Ndung'u & another v Njora (Civil Appeal E641 of 2024)
[2025] KEHC 3135 (KLR) (Civ) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E641 OF 2024

LP KASSAN, J

MARCH 6, 2025

BETWEEN

SUSAN WAIRIMU NDUNG'U ..... 1ST APPELLANT

EUGINE NGANGA ..... 2ND APPELLANT

AND

PATRICK WACHIRA NJORA ..... RESPONDENT

(Being an appeal from the judgment of Hon. H.M. Ng'ang'a (Mr) (SRM) delivered on 28th April, 2023 in Nairobi Milimani CMCC No. E561 of 2022)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Milimani Civil Suit No. E561 of 2022. In the said suit, the Respondent (who was the plaintiff) sued the Appellants (who were the defendants) for both general and special damages as well as future medical expenses arising from a road traffic accident in which he sustained serious bodily injuries and damages.

2. The 2nd Appellant was the driver of the motor vehicle registration number KBS 731Y which knocked down the Respondent who was riding motorcycle registration KMED 837Z along Commercial Street junction enterprise. The motor vehicle was at the time of the accident owned by the 1st Appellant. The claim was fully defended and the trial Magistrate in his Judgment found the Appellants 100% liable for the accident. He awarded the Respondent Ksh 600,000/= as general damages, special damages at kshs.3,550/= and future medical costs Kshs 200,000/= plus costs of the suit together with interest.

3. The Appellants being aggrieved by the whole judgment lodged this appeal dated 27.05.2024 setting out the following grounds: -

i. That the Learned Magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.

ii. That the Learned Magistrate erred in law and in fact in admitting the evidence of PW1 which was not hinged on any factual basis.

iii. That the learned trial magistrate erred in law by awarding future medical expenses based on the Plaintiff's medical report when the same was wholly disputed as bogus by a 2nd medical report filed by the Defendant.

iv. That the learned trial magistrate erred in law in expressly indicating that the Plaintiff's injuries were not in dispute when a 2nd medical report filed by the Defendant indicating otherwise.

v. That the learned trial magistrate erred in law and fact in failing to attach due weight to Appellants' evidence and submissions and authorities attached thereto.

vi. That the learned trial magistrate erred in law and fact in apportioning liability to the 1st and 2nd Appellants when in fact the Plaintiff had failed to discharge his burden of proof.

vii. That the learned trial magistrate erred in law and fact in assessing and awarding general damages and special damages wherein the Respondent failed to prove her case.

viii. The said award is in the circumstances so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the Respondent.

ix. That the learned trial magistrate erred in law

x. That the learned trial magistrate's award lacked legal and factual basis and also amounted to an erroneous estimate of damages due in the particular case and was manifestly excessive.

xi. The Learned trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

4. The appeal was canvassed through written submissions.

Appellant's submissions

5. These were filed by Ogenjo Omboto & Kijala Advocates LLP and are dated 07.10.2024. Counsel submitted on both liability and quantum.

6. On liability counsel submitted that the 2nd Appellant did not owe a duty of care to the Respondent because he joined the junction without due care and attention of other motorist at the junction causing an unforeseen accident. That the 2nd Appellant could not have foreseen any oncoming vehicles at the junction bearing in mind that had he stopped to wait for the junction to clear in order to move and therefore had no way to prevent the accident from occurring unlike the Respondent who could have chosen to stop and first ensure that the junction was clear before joining. That the Learned trial Magistrate did not justify his basis of finding that the Appellants shall bear 100% liability whereas the Respondent none. He placed reliance on section 107 of the *Evidence Act*, section 78A of the *Traffic Act* and the case of Caparo Industries PLC-vs-Dickman [1990] 1 ALL ER 568, Chunpui-vs-Lee Chuen Tal [1988] RTR 298 and David Ogol Alwar-vs-Mary Atieno Adwera & Ano. [2021] eKLR.

7. On quantum, he submitted that the Learned trial Magistrate erred in finding that the Respondent's injuries were not disputed and awarding future medical expenses based on the Respondent's medical report while disregarding the 2nd medical report filed by the Appellants. That no x-ray images or receipts

were produced to show that there were implants or if he had a cast on his legs due to the alleged fractures.

8. On general damages, Counsel submitted that the trial court award of Kshs 600,000/= in comparison to the Respondent's injuries was not a fair requital. He proposed an award of kshs. 150,000/= which would have been sufficient.

