Kimani v Ngatingat (Civil Appeal 203 of 2018)
[2025] KEHC 8730 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8730 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 203 OF 2018

HI ONG'UDI, J

JUNE 19, 2025

BETWEEN

BENJAMIN KIMANI ..... APPELLANT

AND

MABELU OLE NGATINGAT ..... RESPONDENT

(Being an appeal from the Judgment of Hon. N. Makau (CM) delivered on 15th October 2018 in Nakuru CMCC No. 1024 of 2015)

JUDGMENT

1. Benjamin Kimani herein referred to as the appellant was the 2nd defendant in the lower court while the respondent was the plaintiff. The respondent vide the plaint dated 16th September 2015 sued the appellant claiming general damages, special damages and costs of the suit plus interest at court rates.

2. The facts of the case were that on 24th April 2015 or thereabout the respondent was lawfully walking at the verge of the road along Nakuru-Eldoret highway near Eveready when the appellant by himself, servant, agent and/or employee so negligently drove, managed and/or controlled motor vehicle registration number KVJ 701 as a result of which he was knocked down and received severe bodily injuries.

3. After a full hearing the court in its Judgment delivered on 15th October, 2018 apportioned liability in the ratio of 80:20 in favour of the respondent. She awarded kshs. 800,000/= as general damages and kshs. 8,640/= as special damages subject to 20% contributory negligence. The respondent was also awarded costs of the suit plus interest.

4. The appellant being aggrieved by the whole judgment lodged this appeal dated 19th August, 2019 setting out the following grounds: -

i. That the learned trial magistrate erred in law and in fact in finding in favour of the respondent herein in the absence of sufficient evidence to prove on a balance of probabilities that the appellant indeed was negligent.

ii. That the learned trial magistrate erred in law and in fact in apportioning the liability of the appellant to 80% without considering the evidence tendered by the appellant which clearly illustrates that the respondent was the one on the wrong in the circumstances.

iii. That the learned trial magistrate erred in law and in fact in placing reliance on the doctrine of res ipsa liquitor in arriving at a finding in favour of the respondent when the accident occurred due to the sole negligence and omission of the respondent.

iv. That the learned trial magistrate erred in law and in fact in considering the evidence of Dr. Obed Omuyoma only and disregarding the expert evidence of Dr. George W. O. Mugenya when in fact expert evidence is only for the purposes of guiding the court.

v. That the trial magistrate erred in law and in fact when she failed to weigh the expert evidence against the background of other evidence in light of the existence of two conflicting expert evidence in order to determine the best preferred evidence.

vi. That the trial magistrate erred in law and in fact in awarding the respondent a sum of Kshs. 646,912 which was inordinately excessive in the circumstances.

vii. That the learned magistrate erred in law and in fact in adjudicating the costs of the suit in favour of the respondent.

5. The Appeal was canvassed by way of written submissions.

Appellant submissions

6. The same were filed by Mirugi Kariuki & company advocates and are dated 7th March 2025. Counsel gave a brief background of the appeal and identified four (4) issues for determination.

7. On the first issue on whether the trial magistrate erred in law and fact in finding in favour of the respondent when there was absence of sufficient evidence for the same to be proved on a balance of probabilities. Counsel submitted that the evidence adduced during the hearing of the suit was not taken into consideration in making the final determination.

8. He further submitted that respondent ought to have exercised due caution whilst crossing the road. He stated that the appellant's witness statement showed that the respondent rushed to cross the road when there was oncoming traffic. He added that the injuries occasioned upon the respondent were by his contributory negligence.

9. He placed reliance on the decision in Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] KECA 378 (KLR) where the court held as follows;

> " In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances".

10. Regarding the second issue on whether the magistrate erred in law and fact by relying on the doctrine of res ipsa loquitor, counsel submitted that the trial court erred in finding that the respondent had proved the doctrine of Res Ipsar Loquitor, when it ought to have found that the respondent was indeed liable for the negligence resulting in the accident. He stated that the trial magistrate failed to consider the

differences in the medical reports produced by Dr. Omuyoma for the respondent and Dr. Mugenya for the appellant.

11. The third issue is whether the trial magistrate erred in law and fact by awarding the respondent a sum of kshs. 646, 912/= and similarly ordering the appellant to bear the costs of the suit. Counsel submitted that indeed the award on general damages was extremely high given the prevailing economic situation. He placed reliance on the decision in Mursal & Another v Manese (Suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR).

12. Lastly, counsel submitted that costs follow the event pursuant to the provisions of section 27 of the *Civil Procedure Act*. He urged the court to allow the appeal with costs.

Respondent's submissions

13. These were filed by B.O Akang'o advocates and are dated 20th March 2025. Counsel gave a factual background of the appeal and identified four (4) issues for determination.

14. On the first issue on whether the trial magistrate erred in apportioning liability in the manner she did, counsel submitted that the learned trial magistrate correctly evaluated the evidence of both parties before arriving at her decision to apportion liability.

15. The court's attention was drawn to the decision in Masembe v Sugar Corporation and another 2002 2 EA 434, where the court pronounced itself as follows: -

> "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object .... Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, cither drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently...".
>
> See also; Mary Njeri Murugi v Peter Macharia & another [2016] eklr.

16. On whether the learned trial magistrate erred in law and fact in making an award on general damages for pain and suffering, counsel submitted that an award of general damages cannot be disturbed unless it is inordinately high or low due to a misapplication of legal principles or a material misapprehension of evidence. She placed reliance on the decision in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR.

