Njenga v Murage (Civil Appeal 71 of 2018) [2025] KEHC 7746 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 71 OF 2018

JK NG'ARNG'AR, J

JUNE 5, 2025

BETWEEN

JOSEPH MUTURI NJENGA .... APPELLANT

AND

JOSEPH KANGANGI MURAGE .... RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate's Court at Baricho (Hon. M. Kivuti, SRM.) delivered on 6th December 2018 in SPMCC NO. 120 OF 2016)

JUDGMENT

1. The appellant has appealed against the judgment of the Senior Resident Magistrate's Court at Baricho (Hon. M. Kivuti, SRM.), delivered on 6th December 2018. By plaint dated 1st December 2016, the respondent sued the appellant as the party in control, direction and management of the suit motor vehicle registration number KAR xxxB. Framuka Travel Services was also sued as the registered owner of the suit vehicle.
2. On 13th May 2016, the respondent was traveling as a passenger aboard the suit motor vehicle using the Sagana-Makutano road. On reaching Tabere area, the appellant drove the vehicle so negligently that the vehicle lost control, veered off the as a result of which, the respondent suffered an amputation of the left upper limb. The particulars of negligence were captured in the plaint.
3. The respondent averred that he had incurred Kshs. 17,500.00 arising from the medical report, the motor vehicle search results as well as medical expenses. He further sought for costs of a prosthetic arm as assessed. He continued that as at the time of the accident, he was 29 years of age earning Kshs. 8,000.00 monthly. However, due to his diminishing earning capacity resulting from the injury he had sustained, he sought for loss of earning capacity. He thus prayed for general damages, special damages of Kshs. 17,500.00, damages for loss of/diminished earning capacity, costs and interest.
4. In its judgment dated 6th December 2018, the trial magistrate found that the appellant and his co-defendant were liable. Accordingly, judgment was entered at Kshs. 2,510,200.00 accounting for Kshs.

2,500,000.00 in general damages and Kshs. 10,200.00 in special damages. The respondent was further awarded costs of the suit and interest thereon. The appellant is aggrieved. In its amended memorandum of appeal dated 25th August 2023, the appellant raised a prolix 20 grounds of appeal summarized thus:

5. The learned magistrate arrived at an incorrect decision on account of the fact that the 1st defendant failed to participate in the proceedings and the respondent's case was replete with inconsistencies, falsities, dearth of evidence and was not corroborated; the appellant was not properly served with the summons to enter appearance and consequently failed to participate in the hearing of the matter; the defendant did not file (sic) an affidavit in support of his application dated 1st December 2016; the trial court refused to hear the application dated 22nd October 2018; the learned magistrate allowed the respondent to proclaim and sell the appellant's motor vehicle registration number KAX xxxC; and the trial magistrate allowed the enforcement of the decree based on a proclamation notice that was found wanting by dint of Cause No. 23 of 2029.

6. In the premised circumstances, the appellant prayed that the appeal be allowed, the judgment and consequential orders be set aside and the execution of the decree be stayed. In the alternative, he prayed that the court does order for a retrial. Finally, he prayed for costs in this appeal and those at the trial court.

7. The appeal was disposed of by way of submissions. In his written submissions dated 13th March 2025, the appellant submitted that there was no ratio of liability shared between the appellant and his co-defendant. He lamented that the driver of the suit vehicle was not joined as a party. He emphasized on the contents of his draft memorandum of appeal further adding that the plaint was not supported by a supporting affidavit. He prayed that his appeal be allowed.

8. The respondent opposed the appeal. He filed written submissions dated 9th April 2025. He pointed out that the grounds in the appellant's memorandum of appeal at 7, 17, 19 and 20 had been overtaken by events since the execution of the decree had been partially discharged. He urged this court to condemn the appellant for filing an omnibus appeal that challenged the judgment post ipso facto; a procedure not known in law. Summarizing the facts giving rise to the suit, the respondent submitted that the judgment on lability was sound and arrived at on proper principles and supported by the undisputed evidence on record. On quantum, the respondent submitted that the trial magistrate applied the correct principles as a result of which the decision arrived at was just and ought not to be disturbed. He prayed that the appeal be dismissed with costs.

