



**Rukungu & 2 others v Makokha (Civil Appeal E041 of 2022)
[2025] KEHC 8113 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 8113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E041 OF 2022
GL NZIOKA, J
MARCH 4, 2025**

BETWEEN

**JOSHUA BARIU RUKUNGU 1ST APPELLANT
KARIANKI NKIROTE PURIT 2ND APPELLANT
GEOFFREY KIRUI 3RD APPELLANT**

AND

NELSON MANDERA MAKOKHA RESPONDENT

(Being an appeal from the decision of Hon. Y. M. Barasa, Senior Resident Magistrate delivered on 28th April 2022 vide Chief Magistrate's Civil Case No. 773 of 2019)

JUDGMENT

1. The plaintiff (herein “the respondent”) sued the defendants (herein “the appellants”) vide a plaint dated 24th October 2019, seeking for judgement against the appellants for: -
 - a. Special damages Kshs. 20,280
 - b. General damages
 - c. Costs and interest
2. The respondent’s case is that on 6th September 2019, he was walking on the left side of a pedestrian path along Naivasha highway toward Naivasha town, and when he reached near Longonot hospital or Karai area, a motor vehicle registration No. KBW 383P registered in the name of the 1st and 2nd appellants and driven by the 3rd respondent hit him and injured him.
3. He blames the driver of the vehicle of driving it in a negligent manner. The particulars of negligence attributed to the driver are stated at paragraph 5 of the plaint. In a nutshell he states that the driver



was driving carelessly at manifestly excessive speeds without due care and attention to pedestrians and failed to brake, slow down, stop, swerve or control the subject vehicle so as to avoid the accident.

4. That as a result of the accident he sustained the following injuries:-
 - a. Fracture of the mid-shaft of left humerus.
 - b. Severe soft tissue injuries of the left hand.
 - c. Blunt injury to the head leading to mild head injury.
 - d. Deep cut wound on the occipital region of the head leading to soft tissue injuries.
 - e. Blunt injury to the anterior chest wall leading to soft tissue injuries.
 - f. Soft tissue injuries of the toes of the right foot.
 - g. Soft tissue injuries of the toes of the left foot.
5. However, the appellants denied liability vide statement of defence dated 30th June 2020. The appellants also denied the allegations that the 1st and 2nd appellants are registered owners of the subject vehicle and that the 3rd appellant was the driver at the material time. Furthermore, the occurrence of the accident, particulars of negligence attributed to the 3rd appellant and the injuries the respondent alleged sustained was denied.
6. However, in the alternative and on a without prejudice, the appellants blamed the respondent for solely causing and/or substantially contributing to the occurrence of the accident and tabulated the particulars of negligence attributed to the respondent at paragraph 6 of the statement of defence. In a nutshell it alleged the respondent failed to walk on the designated pedestrian path, walking crossing or attempting to on the road when it was unsafe to do so at an undesignated crossing area and failing to keep a proper look out or have any regard for traffic as reasonably expected.
7. The appellants further aver that if the accident occurred as alleged then, it was inevitable despite the exercise of reasonable skill and due care on part of the owners and driver of the subject vehicle.
8. The case proceeded to full hearing with the respondent calling three (3) witnesses in support of his case, while the appellants closed their case without calling any witnesses. Thereafter parties filed their respective submissions.
9. Subsequently the trial court entered judgment on 28th April 2022 as follows: -
 - a. Liability is entered in favour of the plaintiff in the ration of 80:20
 - b. General damages.....Kshs. 650,000
Less 20% contributory negligence.....Kshs. 130,000
Total.....Kshs. 520,000
 - c. Special damages-----Kshs. 20,300
 - d. The plaintiff is awarded costs of the suit plus interest
10. However, the appellants are aggrieved by the entire judgment and appeals against it on the following grounds: -
 - a. That learned Magistrate erred in law and in fact by failing find that the Respondent had not proved his case on liability.



