



**Hamisi & another v Nyamweya (Civil Appeal E060 of 2021)
[2024] KEHC 109 (KLR) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E060 OF 2021**

**FR OLEL, J
JANUARY 17, 2024**

BETWEEN

MOHAMMED HAMISI 1ST APPELLANT

BUSINESS TRAVELLERS LIMITED 2ND APPELLANT

AND

EVANS NYAKUNDI NYAMWEYA RESPONDENT

(Being an appeal from the judgment of Hon L Sarapai (P.M) delivered on 21st September 2020 in the Naivasha Chief Magistrate Court Civil suit No. 18 of 2015)

JUDGMENT

A. Introduction

1. This appeal arises from the judgment/decree of Honourable L Sarapai Principal Magistrate delivered on 21st September 2020 in Naivasha Chief Magistrate court case no. 18 of 2015, where she apportioned liability at 80:20 in favour of the respondent and further awarded the Respondent a total of Ksh.405,000/= as General and Special Damages.

B. Background

2. The Respondent's had filed a plaint dated 27th January 2015, against the appellant's claiming damages in tort. In the plaint and his witness statement, the respondent averred that on the 01.09.2013, he was a lawful passenger in motor vehicle KBF 880H-Nissan Bus Coach(hereinafter referred to as the suit motor vehicle), which suit motor vehicle was being driven along Nairobi – Maai Mahiu road at Muskiti area, when the 1st and 2nd appellants authorized driver negligently and carelessly drove the said suit motor vehicle as a result of which he cause it to hit motor vehicle registration KBH 576C from behind and as a result the suit motor vehicle veered off the road and rolled several times causing him to suffer severe injuries, loss and damage.



3. The appellants on their part did file a statement of defense where they denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellants further denied all the particulars of negligence, carelessness and recklessness attributed to them and/or their servant, employee or agents and stated in the alternative that if indeed an accident occurred, it was substantially contributed too by the respondent's negligence which were particularized in the said defense filed. The appellants further blamed a third-party being driver and owner of motor vehicle KBH 576C and attributed the accident to the third party driver negligence.
4. The parties did record a consent on 09.02 2021, where judgment on liability was endorsed at 80:20 in favour of the respondent. The matter thus went for trial with respect to assessment of damage's suffered.

C. Evidence

5. PW1 Evans Nyakundi Nyamweya testified and adopted his witness statement as part of his evidence in chief. He further testified that as a result of the accident the suit motor vehicle rolled over and he did injure his chest, sustained cut wounds on his right fingers, cut wounds on him left arm, cut wound on the Knee and also injuries to the back and ribs. He still had excessive pain on the knee and could not climb hills or drive for long hours.
6. After the accident he lost consciousness and found himself admitted at Mai Mahiu hospital. Later he was discharged and got further treatment at Manga District Hospital. The witness produced his claim supporting documents and prayed for compensation. In cross examination he maintained that he suffered sever injuries as earlier enumerated in his evidence in chief/pleadings and further stated that as a result of the said accident he could not drive for long distance as his knee still hurt and he was still taking pain killers.
7. PW2 Dr Wellington Kiamba confirmed that he examined PW1 and prepared his medical report which he produced into evidence as Exhibit 5(a) and the receipt as Exhibit 5 (b). PW 1 had sustained multiple soft tissue injuries on the head, chest, back and cut wounds on the hand and knee. He confirmed that PW1 had recovered from the injuries but still experienced pain on the chest, back and knee. He classified the injuries suffered as "Harm". In cross examination the doctor did confirm that he examined PW1 two years after the accident and though he had recovered, he still complained of pain in the knee and backache and that was a limiting factor.
8. The appellant did not call any witness and opted to close their case. Upon considering the submissions filed, the trial court did enter judgment for the Respondent as against the appellant's in the following terms;
 - i. Liability 80:20
 - ii. General Damages Ksh.400,000/-
 - iii. Special damages Ksh. 5,000/-Total Ksh.405,000/=
9. The appellants being wholly dissatisfied by the said judgement did file their memorandum of appeal dated 12th October, 2021 and raised the following grounds of appeal;
 - a. That the learned magistrate erred in law in making a finding of damages against the Defendants.



