



**Macharia & another v Muasya (Civil Appeal E886 of 2022)
[2025] KEHC 2022 (KLR) (Civ) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E886 OF 2022

TW OUYA, J

FEBRUARY 13, 2025

BETWEEN

ALEX IRUNGU MACHARIA 1ST APPELLANT

JAMES MWANGI NG'ANG'A 2ND APPELLANT

AND

FREDRICK MULWA MUASYA RESPONDENT

(In the matter of an intended appeal and stay of the judgment of Honourable V.M Mochache (Ms.) (RM) delivered on 14th October 2022 in Nairobi Small Claims Court Case No. E1494 of 2022, Fredrick Mulwa Muasya Vs Irungu Macharia & James Mwangi Ng'ang'a)

JUDGMENT

Background

1. This appeal emanates from the judgement of Honourable V.M Mochache, Resident Magistrate/ adjudicator delivered on 14th October 2022 in Nairobi SCCC No. E1494 of 2022. The claim was initiated by Fredrick Mulwa Muasya the Respondent herein against Alex Irungu Macharia and James Mwangi Nganga the 1st and 2nd Appellants herein. The claim was for compensation for personal injury arising out of a road traffic accident which occurred on 16th November 2019 involving motor vehicle registration numbers KCH 912N owned by the 1st Appellant and driven by the 2nd Appellant and KMDZ 239T owned and controlled by the claimant.
2. The matter proceeded for full hearing and the adjudicator found in favor of the claimant as against the respondents jointly:
 - a. Liability.....100%



- b. General damages.....kshs. 700,000
 - c. Special damages.....kshs. 3,500
 - d. Future medical expenses.....kshs. 80,000
 - e. Costs and interest of the suit at court rates from the date of filing the suit until payment in full .
 - f. Indemnity from the third party
3. The appellants being aggrieved by the said judgement have filed a memorandum of appeal and set out the following grounds:
- i. That the learned trial magistrate erred in law and facts and misdirected herself in finding that the respondent had proved his case to the required standard despite the glaring inconsistencies and contradiction in the Respondent's evidence.
 - ii. That the learned trial magistrate erred in law by shifting the legal burden of proof from the respondent to the 2nd appellant in proving the facts that led to the accident.
 - iii. That the learned trial magistrate erred in law in misapprehending and failing to properly deal with the evidence adduced in court for the appellants and thus making a finding that is incongruent with the doctrine of negligence, authorities and evidence adduced in court.
 - iv. That the learned trial magistrate erred in law and fact by failing to appreciate that the position on the road of the 2nd appellant's motor vehicle and the Respondent's motorcycle at the time of the accident did matter in apportioning liability, but instead solely apportioned liability to the 2nd Appellant.
 - v. That the learned trial magistrate put undue reliance on the immaterial and irrelevant oral evidence and/or misconstrued evidence adduced by the respondent herein thereby reaching wrong conclusions and findings of facts and law and has occasioned a miscarriage of justice.
 - vi. That the learned trail magistrate erred in law and in fact in holding that the 2nd Appellant was 100% liable for the accident in the absence of credible evidence from the respondent and in failing to consider the 2nd Appellant's overwhelming evidence to apportion liability as such.
 - vii. That the learned trial magistrate erred in law and fact by not considering the submissions and authorities tendered on behalf of the appellant.
 - viii. That the learned trail magistrate erred in law and in fact in awarding general damages of kshs.700,000/= and future medical expenses of kshs. 80,000/= which inordinately too high and incongruent with the proved injuries of the respondent.
 - ix. That the learned magistrate's decision was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned miscarriage of justice.
4. The Appellants pray for orders that:
- i. The appeal be allowed with costs.
 - ii. That the appellate court do set aside the learned Magistrate's judgement delivered on 14th October 2022 as against the appellants.
 - iii. That the cost of this appeal be borne by the respondent.



Submissions

4. The matter was canvassed by way of submissions by counsel for both parties. Counsel for the appellants has raised two issues; Whether the Appellants were 100% liable for the accident and the injuries sustained and whether the respondent is entitled to damages and to what extent. Counsel for respondent on the other hand has raised three issues; Who was liable for the accident? What is the appropriate quantum of damages and who should bear the costs of the appeal.
5. The Appellants submit that in order to determine liability, the court being the first court of appeal has the duty to review the entire evidence afresh and relies on the authority of *Selle and Another v Associated motor Boat Company Ltd & Others*. He points out that CW2 and RW2 prosecution and defence witness respectively during the trial gave two different accounts blaming each other for the accident. He submits that in such circumstances the court should apportion liability at 50:50% and relies on the authority of *Hussein Omar Farah v Lento Agencies (2006)eklr* and *Baker V Market Herborough Industrial Cooperative Society (1953)1 WLR1472at 1476* where Lord Denning held inter alia that:

