Nyoike v Kimeu (Civil Appeal E110 of 2023)
[2025] KEHC 5947 (KLR) (13 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E110 OF 2023

SM MOHOCHI, J

MAY 13, 2025

BETWEEN

CATHERINE WAMBUI NYOIKE ..... APPELLANT

AND

JOSEPHINE NDINDA KIMEU ..... RESPONDENT

(Being an appeal from the judgement of Honourable D. Mosse (SRM) delivered on 12th May, 2023 in Nakuru CMCC No. 677 of 2020)

JUDGMENT

1. The background of this appeal is that the Respondent, instituted Nakuru CMCC No. 677 of 2020 against the Appellant vide Plaint dated 3rd September, 2020 seeking general and special damages, costs of future treatment, costs of the suit and interest resulting from an accident that occurred on 22nd October, 2017 while standing at a matatu stage. That motor vehicle registration number KBX 478D belonging to the Appellant hit a bump, lost control veered of the road and hit the Respondent while standing at a matatu stage.

2. The Appellant in her statement of Defence denied the particulars of negligence and stated that in trying to avoid hitting a truck that had suddenly changed lanes she swerved left, hitting a bump that caused her to lose control of the vehicle occasioning it to roll whereupon it hit pedestrians at the road side.

3. In the judgement of the Court, the Court found in favour of the Respondent where she was awarded general damages of Kshs. 1,500,000, special damages Kshs. 639,000, costs of future treatment Kshs. 500,000 costs of the suit as well as interests from the date of judgement.

4. The appellant obviously aggrieved by the whole decision preferred the instant appeal vide Memorandum of Appeal dated 9th June, 2023 on the following grounds:-

i. That the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's evidence on liability thus finding the Appellant 100% liable for the accident;

ii. That the Learned Trial Magistrate erred in law and fact in finding the Appellant 100% liable for the accident despite appreciating in her judgement that the Respondent had a duty as a pedestrian;

iii. That the Learned Trial Magistrate erred in law and in fact in awarding general damages that are inordinately high and expensive;

iv. That the Learned Trial Magistrate erred in law and in fact in awarding excessive costs of further treatment;

v. That the Learned Trial Magistrate erred in law an in fact by failing in her award of general damages, to be guided by awards made by other Courts in the past relating to similar and/or comparable injuries;

vi. That the Learned Trial Magistrate erred in law by awarding excessive general damages of 1,500,000 contrary to the practice that general damages are not awarded as restitution but are meant to offer reasonable compensation

vii. That the Learned Trial Magistrate erred in law and in fact as matter of practice by failing to award reasonable general damages commensurate with injuries suffered and reflective of that the same would be paid as lump sum; and

viii. That the learned Trial Magistrate erred in law and in fact by failing to apply and uphold the principle in awarding damages and in their place applying wrong, irrelevant and inapplicable principles.

5. The Appellant thus seeks the appeal be allowed and the Trial Court's judgement and decree of Trial Court be set aside.

Appellant's Submissions

6. On liability the Appellant submitted that there was an error in apportioning liability and as such the same should be apportioned at the ration of 80:20 since the Court, in the judgement acknowledged the possibility that the Respondent was crossing the road, they might have not taken caution if the oncoming vehicles. That the Court failed to take into account that the Appellant has not been charged or prosecuted for the accident.

7. On comparable damages, it was the Appellants submission that comparable damages should be awarded to similar injuries sustained to ensure that there is uniformity in awarding damages as was held in H. West and Son Ltd V. Shepherd [1964] AC 326.

8. In submitting that and award of Kshs 700,000 was fair and reasonable the Appellant relied inter alia in Pestony Limited & Another v Samuel Itonye Kagoko [2022] eKLR, Jiran Nagra v Abdinego Nyandusi Oigo [2018] eKLR, United Millers Limited v Wanjiku [2023] KEHC 26808 (KLR) A. O Bayusuf & Sons v Patricia Muthoka Mutunga [2020] eKLR and Joseph Njuguna Gachie v Jacinta Kavuu Kyengoi [2019] eKLR.

Respondent's Submissions

9. On liability, it was submitted that the Court cannot be faulted for its findings since 8 people cannot all make an error of judgment while attempting to cross the road. That the defence was not consistent as

to who was driving the vehicle, the defence and statement of defence do not tally whereas the statement and pleadings of the Respondent were consistent throughout.