9. I have considered the memorandum of appeal, examined the submissions of the parties as well as record of appeal and analyzed the law. As a first appellate court, my role is to reassess, reevaluate and reanalyze the evidence on record and make my own independent conclusions bearing in mind that I had no advantage of seeing or hearing the witnesses and make due allowance for that. [See *Selle & another vs. Associated Motion Boat Co. Ltd & others* (1968) EA 123.]

10. At the onset, I must also point out that this appeal shall be strictly confined to the impugned judgment. The actions or lack thereof complained by the appellant are not part of this appeal since he was very clear, from his memorandum of appeal, that it was an appeal from the judgment and decree of the trial court. For that reason, I will only deal with the proceedings leading up to the judgment. If the appeal succeeds, needless to say that al consequential orders arising from the judgment shall be set aside.

11. The record before us shows that the suit proceeded undefended initially. However, the appellant applied to set aside those proceedings. By consent of the parties, the ex parte proceedings were set aside on 20th September 2018 paving way for the taking of viva voce evidence.

12. According to the facts captured in the record, PW1, the respondent, testified that he was lawfully aboard motor vehicle registration number KAR xxxB on 13th May 2016. He was at work as a turn boy ferrying fresh market produce from Kerugoya County to various markets in Nairobi. He was employed by the appellant who did not furnish them with letters of employment. To his knowledge, the appellant was also the owner of the suit vehicle. On that fateful day, he was seated as a co-driver. He had fastened his seat belt during the journey. There was also a turn boy called Paul aboard the suit vehicle.

13. On reaching Tabere concrete area, the driver of the motor vehicle, one Koigi, encountered a vehicle that had stalled on the road that was 15 – 20 meters ahead. The driver was freewheeling and could not engage the brakes since it was being driven at a high speed. Resultantly, the driver lost control, causing the vehicle to overturn and roll thereby occasioning an accident.

14. PW1 sustained severe injuries. He fell unconscious. He was taken to Focus Clinical Laboratory and later to Thika Level 5 Hospital. Between 13th May 2016 and 17th May 2016, his arm developed pain. He was thus taken to Kwa Nyaga Hospital alias Kagio Nursing Home and referred to Kerugoya County Hospital where he was admitted for two weeks from 17th May 2016 to 29th May 2016and had his left arm amputated above elbow.

15. The accident was reported at Sagana Traffic Base where PW1 was issued with a P3 form and a police abstract. He thereafter visited Dr. F.W. Muleshe who prepared a medical report costing Kshs. 3,000.00. He added that a search at the motor vehicle registry was done confirming that the appellant's co-accused was the owner of the vehicle. These documents were adduced in evidence together with his discharge summary from Kerugoya Hospital, receipts for all medical expenses, a letter from Thika Level 5 Hospital and chemical pathology report from Focus Clinical Laboratories dated 17th May 2016.

16. PW1 blamed the driver for occasioning the accident since he was driving too fast; the reason he was unable to brake in good time. He testified that due to the amputation of his left arm, he was unable to find employment. He recalled that he was in the manual labour industry as a turn boy/loader and would earn Kshs. 8,000.00 monthly. However, he has been unable to gain employment. Finally, he stated that he required funding to fix a prosthetic arm.

17. DW1, the appellant testified that he is a business man and motor vehicle registration number KAR xxxB was registered in the name of his friend, Framuka Travel. He further confirmed that he used it to run his business having taken out an insurance policy for the year 2017 which was produced in evidence. He testified that the driver one Koigi was employed to transport produce from Kirinyanga to Nairobi. He had also employed a turn boy called Paul.

18. His evidence was that on the fateful day, the motor vehicle was parked. He had indicated that the vehicle did not admit unauthorized passengers or goods. He denied knowing PW1 and asserted that he neither authorized nor was informed by his driver that any unauthorized passengers boarded the vehicle. He stated that his vehicle was in good condition, was not called during its inspection, his driver was not charged with any traffic offence, was not present when the passenger boarded his vehicle, did not pay for PW1's treatment, was not informed of his injuries, was not liable to pay and was not served with any demand letter. However, he stated that he was aware that an accident occurred on 13th May 2016. Finally, there were many loaders in Kagio town.

