



REPUBLIC OF KENYA



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**Indumwa v Bii (Civil Appeal E046 of 2021)
[2024] KEHC 431 (KLR) (10 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E046 OF 2021
SN MUTUKU, J
JANUARY 10, 2024**

BETWEEN

EMILY AFANDI INDUMWA APPELLANT

AND

NAOMI CHEPKOECH BII RESPONDENT

JUDGMENT

1. The Respondent herein instituted a suit in the lower court through a Plaint dated 16th January 2020 seeking damages on account of a road traffic accident which occurred on 23rd August, 2019.
2. In a judgment delivered on 1st October 2018, the learned trial magistrate found in favour of the Respondent in the sum of Kshs 630,000/- less 20% contribution plus special damages of Kshs. 3550/- together with costs.
3. The Appellant was aggrieved by the said judgment and has preferred this Appeal.

Memorandum of Appeal

4. In the Memorandum of Appeal dated 2nd September 2021 the Appellant has raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and in fact in apportioning liability at 20:80% despite the weighty evidence tendered by the Appellant that the Respondent was the author of her own misfortune as she was riding her motorcycle on the wrong side of the road and failed to give way to oncoming traffic when the accident occurred.
 - ii. That the learned trial magistrate erred in law and in fact by awarding general damages which were extremely high without considering that the evidence adduced by the Respondent relating to the nature of injuries suffered was at variance with her pleadings.



- iii. That the learned trial magistrate erred in law and in fact by failing to critically analyze the evidence adduced by the parties thereby reaching a wrong finding on both liability and quantum.
 - iv. That the learned trial magistrate erred in law and fact by making findings which were not supported by evidence on record.
 - v. That the learned trial magistrate erred in law and fact by failing to take into account the evidence and written submissions given on behalf of the Appellant both on the issue of liability and quantum while considering her judgement.
5. The Appellant seeks orders that the Appeal be allowed; that this Honourable Court be pleased to set aside the finding on liability and assess liability afresh or dismiss the suit; that this Honourable Court be pleased to set aside the award on damages for pain and suffering or in the alternative review the same downwards and that the Appellant be awarded the costs of this Appeal and of the lower court case. The Appellant further seeks any other Order in the interest of justice.
6. The Appeal was canvassed through written submissions as directed by this court.

Appellant's Submissions

7. In her submissions dated 25th August 2023 the Appellant raised four issues for determination:
- a. Whether the holding that the Appellant was 80% liable for the accident by the trial magistrate was proper given the weighty evidence tendered by the Appellant that the Respondent was the author of her own misfortune?
 - b. Whether the Respondent was entitled to any damages and if so how much?
 - c. Whether the trial court's award in general damages was excessive?
 - d. Who should bear the costs of this Appeal?
8. On the first issue it is submitted that this honorable court should re-evaluate and re-assess the evidence adduced before the trial court and arrive at its own independent conclusions (*Selle -vs- Associated Motor Boat Company* 1968 EA 123).
9. It was submitted that the Appellant's case against the Respondent showed that the Respondent was to blame wholly for the accident as testified by the Investigating Officer, DW1, who stated that the Respondent caused the accident as she was riding on the wrong side of the road and encroached on the correct lane of the motor vehicle KBW 944K causing the accident; that this testimony was corroborated by the evidence of DW2 that the Respondent was at fault; that the Respondent did not adduce any evidence in rebuttal and that the Respondent should bear the greater burden on liability. The Appellant urged this court to set aside the lower court's judgement and find the Respondent 100% liable or in the alternative apportion the same at 90:10%.
10. The Appellant cited a number of cases as shown on the face of the submissions, among them *Jacob Momanyi Orioki -vs- Kevian Kenya Limited* [2018] eKLR, which was cited with approval in the case of *Dickson Ciuri Wanjiru -vs- Municipal Council of Nakuru & another* [2020] eKLR where it was held that:

“Going further, the police abstract was clear that the Appellant was blamed for having caused the accident. Although the police were not called to tender in evidence the said police Abstract Report, the appellant did not object to the same being produced in court by



the Respondent. In the absence of any documentary evidence to the contrary, this court concluded that the Respondent case had remained unrebutted and /or uncontroverted. The judge further held: For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged in court on 9th July 2014 was not merited and the same is hereby dismissed. The decision of the Learned Trial Magistrate’s decision is hereby upheld. Appellant will bear the Respondent’s costs of this Appeal.”