“... if each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame...”
6. Counsel submits further in line with *Welch v Standard Bank Ltd (1970)EA 115and 117* and *Simon v Carlo(1970)EA 285* that as no side could establish the fault of the opposite party, we would think that liability for the accident could be equally on both drivers.
7. On the damages for future medical expenses, counsel points out that going by the medical report by Dr. Gakuna, dated 10th September,2022 the respondent was fully healed and was walking without difficulty and that had zero permanent disability save for a small wound which could be managed cleaning and dressing services. For the above reason he submits that kshs. 50,000 would suffice for future medical expenses.
8. On general damages for pain and suffering, counsel takes the view that the award of kshs. 700,000 was excessive in view of the injuries that were sustained. From the record, the respondent sustained the following injuries: right floating knee, fracture right femur, fracture right tibia, blood loss, soft tissue injuries and physical and psychological pains. At the time of examination, Dr Kayo noted that he was walking with help of crutches, metal implants in situ, deformity on the right lower limb at the ankle region and hyper pigmented scars on the right lower limb where the metal implants were placed.
9. Counsel relies on the authority of *Geoffrey Kamuki & Another v RKN (Minor suing through her late father and next friend ZKN) (2020)eklr* where an award of kshs. 600,000 for similar injuries was reduced to kshs. 450,000. Counsel relies further on the authority of *Philip Musyoka Mutua v Leonard Kyalo Mutisya (2018)eklr* where court awarded kshs. 300,000 for similar injuries citing that the respondent is only entitled to what is fair compensation in the circumstances. Lastly, counsel cites *Ossuman Mohamed & Another v Saluro Bandit Msahumed<HCCA No. 30 1997 (unreported)* where the court made reference to *Spin Knit Ltd v Venard Kiplagat Cheruiyot (2022) eklr* emphasizing that damages must be within limits set out by decided cases and also within limits of the country’s economy. Counsel submits that the award of kshs. 700, 000 was inordinately high, should be set aside and substituted with kshs. 300,000. Counsel submits that should this appeal succeed; the court should award him costs and interest thereon.
10. Counsel for the Respondent refers this court to the authority of *Selle & Another v Associated Motor Boat Co Ltd& Others (1968)* for purposes of reviewing the entire evidence afresh in determining



liability. He contends that the respondent was responsible for having failed to give way at the junction when the respondent had the right of way and that is why he was held 100% liable. He submits that from the evidence adduced during trial there was only one account as to how the accident occurred and not two versions as to warrant 50:50% liability. He relies on the authority of *Jennifer Mathenge v Patrick Muriuki Maina* (2020) eKLR where the court held that the cause of an accident cannot be scientifically proven but the court has to consider the facts and take the most logical version. He submits that the Respondent witnesses were consistent as to how the accident occurred and their version was more credible.

11. On the general damages, Counsel makes reference to the Respondent's injuries and submits that the award of kshs. 700,000 was reasonable considering that the respondent's submissions and prayer before the lower court was for kshs. 800,000 and above. He cites the authority of *Pestiny Limited & Another v Samuel Itonye Kagoko* (2022) eKLR where an award of kshs. 800,000 was made for a plaintiff who had suffered fracture of the left femur. Counsel invites the court to consider in addition to the above, the cases of: *Martin Mwirigi Mbaya & another V Abdulrahman Salim Mwakumbuko* (2022) eKLR, where on appeal the court refused to disturb an award of ksh. 1,000,000/= for a fractured right femur in 2022. In *Lucy Waruguru Gatunde V Francis Kinyanjui Njuki* (2017) eKLR where justice Mary Kasango in dismissing the appeal declined to interfere with the lower's court award of kshs. 1,600,000.00 for fracture of the femur and tibia fibula fracture in 2017. Similarly in *Mary Pamela Oyioma Vs Yess Holdings Limited* (2011) eKLR where justice Justice Ouko (as he then was) awarded the plaintiff kshs. 900,000/= for fractures of the femur and tibia in 2011.
12. On the future medical expenses, counsel points out that the respondent had pleaded that he would need kshs. 150,000 for the removal of the metal implants still in situ but Dr. Gakuna did not give any estimate cost of their removal. He submits that kshs.80,000 awarded by the court was reasonable and should not be disturbed.

Analysis

13. This court has considered the memorandum of appeal, the record of appeal, original lower court record together with the submissions by counsel for both parties. The court notes that the substratum of this appeal is premised on three issues: Whether the holding of liability at 100% against the Appellants was justified, Whether the awards for general damages for pain and suffering and future medical expenses were reasonable and who should bear the costs of this appeal.
14. The first issue for determination is whether it was proper to award liability of 100% to the Appellants. In ordinary appeals, the first appellate court will only interfere with a finding of fact made by a trial court when such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Nevertheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and it would be remiss if this Court were not at the outset, satisfy itself that the appeal before it falls within the purview of Section 38 of the *Small Claims Court Act*.
15. It would be apt to observe at this juncture that this is a first appeal and specifically one from the Small Claims Court. Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the said Court to the High Court by providing that; -

“(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.