- b. That the trial magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
- c. That the learned Magistrate erred in law and in fact in failing to appreciate the impeccable defence of the defendant thereby arriving at a wrong and erroneous conclusion condemning the defendants to General Damages of Kshs 400,000/= without any tangible proof of the same.
- d. That the learned trial magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs 5,000/=-, allegedly spent in what the plaintiff turned to be merry celebration without concrete documentary evidence.
- e. That the learned magistrate erred in law and in fact in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to excess quantum and special damages without concrete documentary evidence.
- f. That the trial magistrate erred in law and in fact by failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
- g. The learned trial Magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.
- h. That the learned Magistrate erred in law and fact in entering judgement in favour of the plaintiffs against the defendants in spite of the plaintiffs miserable failure to establish her case more specifically on quantum.
- i. That the learned trial Magistrate decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of Justice.
- j. That the learned trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented, filed by the appellants.
- k. That the learned trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;

Analysis and Determination

- 10. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
- 11. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding.



This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari vs Purushottam Tiwari (Deceased) by L.Rs* (2001) 3 SCC 179.

12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko vs Varkey Joseph* AIR 1969 Keral 316.
13. The appellant's in their memorandum of appeal had raised eleven (11) grounds of Appeal, which grounds are repetitive. The only issue the appellants are challenging is the quantum awarded for being excessive.
14. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] eKLR 55 set out 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 in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors or 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”.

15. Similarly, in *Jane Chelagat Bor vs Andrew Otieno Oduor* [1988] – 92] eKLR 288 ; [1990-1994] EA 47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

16. The appellants challenged the award Kshs 405,000/= and stated that the same was inordinately high and was not commensurate with the injuries suffered. The respondent had suffered soft tissue injuries, which was confirmed by PW2 Dr Wellington Kiamba to have healed and thus considering similar injuries for similar awards the damages ought to be reduced to Ksh.80,000/=. Reliance was placed on *Ndungu Dennis vs Ann Wangari Ndirangu & another* (2018) eKLR and *Eva Karemi & 5 others vs Koskei Kieng & Another* (2020) eKLR.
17. The respondents on the other hand urged this court to uphold the award as the respondent did suffer multiple injuries and produced medical documents to support his claim. The trial magistrate did consider various decision's with similar injuries and proceeded to properly award the respondent Kshs 405,000/=. The said award was also guided by prevailing economic conditions and the court was urged not to interfere with the same. Reliance was placed on *Kiwanjani Hardware Ltd & Another vs Nicholas Mule Mutinda* HCCA 16 of 2008 Machakos , *HB (Minor suing through mother and next friend) DKM vs Jasper Nchonga Magari & Another* (2021) eKLR , *Nance vs British Colombia*



Electrical Railway Co Ltd (1951) A.C 601, 613 and *Sospeter Kimutai & Another vs Isaac Kipleting* Boit HCCA No 68 of 2019 Naivasha.

18. The respondent suffered soft tissue injuries, which he did adequately approve by the medical documents presented and admitted into evidence. PW2 Dr Wellington Kiamba in his Medical Report dated 15.01.2015 did confirmed these injuries and further stated that the respondent had recovered from the injuries sustained during the accident, however he suffered from Backache, pain in the chest and on the Knee joints. He classified the injuries as “Harm.”
19. The award of Kshs 400,000/= for the soft tissue injuries sustained by the Respondent, constituted an awarded which was excessive and inordinately high for the injuries suffered, when considered with similar injury awards. To that extent the trial magistrate did error and this court has no option but to intervene to correct the erroneous estimate of damages awarded.

Disposition

20. This appeal is thus succeeding. The award of Ksh.400,000/= issued by Hon L Sarapai (PM) in Naivasha CMCC No 18 of 2015 vide its judgment dated 21st September 2020 is hereby set aside and the same is reduced to Kshs 150,000/=.
21. The finding on liability and special damages will remain the same, as earlier awarded.
22. The appellants are awarded half costs of this appeal.
23. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY 2024.

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF JANUARY 2024.

FRANCIS RAYOLA OLEL

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JUDGE

In the presence of;

No appearance for Appellant

No appearance for Respondent

Susan/ Sam - Court Assistant

