Muriuki v Kamau (Civil Appeal 124 of 2023)
[2025] KEHC 4391 (KLR) (Civ) (7 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 124 OF 2023

KW KIARIE, J

APRIL 7, 2025

BETWEEN

HENRY KIRIMI MURIUKI ..... APPELLANT

AND

JOSEPH KOI KAMAU ..... RESPONDENT

(Being an Appeal from the judgment and decree in Engineer Senior Principal Magistrate's SPMCC No. E002 of 2022 by Hon. E. Wanjala – Principal Magistrate)

JUDGMENT

1. Henry Kirimi Muriuki was the defendant in Engineer Senior Principal Magistrate's SPMCC No. E002 of 2022. He had been sued for a claim of general and special damages following a road traffic accident involving motor vehicle KCF 562N and the respondent, a pedestrian. The respondent sustained injuries. The learned trial magistrate held the appellant 100 per cent liable. The respondent was awarded Kshs. 950,00.00 in general damages and Kshs . 60,656.00 in special damages.

2. The appellant was aggrieved by the judgment on liability and quantum and filed this appeal through G & G Advocates LLP. They raised the following grounds of appeal:

    a. The learned trial magistrate erred and misdirected herself in law and, in fact, in finding that the appellant was fully liable for the occurrence of the accident.

    b. The learned trial magistrate erred and misdirected herself in law and, in fact, in finding that the inconsistent and contradictory evidence of the respondent needed to be rebutted.

    c. The learned trial magistrate erred in fact and law in finding that in all and sundry civil cases, failure by the defence to call evidence meant that the plaintiff's case was proved contrary to binding decisions of superior courts cited before her.

d. The learned trial magistrate erred in law in failing to follow binding authorities placed before her without giving reasons or distinguishing the binding precedents.

e. The learned trial magistrate erred and misdirected herself in law and, in fact, in finding that the respondent had proved his case to the required standard.

f. The learned trial magistrate erred in law and failed to find how the accident occurred when the respondent presented two different narratives.

g. The learned magistrate erred in fact and law in failing to determine how the appellant was negligent, especially when the respondent presented more than one narrative before the trial court.

h. The learned magistrate erred in law and, in fact, in finding that the respondent had proved that the appellant was negligent, whereas the respondent's evidence through the Police Investigating Officer exonerated him of any blameworthiness.

i. The learned magistrate erred in law and fact in failing to consider relevant and material evidence adduced before her, including that the police officer investigating officer confirmed that the accident occurred on the road, there were blood residue or bloodspots on the road, the respondent had hanged on the appellant's motor vehicle, the motor vehicle had just made a turn and was driving at a snail's speed; that the respondent fell from the motor vehicle while attempting to steal a ride; that the appellant's motor vehicle never lost control and that the respondent was an unauthorized passenger in the motor vehicle hence the appellant did not owe him any duty of care.

j. The trial magistrate erred in law by failing to consider the totality of the evidence before her and cherry-picking evidence without giving reasons for disregarding crucial evidence.

k. That the learned trial magistrate erred in law and, in fact, in awarding damages that were manifestly and grossly excessive and out of sync with comparable awards.

l. That the learned magistrate erred in law and, in fact, in failing to take into account the principles governing the assessment of damages.

3. The respondent opposed the appeal through Wanjohi Wawuda & Company Advocates. The following were his grounds of opposition:

a. That the respondent established his case on liability.

b. That the award was commensurate to the injuries.

4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.

5. How did the accident occur? According to the respondent, the appellant's motor vehicle ran over him while he was seated at the side of the road. However, this was contradicted by PC Wilson Mbuvi (PW2), who stated that he was the investigating officer and that the respondent was injured while attempting to board the vehicle as it was in motion. He attributed this account to the driver and two witnesses, none of whom testified.

6. In paragraph 4 of the pleadings, the appellant averred that the accident did not occur. He alternatively pleaded that the respondent would have substantially contributed to the injuries if the accident had occurred. This is double-speaking. A party cannot be allowed to blow cold and hot simultaneously. The purpose of pleading was explained by the Court of Appeal in David Sironga Ole Tukai vs Francis arap Muge & Others, Ca No. 76 Of 2014, as follows:

> In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.
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> When the appellant claimed that no accident occurred and then proceeded to say that if it had occurred, he was largely to blame for it, he was expressing nothing coherent.