10. On general damages the Respondent highlighted her injuries and relied on the case of Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v Nia & 3 others [2018] eKLR in which she opined Benson Boru has suffered more or less similar injuries and the Court made an award of Kshs. 2.5 million. She submitted that the award by the Trial Court was on the lower side compared to the one of 3,000,000 initially proposed and should therefore not be disturbed.

11. On Future medical expenses, the same was prayed for based on the estimation by the Doctor and the Court took it as admitted as the Appellant made no comment to it Special damages were pleaded and proven with receipts.

Analysis and Determination

12. Having considered the record and the evidence before the Court as well as the rival submissions, this Court as the first Appellate Court is not bound to follow the decision of the Trial Court of fact it is however tasked with reconsidering and re-evaluating the evidence on record and appraising itself in drawing an independent conclusion.

13. See; Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123.

14. Similarly, in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held:

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L.
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> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words: -
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> > "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

15. This Court has to also give due regard to the fact that it neither heard nor saw the witnesses while they testified and give due allowance.

16. In order to interfere with the decision of the Trial Court on a finding of fact, this Court is bound by the principles espoused in Mbogo vs Shah & Another [1968] EA 93 wherein it was held:

> " A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless such finding is based on no evidence or on misapprehension of the evidence or the judge is shown demonstratable to have acted on wrong principles in reaching the finding;

> an appellate court is nit bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with evidence in the case generally"

Liability

17. The Trial Court apportioned liability at 100% against the Appellant in favour of the Respondent. Appellant has intimated contributory negligence and proposed the same be apportioned at 80%:20%.

18. PW1, the Respondent herself testified that she was standing at the stage together with others who were also injured. She never saw a lorry that was speeding. PW2 Cpl Jackson Nkonge testified that the vehicle lost control and rammed into pedestrians standing at the stage, injuring several among them the Respondent and rolled several times landing in a ditch. He confirmed that he was not the investigating officer but knew with the investigating officer who prepared the abstract.

19. DW1, on the other hand, one Martha Lorraine Ochwada testified that she was the one driving the subject vehicle and not the owner, the Appellant herein. That she saw 8 people trying to cross the road, she tried to avoid the accident but lost control and hit them. The road was clear at the time. That all attempts to stop the car, trying not to hit them.

20. What is in doubt at this point is whether the Respondent was knocked at the bus stage as alleged by PW1 or whether she was knocked on the road whilst attempting to cross the road as alleged by DW1.

21. PW2 was not the Investigating Officer nor was he at the scene nor was sketch plan produced. It is not clear how the Respondent was hit while waiting at a bus stop. The Police Abstract dated 17th July, 2020 indicates that the case is pending under investigation. The testimony of PW2 is hearsay at best. There was no other independent witness.

22. Now therefore from the testimony and evidence on record who is to blame for the accident? The standard of proof in a civil case is 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. I find difficulties in reasoning with the Appellant's evidence since DW1 in her Witness Statement dated 12th July, 2021 mentioned slowing down at a bump then all over sudden a group of around 8 people emerged from the left side of the road attempting to cross to the right.

24. In her sworn testimony she stated that she saw 8 people crossing the road and tried to avoid hitting them and lost control hitting them nonetheless. In cross examination she added that she was forced to change lanes since there was a truck changing lanes. This was however upon it being pointed out that the owner of the vehicle in the Statement of Defence blamed the truck and not the pedestrians.

25. Secondly the Statement of Defence alluded to a truck changing lane and in avoiding hitting the truck, the driver swerved left, hit a bump, lost control, rolled and hot the pedestrians. That the emergency was presented by a third Party. This therefore blamed a third party, presumed to be the lorry, and not the pedestrians.

26. I am guided by the case of Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd [2015] KEHC 6337 (KLR) where it was stated:-

> " Referring also to a decision of Nigerian Supreme Court our Court of Appeal stated-
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> > "Adetoun Oladeji (NIG) Ltd Vs. Nigeria Breweries PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;
> >
> > '.... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."
> >
> > Having referred to the above, it is not entirely correct to say that the Court cannot base its judgment on an issue that is not pleaded. This was stated by the Court of Appeal in the case Dr. Leonard Kimeu Mwanthi V Rukaria M'twerandu M'iriungi [2013]eKLR viz-

27. The evidence of the Appellant has some level of inconsistencies and blanks. It is not accurate how the accident happened based on the witness statement, the sworn testimony and the Defence.

