Oracle Engineering Limited & another v Muliro (Civil Appeal E006 of 2024) [2025] KEHC 5409 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5409 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E006 OF 2024

DK KEMEI, J

MAY 2, 2025

BETWEEN

ORACLE ENGINEERING LIMITED ..... 1ST APPELLANT

LUCAS DINDI ..... 2ND APPELLANT

AND

ZEDEKIAH MULIRO ..... RESPONDENT

(Being an appeal from the Judgment and Orders delivered by Hon. J.P Mkala delivered on 29th January 2024 in Siaya SCCC No. E002 of 2023)

JUDGMENT

1. The Appeal arises from the Judgment and Orders delivered by Hon. J.P Mkala delivered on 29th January 2024 in Siaya SCCC No. E002 of 2023.

2. The brief facts are that on or about 21st October 2023 at around 1240 hours the Respondent (Claimant) while cycling along Kisumu-Busia Road around Simenya area, the driver/agent/servant of the 1st Appellant's controlled Motor vehicle registration number UBN 312B in a careless/reckless manner hence knocking down the motor cycle he was riding by abruptly swerving into the cycling lane/pedestrian lane. The Respondent sustained serious injuries. The Respondent blamed the driver of the motor vehicle UBN 312B for the accident. The Respondent sought special damages of Kshs. 498,550.00, general damages, costs of the suit and interest.

3. In his witness statement dated 16th November, 2023, the Respondent stated that he suffered injuries inter alia; tender swollen forehead, fracture of the right clavicle, fracture head right humerus, dislocation right humerus, fracture right tibia distal.

4. In his evidence, the Respondent told court that it was at around 1100 hours when he was riding a bicycle on his lane when the motor vehicle hit his bicycle from behind. That the weather was clear and

it was sunny. He denied riding on the middle of the road. He was riding on the side when the motor vehicle veered of the road and hit him. He sustained a head injury, shoulder dislocation, right arm and lower limb. He stated that his arm has not healed but that the lower limb has healed. He stated that he only saw doctors from Jaramogi and Siaya Referral Hospital.

5. CW2 No. 83157 Pc Michael Kasafiri attached at Ugunja Traffic Base stated that on 21st November 2023 at around 1600 hours he received a report from his commander that there was an accident that had occurred along Kisumu- Busia Road at Semenya area. He stated that the motor vehicle overtook the cyclist, hit and pushed by the rear trailer and fell down. He stated that motor vehicle UBN 312B-UBN 896D are one and the same, one being the head vehicle and the other is the trailer. He stated that he went to the scene with Sgt Miriti where they established that the road had several potholes and had a yellow line separating traffic. It had a lane for cyclist though it was not marked. The cyclist and motor vehicle were going in the same direction but that the cyclist was on the pedestrian lane. The driver left his lane and hit the cyclist. The cyclist used the murram road.

6. CW3 Levis Wakhisi, clinical officer No. 22174 at Kakamega County Hospital stated that as per the P3 Form and medical report, the Respondent suffered tender swelling of the head, fracture right clavicle bone, fracture right humerus bone, fracture right tibia distal bone. He stated that the fractures will need an open reduction and internal fixation surgery to repair the fractured bone. The surgery would be on the right tibia bone, right clavicle humerus bone and that they would need to remove the metal plate later if the fractures are totally healed. He stated that the Respondent would need physiotherapy and occupational therapy and because of the injuries, his life style will change. He stated that he relied on the documents from Siaya County Referral Hospital and Jaramogi Oginga Odinga Hospital as well as the P3 form, treatment notes, medical report and X-ray report. He stated that the Respondent walked using a walking aid. He stated that the amount indicated for future medical expenses is an estimation at a public hospital but in a private hospital it may change. He stated that the physiotherapy and occupational therapy are mandatory after undergoing the surgical procedure. He stated that he charged Kshs. 20,000.00 for his services.

