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Mageto v Momanyi (Civil Appeal E063 of 2024) [2025] KEHC 2848 (KLR) (3 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2848 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E063 OF 2024

DKN MAGARE, J

MARCH 3, 2025

BETWEEN

LYDIA KEMUNTO MAGETO .... APPELLANT

AND

ERIC GISORE MOMANYI .... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. B.O. Omwansa (SPM) on 12.3.2024 in Kisii CMCC No. E407 of 2022.
2. The Appellant lodged the Memorandum of Appeal dated 25.4.2024 raising the following grounds of appeal:
    a. The learned magistrate erred in law and fact in finding liability of 100% against the Appellant.
    b. The learned magistrate erred in law and fact in finding against the Appellant without evidence.
    c. The learned magistrate erred in law and fact in awarding excessive general damages of Ksh. 250,000/-.
    d. The learned magistrate erred in law and fact in awarding special damages of Ksh. 14,710/- not pleaded and proved.
    e. The learned magistrate erred in law and fact in failing to consider the Appellant's submissions.

Pleadings

3. In the plaint dated 18.5.2022, the Respondent claimed damages for an accident pleaded to have occurred on 5.3.2022 along Kisii – Nyamira road at Nyankongo area when the Responded was a pillion passenger on motorcycle registration No. KMCJ 554R when the Appellant's motor vehicle

Registration No. KDB 640X hit the motorcycle. The Respondent set forth particulars of negligence and injuries and pleaded special damages. The injuries were pleaded follows:

i. Chest contusion

ii. Back contusion

iii. Forearm contusion and bruising

iv. Bruising of both legs

4. The special damages were also pleaded as follows:

   Medical report Ksh. 6,500/=

   Motor vehicle search Ksh.550/=

   Treatment expenses Ksh. 7660/=

5. The Respondents filed its defence dated 1.7.2022. She denied the particulars of negligence as pleaded by the Respondent and blamed the Respondent for the accident.

6. The lower court considered the matter and awarded reliefs as follows:Liability agreed at 100% for the RespondentSpecial damages Ksh 14,710/=General damages Ksh. 250,000/=

Evidence

7. PW1 was Dr. Daniel Nyameino. He relied on his medical report produced in evidence. It is dated 23.3.2022. He testified on cross examination that the Respondent suffered multiple soft tissue injuries.

8. PW2 was the Respondent. He lived in Sironga. He was involved in the subject accident. The motor vehicle hit the motorcycle on which he was a pillion passenger from behind and he suffered injuries as pleaded. On cross examination he testified that he was treated and discharged. He was not admitted. He was not wearing a helmet.

9. PW3 was No. 88300, PC Moses Kaera of Kisii Police Station. He testified that the motor vehicle hit the motorcycle while trying to overtake it. On cross examination, he stated that he was not the investigating officer. The matter was pending under investigation.

10. The Appellant closed their case without calling witnesses.

11. The Appellant submitted relying on the grounds in the Memorandum of Appeal that the Respondent did not prove liability on the balance of probabilities. Further, that the award of general damages was excessive as Ksh. 50,000/= would have been adequate. She relied on authorities which I have considered. The injuries are diagrammatically incongruent to this case. They are far less severe and I do not see the reason to rely on them. In HB (Minor) v Jasper Nchinga Magari & Another (2021) eKLR for instance, the Plaintiff therein suffered blunt object injury and there was no indication of bruises and contusion as is in this case.

12. On the part of the Respondent, his submissions dated 27.12.2024 were to the effect that the lower court finding on both liability and quantum was correct and need not be disturbed. Reliance as to quantum was based on among others, Anthony Nyamwanya v Jacklyne Moraa Nyandemo (2022) eKLR.

Analysis

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike

the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

14. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

18. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

19. The Appellant urged the court to find that the lower court erred in finding 100% liability against the Respondent. She proposed that the judgment of the lower court be set aside. On the other hand, the Respondents' case is that the judgment of the lower court was correct on both quantum and liability and should not be disturbed.

20. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant was 100% liable for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

21. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden… is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

22. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

23. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

24. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- 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;-

> "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.
>
> 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."