(2) An appeal from any decision or order referred to in subsection (1) shall be final.”

16. Black’s Law Dictionary, 9th Ed. Pg. 1067 defines; -

“Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and
Matter of law as: A matter involving a judicial inquiry into the applicable law.”.

17. The finding on liability is based on the evidence availed during the trial and such is not available for review by this court for purposes of appeal. The issues raised by the Appellant that the trial court did not take into account their submissions is unfounded as the trial court finding is that:

“ 8. from the totality of the evidence on record, it is the respondent’s motor vehicle to blame for causing the said accident. He confirms in re-examination that he was required to give away at the junction but from the evidence adduced, it is clear he never did what was required of him. On the other hand, the motorcyclist states that he was about to finish passing when he was hit by the respondent’s motor vehicle which was joining from the right.

9. It is not in dispute that the respondent’s motor vehicle was joining from the right, the driver states that he had already passed the junction, he also avers that the motorcyclist was over speeding, he however doesn’t tell us that he slowed down to give way since he saw the motorcycle which had the right of way approaching. The driver of the respondent’s motor vehicle had a duty of care towards other road users, he thus ought to have taken due care at the junction in order to avoid the said accident.”

18. There is no indication that there were two versions as to how the accident occurred suggesting for apportioning of liability equally as between the parties. It is my view that the above finding by the Adjudicator was sound and based on the law. This court does not have the liberty to interrogate the evidence that was taken into consideration in arriving at the finding and will not interfere with it.

19. On the quantum of damages, this court refers to the statement of claim, according to which the respondent suffered right floating knee, fracture right femur, fracture right tibia, blood loss, soft tissue injuries and physical and psychological pains. The trial court awarded kshs.700, 000 which the appellants consider to be excessive. The award of damages is discretionary and is made with due regard to facts, evidence and guiding authorities. In the case Kenya Power Lightning Company Limited M another v Zakayo Saitoti Naingola M another (2008) eKLR cited in the case of Jennifer Mathenge v Patrick Muriuki v Maina (2020) eKLR. The court held;

“On quantum the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages: -

(1) Damages should not be inordinately too high or too low.

(2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.

(3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.



- (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.”

20. This court will thus consider contemporary cases with injuries of similar nature. In the case of Antony Mutai Njuguna v Emmanuel Adayo HCCA No.338 Of 2021 the Court upheld an award of Kshs.800,000 being general damages for similar injuries. In Obare & 2 Others v Ochieng (Civil Appeal E215 of 2023) [2024] KEHC 1077 (KLR) where the court reviewed an award of kshs. 1,500,000 to kshs. 800,000 general damages where the respondent had sustained injuries of fracture of the proximal femur (left leg), lower limb pain and hip pain. In the case of Mwangi alias Luke Wambugu Mwangi v Irungu (Civil Appeal 72 of 2018) [2022] KEHC 14346 (KLR) Luka Wambugu Mwangi Alias Luke Wambugu Mwangi v Justus Nguyo Irungu, the court set aside an award of kshs. 3,000,000 and substituted it with kshs.800,000 in general damages for head injury, soft tissue injuries to the right shoulder and leg, blunt dental injury and fracture of the right humeral head and neck and left tibia-fibula. In Daneva Heavy Trucks & another v Chrispine Otieno (2022) eKLR, the respondent sustained fractures of the pelvis and left tibia and fibula. The respondent was later to walk with a limping gait support himself on crutches for another one year before full recovery. On appeal the award was reduced to Kshs. 800,000/= . In the case of David Mutembei v Maurice Ochieng Odoyo (2019) eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia. An award of Kshs. 1,600,000 was reduced on appeal to Kshs. 800, 000.
21. Upon review of the evidence and the authorities cited by both sides, I find the authorities cited by the counsel for the appellant to have involved less serious injuries than those sustained by the respondent in the instant case and are not current as some date from 1997. The authorities cited by the counsel for the appellant were far more relevant and in tandem with those addressed by the court above. In view of the above, I find that the award of kshs. 700,000 was reasonable and will not interfere with it.
22. The third issue is the award for medical expenses. The court in the instant case awarded kshs. 80,000 against a claim of kshs. 150,000 for the removal of metal plates which were still in situ. Counsel for the Respondent finds the amount reasonable considering that Gakuna did not give any estimate cost of their removal. Counsel for the Appellants urges the court to reduce the amount to kshs. 50,000 based on Dr. Gakuna’s report that the Respondent had healed and could walk without difficulty. I find that this prayer is misplaced because it does not speak to the purpose for which the money is required. This court finds the award of ksh.80,000 for future medical expenses reasonable and will therefore uphold it.

Determination

23. Based on the above findings, this court hereby upholds the finding and award of the Adjudicator in Nairobi SCCC No E1494 of 2022 in its entirety with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13th DAY OF February 2025.

HON. T. W. OUYA

JUDGE

For the Appellants...Chege

For the Respondents...Njoroge

Court Assistant; Martin Korir