11. It was submitted that the Respondent failed to prove negligence against the Appellant. She relied on the case of *East Produce (K) Limited -vs- Christopher Astiada Osiro* in Civil Appeal No 43 of 2001, which was cited with approval in the case of *Dickson Ciuri Wanjiru -vs- Municipal Council of Nakuru & another* [2020] eKLR where it was held that:

“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* 1991 where it was held that “there is a yet no liability without fault without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based.”

12. On the second ground she submitted that it is trite law that parties are bound by their pleadings. That in the Plaint at paragraph 5 sets out the injuries as compound fracture of the right tibia and fibula. That this was supported by the medical report dated 29th November 2019 by Dr. Okere (Ex 6); that during evidence in chief the Respondent stated that she had suffered compound fracture of the left leg and even pointed to the said leg. That this was confirmed by the medical report of Dr. Waithaka Mwaura dated 9th June, 2021 adduced by the Defendant and marked as D exh-3. It was her submissions that the pleadings were not amended and that the Respondent cannot plead for damages on her right leg then at trial, a departure from the pleadings and seek damages for injuries on her left leg.
13. She further submitted that Order 2 Rule 4 of the *Civil Procedure Rules* provides that the nature of injuries suffered by a party must be specifically pleaded. The pleadings on this claim must fail. She relied on *Patrick Muiru Kamunguna -vs- Kaylift Services Ltd & another* (2021) eKLR on the point that parties are bound by their pleadings. She also relied on *Boniface Kinyua Kathuri -vs- David Munyoki* [2020]eKLR where it was held that:

“This court takes a similar position because a party cannot plead for instance that he suffered certain injuries on the head but during trail and out of the blue goes ahead to list different injuries suffered on the stomach. The omission in my view is fatal. Allowing parties to depart from his/her pleadings is undesirable and a violation of the rules because the result would be to expose the opposing party to unfair trial. A defendant in tortuous claims based on negligence should be able to know specifically what he/she is going to defend in court. When a party pleads specifically the nature and the extent of injuries like the Appellant clearly did at the trial, but goes on to prove different nature of injuries that amounts to an ambush the same is not only unfair but a violation of the rule cited above. In that respect the Appellant really cannot blame the trial Magistrate for applying the law in the manner he did. He can only blame himself for the omission because he had the chance to amend his pleadings if he discovered that the nature and extent of injuries pleaded were not in tandem with the medical documents he was relying on.

It is my considered view that the obligation placed by law on the Plaintiff in claims based on tort of negligence to specifically plead the nature and extent of injuries means that a plaintiff cannot make a general claims and leave gaps to be filled by assumptions by the defendant or



the court. That would be a risky venture and omission. A pleading is everything because a party is bound by his/her pleadings. Where gaps are discovered, the law provides windows/avenues to seal the loopholes in his/her pleading which is through amendments.”

14. On whether the general damages awarded were excessive, it was submitted that the Appeal court can interfere with an award if it is shown that the award was inordinately high or low as to present an erroneous estimate; that the awarding court proceeded on wrong principles or misapprehended the evidence and that the court considered irrelevant factors or left out relevant factors in assessing the damages.
15. It was their case that the injuries sustained by the Plaintiff as per the medical report by Dr. Okoth Okere were compound fracture of the right tibia and fibula with a degloving injury on the posterior part of the ankle. The injuries were classified as grievous harm and degree of incapacity at 30%. It was their case that an award of Kshs. 630,000/- was too excessive and cited various authorities shown on the face of their submissions. She submitted that an award of 400,000/- less 90% liability would leave a balance of Kshs. 40,000/- which would be sufficient.

