Ngari & another v Omete (Civil Appeal E149 of 2024)
[2025] KEHC 9767 (KLR) (11 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9767 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E149 OF 2024

TA ODERA, J

JUNE 11, 2025

BETWEEN

JEREMIAH NGAYU NGARI ..... 1ST APPELLANT

BERNICE WANGECHI ..... 2ND APPELLANT

AND

WILLIAM NYAMWEYA OMETE ..... RESPONDENT

(Being an appeal from the Judgment delivered by Hon. Mutai Paul Kipkemoi (P.M) on 5th June 2024 in Kisii CMCC No E230 of 2023)

JUDGMENT

Background

1. This Appeal arises from the Judgment delivered on 5th June, 2024 in Kisii CMCC No 230 of 2023 whereby the Appellant was found to have been 80% liable for the accident in which the Respondent was involved and was awarded General damages in the sum of Kshs 700,000/=.

2. Aggrieved by the decision of the trial court the Appellants filed this appeal based on the grounds that;

    a. The learned Magistrate erred in law and in fact in apportioning 80% liability against the appellant without considering the circumstances of the case.

    b. The learned trial magistrate erred in law and in fact in apportioning liability in the ratio 80:20 in light of the evidence placed before the court by both the appellant and respondents which did not prove on a balance of probability, negligence against the appellants.

    c. The learned magistrate erred in law and fact by failing to consider the evidence by the appellants as well as submissions, thereby arriving at an erroneous finding.

d. The learned magistrate erred in law and fact by relying on extraneous evidence not before the court thereby arriving at an erroneous finding.

e. The learned trial magistrate erred in law and fact by awarding the respondents an excessive and exorbitant amount of Kshs 700,000 for general damages, in total disregard of the submissions by the parties herein.

3. The appellants are seeking orders that:

a. Spent

b. The appeal be allowed as a consequence whereof the judgement made by the learned magistrate on 5th June 2024 be set aside and be substituted with an order dismissing the suit.

c. The honorable court be pleased to assess downwards the quantum of damages that may be awarded to the respondent.

d. This honorable court be pleased to apportion liability equally between the appellants and the respondent.

e. The respondent does pay the costs of this appeal and the costs in the lower court.

f. Such further relieve as may appear just to the honorable court.

4. The background of the matter is that the Respondent filed a suit against the Appellant vide a plaint dated 20th March, 2023 seeking Special damages, General damages for pain, suffering and loss of amenities and loss of future earning capacity, costs of the suit and the interests on special damages and General damages above at court rates. To support his claim the Respondent alleged that on or about 1st December 2022, he was walking off Christamarian-mashauri road in Kisii Town when the Applicant's driver, servant agent and employee so negligently drove, managed, and controlled motor vehicle KAP 126A that he caused or permitted the same to knock the Respondent, by reason of which he sustained physical injuries and has suffered pain, loss and damage. He thus prayed that the Appellants to be held jointly and severally liable vicariously or otherwise for the tortious acts and omissions of their driver, servant and or agent. This was supported by the Evidence of the plaintiff (PW2), Evans Nyamosi (PW3), Dr Morebu Peter Momanyi (PW4) and the police officer PC Moses Kasera (PW1).

5. In their defense, the appellant denied allegations against it and averred that the accident was not in any way due to negligence of the defendants and that if it had occurred and it was substantially contributed to by the negligence of the Respondent herein. Their case was supported by the Evidence of Paul Mwikali Kimani (DW1)

Issues and Determination

6. In regard to the applications and submissions made, the issues for determination are:

a. Whether the learned trial magistrate erred in law and fact in apportioning liability in the ratio of 80:20 in favor of the respondent as against the respondent.

b. Whether the learned trial magistrate erred in law and fact in awarding Kshs 700,000 as general damages.

7. This a first appellate court and it is the duty of this court is to re-evaluate the evidence on record and come to its own conclusion bearing in mind that it did not have an opportunity to see the witnesses as was held in the case of as was held in the case of *Gitobu Imanyara & 2 others v Attorney General* (2016)

eKLR, to wit;" ..... 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".

Whether the learned trial magistrate erred in law and fact in apportioning liability in the ratio of 80:20 in favor of the respondent as against the respondent.

8. According to the Appellants the trial court erred in finding that it was 80% liable to the accident. They contended that if this court was inclined to finding that the Appellant was responsible for the accident then, it should consider that the respondent contributed to the accident.

