Mbote & another v Kisa (Civil Appeal E312 of 2024)
[2025] KEHC 11688 (KLR) (Civ) (25 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11688 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E312 OF 2024

DKN MAGARE, J

JULY 25, 2025

BETWEEN

JAMES MBOTE AKA FRED .... 1ST APPELLANT

ROYAL OILFIELDS LOGISTICS SERVICES AND SUPPLIES LIMITED .... 2ND APPELLANT

AND

EPHAEL MMBONE KISA .... RESPONDENT

(Appeal from the Judgment and decree of Hon. N. Ruguru (Senior Principal Magistrate) delivered on 2.2.2024 in Nairobi CMCC No. 8568 of 2017)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. N. Ruguru (Senior Principal Magistrate) delivered on 2.2.2024 in Nairobi CMCC No. 8568 of 2017. The Appellants were the Defendants in the lower court. The court heard the matter and delivered judgment as follows:
    a. Liability 100%
    b. General damages Ksh. 1,800,000/=
    c. Special damages Ksh. 4,450/=
    d. Costs and interest of the suit
2. The appeal is against liability and the award of damages. However, the Appellant filed a 5-paragraph Memorandum of Appeal, 4 grounds on liability and one on quantum.

3. The grounds are thus ancillary, repetitive, prolixious and a waste of judicial time. This court will have to deal with whether the magistrate erred in finding the Appellant liable and in the award of the damages. The only two issued are whether the court misapprehended evidence in its finding on liability and whether the award of damages was inordinately high.

Pleadings

4. The Plaint dated 13.9.2017 and amended on 5.3.2021 claimed damages arising from injuries caused through an accident that occurred on 14.9.2016 involving the Respondent and the Appellants' motor vehicle registration number KBW 888P that occurred when the Respondent was crossing Lower Kabete Road. The motor vehicle is said to have collided with the Respondent. The Respondent pleaded particulars of negligence on the part of the Appellant and also that he suffered the following injuries:

    i. Blunt scalp and facial injuries causing swelling

    ii. Fracture of 3 ribs

    iii. Fracture of the sacrum

    iv. Fracture of the right superior pubic ramus

    v. Fractures of the right inferior pubic ramus

    vi. Flexion deformity of the left middle finger

    vii. Permanent disability at 6%

    viii. Bruising of the right leg

5. The 1st Defendant entered appearance and filed defence dated 8.6.2021 denying liability and injuries and blaming the Respondent for the accident.

Evidence

6. PW1 was Dr. Washington Wokabi. He produced his medical report dated 6.4.2017. There were no questions on cross examination.

7. PW2 was the Respondent. The accident occurred on 14.9.2016 at around 8 pm. She was crossing from right to left. She was almost finishing crossing when an overtaking car hit her. She produced her bundle of documents. On cross examination, it was her case that the driver was overtaking at a high speed. She also testified that she did not alight from any vehicle as she was walking crossing the road. She checked on both sides and it was clear but while crossing, the accident motor vehicle emerged abruptly while overtaking. It was her case that the road was well lit.

8. DW1 was James Mbote, the 1st Defendant. He produced the police abstract and claim documents in the list of documents and relied on his witness statement. According to him, he was heading home from work. A matatu had stopped abruptly on the right hand side of the road. He saw a lady crossing the road running. He was not overspeeding. He did not know he had hit the lady as he sensed he had touched her. He stopped and came back and took the lady to MP Shah Hospital. On cross examination, it was his case that at the accident point, it was dark. The road had spaced street lights.

Submissions

9. The Appellant filed submissions dated 25.2.2025. It was submitted that the Respondent did not prove liability and the lower court so awarded 100% liability in favour of the Respondent in error. He submitted that both parties were to blame for the accident at 50:50 and relied inter alia on Holistic Educational Trust v Mulatya alia Musau Mulatya Samson & Another (2024) eKLR.

10. The Appellant submitted further that the award of Ksh. 1,800,000/= in general damages was inordinately high. The authorities relied upon however presented dissimilar injuries ranging from metacarpal bone fracture, fractures of the tibia and fibula and fracture of the humerus. The cases were cited based on the permanent of disability. There has to be coherence in the injuries before permanent disability can apply. The cases included Mule v Heven (2024) eKLR. And China Road & Bridge Limited v Muthuva (2023) eKLR.

11. The Respondent submitted that the Appellant was 100% liable for the accident. She supported the injuries as pleaded and proved by medical evidence. Reliance was placed inter alia on Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo (2019) eKLR.

Analysis

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

13. The duty of this court in the appeal is thus to reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

14. On liability, the Respondent had the duty to prove her case against the Appellant. 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."

15. The balance of probabilities is also about what is likely to have happened than the other. In Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 it was held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent

is appropriated in the particular case, that the more serious the 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….."

16. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of appeal held that:

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

17. The Respondent's evidence was that she was crossing the road at Lower Kabete from right to left. The Respondent came overtaking and hit her. The Appellant denied overspeeding. However, the issue was not overspeeding. The issue was driving a high speed in the circumstances. The Appellant's case was that he saw the Respondent running. Here, the Appellant ought to have been cautious. Running across the road, even if it was the case, did not entitle the Appellant to hit the Respondent.

18. The Respondent proved negligence on the part of the Appellant. The Appellant, conversely did not plead and prove circumstances but for which he would have avoided the accident. There was no testimony or evidence that he slowed down, braked, swerved or that the Respondent emerged so abruptly that the Appellant had no time to control his motor vehicle from hitting the Respondent.

19. The evidence of the abstracts have no bearing on the question of liability. It is only the investigating officer who could have clarified the issues of the police finding. In absence of the police findings the court will rely on the witness accounts. The court found the respondent's evidence more believable. Upon evaluating the evidence, there is no basis to differ with the lower court. The jurisdiction for this court to review the evidence in the lower court should be done but with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

20. The court found that the appellant saw the respondent cross the road. However, he pleaded no evasive action taken. From the nature of injuries and impact, it is not possible to believe the appellant's evidence. The court below was correct that the Appellant was fully to blame. The appellant was not able to prove contributory negligence. It must be remembered that it is not illegal to cross the road. The Respondent was required to take precautions which she did. Consequently, the defence of contributory negligence thus fails. In the case of Mombasa Maize Millers & another v Elius Kinyua

Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
>
> > "......When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

21. I therefore find no basis upon which to fault the finding of the lower court on liability. I uphold liability of 100% against the Appellant.

22. On quantum, the Court of Appeal pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

23. For the Appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

24. Therefore, where damages are proved to be at large, they must be commensurate with similar injuries. The injuries that the Respondent suffered were as follows:

    i. Blunt scalp and facial injuries causing swelling

    ii. Fracture of 3 ribs

    iii. Fracture of the sacrum

iv. Fracture of the right superior pubic ramus

v. Fractures of the right inferior pubic ramus

vi. Flexion deformity of the left middle finger

vii. Permanent disability at 6%

viii. Bruising of the right leg

25. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...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.....”

26. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

27. The injuries were undisputed and I find that these were the injuries that the Respondent suffered. As regards general damages, the lower court awarded Ksh. 1,800,000/=. This was based on the authority of Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo (supra). In the said case, the doctor summarized the injuries sustained as pelvic fracture and open back facial bruises. I have to analyze whether the award of Kshs. 1,800,000/- was inordinately high in the circumstances of this case.

28. In case of Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs Naomi Gaima Galgalo (supra) on appeal, the court substituted an award of Kshs. 2,000,000/= with an award of Kshs. 1,400,000/=. The plaintiff in that matter had sustained a pelvic fracture and open back facial bruises.

29. In Wurano Tosha & another v DMK [2021] eKLR (Chitembwe, J), the appellant had sustained complex pelvic fractures, a fracture of the left transverse process, a fracture of the coccyx, a fracture of the 4th metatarsal and fractures of the 2nd to 4th ribs, with permanent disability at 22%, and an award of Kshs 2,500,000.00 was made.

30. In Penina Waithira Kaburu v LP [2019] eKLR (Ngaah, J), the appellant had sustained multiple fractures of the pelvis, and an award of Kshs 2,000,000.00 was made. I am persuaded that the award of Kshs 2,500,000.00 was within the range.

31. In Latema 22 Travellers Sacco Society Limited v Nyakwara & 2 others (Civil Appeal E071 of 2022) [2024] KEHC 5415 (KLR) (Civ) (6 May 2024) (Judgment) the High Court upheld an award of Kshs 2,500,000.00 for the Plaintiff who suffered multiple fragmented fractures of the right superior and inferior public rami, fracture of the left acetabulum, fracture of the left iliac bone, fracture of the

sacrum, fracture of the transverse process, partial dislocations of the left sacral iliac joint and the midline of the pelvis, and anal rectal injury.

32. The award was high but not inordinately high as to amount to an erroneous estimate of damages. The duty of the court, sitting as a first appellate court is not to substitute the opinion of the court with its own. The injuries that the Respondent suffered are largely similar to the above authorities in that she suffered multiple fractures involving the ribs, sacrum and pubic ramus. The damages must be commensurate to the injuries for consistence in the judicial award. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

33. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

34. Based on the above principles and similar fact cases, the award of Ksh. 1,8000,000/= for general damages, though high, it cannot be said to be inordinately high. It was commensurate to the injuries that the Respondent suffered. I uphold it. There was no appeal against the award of special damages and I will not interfere with this award.

35. I uphold the finding of the lower court on both liability and quantum and dismiss the appeal.

Determination

36. The upshot of the foregoing is that I make the following orders: -

    a. The appeal lacks merit and is dismissed.

    b. The Respondent shall have costs assessed at Ksh. 105,000/=

    c. File is closed.

DELIVERED, DATED and SIGNED at NYERI ON THIS 25TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Ms. Kanani for the Respondent

Court Assistant – Michael