Respondent’s submissions

16. The Respondent’s submissions are dated 16th October, 2023. She has raised three issues for determination as follows:
 - a. Whether the magistrate erred in law and in fact when apportioning liability at 20:80% in favour of the Respondent?
 - b. Whether the magistrate erred in law and in fact by failing to take into account that the nature of injuries suffered by the Respondent was at variance with her pleadings?
 - c. Whether the general damages of Kshs. 630,000/- awarded to the Respondent by the magistrate were extremely high in law and in fact?
17. On the first issue, the Respondent while recapping the duty of this court sitting on first appeal, submitted that it is clear from the lower court record that the issue for contention was how the accident occurred; that the lower court was presented with two scenarios and the court was tasked with determining what scenario was more probable; that the magistrate was right in agreeing that the accident was due to the Appellant’s fault and agreeing with the Respondent that the accident occurred on the pavement.
18. It was submitted, further, that the magistrate noted the evidence of DW1 that the accident occurred on the pavement; that the accident occurred because the Appellant’s vehicle was being driven at a high speed such that it veered off the road onto the pavement and hit the motor cycle and that due to the impact the motor cycle was thrown in the air and the Respondent in a ditch.
19. It was submitted that the lower court was correct in finding that the Respondent’s version of events was more plausible; that according to section 107(1) of the *Evidence Act* the Respondent proved her case; that there were two police abstracts presented, the one dated 28th October, 2019 and the one dated 11th November, 2019 which blamed the Respondent for the accident; that despite that, DW1 did not charge the Respondent with any traffic offence.
20. It was submitted that during his testimony, DW1 stated that he opted not to charge the Respondent on humanitarian grounds; that the magistrate in analyzing this issue stated that the earlier abstract did not indicate who was to blame for the accident neither did it indicate whether the investigations were pending for which DW1 explained on cross-examination that it was an omission on his part.



21. It was submitted that the magistrate was within the law when she considered DW1's actions and/or omissions unsubstantiated and concluded that the only logical reason was that there was insufficient evidence to bring a traffic offence against the Respondent.
22. On the second issue, it was submitted that it was an error whether the injury occurred on the left or right; that though parties are bound by their pleadings there is an exception as shown in the case of [Douglas Mbae Mwamba & another-vs- Peter Musyoka Ndeti](#) [2021] eKLR where it was held:

“While appreciating that the general rule is that a Court is bound to determine issues which flow from pleadings, it was contended that the rule is not without exception and that the exception is that a Court will determine issues which have not been pleaded if the parties raise and address unpleaded issues and leave them to the Court to decide or by consent the parties invite the Court to determine an unpleaded issue. ...”
23. It is the Respondent's case that during trial she clarified to the court that the injuries were on the left leg and not the right foot as indicated in the Plaintiff; that she was physically in court and the magistrate was able to see and ascertain the injuries were on the left leg; that the Appellant's medical report was produced by consent and it was agreed that the Respondent suffered severe injuries including compound fracture to the left tibia/fibula.
24. The Respondent cited [T.S.S Company Limited -vs- Isaac Hero Matatia](#) [2018] eKLR where it was stated that:

“In my view, Article 159(2)(d) of [the Constitution](#) looks into procedural technicalities only and cannot be used to upset the principle that parties are bound by their pleadings. However, in this case the particulars of injuries pleaded in both the original and amended plaintiff were “multiple cut wounds.” The evidence adduced by way of the discharge summary talked of multiple wounds. The evidence of Dr. Kamami and the Respondent only detailed the nature of those cut wounds. The injuries referred to by Dr. Kamami in his report were recorded in the P3 form which was produced as an exhibit by consent of the parties. The evidence adduced was therefore in support of the injuries sustained and pleaded. The injuries pleaded in the amended plaintiff were established through the evidence adduced. Though it was not necessary for the trial court to make reference to Article 159(2)(d) of [the Constitution](#), there was no error in the magistrate's decision as to the nature of injuries sustained by the Respondent.”
25. On the third issue, it was submitted that the amount of Kshs. 630,000/- was not excessive for the injuries of comminuted fracture of tibia/fibula, degloving injury and permanent disability of 30% and relied on the various cases specified in the submissions. The Respondent cited [Peter Kibe Waweru -vs- Moses Maina](#) [2022] eKLR where it was stated that it is trite that the assessment of general damages is at the discretion of the trial court and the decision as to quantum was upheld as it was not erroneous and urged the court to uphold the award of Kshs. 630,000/- as the same was not erroneous nor excessive.
26. It was submitted that in the alternative should the court consider that the impugned injury of the comminuted fracture of left leg tibia/fibula was not proved it should consider the degloving injury at the posterior part of the ankle with permanent disability of 30% and that Kshs 500,000/- would be sufficient compensation for pain and suffering. She cited [Elizabeth Wangui Njiru – vs- David Mwangi Ngugi & another](#) [2020] eKLR where the court set aside an award of 250,000/- for a degloving injury with 45% permanent disability and proceeded to award the Respondent a sum of Kshs. 500,000/- for general damages for pain and suffering.