9. On the award for general damages counsel urged the court to be guided by the following cases;

    i. Ndung'u Dennis-vs-Ann Wangari Ndirangu & Ano. [2018] eKLR, wherein Ngugi J. the Respondent suffered minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg. All three doctors who examined the Respondent concluded that the injuries were "soft tissue injuries." The Appellate court awarded Kshs 100,000/= after reversing the trial court's award of Kshs 300,000/=.

    ii. Ogembo & Ano.-vs-Arika (Civil Appeal 29 of 2021) [2022] KEHC 12219, the Respondent sustained a chest contusion, blunt trauma to the occipital region, deep cut wounds on the right knee and ankle and bruises on the right toes and left knee. The trial court award of Kshs 500,000/= was set aside and substituted with Kshs 150,000/=.

    iii. Lillian Anyango Otieno-vs-Philip Mugoya [2022] eKLR., the Plaintiff suffered head injury with dislocation of cervical spine of the neck, chest injury with damage of the rib cage and blunt abdominal injury, tissue injuries of both upper limbs with dislocated wrist and elbow joint and dislocated pelvic frame involving both hip joints and damage of the right lower limb with dislocation at the ankle joint. The trial court award of Kshs 100,000/= was set aside and substituted with Kshs 150,000/=.

10. Counsel concluded his submissions by urging the court to allow the appeal and award the appellants costs of the suit based on the provisions of section 27 (1) of the *Civil Procedure Act*.

Respondent's submissions

11. These were filed by Waiganjo Wachira & Company Advocates and are dated 15.11.2024.

12. On liability he submitted that the trial court's findings on liability was justified and should be upheld.

13. The court's attention was drawn to the decisions in Cosmas Mutiso Muema-vs-Kenya Road Transporters Ltd & Ano. [2014] eKLR, Ndatho-vs-Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) and Kenya Power & Lighting Co. Ltd-vs-Kenneth Lugalia Imbugua [2016} eKLR.

14. On quantum, counsel submitted that the award for general damages was justified, reasonable and should be upheld. That the medical report and case summary from Kenyatta National hospital confirmed the Respondent sustained the injuries. He relied in the cases of Daneva Heavy Trucks & Ano-vsChrispine Otieno [2022] eKLR and Karanja & Ano.-vs-Mwachala (Civil Appeal E749 of 2021) [2024] KEHC 7171 (KLR) where Kshs 800,000/= and Kshs 700,000/= respectively were awarded.

15. On future medical expenses of Kshs 200,000/=, he submitted that the medical report by Dr. G.K. Mwaura confirmed the Respondent would require the said sum for purposes of undergoing treatment in the future to remove the metal implants.

16. In conclusion, counsel submitted that the special damages were proved and urged the court to dismiss the appeal with costs to the respondents.

Analysis and determination

17. As a first appellate court, I am guided by the principle established in Selle v. Associated Motor Boat Co. Ltd. [1968] E.A. 123, which held that the first appellate court must reconsider and re-evaluate the evidence presented before the trial court, analyze it, and arrive at its own independent conclusion.

18. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the court stated with regard to the duty of the first appellate court, as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

19. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are as follows:

    i. Whether the trial magistrate erred in finding the appellants wholly liable for the accident.

    ii. Whether the award on general damages was inordinately high.

    iii. Whether the trial magistrate erred in awarding future medical expenses

    iv. Whether the trial magistrate erred in awarding special damages

    v. Who should bear the costs

20. On the first issue, I refer to the Court of Appeal decision in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR where it stated

> " The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in Stapley V Gypsum Mines Ltd (2) (1953) A.C 663 at pg 681 as follows;
>
> > "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide .....
> >
> > "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally".

21. Further, in Farah V Lento Agencies [2006] 1 KLR 124, 125, the Court of Appeal held that:

> " Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame".

22. Relying on the aforementioned authorities, I am of the view that in determining liability, this court must examine the facts of the case to establish the primary cause of the accident. The court will assess the manner of driving, the conduct of the parties, and identify the party at fault to assign responsibility accordingly. Where the facts and circumstances do not clearly indicate who was at fault, the court will apportion liability.

23. This court has considered the evidence adduced before the trial court. It is not in dispute that the 2nd Appellant was the driver of motor vehicle registration number KBS 713Y which was involved in an accident with motorcycle registration number KMED 837Z ridden by the Respondent. The said accident occurred at the junction of Commercial street and Enterprise road. The 2nd Appellant does not deny that the accident occurred save that it was the Respondent's fault as he did not take due care and attention while riding the motorcycle. The 2nd Appellant was driving on the left side lane of Commercial Street and was joining Enterprise road on the right side.

24. The Respondent produced the police abstract which blamed the 2nd Appellant for the accident. The 2nd Appellant did not ask for the police to produce the police abstract, he noted in his cross-examination that he knew the police blamed him for the accident.

25. The trial court held that the 2nd Appellant was joining the junction without due regard of other road users. That the 1st Appellant was vicariously liable for the accident.

26. From the evidence that was adduced, the 2nd Appellant said he joined Enterprise road and that the road was clear. The Respondent was on his lane and should have seen the 2nd Appellant was branching off into Enterprise road. The 2nd Appellant indicated that the Respondent collided with the left side of his car. The sketch map of the accident scene was not produced nor were the inspection reports of the motor vehicle and the motorcycle, and so one cannot determine where the point of impact occurred and as such who was to blame.

27. In the case of Lakhamshi Vs Attorney General, (1971) E A 118, 120 (as quoted in the case of; Calistus Juma Makhanu vs Mumias Sugar Co. Ltd & another [2021] eKLR), where Spry VP stated that: -

> " It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame..."

