



REPUBLIC OF KENYA



**Toroitich v Kibe & another (Civil Appeal E124 of 2023)
[2024] KEHC 251 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E124 OF 2023
RN NYAKUNDI, J
JANUARY 24, 2024**

BETWEEN

ENOCK TOROITICH APPELLANT

AND

FAITH MUTHONI KIBE 1ST RESPONDENT

CAR AND GENERAL (TRADING) LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. P. Areri (SPM)
delivered on 20.06.2023 in Eldoret civil suit no. 1248 of 2018)*

JUDGMENT

1. The appeal is both on quantum and liability. In the trial Court the 1st Respondent sued the Appellant claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 21/11/2018, wherein it is alleged that the 1st Respondent was travelling as a pillion passenger on motor cycle registration number KMED 550E along Uganda road at paradise when the Appellant and or his driver recklessly drove motor vehicle registration number KCG 624 R Toyota causing it to knock down motor cycle registration number KMED 550E and as a result of which the 1st Respondent sustained serious injuries.
2. In a defence to the Claim dated 30/06/2020, the Appellant denied being the registered owner of the motor vehicle registration number KCG 624R and denied the occurrence of the accident as well as that the 1st respondent Plaintiff was lawfully being carried as a passenger on motorcycle registration KMED 550E as a result of which she sustained serious injuries and in the alternative the Appellant/Defendant blamed the 1st respondent/Plaintiff and the rider of motorcycle registration number KMED 550E for the occurrence of the accident.



3. After trial, Judgment was delivered on 20.06.2023 and the Appellant was found 100% liable and damages assessed as hereunder: -
 - a. General Damages..... Kshs.700,000/=
 - b. Special Damages..... Kshs.8,000/=
 - c. TotalKshs.708,000/=
 - d. Plus, costs and interests awarded to the Plaintiff and the third party.
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (10) grounds: -
 1. That the learned trial Magistrate/Adjudicator erred in law by failing to dismiss the 1st Respondent's suit against the appellant whereas negligence on the Appellant was not proven in trial.
 2. That the learned trial Magistrate/Adjudicator erred in law by failing to dismiss the 1st Respondent's suit against the appellant whereas the 1st Respondent failed to discharge the burden of proof so as to warrant a judgment in her favour.
 3. That the learned trial Magistrate/Adjudicator erred in law by failing to take into account relevant facts relating to the suit thus arriving at a decision that is wholly erroneous in law and facts and/or that a reasonable tribunal would arrive at in view of the evidence adduced.
 4. That the learned trial Magistrate/Adjudicator erred in law and in fact by holding the Appellant 100% liable for causing the accident contrary to the evidence on record and or adduced during trial.
 5. That the learned trial magistrate/adjudicator erred in law and in fact by failing to elaborate on a balance of probability, how the 1st respondent proved negligence and/or adduce reasons for holding the appellant liable to the degree of 100%.

SUBPARA 6.

That the learned magistrate erred in law and in fact by holding that the 2nd respondent had proved it was not the owner of motor cycle registration number KMED 550E contrary to the evidence on record and/or adduced during trial.

SUBPARA 7.

That the learned trial Magistrate/Adjudicator erred in law by failing to consider the Appellant's written submissions and legal authorities and or precedents on both quantum and liability thereby arriving at determination which is wholly erroneous in fact and law.

SUBPARA 8.

That the learned trial magistrate misdirected herself by failing to take into account the well-established principle requiring comparable awards to be made for comparable injuries sustained thereby falling into an error by awarding Kshs. 700,000/= which award is manifestly excessive.

SUBPARA 9.

That the sum of Kshs. 700,000/= as general damages which award is excessive in view of the injuries sustained by the 1st respondent thereby deviating from the principle of stare decisis requiring comparable awards being made for comparable injuries sustained.



SUBPARA 10.

That the learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering at Kshs. 700,000/= which is very high all circumstances and injuries considered.

5. The appeal was canvassed vide written submissions. The 2nd Respondent filed submissions dated 17.11.2023 and filed on 20th November, 2023 whereas the 1st respondent on 29.09.2023 filed her submissions dated 29.09.2023. Unfortunately, at the time of drafting this judgment, the appellant had not filed his submissions.