- b. That the learned Magistrate erred in law and in fact by failing to dismiss the Respondent's case for lack of proof of the Appellant's negligence.
 - c. That learned Magistrate erred in law and in fact by disregarding the evidence on circumstances of the accident which contradict the Respondent's allegations on how the accident occurred in imputing negligence on the Appellants.
 - d. That learned Magistrate erred in law and in fact by predetermining liability against the Appellants notwithstanding the weight of the evidence on the Respondent's sole negligence that caused the accident,
 - e. That the learned Magistrate erred in law and in fact by apportioning greatest liability against the Appellants without any judicial backing or rationality.
 - f. That the learned Magistrate erred in law and in fact by completely ignoring the appellant's written submissions dated 19 April, 2022 and focusing on the Respondent's written submissions to reach a skewed determination on both liability and quantum.
 - g. That the learned Magistrate erred in law and in fact by failing to consider and determine the pertinent issues raised by the Appellants in their written submissions dated 19th April, 2022.
 - h. That the learned Magistrate erred in law and in fact by framing issues which predetermined the Appellant's liability and compensation to the Respondent.
 - i. That the learned Magistrate erred in law and in fact by failing to be guided by the doctrine of stare decisis in his judgment.
 - j. That the learned Magistrate erred in law and in fact by awarding exorbitant general damages.
 - k. That the learned Magistrate erred in law and in fact by awarding excessive special damages than what was pleaded,
11. As a result the appellants are seeking for the following orders:-
- a. That the appeal against the judgment of Honourable Y. M. Barasa (SRM) delivered on 28th April 2022 in Naivasha CMCC No. 733 of 2019 be allowed.
 - b. That the judgment of Honourable Y. M. Barasa (SRM) delivered on 28th April 2022 in Naivasha CMCC No. 733 of 2019 be reversed and the suit therein be dismissed with costs.
 - c. That costs of the suit in Naivasha CMCC No. 733 of 2019 and costs of this appeal be awarded to the appellant.
12. The appeal was disposed of vide filing of submissions. The appellants in submissions dated 20th May 2024 argued that, the respondent failed to substantiate the allegations of negligence against the appellants as there was no eye-witness to corroborate the respondent's evidence that the subject vehicle veered off it's the road into the pedestrian path.
13. Further, PW2 PC Rodgers Wafula evidence that the accident occurred as the respondent was crossing the road when he was hit by the subject vehicle, contradicts the respondent's evidence that the subject vehicle veered off the main road into the pedestrian path raising doubt to the respondent's credibility.
14. That, the trial Magistrate having acknowledged the afore contradiction as stated in the judgment ought to have found that the respondent failed to discharge his burden of proof and dismissed the suit. The case of, Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR was relied on where the



High Court reiterated that he who alleges must prove and that the burden does not shift even if the case proceeds undefended.

15. The appellants further submitted that parties are bound by their pleadings and where the allegations in the pleadings are not proved no relief outside the pleadings should be given. The case of Francis Mburu v Moses Omuse & 3 others [2015] eKLR was cited where the High Court stated that parties' cases are framed by their pleadings, and held that the 1st respondent's claim did not disclose a cause of action against the appellant as it raised a completely different cause of action. That the High Court allowed the appeal and set aside the judgment of the trial court.
16. The appellants also relied on the case of; Rose Wanjiru Njiga [Suing as the legal representative & administrator of the Estate of the late Edwin Gachoki Njiga [Deceased] v Packson Githongo Njau & another [2019] eKLR where the High Court held that the appellant did not adduce evidence to prove negligence as the police abstract indicated that the matter was pending investigations and went to find that the trial court's decision on liability was based on no evidence but an error of law.
17. On quantum, the appellants submitted that the award by the trial Magistrate was exorbitant taking into consideration the injuries the respondent sustained and that it failed to take into consideration the appellants submissions on the same. The appellants proposed an award of Kshs. 150,000 and relied on the case of Said Abdullahi & Another v Alice Wanjira [2016] eKLR where the respondent suffered a fracture of the right humerus midshaft spiral and the High Court set aside the trial Court's award of Kshs. 600,000 and substituted it with an award of Kshs. 300,000.
18. On special damages, the appellants submitted that the trial Magistrate awarded damages beyond what was specifically pleaded and proved.
19. However, the respondent on its part filed submissions dated 12th June 2023 and argued that he had proved his case on a probability of balances. That he gave ample evidence on how the accident occurred which evidence was not controverted by the appellants who closed their case without calling any witnesses. Further, the driver never filed a witness statement to deny the fact that the respondent was walking off the road.
20. That in the case of Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 others Nairobi (Milimani Commercial Courts) H.C.C.C.S. No. 1243 of 2001 the High Court held that where a party fails to call evidence in support of its case, the pleadings remain mere statements of facts and that the failure to adduce evidence means the evidence adduced by the plaintiff is uncontroverted and unchallenged.
21. The respondent submitted that it did not support the particulars in the produced by PW2 PC Wafula which indicate that he was crossing the road when the accident occurred. He argued that, the entry in the Occurrence Book only captures what is stated during a report and it would therefore be erroneous and a miscarriage of justice to presume that what is captured therein is what actually happened even before investigations are commenced and witnesses interviewed.
22. That, when the entry was made, he had not been interviewed to give his version of events as he had been seriously injured and rushed to Naivasha Sub-County Hospital. That in the circumstances, the report made in his absence was possibly skewed in the driver's favour. Further, that the evidence of PW2 PC Wafula was hearsay as he was not at the scene when the accident occurred and was therefore inadmissible.
23. Furthermore, the trial Magistrate laid a good basis and exercised discretion in arriving at the decision on liability. The respondent argued that this court ought not to interfere with the trial Magistrate discretion unless such discretion was exercised improperly by taking into account factors that ought not to be considered or failing to take into account facts that ought to be considered or there is