28. Although each party blames the other for the accident, the 2nd Appellant should bear the larger brunt because he was the one joining Enterprise road and ought to have ensured the road was clear before joining. If the road was clear as per his evidence, then why did the accident occur? This could mean his calculation or his estimation of the distance from the motorcycle was inaccurate. As road users approach a junction, one should slow down. The Respondent herein was approaching a junction, there was no indication that he slowed down as he approached the junction, or that he tried to brake when he saw the motor vehicle ahead joining or that he tried to swerve to avoid the accident. It could also be possible that the Respondent was at high speed and failed to brake to avoid the accident. The 1st Appellant at the time of the accident was the registered owner and as such is vicariously liable. I

hold both Appellants jointly and severally liable. Consequently, this court finds that the decision by the trial magistrate finding the Appellants 100% liable was erroneous and therefore the same is set aside and substituted with the ratio of 90:10 in favour of the Respondent.

29. On the issue as to whether the award on general damages was inordinately high.

30. The Court of Appeal in Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2) (1987)) KLR 30 stated 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 the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly."

31. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated as follows: -

> " comparable injuries should attract comparable awards"

32. In assessing quantum, the trial Magistrate considered the injuries sustained by the Respondent and confirmed by his medical report. From the pleadings, and the material on record the Respondent mainly suffered a fracture of the left tibia/fibular. The trial court further considered the authorities relied on by the Respondent and went ahead to award general damages amounting to Kshs. 600,000/=.

33. I have considered the award of Kshs. 600,000/= made by the trial magistrate based on authorities cited by the Respondent in their submissions before that court. I have looked at the cases relied on by both parties in the lower court and on Appeal. In the authorities relied on by the Respondent on appeal the plaintiffs therein were awarded Kshs. 500,000/=, and Kshs. 500,000/= respectively for injuries similar to those sustained by the Respondent herein.

34. On their part, the Appellants requested for an award of Kshs. 150,000/= in the trial court but the authorities they relied on as quoted in the submissions were of a lesser degree of injury.

35. Having observed as above it is my considered view that the authorities relied on by the Respondent justifies the award by the trial magistrate. The plaintiffs therein sustained injuries comparable to those of the Respondent and awards of kshs. 500,000/= made which is not far from the Kshs. 600,000/= by the trial Magistrate considering the awards in the cited authorities were made in the year 2018 and 2020.

36. The 2nd Appellant submitted that the 2nd medical report was overlooked by the trial court. I note that although produced, it was done after the Respondent had testified and closed his case. The Respondent was not examined on the same and as such the contents therein were not tested. The primary medical documents were produced without objection by the Appellants. The discharge summary from KNH being a primary document clearly shows the Respondent's in-patient number as 54116/2021 he was admitted on 25.04.2021 and discharged on 09.05.2021. The same shows there was a fracture of the left tibia and fibular and implants and screws were done. Since these were the initial treatment notes, it proves that the Respondent sustained the injuries thereof. Further, the Appellants having been served with the supporting documents could have done their investigations as to whether the Respondent was indeed treated and had the same documents authenticated. When the Appellants filed their 2nd medical report and noted there was no evidence of a fracture, they ought to have made the necessary application before the trial court. It is trite clear that courts considered primary documents over secondary documents.

37. In view of the foregoing, it is my opinion that the award of Kshs.600,000/= by the trial Magistrate was not inordinately high. It will be retained but less 10% contribution = Ksh 540,000/=

38. The award on special damages for Kshs.3,550/= was support by the medical receipt of Kshs 3,000/ = and the copy of records receipt Kshs 550/=. The same was specifically pleaded and proved by the Respondent.

39. As for the future medical expenses, it is the 2nd medical report that stated the implants had been removed. However, the same was not tested against the evidence of the Respondent as he had testified and closed his case. As such I cannot rely on the same to discount under this head as it is supported by the primary document (KNH discharge summary). Refer to par.36 above. The 1st medical report by the Respondent shows that removal of the implants would cost about Kshs 200,000/=. There is no contradictory opinion by a medical expert as to the cost of removal of the implants to oppose the quoted Kshs 200,000/=. As such, I find under this head the Respondent specifically pleaded and proved the same.

40. The upshot is that the appeal partially succeeds. The lower court Judgment is hereby set aside only to the extent of liability which is apportioned 90:10 in favour of the Respondent. I enter Judgment for the Respondent as follows:

    i. General damages Kshs 600,000/=

    ii. Future Medical expenses Kshs 200,000/=

    iii. Special damages Kshs 3,550/=

41. The award is subject to the liability apportionment. The interest and costs at the lower court are awarded to the Respondent.

42. As the appeal has succeeded partially, each party to bear its own costs of the appeal.

    Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH 2025.

L. KASSAN

JUDGE

In the presence of:-

No appearance for Appellant

Kwamboka for Respondent

Carol - Court Assistant