Analysis and Determination

27. While reminding myself of the duty of this court sitting on first appeal, I have read the entire lower court record, the record of appeal, parties' submissions and the authorities cited. To my mind the following two main issues pop up for determination:
- a. Whether the lower court erred in awarding liability at 20:80% in favour of the Respondent?
 - b. Whether the general damages were excessive?
28. To resolve these issues, I must analyze the evidence adduced in the lower court. The Respondent, who was the Plaintiff in the lower court, adduced evidence contained in her witness statement and her cross-examination that she blamed the Appellant for the accident; that she was riding her motorcycle registration number KMDY 519T on the left lane facing Kajiado while the Appellant drove on the left lane facing Kitengela. It was her case that prior to the accident she was travelling to the right to get into a petrol station when she hit the left side of the motor vehicle. She stated that she was joining the petrol station and was at the pavement when the accident occurred. She testified that the motor vehicle should have slowed down and allowed her to pass by or move outside the road.
29. Chris Odhiambo, the Investigating Officer, testified as DW1. He told the court that he visited the scene of the accident which was at Lake Oil Petrol Station on the exit side as one faces Kitengela direction. He found the motor cycle lying on the left side of the road on the pavement. He drew a sketch plan of the scene. It was his evidence that the Respondent was to blame for the accident as she was riding on the wrong side of the road and did not give way to the motorist. It was his testimony that they did not charge the Respondent with a traffic offence as she had suffered enough from her injuries. He produced a police abstract dated 11th November, 2019, produced as (Dex.1) which shows that the Respondent was to blame for the accident.
30. He further testified that there were 2 police abstracts' one issued before the investigations were carried out and another after conclusion of the investigations. He stated that the earlier police abstract was issued to the Plaintiff, but it was blank on the investigations result as to who was to blame for the accident, which he admitted was an omission on his part. He stated that the latter abstract issued to the Appellant stated that someone was charged for a traffic offence.
31. The Appellant testified as DW2. She adopted her witness statement dated 15th February, 2021 as her evidence and the documents dated 12th February, 2021 and 22nd June, 2021 as (Dex. 3 – 7). It is her case that she fully blamed the Respondent for the accident. It is her evidence that prior to the accident, she was driving at 100 kilometres per hour and that the motor cycle came abruptly to her left side. That the said motor cycle was riding head on towards her from the opposite direction; that she applied emergency brakes but the motor cycle hit her vehicle before landing in a ditch and that she could not swerve on her right because of an oncoming motor vehicle.
32. The Plaintiff in a civil suit bears the burden of proving his/her case to the required standard, being on a balance of probabilities. The Court in Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the Court 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not.



This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained.”

33. Further, 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 event 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.....”

34. What is in contention in this case is who is to blame for the accident. It is clear to this court that the Appellant and the Respondent blame each other for causing the accident. The learned trial magistrate, after analyzing the evidence adduced before her agreed with the Respondent that the Appellant was to blame at 80% liability and blamed the Respondent at 20%. I have read her reasoning in the judgment of that court.

35. On my own analysis, I have noted that the Respondent on cross-examination admitted having been riding on the left lane facing Isinya while the Appellant was driving on the left lane facing Kitengela. In other words, each party was on their lawful lane of the road. The Respondent told the court that prior to the accident, she was travelling to the right getting into a petrol station and that is when she hit the left side of the Appellant’s motor vehicle causing damage. She admitted that

“the accident occurred on the rightful lane of the motor vehicle.... The motor vehicle was passing and I was joining. It was possible for the motor vehicle to either slow down and allow me to pass by or move outside the road, which did not happen.”

36. I have compared this evidence to that of the Appellant. She testified on cross-examination that

“Prior to the accident, I drove at 100 kilometres per hour and the road is downhill and clear. ...the motorcycle abruptly came in the left side into the road. Actually, the motorcycle was riding head on towards me from the opposite direction. So I had to apply emergency brakes to avoid the collision. My motorcycle stopped but the motorcycle hit my motor vehicle before landing into a ditch.”