7. For the sake of argument, if we may suggest that the appellant intended to imply that he caused the accident, he introduces further confusion into the case. PC Wilson Mbuvi (PW2) was not an eyewitness. He relied on the driver of the offending motor vehicle and two witnesses who did not testify to make this assertion. Their contention was not tested in court. This assertion by the appellant remained mere pleading. It is a well-established law that pleadings are merely pleadings and cannot be substituted for evidence. In CMC Aviation Ltd vs Cruise Air Ltd (1) [1978] KLR 103, Madan J stated:

> Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.

8. The respondent's account of the accident was uncontested. The learned trial magistrate cannot be criticized for deeming the appellant 100 per cent liable.

9. The appellant contended that the learned trial magistrate erred in awarding damages that were manifestly and grossly excessive and misaligned with comparable awards. Before an appellate court can interfere with an award of damages, it must be satisfied that a wrong principle of the law was applied, some irrelevant factors were considered, some relevant ones were left out, or the award is so inordinately

low or so inordinately high. These principles were laid down by the Privy Council in Nance vs British Columbia Electric Railways Co. Ltd. [1951]AC 601 on page 613, where it held:

> The principles which apply under this head are not in doubt. Whether the assessment of damages is by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have granted a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint vs Lovell [1935] 1KB 354) approved by the House of Lords in Davis vs Powell Duffryn Associated Collievers Ltd. [1941]AC 601.

10. Dr. Obed Omuyoma examined the respondent, who sustained the following injuries:

    a. Compound fracture of the right tibia and fibula; and

    b. Severe soft tissue injuries of the left leg.

11. In the trial court, the appellant proposed an award of Kshs. 300,000.00 as general damages. He relied on several decisions, including Reamic Investment Ltd vs Joshua Amenya Samuel [2021] eKLR. The respondent sustained a fracture of the femur and soft tissue injuries. On appeal, the respondent was awarded Kshs. 350,000.00. These injuries are less severe than those sustained by the respondent in the instant case. The appellant also relied on the decision in Catherine Gatwiri vs Peter Mwenda Karaai [2018] eKLR. In this case, the respondent sustained scars on the face, a deformity of the left clavicle, pain over the scapula with low power in the left upper limb, a surgical scar on the right shin, and a shortening of the right lower limb by 2cm. The respondent also had paresthesia over the right shin. He was awarded Kshs. 500,000.00.

12. The respondent had proposed an award of Kshs.1,500,000.00 in general damages. He relied on two decisions as follows:

    a. In Joseph Musee Mua vs Julius Mugi & 3 others [2013] eKLR, the plaintiff was involved in an accident on Thika road and was admitted to hospital for 2½ months. He suffered unconsciousness, had injuries on the head, an injury on the left leg and a wound. He had a broken tooth and a missing tooth. He had chest pain and injuries on the right shoulder and left elbow. During the X-ray examination, no fractures were noted on the skull. The chest had no fractures. The left leg showed a fracture of the tibia and fibula bones with an overlying wound over the fracture. The plaintiff had a surgical toilet applied, which was cleaning the wound at Thika District Hospital. The wound, however, became infected despite his being put on antibiotics. He was awarded Kshs.1,3000,000.00 in general damages.

       The injuries were more serious than what the respondent in this case suffered.

    b. In George William Awuor v Beryl Awuor Ochieng [2020] eKLR, the respondent suffered a compound fracture of the left tibia fibula and right a simple fracture of the femur. The respondent's right thigh had surgical scars and some bruising, which had since healed, but the nail was still in situ, and she would have to undergo surgery to remove the nail. She was awarded Kshs.1,200,000.00 in 2020.

       These injuries are slightly serious compared to what the respondent sustained.

13. After considering that no two sets of injuries may be the same and factoring in the time difference since the decisions relied on were made, I find that the award cannot be described as excessive.

14. I find no merit in the appeal. The same is dismissed with costs.

DELIVERED AND SIGNED AT NYANDARUA THIS 7TH DAY OF APRIL 2025

KIARIE WAWERU KIARIE

JUDGE