The 1st respondent's submissions

6. Counsel submitted that the role of this court as an appellate court is to review the evidence on record against the decision of the Trial Magistrate to see if the conclusion by the trial magistrate should stand and or be disturbed. On this, the 1st respondent relied on the case *Selle v Associated Motor Boat Company LTD* [1968] E.A 123.
7. On the issue of non-appearance of the 1st respondent in the occurrence book, the 1st respondent submitted that the Appellant's witness DW1 did produce a letter dated 4th June 2021 in which they purported to state that the 1st respondents name could not be traced in the occurrence book and other records and stated that the P3 forms and Police Abstract could not be used as proof of her involvement in the accident and therefore null and void.
8. The 1st respondent submitted that DW1 confirmed the appearance of the 1st respondent's name in the occurrence book and the purported nullification of the P3 and the Police Abstract is inconsequential as the 1st respondent's name was traced in the occurrence book.
9. Counsel noted that the 1st respondent was issued with police abstract and vide OB3/22/11/2018.
10. With regard to liability Counsel for the 1st respondent submitted that the evidence of the 1st respondent was corroborated by that of the police officer PW3 who stated that Motorcycle Registration KMED 550E had a right of way as she was manning the traffic and had stopped all the vehicles coming from the Webuye direction to give way to the Motorcycle to cross the junction.
11. It was submitted that knocking down the motorcycle from the rear was a clear indicator that the driver of motor vehicle registration KCG 624 R did not keep distance when he was expected to take utmost care and skill whilst driving at the junction.
12. Counsel urged the court to disregard the evidence of the Appellant's police officer DW1. That DW1 was not an eye witness and only came to produce an occurrence book. The occurrence book was based on a report made by the appellant and or his driver, agent, servant and or employee. The same was not supported by sketch plans and or witness statements from the 1st respondent.
13. Additionally, the 1st respondent submitted that the evidence of the 3rd party was merely to the effect that the vehicle has been sold to Meena Collections and they were not in control or use of Motorcycle Registration KMED 550 E and hence not liable. Counsel agreed with the court's finding on the issue.
14. On Quantum of damages, the 1st respondent supported the finding of the trial court. It was stated that the trial court on quantum is not ordinarily too low or so high so as to amount to a wholly erroneous estimate and the appellate court should not disturb the award. Counsel relied on the case of *Mombasa HCC No. 475; Agnes Monica Nusyoki v Charles Otieno Oketch & Anor* and *Nairobi HCC No. 2216*



of 1993; George Mathenge Muhingu vs M.D Patel where the court assessed general damages at Kshs. 600,000/=.

15. Counsel prayed that the appeal be dismissed with costs to the 1st respondent.

The 2nd Respondent's Submissions

16. As to whether the appellant/defendant proved his claim against the 2nd respondent/third party, counsel submitted that the trial court was correct in its finding that the defendant did not adduce any evidence to show that the rider of the said motor cycle was an employee, agent and or servant of Third Party so that the actions or omissions of the said driver can be attached to the third party. Counsel relied on numerous decisions which were to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence.
17. Further, it was counsel's submission that whoever has the obligation to convince the court is the person said to bear the burden of proof. On this, counsel cited the case of Gateway Insurance Company Limited v Jamila Sulaiman & Another [2018] eKLR.
18. On the question of who is the owner of motor vehicle registration number KMED 550, it was submitted for the 2nd respondent that the trial court was correct in holding that the 2nd respondent/third party had provided rebuttal evidence to the provisions of section 8 of the *Traffic Act* and held that the 2nd Respondent/Third Party had sold the said motorcycle. Counsel cited the case of Car & General (Trading) Limited v JNK (Suing as the mother and legal representative of the estate of EWK – Deceased) & 2 others (Civil Appeal 17 of 2020).
19. It was submitted for the 2nd respondent that in Kenya, it is a statutory requirement for all dealers and importers of motor vehicles and motorcycles such as the third party to have motor vehicles and motorcycles registered in the name of dealers and importers as per the declaration of the custom entries. The said statutory requirement was emphasized and reiterated by the National Transport and Safety Authority (NTSA) in 2020.
20. As stated above the two limbs to this appeal are quantum and liability. I propose to deal with the issue of liability first. The appellant has argued that the trial court misdirected itself at apportioning liability against the Appellant at 100% despite overwhelming evidence to the contrary.

Liability

21. The facts speak for themselves that an accident indeed occurred on 21/11/2018, involving motor vehicle registration number KCG 624R Toyota belonging to the Appellant and motor cycle registration number KMED 550E and that as a result of which the Respondent sustained injuries.
22. On one hand the Appellant denied the occurrence of the accident and the ownership of the said vehicle and he as well denied the particulars of negligence, which he attributed to the Respondent.
23. What then is the extent of the Respondent's liability? To determine this the Court will draw upon the evidence at the trial Court.
24. The account narrated by the Respondent PW4 was that the motorcycle KMED 550E had fully crossed the junction on Uganda Road when Motor vehicle Registration KCG 624R rammed into it from the rear having come from the Uganda road directions towards Nakuru. She further stated that the ramming of the motorcycle was an indicator that the motorcycle had a right of way to cross at the junction and it had in fact completed crossing the road when the accident occurred.