17. Counsel further submitted that that Dr. George Mugenya's evidence was merely speculative and not cogent and could not outweigh Dr. Obed Omuyoma's expert evidence. He relied on the sentiments of the court in Stephen Kinini Wang'ondu vs. The Ark Limited [2016] eKLR where it was held as follows:

> "In my view it's correct to state that a court may find that an expert opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. ....the expert's process of reasoning must therefore be clearly identified so as to enable a court to

choose which of competing hypothesis is the more probable....It is trite principle of evidence that the opinion of an expert, whatever the field of expertise is worthless unless founded upon a substratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof, The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence."

18. It was further submitted that in evaluating compensation for general damages, the Court ought to evaluate the nature of the injuries and the awards given by other Courts. The Court of Appeal observed in Simon Taveta vs. Merc Mutitu Neru 2014 eKLR as follows;

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

19. Counsel submitted that the amount awarded was consistent with awards in similar cases and compensated the respondent for his pain and suffering. Additionally, that the following comparable awards made in the past-decided cases should guide the court;

    a. Caroline Wanjiku Karimi v Simon K. Tum and another 2012 eKLR where the plaintiff suffered almost similar fractures and the High Court awarded Kshs. 1, 500,000 as general damages.

    b. James Gathirwa Ngugi v Multiple Hauliers EA Ltd & Anor HCC No 658 of 2009 where Kshs 1,500,000/= was awarded for injuries including: compound comminuted fracture of right tibia, compound comminuted fracture of right fibula.

20. He concluded by submitting that the appellant had demonstrated that the trial court proceeded on wrong principles or misapprehended the evidence. He urged the court to dismiss the appeal with costs.

Analysis and determination

21. This being a first appellate court, I am guided by the dictum in the case of Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

22. 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 re-analyse 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. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by both parties, I find that the issues for determination to be:

    i. Whether the trial magistrate erred in apportioning liability between the appellant and the respondent.

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

24. 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 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".

25. 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".

26. Guided by the above cited authorities, it is my humble view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

27. This court has considered the evidence adduced before the trial court. It is not in dispute that the appellant was the driver of motor vehicle registration number KBD 850N which knocked down the respondent. During trial the respondent called three witnesses but he did not tell the court much about the accident. He testified that the appellant was driving at a high speed and he did not know what happened as he was hit at the road side after crossing the road.

28. PW3 No. 49XX7 CPL Jackson Kony did not equally tell the court much about the accident. He testified that a report on the accident was prepared and that the appellant was driving towards Eldoret direction when the respondent was crossing the road from left to right. Upon cross-examination, he stated that the O. B and police abstract did not indicate whether there was a zebra crossing at the scene. He confirmed that the O. B and the police abstract differed. In re-examination, he stated that the police

officer who went to the scene got information and went to the scene but did not find the victim of the accident and confirmed they were at the hospital.

29. The appellant testified as DW1 and gave sworn testimony. He stated that while he was driving motor vehicle KBJ 701 around Eveready and just as he was overtaking a lorry the respondent crossed the road. He tried applying brakes but unfortunately the respondent was hit and he fell down. He stated that he was driving at a speed of 40-50 km per hour and there was no zebra crossing. He blamed the respondent for crossing the road when it was not appropriate to do so.

30. The trial court in its judgment apportioned liability in the ratio of 80% as against the appellant and 20% as against the respondent.

31. After analysing all the evidence above, this court notes that it is not disputed that the respondent while crossing the road was knocked down by motor vehicle KBJ 701 being driven by the appellant. During trial both the appellant and the respondent did not tell the court much on how the accident occurred. The court notes that the only document that attests to the occurrence of the accident is the police abstract. Further, no police investigations' report was produced to show whether either the deceased who was a pedestrian at the time of the accident or the rider of the motor vehicle KBJ 701 was wholly to blame. The police abstract does not give sufficient details. The court was therefore not assisted much on this point.

32. Consequently, it is this court's finding that in the absence of any concrete evidence on who is wholly to blame for the accident, the respondent and the appellant were equally to blame for the accident. Therefore, liability is apportioned at 50:50 between the parties herein. The finding of 80:20 by the trial court is set aside.

33. Moving to the issue of quantum, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated as follows: -

> " comparable injuries should attract comparable awards".

34. Further, in the case of Borthy-Gest stated in West (H) & Son Ltd v Shepherd [1964] A.C. 326 pg. 345:

> " But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

35. According to the medical report by Dr. Omuyoma at page 16 of the record of appeal the injuries sustained by the respondent include; fractured left wrist joint, left radius and ulnar and dislocation of the right knee joint. The scan done at the Rift Valley General Hospital Nakuru on 24th April, 2015 confirmed the same injuries. Dr. Mugenya did not testify for purposes of cross examination of his report. The plaintiff prayed for an award of kshs. 2,000,000/=. He relied on the decisions in; (i) Caroline Wanjiku Karimi V Simon K. Tum & another [2012] eKLR, where the plaintiff suffered similar fractures, and the High Court awarded kshs. 1,800,000.00 as general damages. (ii) James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR, where the plaintiff suffered similar fractures and the High Court awarded kshs. 1,500,000.00/as general damages.

36. I have endeavoured to search for precedents that are more relevant in this appeal. Haron Cheron -vs- Eastern Produce [2014] eKLR where the appellate court reviewed general damages from Ksh.800,000/= to Ksh.450,000/= for a fracture to the right ulna, fracture to the right olecranon of right ulna at the elbow joint and where some plates were fixed to deal with the fracture.

37. After due consideration of all the injuries suffered by the respondent and the decided cases I find no reason to interfere with the award on general damages. I therefore confirm the award of Ksh 800,000/= as general damages less 50% contribution plus special damages of Ksh 8640/=. Judgment is entered accordingly plus interest and costs from the date of Judgment in the lower court. The appellant will get half of the costs of the appeal.

38. Orders accordingly

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 19TH DAY OF JUNE, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE