any witnesses to rebut the Respondent's testimony and as such, there is no material upon which a finding can be made that the Respondent did not prove her case on a balance of probabilities. In such a case, the doctrine of Res Ipso Loquitur would justify apply against the Appellants.

21. The above doctrine was aptly described in the East African Court of Appeal's decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22 in the following terms:

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant ... The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."

22. Once pleaded therefore, the res ipsa loquitur doctrine presupposes that a Plaintiff has discharged his or her burden of proof and in order to extricate himself from liability, a Defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

23. In any event, the trial Magistrate in his Judgment noted that the Respondent was a fare paying passenger and posed the question; "... what role could she have played in controlling the motor vehicle so that the accident could be avoided? His remark thereon that "none whatsoever, the driver had full control of the said motor vehicle" was therefore correct and justified.

24. The conclusion arising from the Appellants' failure to call any witness similarly applies to the allegation of ownership by the Appellants of the motor vehicle.

25. In any event, as aforesaid, the Appellants, in their written Submissions, have also not addressed this limb of liability. With this omission, the Appellants missed out on the last chance upon which they could have demonstrated to this Court the gist of that ground of Appeal. I therefore find no basis for challenging the trial Court's finding that the Appellants were 100% liable for the accident.

ii. Whether the trial Court's award of Kshs 600,000/- as general damages was inordinately high and thus excessive

26. In Kemfro Africa Limited t/a "Meru Express Services" [1976] & Another V. Lubia & Another (No. 2) [1987] KLR, the Court of Appeal held that:

> ".... The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that 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 damage."

27. The Court of Appeal reiterated the said principle in the case of Dilip Asal v Herma Muge & another [2001] eKLR [2001] KLR, as follows:

> "..... Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

28. An appellate Court will not therefore disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. For the appellate Court to interfere, it must be shown that the trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was unsupported.

29. On the mode of assessing damages, the Court of Appeal in the case of Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards". Similarly, in Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal observed that:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

30. From the above, it is clear that in awarding damages, some degree of uniformity must be sought depending on the facts and the best guide would be to consider recent awards on comparable injuries.

31. The Appellants' complaint is that the award of general damages at the sum of Kshs 600,000/- was excessive and inordinately high. In this case, the Medical Report dated 8/03/2019 prepared by Dr. Sokobe described the injuries suffered by the Respondent as bruises on the neck, fracture right radius/ ulna (distal) and bruises on both knees. Before the trial Court, the Respondent (Plaintiff) had proposed an award of Kshs 700,000/- while for the Appellants (Defendants). I have not come across their Submissions. To establish comparable awards, I have perused various relatively recent authorities in which the injuries suffered were similar or close to those suffered herein. I have for instance, picked out the following:

    a. DKN Magare J, in the case of Joho v Kilinju alias Everest Juma (Civil Appeal E108 of 2022) [2023] KEHC 23462 (KLR) (25 September 2023) (Judgment), on appeal, reduced an award of Kshs 650,000/- to Kshs 450,000/-.

    b. H.I. Ongudi J, in the case of *Ngugi v Kabutha & another (Civil Appeal E589 of 2022)* [2024] KEHC 9599 (KLR) (Civ) (26 July 2024) (Judgment), on appeal, enhanced an award of Kshs 250,000/- to Kshs 450,000/-.

    c. F. Olel J, in the case of *Njenga & another v Kinyanjui (Civil Appeal E117 of 2021)* [2024] KEHC 3810 (KLR) (12 April 2024) (Judgment), on appeal, upheld an award of Kshs 400,000/-.

32. From the foregoing, I find that most awards for the injuries in issue herein range at between Kshs 300,000/- and Kshs 500,000/-, of course each depending on the severity thereof. While the prevailing status of our currency and economy have to be taken into account in awarding damages, astronomical awards must also be avoided. The Court must therefore ensure that awards result in fair compensation.

33. In light of the said comparable awards and the principles referred to, I find the sum of Kshs 600,000/- for general damages as awarded by the trial Magistrate to be considerably high and substantially excessive to amount to an error in principle. The same justifies interference by this Court. Accordingly, I set aside the award of Kshs 600,000/- awarded in general damages and substitute it with an award of Kshs 400,000/-.

34. I may mention that although she did not expressly say it, it appears that the trial Magistrate factored in some element of "future medical expenses" in reaching the award of Kshs 600,000/. This consideration seems to have been based on the following statement appearing in Dr. Sokobe's Medical Report:

> " .... She requires further treatment (open reduction & internal fixation) at an estimated cost of Kshs 200,000 ....."

35. In respect thereto, this is how the trial Magistrate pronounced herself:

> " .... I am guided by the submissions and the medical documents. The injuries were both bone and soft tissue injuries and further treatment would be required at an estimated cost of Kshs. 200,000/-."

36. In respect to the above, I cite the Court of Appeal case of Mbaka Nguru & Another v James George Rakwaro [1998]eKLR, wherein the following was stated:

> " We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report

to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head ....”

37. In light of the above, if indeed, the trial Magistrate did include the “future treatment” aspect as an additional item subsumed in the general damages award then she clearly erred since the Plaint did not contain any such prayer and neither was it pleaded or even canvassed at the trial.

Final Orders

38. The upshot of my findings above is that this Appeal partially succeeds, and only to the extent that the award of Kshs 600,000/- under the head of general damages is reduced to Kshs 400,000/-.

39. Accordingly, the Judgment of the trial Court is set aside and substituted as follows:

Liability	100% against the Appellants
General damages	Kshs 400,000.00
Special damages	Kshs 35,391.00
Total	Kshs 435,391.00
Plus costs and interest	

40. Since the Appeal has only partially succeeded, each party shall bear his/her own costs of thereof.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF FEBRUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Nanjira for the Appellant

Mr. Omusundi for the Respondent

Court Assistant: Brian Kimathi