37. It is clear to me, and there is no dispute, that the accident occurred on the left lane facing Kitengela, the lawful lane for the Appellant to drive on since she was headed to Kitengela. It is clear to me that the Respondent blames the Appellant for not doing anything to avoid the accident but does not admit her wrong-doing. She accepted moving from her left lane facing Isinya or right lane at the scene, to the left lane where the Appellant was lawfully driving. There is evidence from the Appellant that she applied emergency brakes to avoid hitting the Respondent’s motorcycle head on and stopped the car but was still hit on the front left side of her car. There is no evidence whatsoever as to any actin taken by the Respondent to avoid the accident.

38. IP Chris Odhiambo, DW1, was clear in his evidence. He told the court that,

“We found unattended motorcycle lying on the left side of the road on the pavement..... The Plaintiff was to blame because before the accident, she was riding on the wrong side of the



road. Secondly, she failed to give way to the motorist. However, we did not charge her for a traffic offence because she had suffered enough from her injuries...”

39. The learned trial magistrate analyzed that evidence and reasoned as follows:

“Looking at the evidence from both sides, it was not in dispute that an accident occurred on the left lane of the road facing Kitengela direction from Kajiado direction. In that case, the damages on the Defendant’s vehicle would have been on the left side at the passenger’s side which was the case as seen on the photographs annexed as evidence. This is not disputed with the Plaintiff attributing the damages to the fact that her rear wheel which was already off the road hit was hit by the Defendant. On her part, the defence admitted to the fact that after the accident the motorcycle was thrown in the air and ended up injuring a by-stander. It is my view this could only have occurred if indeed the accident occurred as per the Plaintiff’s version. This was the most logical scenario that would have lifted the said motorcycle off the ground due to its impact and after the Plaintiff had already been thrown off and landed in a ditch (sic).

40. The trial magistrate further went on to state that

“Similarly, this explanation agrees with the investigation officer’s finding that there had been failure to give way, implying that he had expected the Plaintiff to have given the Defendant way before joining her lane, which did not happen.”

41. To my understanding, the trial magistrate is referring to the Plaintiff’s version of the evidence. But she seems to have misapprehended the evidence. The Investigating Officer was referring to the Respondent, Plaintiff at the time, for failing to give way not the Appellant. This is the only context within which the evidence of the Investigating Officer can be understood when one reads this evidence:

“The Plaintiff was to blame because before the accident, she was riding on the wrong side of the road. Secondly, she failed to give way to the motorist”.

The evidence does not say that she failed to give way to the rider or motorcyclist. This can only mean one thing therefore, that the rider, who is the Respondent, failed to give way to the motorist, the Appellant. That is the only way she could be blamed for the accident.

42. I fail to understand how the trial magistrate shifted the blame from the Respondent and placed it on the Appellant even with clear evidence from all the parties. On my own analysis, the Appellant tried to avoid a head on collision. The Respondent was negligent in changing lanes to join the petrol station without confirming that the road was safe to do so. She seems to have underestimated the oncoming traffic and failed to either wait for the road to be safe to change from her side of the road to get into the petrol station on the other side of the road.

43. I hold the Respondent to blame for the accident. If the Appellant had any blame for this accident, then her percentage of liability was minimal. I find the learned trial magistrate in error of law and fact in apportioning liability at 20:80% in favour of the Respondent. I reverse this finding and order of the trial court and apportion liability at 80:20%, that the Respondent is held 80% liable for the accident and the Appellant is held at 20% liable.

44. I will not interfere with the issue of the nature of the injuries as this was explained in evidence and the medical documents produced or the award of damages granted by the trial court, which award I do not



find excessive in the circumstances. However, given the reversed percentages of liability, the figure will be worked out to show that the Respondents is now entitled to the award as shown below:

- a. General damagesKshs 630,000/=
- b. Less 80% contribution on liability.....Kshs 504,000/=
- TotalKshs 126,000/=
- c. Special damages.....Kshs 3,550/=
- Grand total.....Kshs 129,550/=

45. I have considered the issue of costs of this Appeal and given the findings of this court and the award of damages I have granted, it is my view that the Appellant bears own costs for this appeal.

46. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 10TH JANUARY 2024.

S. N. MUTUKU

JUDGE