7. The Appellants filed a response dated 19th December 2023 wherein they denied the claim. The Appellants accused the Respondent for several transgressions inter alia; encroaching onto the motor vehicle lane; obstructing he motor vehicle; not wearing the helmet and reflective jacket; cycling in the middle of the road; cycling while intoxicated; not giving way to the motor vehicle; not taking evasive measures to avoid the accident; not heeding to the hooting by the motor vehicle; failing to take any precautionary measures for his own safety; not adhering to the traffic rules and regulations.

8. The Appellants denied the particulars of injuries. The Appellants urged the trial court to dismiss the claim with costs.

9. The Appellants case was closed without calling any witness.

10. In his submissions, the Respondent urged the trial Court to find the Appellants 100% liable. According to the Respondent, after the accident he was not able to go to back to his daily routine as he had not fully recovered. He urged the trial Court to award him damages of Kshs. 600,000.00 to 800,000.00. Regarding special damages, the Respondent urged the trial Court to award Kshs. 23,100.00 as per the receipts produced and recommended future medical expenses amounting to Kshs. 400,000.00.

11. On their part, the Appellants urged this Court to dismiss the suit or in the alternative apportion liability at 50%:50% as the Respondent was to blame for the accident. According to the Appellants, the Respondent knew the lane to be one way, he ought to have exercise caution as a road user and give regard to other road users especially trucks. On general damages, while relying on the case of Robert Kithinji Kithaka vs AG [2018] eKLR, the Appellants submitted Kshs. 250,000.00 was

sufficient. On special damages, the Appellants submitted that the Respondent was only entitled to Kshs. 8,500.00. According to the Appellants, no compelling evidence was led to prove claim for future funeral expenses, thus not awardable. The Appellant submitted that the claim of Kshs. 50,000.00 recommended for physiotherapy and occupational therapy was not proved as they were confirmed by the clinical officer to be estimates. It was submitted that the claim had not been pleaded in the Statement of Claim. Reliance was placed on the case of Judy Ngochi vs Kamakia Ele Selelo Ledamoi [2019] eKLR.

12. In his judgment, the learned trial magistrate found the Respondent's testimony uncontroverted and corroborated by CW2 and held that it was common sense in a road which had potholes for the driver to be more vigilant and drive slowly in the circumstances. The Appellants were found 100% liable for the injuries sustained by the Respondent. Regarding the quantum of damages, the learned trial magistrate relied on Barnabas vs Ombati (Civil Appeal E43 of 2021) [2022] KEHC12136(KLR)(2017) and in Bethwel Mutai vs China Road & Bridge Corporation[2008]eKLR where courts awarded Kshs. 800,000.00 and Kshs. 900,000.00 respectively to award the Respondent general damages in the sum of Kshs. 900,000.00.

13. The learned trial magistrate observed that Dr. Wakhisi opined that the Respondent would need ORIF Surgery of the distal tibia bone, right clavicle and humerus bone at Kshs. 200,000.00, removal of the metal implants at Kshs. 150,000.00, physiotherapy and occupational therapy at Kshs. 50,000 but since the discharge summary from JOOTRH indicated that a reduction surgery for the humerus had been conducted on the Respondent, there would be no need for future surgery. According to the learned trial magistrate, since Dr. Wakhisi indicated that there are no metal implants in the Respondent, the Court would not award monies for removing non-existent implants, thus the award was declined.

14. Having sustained serious injuries and Dr. Wakhisi recommending for physiotherapy and occupational therapy, the learned trial magistrate awarded the Respondent Kshs. 50,000.00.

15. Regarding special damages, the learned trial magistrate found receipt for medical examination at Kshs. 20,000.00, medical expenses at Kshs. 3200.00 and motor vehicle search at UG 88,885 (Kshs. 3,789) were produced by the Respondent, thus were awardable. The invoice from JOOTRH for a sum of Kshs. 14,000.00 was declined as it had not been indicated as 'Paid'. The Respondent was awarded costs of the suit and interest at court's rate from the date of entry judgment until payment in full.

16. Aggrieved, the Appellants filed a Memorandum of appeal dated 19th February 2024 contending that:

    1. That the learned trial magistrate in law in awarding a sum of Kshs. 900,000.00 to the Respondent as general damages which was inordinately high and excessive thus occasioning a miscarriage of justice.