25. PW2 PCW Elishiba Mweru told the Court that motorcycle registration KMED 550E had a right of way as she was manning the traffic and had stopped all the vehicles coming from the Webuye Direction to give way to the motor cycle to cross the junction.
26. PW1 Dr. Paul Rono, testified in support of the respondent's case and a medical report was prepared by Dr. Joseph Sokobe outlining the injuries suffered.
27. When I place the evidence on legal scale of balance of probabilities, it is more probable than not that the Appellant's was not paying attention to traffic rules and other road users when the accident occurred. The Respondent evidence in this matter was further corroborated by PW2 who confirmed that indeed on the fateful day an accident had occurred and as a result of which the Respondent sustained injuries. The Respondent herein was only a pillion passenger and had no control whatsoever over the suit motor vehicle and the suit motor cycle.
28. I do not find evidence to disapprove the account of the PW4 testimony in the circumstances therefore, the will Court will not disturb the finding of liability by the trial Court. Accordingly, the trial Court did not err in apportioning liability at 100% against the Appellant.

Quantum

29. The issue for determination here is whether the award of general damages of Kshs.700,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".
30. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.
31. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] Kneller. J.A, stated:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, 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 the damage. See *Ilango V. Manyoka* [1961] E.A. 705, 709, 713; *Lukenya Ranching and Farming Co-operatives Society Ltd V. Kavoloto* [1970] E.A., 414, 418, 419. This Court follows the same principles."
32. The question is whether this court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.
33. To begin, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the medical report by **Dr. Joseph Sokobe** as:
 - a. Blunt injury to the forehead and face.
 - b. Blunt injury to the neck.



- c. Fracture of the right ulna.
 - d. Lacerations on the right thigh posteriorly.
 - e. Deep cut wound on the anterior left knee
 - f. Lacerations on the left leg anteriorly.
34. At this point it is worth pointing out that injuries will never be fully comparable to other person's injuries. What a Court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.
35. Emphasis is made to the fact that an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
36. From the evidence adduced by Dr. Joseph Sokobe medical report it is clear that the Respondent herein sustained injuries outlined. While appreciating that money cannot renew a physical frame that has been shattered or battered, the Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.
37. Considering the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that the trial court was properly guided by the authorities cited before her and arrived at a reasonable assessment of general damages. The learned trial Magistrate cannot be faulted as the award of Kshs.700,000/= is neither too low nor too high in the circumstances. In Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support, the court awarded Kshs. 700,000 as general damages.
38. In the case of Hussein Dairy Ltd Vs Samuel Mokaya HCCA NO. 137 OF 2012, the Plaintiff had suffered the following injuries;
- (i) Fracture of the right radius bone;
 - (ii) Fracture of the ulna bone;
 - (iii) Chest contusion;
 - (iv) Deep cut wound on the right leg;
 - (v) Fracture of the left pelvic bone;
 - (vi) Bruises on the back; and
 - (vii) Cerebral concussion.
39. The learned Judge maintained the sum of Kshs 800,000/ which the trial Court had awarded as General Damages.
40. On the basis of the above positions, I see nothing to suggest that there is need to interfere with the award of the trial court on general damages. The award of Kshs. 700,000/= for special damages is hereby upheld.



Ownership*

41. On this Limb, I agree with the 2nd respondent's submissions. The 2nd Respondent argued that it is a statutory requirement for all dealers and importers of motor vehicles and motorcycles to have the motor vehicles and motorcycles registered in the name of dealers and importers as per the declaration of the customs Entries.
42. The 2nd Respondent went a step further to reproduce the contents of a notice dated 07.09.2020 which states;
- “That registration of any unit will be as per customs entry. Therefore, the dealer or the importer should apply for the registration under their names and KRA PIN as per declaration of the Custom's Entry.”
43. The lower court in pronouncing itself on the matter, stated as follows:
- “Even if the defendant was to revert back to the original defence where they had attributed negligence to the rider of motorcycle registration number KMED 550E, there is nothing to show that the rider was an employee, agent or servant of the third party so that his actions or omissions can attach the third party. To the contrary the third party proved that he had sold the motorcycle to Meena collections that were not enjoined in this suit. From the foregoing I find that the defendant had no cause of action against Car & General and his claim against the third party fails and is dismissed with costs.”
44. I couldn't agree more. I am satisfied that the said motor vehicle was sold to Meena Collections. The third party's witness I evidence established that the third party is in the business of sale of motorcycles and as such it is required to have motorcycles and motor vehicles registered in their name but many at times they might not be the beneficial owners as is in this case.
45. Turning to special damages, Kshs.8,000/= was pleaded and strictly proved as was held in the case of Hahn v Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
46. In the end the Court finds no merit in this appeal and therefore proceeds to enter judgment in favour of the Respondent in the following terms;
- i. Liability100% against the Appellant
 - ii. General Damages..... Kshs.700,000/=
 - iii. Special Damages..... Kshs.8,000/=
 - iv. TotalKshs. 708,000/=
 - v. Plus, costs and interest
- It is ordered so.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY 2024.



R. NYAKUNDI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of:

Ms. Chemeli for Mwinamo for the respondent