19. It is not disputed that an accident occurred on 13th May 2016 involving motor vehicle registration number KAR xxxB. It is also not disputed that the appellant was the beneficial and resultant insured owner of the vehicle while his co-defendant, namely Framuka Travel Services, was its registered owner. According to the uncontroverted police abstract, an accident occurred on 13th May 2016 at 12:30 a.m. at Tabere area involving motor vehicle registration number KAR xxxB. It was indicated that it was a

self-involving accident. The respondent was recorded to have sustained serious injuries. His P3 form, which was also not disputed, similarly confirmed that an accident occurred on that day.

20. Though the appellant denied that the respondent was not on the vehicle, it is apparent that he was not at the scene of the accident as to establish the veracity of whether he was aboard the vehicle or not. This also discounted his evidence to the extent that the vehicle was parked on that day. It may well have been parked on that day but the vehicle was certainly in motion on the night of 13th May 2016 at 12:30 a.m.

21. The appellant also testified that the respondent was not in his employ. I am of the considered view that once the respondent testified that he was employed but had no contract with the appellant, the evidentiary burden shifted to the appellant to establish that the allegations were not true. Instead, he merely denied without any corroborative evidence. Accordingly, I find that the respondent was indeed employed at the time of the accident by the appellant.

22. Turning to the circumstances of the accident, this court observes that though Koigi is mentioned as an instrumental witness, the appellant, who is his employer, did not call him as a witness. He probably would have shed light on the circumstances leading up to the accident in the lens of the appellant. Contingently, it may have assisted the trial court in holistically assessing those circumstances. In its absence, the evidence of the respondent remained uncontroverted to the extent of the circumstances leading up to the accident. In any event, from the record, the respondent appeared to be a credible witness who in spite of being was vehemently cross examined, remained unshaken.

23. I therefore find that on a balance of probabilities, Koigi was driving the suit vehicle, occupied by the respondent and one Paul. On reaching Tabere area, the driver of the motor vehicle encountered a vehicle that had stalled on the road that was 15 – 20 meters ahead. He was freewheeling and could not engage the brakes since it was being driven at a high speed. Resultantly, he lost control, the vehicle overturned and rolled thereby causing an accident.

24. Since this was a self-involving accident, I find that the respondent could not be held liable. Accordingly, I find that the trial court properly found that the appellant was 100% vicariously liable for the accident while Framuka Travel Services was liable as its registered owner. The appeal on that ground thus lacks merit and is hereby dismissed.

25. On quantum, the Court of Appeal in the case of *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR established following principles when being urged to interfere with the trial court's assessment of general damages:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, JA that: "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

26. The respondent relied on his discharge summary to demonstrate that his left arm above the elbow had been amputated. That was not in dispute. He also produced a letter from Thika Level 5 Hospital to demonstrate that he was treated at the facility. The respondent was admitted between 17th May 2016 and 31st May 2016. It is instructive to note that a chemical pathology report from Focus Clinical Laboratories dated 17th May 2016, his P3 form and the medical report by Dr. F.W. Muleshe assessed the degree of permanent incapacity at 50%. Furthermore, the estimated cost of the prosthetics was found to be Kshs. 500,000.00. Similarly, these documents were not disputed with evidence.

27. The trial court took into account the submissions of the respondent since the appellant did not submit on that issue. He has similarly not submitted before this court on the award of quantum in terms of its assessment. In his view, the assessment ought not to have been there ab initio. However, the appellant sustained permanent injuries as a result of the accident. He has also diminished his earning capacity arising from the amputation. He is surely entitled to general damages and special damages for the expenses incurred.

28. The trial court cited several decisions in analyzing the awards under different heads and this court needs not to reproduce them. It is important to state that the awards were based on comparative judicial authorities. I have therefore nothing to fault the trial court. I find that the learned trial magistrate did not act upon some wrong principles of law, or that the amount awarded was extremely high or low as to maki it an entirely erroneous estimate of the damage to which the respondent is entitled to.

29. The awards under the different heads were properly assessed and the principles applied were correct as to arrive at a proper finding in the award on general damages of Kshs. 2,500,000.00 and special damages of Kshs. 10,200.00 which were proved to that extent.

30. The upshot of my above analysis is that the appeal herein lacks merit. It is hereby dismissed with costs to the respondent.

It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025 IN THE PRESENCE OF;

Muturi holding brief for the Appellants

No appearance for the Respondents

Siele /Mark (Court Assistants)

…………………………….

J. NG'ARNG'AR

JUDGE