    2. That the learned trial magistrate erred in law by going against established precedence and awarding quantum of damages which were excessive in comparison to the alleged injuries suffered by the Respondent.

    3. The learned trial magistrate erred in law and grossly misdirected himself by treating the Appellant' submissions on quantum superficially thus coming to a wrong conclusion

    4. The learned trial magistrate erred in law by ignoring the principles applicable in awarding quantum of damages thus awarding the Claimant general damages more than the Claimant had submitted in his submissions and by so doing reached a figure that was totally unsupportable

5. The learned trial magistrate erred in law and proceeded on wrong principles and misapprehended the law on award of future medical expenses and granted the Claimant what he had not pleaded if any, and failed to apply the precedents and tenets of the law applicable

17. The Appellant prays that the judgment and order of the trial court be vacated and/or set aside.

18. The appeal was canvassed by way of written submissions. Both parties duly complied.

19. I have considered the appeal in light of the evidence on record and submissions on behalf of the parties.

20. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (Selle vs Associated Motor Boat Co. [1968] EA 123).

21. Odunga J. (as he then was) China Wi Yu Company Limited vs Ronald Manthi David [2021] KEHC 1626 (KLR) stated that this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

22. In Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, about the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze 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"

23. The legal burden of proof was on the Respondent to prove his claim on a balance of probabilities. It was therefore incumbent upon the Respondent to prove his assertions pleaded in the Plaint.

24. Section 107(1) of the *Evidence Act*, Cap 80 provides that:

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.

25. However the burden may shift to the Defendant to disprove the alleged claim. This is the evidential burden of proof which is well captured under Sections 109 and 112 of the *Evidence Act*.

26. The Court of Appeal in Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 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 cast 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."

27. The standard of proof is well captured in the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Court held that:

Denning J. in Miller v 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 the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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."

28. Kimaru J. (as he then was) in William Kabogo Gitau Vs George Thuo & 2 others (2010) 1 KLR 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 pleased in his case are more likely than 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 opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred."

29. In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR Kariuki, J, stated:

> " But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in Shaneebal Limited vs County Government of Machakos [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.

30. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

31. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of

opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

32. It is noted that the Appellants herein did not tender evidence to challenge that of the Respondent and therefore ipso facto the Respondent's evidence remained uncontroverted. Indeed, the burden of proof which is on a balance of probability lay with the Respondent to discharge. As noted in the preceding paragraphs, the Respondent presented his evidence on how accident occurred and called witnesses to support his claim. The police officer (CW2) who investigated the case testified that the Respondent and the Appellant's driver were headed in the same direction and that the Respondent was ahead of the vehicle where upon the Appellants' driver overtook the Respondent and in the process the Respondent who was riding a bicycle was hit by the Appellants' trailer causing his serious injuries. The witness further added that the Appellants' driver left his lane and hit the peddle cyclist. The said witness further added that the section of the road where the accident took place was littered with potholes. It was therefore incumbent upon the Appellants' driver to drive carefully and to have due regard for other road users. The Appellants' driver owed a duty of care to the Respondent. As the Appellants' opted not to tender evidence, then the version of events as explained by the Respondent must be accepted and hence the apportionment of liability at 100% against the Appellants by the trial court was proper. I find in the circumstances, the Respondent did not contribute to the accident since he was on his lawful lane. It is common knowledge that there is a perennial behavior by truck drivers along the high ways to elbow other road users out of the roads. It is instructive that the Appellants' appeal is not on liability but on quantum of damages.

33. The Appellant has challenged the various heads of damage. They have maintained that the award of Kshs900,000/= as general damages was excessively high and has occasioned a miscarriage of justice. The Appellants contend that the injuries suffered by the Respondent were exaggerated. The Appellants maintain that the fracture of the right distal tibia and fracture of the right humerus was not captured in the treatment notes or the discharge summary and were therefore fictitious. The Appellants submitted that the award of Kshs900,000/= should be reduced substantially to a sum of between Kshs250,000/

= and Kshs450,000/=. Further, the Appellants challenged the lower court's award of future medical expenses yet the same had not been pleaded and proved.