25. The Appellant filed a defence but did not call the driver of the accident motor vehicle at the hearing. The evidence of the Respondent as to the occurrence of the accident was largely uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* stated that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
>
> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

26. Therefore, the defence filed by the Appellant in the lower court thus contained mere allegations that were not substantiated in evidence and I so find. However, even if there were no defence filed, the Respondent still retained the duty to prove her case on the balance of probabilities. The Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

27. The Respondent was a pillion passenger and there is nothing he could have done to prevent the accident. The Appellant did not blame the rider of the motorcycle and his case is not before this court. Where the Respondent proved their case to the required standard, it was the duty of the Appellant to prove contributory negligence which in my view she failed. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

28. The motor vehicle Registration No. KDB 640X could not have just caused the accident if well controlled and managed. As was held in Kenya Bus Services Ltd V Dina Kawira Humphrey Civil Appeal No. 295 of 2000 where the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

> "Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."

29. The above decision was also cited with approval by the Court of Appeal in Nairobi Civil Appeal No. 179 of 2003 - in Re Estate of Esther Wakiini Murage V Attorney General & 2 others [2015] eKLR where the Court of Appeal reiterated as doth: "Well driven motor vehicles do not just get involved in accidents....."

30. Therefore, I find no basis to disturb the finding of the learned magistrate on liability and hold that the Respondent proved want of care on the part of the driver of KDB 640X. I am in consonance with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> "In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
>
> "......When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

31. The court finds no basis for interfering with the liability at 100% against the Appellant. I dismiss the appeal on this head.

32. On quantum, the lower court awarded Kshs. 250,000/- in general damages but without citing any supporting authority. In this case, the only medical report produced was one by Dr. Daniel Nyameino dated 23.3.2022 and which confirmed the injuries sustained by the Respondent herein as follows:

    i. Chest contusion

    ii. Back contusion

    iii. Forearm contusion and bruising

    iv. Bruising of both legs

33. The court has to assess the effect of the injuries on the Appellant. In my reevaluation, I have no reason to doubt the evidence of the medical doctor obtained in the medical report above referenced. Viewed in line with the finding of the lower court, I equally, in the absence of any contrary medical evidence, find no reason to fault the lower court's finding and therefore uphold the injuries suffered as the injuries pleaded and proved on evidence. The injuries were soft tissue injuries.

1. Therefore, this court has to establish similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985] eKLR. However, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

35. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
    2. The award should be commensurable with the injuries sustained.
    3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
    4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
    5. The awards should not be inordinately low or high.

36. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

37. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR as follows:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa 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.

38. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British

Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> 'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'
>
> We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:
>
> "I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

39. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

40. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

41. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries

should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional…..”

42. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

43. I thereof proceed to determine similar fact cases in relation to damages as applicable to this appeal. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR, the court awarded Ksh. 180,000/= for more serious soft tissue injuries. These were: multiple cut wounds on the right lower limb, bruises on the right lower limb, bruises on both elbows, bruises on the right iliac region, bruises on the frontal region, bruises on the temporal region, lacerations on the frontal region, cut wounds on the left iliac region, cut wounds on the frontal region, cut wounds on the temporal region and blunt trauma to the abdomen.

44. In Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR , the claimant suffered a cut wound on the head, blunt injury to the right knee, multiple bruises on the upper limbs, and bruises on the right knee. The court set aside the finding by the subordinate court that awarded Kshs. 350,000/= and awarded Ksh. 140,000/- in 2020. These injuries were fairly more serious than the Respondent herein.

45. In the circumstances, the award of Kshs. 250,000/= was inordinately on the higher side. A sum of Kshs. 150,000/= will have sufficed.

46. The Appellant lamented that the award on special damages of Ksh. 14,710/= was not pleaded and proved. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> “ The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

47. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> “ In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the

circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

48. On special damages, the pleadings and evidence show that the Appellant pleaded and proved Ksh. 14,710/= which the lower court granted. I uphold it.

Determination

49. In the upshot, I make the following orders:

    a. The appeal on liability is dismissed.

    b. The award of Kshs. 250,000/= is set aside. In lieu thereof, I substitute with an award of general damages of Ksh. 150,000/=.

    c. Special damages are not affected.

    d. Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3RD DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Oremu for the Respondent

Court Assistant – Michael