a misapprehension of the law, or the awards given are inordinately high or low to deem it fair compensation. He relied on the case of; United India Insurance Company Ltd vs East African Underwrites (Kenya) Ltd [1985] EA.

24. On the failure to the trial Magistrate to consider the appellants' submissions, the respondent argued that, the appellants' submissions in the trial court were filed outside the timelines as directed by the court. Further, that the trial court framed issues and was not bound to consider submissions in order to write its judgment.
25. On quantum, the respondent submitted that the major considerations are the nature and extent of injuries suffered and awards for similar injuries. That the award by the trial court was neither too high or too low to warrant interference by this court, as he produced a medical report that confirmed the injuries he suffered and was admitted in hospital for three (3) days.
26. The respondent submitted that, in the case Nguku Joseph & Another vs Gerald Kihui Maina [2020] KEHC 7670 (KLR) the respondent suffered mild head injury, lacerated wound on the left supra orbital region of the face, blunt injury to the anterior abdominal wall leading to gall bladder laceration and liver laceration, fracture right humerus and lacerated wound on the scalp about four (4) cm long and the medical reports indicated he had healed well from his injuries without any permanent disability, the High Court set aside the award of Kshs. 2.5 million and substitute it with Kshs 500,000
27. That similarly, in the case of Ben Mwita Matinde vs Salina Kosgey [2020] eKLR the High Court set aside the trial court award of Kshs. 250,000 as general damages and substituted it with an award of Kshs. 1,000,000 where the plaintiff suffered injuries on the right upper arm which was swollen and tender, fracture of the right humerus distal third, right ankle was swollen and tender, and fracture of the right tibia near the ankle joint.
28. The respondent also relied on the case of; Desmond Lempoko vs Kenya Commercial Bank Ltd [2013] KEHC 4949 (KLR) where the appellant suffered a segmented fracture of the right femur which the medical reports showed would require future treatment to correct and the High Court substituted the award of Kshs. 250,000 as general damages with an award of Kshs. 800,000.
29. In considering the appeal, I note that the 1st appellate court's role is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as stated by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.
30. The Court of Appeal thus observed: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 demeanour of a witness is inconsistent with the evidence in the case generally.”
31. To revert back to the matter herein, I have considered the arguments by the parties and note that on the issue of liability, the appellants argue that the respondent did not prove his case on the balance