34. On the other hand, the Respondent submitted that the award of general damages should be increased to Kshs1,000,000/=. On future medical expenses, it was submitted that the said amount must be paid as the Respondent could be undergoing medication by doctors and that the same must be awarded. It was submitted that the amount awarded by the lower court of Kshs76,989/= should be increased to Kshs 400,000/= as recommended by the doctor.

35. A perusal of the Respondent's statement dated 16/11/2023 shows that the injuries suffered were:

    i. Tender swollen forehead.

    ii. Fracture of the right clavicle.

    iii. Fracture of head right humerus.

    iv. Dislocation of right humerus.

    v. Fracture of right tibia distal.

    The Respondent called a registered clinical officer Levis Wakhisi who confirmed that the Respondent suffered the aforesaid injuries and that from the fractures sustained, the Respondent would need an open reduction and internal fixation surgery to repair the fractured bone. He also added that the removal of the metal plate could be done later after the Respondent had healed. He also proposed that the Respondent would require physiotherapy and occupational therapy as well. He also added that at the time of examination, the patient did not have a metal implant. He proposed that the surgery would cost Kshs200,000/= while the removal of the metal implant would cost Kshs150,000/= and that the physiotherapy would cost Kshs50,000/=.

    Looking at the injuries suffered by the Respondent, it is noted that the Respondent had not undergone surgery as proposed by the doctors. No explanation was given by the Respondent why he did not do so. It seems to me that the Respondent wanted to be compensated first before undergoing the surgery. This brings me to the claim of future medical expenses. It is trite that such kind of expenses are in the form of special damages which must be specifically pleaded and proved. It is noted from the Respondent's statement of claim that the prayers sought were in respect of special damages, general damages, cost of the suit and interest. There is no prayer for future medical expenses. It was incumbent upon the Respondent to specifically plead the claim in order to justify an award in that regard. It is noted that the Respondent admits that he was constrained to bring his claim within the jurisdiction of the Small Claims Court whose pecuniary jurisdiction does not exceed Kshs1,000,000/=. Hence, the Respondent was to bring his claim within that limit. As the claim for future medical expenses has not met the threshold of proof, the Respondent will have to contend with awards under general damages, special damages and costs.

    On general damages, the decision in the case of Civicon Limited vs. Richard Njomo Omwancha & 2 Others [2019] eKLR, rendered by the Court of Appeal is relevant. In that case, the Claimant had sustained injuries inter alia; fracture of four upper teeth, cut wound on upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on the right knee, fracture of the right tibia and fibula and that he suffered a 30 % permanent disability and was unable to walk without support. In that case, the court on appeal awarded Kshs500,000/=. The said injuries are more or less similar to the ones suffered by the Respondent herein although the Respondent did not indicate whether he suffered any disability though the doctor indicated that he was at a time of examination walking with some aid. Further, the recommendation for physiotherapy would go a

long way in resolving the Respondent's medical needs. It is noted that the aforesaid authority was decided much earlier and the incidence of inflation must be factored. I am of the view that the sum of Kshs650,000/= would be adequate as general damages for pain, suffering and loss of amenities.

On special damages, it is noted that the Respondent had made a claim of Kshs498,550/=. However, he was only able to prove the sum of Kshs26,989/= which is hereby upheld.

36. In view of the foregoing observations, it is my finding that the Appellants' appeal partially succeeds. The judgment of the trial court dated 29/1/2024 is hereby set aside and substituted with the following.

a. Liability against the Appellants.....100%

b. General damages.....Kshs650,000/=

c. Special damages.....Kshs 26,989/=

Total Ksh676,989/=

The Appellant is awarded half costs of the appeal while the Respondent shall have full costs in the lower court.

DATED AND DELIVERED AT SIAYA THIS 2ND DAY OF MAY, 2025.

D. K. KEMEI

JUDGE

In the presence of:

M/s Wambani.....for Appellants

Otieno..... for Respondent

Okumu.....Court Assistant