28. Further, according to the testimony of DW1, the road was clear and on seeing the bump she slowed down. If the road was as clear and she slowed down as she pointed out she ought to have seen the group of people attempting to cross the road and applied brakes and control the vehicle in a manner to avoid the accident. The road being clear meant that the driver's visibility was not obstructed.

29. I also note the possibility of the pedestrians attempting to cross the road. But I agree with the reasoning of the Trial Court that the driver was likely driving at a high speed and was not careful enough to see the bump on time in order to avoid the hitting them. As submitted by the Respondent it is unlikely that a group of 8 people would all decide to cross the road without first ascertaining and making calculations that that they would make it to the other end of the road safely. Error of judgment of one two people is a possibility but a number all the way to 8 is unfathomable.

30. The standard of proof requires application of a reasonable degree of probability where the Court in balancing the probabilities, would ideally make a decision on the probability is more likely than the other.

31. The Court in Mbasu & another v Onyapindi & Cheseny (Suing as the Legal Representatives of Bernard Simiyu Wamalwa - Deceased [2024] KEHC 11716 (KLR) the Court stated:

> " ...When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious 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..."

32. After analyzing the evidence on record, I find that the Appellant was to blame for the accident and I find no reason to disturb the Trial Court's finding on liability.

General Damages

33. This Court is guided by the principles in Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) [1985] KECA 137 (KLR) thus:

> " 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 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. See Ilango V. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching And Farming Co-operatives Society Ltd V. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles.""

34. The Appellant to buttress the rationale behind the proposed award of Kshs 700,000 relied on a number of authorities both in A. O. Bayusuf & Sons v Patricia Muthoka Mutunga (supra) the Trial Court and on Appeal, it was submitted that the Appellant in the quoted case suffered serious injuries and the Court on Appeal upheld an award of Kshs. 800,000 in 2020.

35. The Respondent pleaded that she suffered multiple fractures on the right femur, compound fractures on the rights femur a fracture of the left radius. Dr. Kiambaa in his report dated 17th July, 2020 confirmed the injuries. After the accident she was admitted at Nakuru PGH rom 23rd October, 2017 till 20th December, 2017. She thereafter was attended at AIC Kijabe Hospital, Nakuru War Memorial Hospital and attended several physio therapy sessions. She had been confined to a wheel chair for one and a half years having also suffered an infection on the left femur requiring strong medication. She has to attend to further series of treatment.

36. According to the doctor, the Respondent will develop post traumatic osteoarthritis of the left hip joint. The left lower limb is shorter than the right limb by 8cm and the pelvis tilted to the left. The doctor classified the Respondent's injuries as grievous harm and assessed the degree of permanent incapacitation as 60%

37. I have considered the injuries suffered by the Respondent and the authorities relied on by the parties. The Respondent in my considered opinion suffered serious injuries and especially the compound fracture on the left femur meaning the broken bone pierced the skin. The multiple fractures of the right femur meant she had 2 or more broken pieces. Also, the fracture of the left radius.

38. The accident occurred on 22nd October, 2017 and as at the time the Respondent was going for the assessment on 17th July 2020, almost 3 years later, she was on assisted walking by way of crutches. Having broken both legs and one hand, the Respondent was at the mercy of third parties for practically everything physical and could not even fend for herself.

39. Comparable injuries always attract comparable damages. Nonetheless not all injuries are similar or attract the same results. Pain and suffering is also considered, the period of recovery, the level of incapacity and level of future incapacity. A 60% disability is severe and impacts daily activities of an individual.

40. Taking into account the severity of the injuries, the current inflation trends, the value of the Kenyans shilling and the fact that the Respondent has to undergo future treatment I am of the view that the award of general damages was commensurate with the injuries suffered and I find no reason to interfere with the said award.

Costs for future treatment,

41. Dr. Kiambaa in the report dated 17th July, 2020 estimated the costs for future treatment to be at least Kshs. 500,000. There was no second opinion conducted on behest of the Appellant. The Appellant also did not provide an alternative figure from a professional to counter the amount. The amount was also not challenged during the trial. I see no reason to disturb that figure.

Special damages

42. Special damages were pleaded and proven to the required standards and the same was equally not challenged. The amount therefore stands.

43. I find this appeal lacking in merit and I hereby dismiss it with costs to the Respondent.

    It is hereby so ordered.

JUDGEMENT DELIVERED AT NAKURU ON THIS 13TH DAY OF MAY, 2025

MOHOCHI S.M.

JUDGE.