- of probability and that it should have been dismissed. Yet the court apportioned liability among the parties in the ratio 80:20% in the favour of the respondent and against the appellants.
32. Further there is contradiction in the respondent's evidence and that of his witness PW2 on how the accident occurred and in particular where the respondent was when he was hit. I note from the judgment of the trial court that apparently, the court noted the contradiction but treated PW2 the police officer who produced the police abstract as a neutral witness, who was telling the truth that the plaintiff was knocked while crossing the road.
 33. However, parties are bound by their pleadings and in the plaint filed in court the respondent states that he was knocked while on the left side of the road on the pedestrian path.
 34. However, on the other part although PW2 testified that the respondent was hit while crossing the road from left to right while facing Nairobi direction this evidence is not supported in any way. First and foremost, PW2 was not at the scene. Secondly he was not the investigating officer. Thirdly, it is not evident from the police abstract which party was to blame as the police abstract indicates that the matter was under investigation. Fourthly, an examination of the evidence of PW2 on cross-examination reveals that he was not in a position to explain the exact point of impact and it was not indicated whether the motor vehicle veered off the road. He did not have the police file and therefore his evidence could not have been the basis upon which the court could determine liability.
 35. In the same vein, it cannot have been the basis upon which the court could hold that it contradicted respondent's case.
 36. However, the appellants on their part did not offer any evidence in support of their statement of defence and therefore the evidence of the respondent who was at the scene and therefore an eye witness remained uncontroverted.
 37. It suffices to note that the court will take judicial notice that the evidence in a police abstract, irrespective of which party to a case avails it, is deemed to be neutral as the author thereof is an independent entity with the mandate to objectively investigate the matter. But of course the party that avails the evidence is deemed to be inviting the court to rely on it.
 38. Be that as it may, the duty to prove the case remains upon the claimant as stated by section 107 of *Evidence Act* (Cap 80) Laws of Kenya that:
 - (1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 39. In the instant matter taking into account that the police abstract does not lay blame on either party involved in the accident, it is only fair and just that liability be distributed among the parties equally. In that case I set aside the finding of the trial court apportioning the liability at 80:20% and substitute it with a finding of liability at 50:50% in favour of and as against the respondent and appellants respectively.
 40. As regards quantum, the law is settled that the appellate court will not interfere with the decision of the trial court on the same unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another Vs Shah* (1968) EA and *Mkube -vs - Nyamuro* 1983 KLR 403.



41. Furthermore, the Court of Appeal in *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* [CA 142/2003](#) (unreported) stated that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga vs Musila* [1984] KLR 257).”

42. In this matter, I note the particulars of the injuries the respondent suffered are pleaded at paragraph 6 of the plaint. The respondent supported the same by the evidence of Dr. Obed Omuyoma.

43. In his submission in the trial court the respondent proposed a sum of Kshs 900,000 as general damages. On the other part the appellants proposed a sum of 150,000. The court awarded a sum of Kshs 650,000 relying on a decision of; *Nguku Joseph and Another –vs- Gerald Kiu Maina* [2020] eKLR where the victim is stated to have suffered similar injuries.

44. Having considered the evidence herein I note from the discharge summary from Naivasha District hospital, P3 form and medical report by Dr. Obed Omuyoma, the respondent sustained a fracture and soft tissue injuries to the left hand toes of the right foot, blunt injury to the head, interior chest and a wound on the head.

45. That he was admitted for five (5) days and he was in P.O.P for six (6) weeks but there is no indication of permanent disability in the report whereas the degree of injury was classified as grievous harm. The appellants did not adduce any evidence to rebut the afore medical evidence.

46. Further I have considered the injuries suffered by the plaintiff in the case of the case of; *Ben Mwita Matinde vs Salina Kosgey* [2020] eKLR cited by the respondent and note that the injuries of the victim therein were more severe than the injuries herein. As regard case of *Desmond Lempoko vs Kenya Commercial Bank Ltd* [2013] KEHC 4949 (KLR) the nature of injuries the plaintiff suffered are not clear.

47. On the other part the appellants relied on the case of; *Said Abdullahi & Another v Alice Wanjira* [2016] eKLR where Kshs 300,000 was awarded in the year 2016. The judgment herein was delivered in the year 2022 consequently, that sum herein cannot be below the Kshs 300,000. It can only have gone up based on inflation and other economic factors. Therefore the proposal of Kshs 150,000 by the appellants is not tenable.

48. In the considered opinion of the court, the trial court was well guided in accessing general damages. I find no good reason to interfere with award of Kshs 650,000 as general damages. The claim of Kshs 20,300 awarded as special damages is stated to have been proved. There is no evidence to the contrary. Consequently, judgment is entered in favour of respondent as against the appellants in the following terms: -

a. General damages-----Kshs 650,000

b. Special damages-----Kshs 20,300

Total-----Kshs 670,300

Less 50% (contributory negligence)-----Ksh 335,150

This sum will attract interest from the date of judgment in the trial court upto payment in full.



Each party will bear their own cost

49. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 4TH DAY OF MARCH 2025.

GRACE L. NZIOKA

JUDGE

In the presence of

Ms. Awour for the Appellant

Mr. Kirui H/B for Mr. Mboga for the Respondent

Ms Hannah: Court Assistant