9. The Respondent on the other hand reiterates the findings of the trial court that the Applicant denied the accident but in the alternative attributed negligence to the Respondent but did not adduce any evidence to prove those particulars of negligence and cited *Joseph Kainda Maina v Evans Kamau Mwaura & 2 others* (2014) eKLR paragraph 46 quoted with approval the decision of Justice Lenaola J in *Esther Nduta Mwangi & another v Hussein Dairy Transporters Limited* Machakos HCCC No 46 of 2007:

> " Although the defendant denied the accident but pleaded in the alternative that the accident was as a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations. The plaintiff, on the other hand pleaded the doctrine of res ipsa loquitor and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of res ipsa loquitor was pleaded, the burden of proof was shifted to the defendant to disprove the particulars of negligence attributed to him."

10. The appellants argued that occurrence of the accident and the involvement of their vehicle were not proved. PW2 said he did not see the vehicle hit him, PW3 said they saw the vehicle hit PW1 who was walking ahead of him and he boarded another vehicle and chased the vehicle herein till Tosha petrol station and tried to stop the driver but he sped off towards Keroka direction. PW1 said that the accident occurred. He said he was not the investigating officer and he did not have the sketch plan or the police file. He said that preliminary investigations revealed the driver was to blame for the accident for being negligent. The appellants argued that it was not clear how the accident occurred and thus liability should be apportioned at 50: 50. The evidence of PW3 was on occurrence of the accident was not impeached. He was clear that the vehicle veered to their side and hit the respondent. This was prima facie evidence of negligence. Though the investigating officer and the police file were not availed this is a civil case and the standard of proof is that of balance of probability. The evidence of PW2 as supported by that of PW1, PW3 proved occurrence of the accident. The appellant claimed that the trial court erred in ignoring the authorities cited, I find no merit in this submission as the learned trial magistrate in his judgment clearly indicated that he had considered the submissions made by each of the parties.

11. I have considered the two positions held by the two parties as well as the findings of trial magistrate and in my view, I find, the learned trial magistrate did not err when she apportioned liability at the ratio of 80:20 in favour of the Respondent against the Appellants.

Whether the learned trial magistrate erred in law and fact in awarding Kshs 700,000 as general damages.

12. The respondent pleaded that he sustained left ula fracture, left elbow joint dislocation, bruises on the left elbow, blunt trauma to the back, blood loss and psychological pains and 10 % disability. This

was confirmed by the P3 form and the medical report of Dr Morebu produced herein. No medical evidence was called by appellants to counter the findings of Dr Morebu and the P3 form. In the case of *Maraga v Musila* (1984) 1 KLR 251, the Court of Appeal when addressing the issue of assessment of damages stated that; "The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles". Therefore, in order for an appellant court to alter the amount awarded, the rules established herein have to be proved, that:

a. The judge acted on a wrong principle of law.

b. Has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

The appellants, in their submissions, disputed the general damages awarded by the trial court. In his judgment the learned magistrate noted that general damages in the sum of Kshs 600,000/= was awarded for similar injuries in the case of *Joseph Njuguna Gacheo v Jacinta Kavuu Kyengo* (2019) eKLR, where the respondent suffered blunt temporal injury with swelling, facial bruises, blunt injury to forearm, comminuted fracture of left radius and dislocated left ulna joint. The learned magistrate proceeded to award Kshs 700,000.

13. The appellants cited the case of *Gogni Rajope Construction Company Limited v Francis Ojuok Olewe* [2015] eKLR, where the respondent sustained a fracture of the radius and ulna and a dislocation of the elbow joint and minor soft tissue injuries and general damages the sum of Kshs 350,000/= as awarded. The Gogni case cited by the appellants was old as it was decided in 2023 about 12 years ago while the Joseph Njuguna case was decided in 2019 which is about 6 years ago. The injuries in both cases are similar save that in the instant case there was 10 % resultant permanent. Disability. Considering the nature of the injuries sustained by the respondent herein, the trend of awards in recent decided cases for similar injuries, the cited cases and the inflation factor, I find that the award by the trial magistrate was adequate and I see no reason to disturb the same I therefore uphold the award of Kshs 700,000 as general damages.

14. In the upshot the appeal is devoid of merit and I proceed to dismiss it with costs.

T.A ODERA

JUDGE

11.6.25

DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS 11TH DAY OF JUNE 2025 IN THE PRESENCE OF:

Court Assistant - Kipchirchir