



**Akida v Mukoya (Civil Appeal 81 of 2022)
[2024] KEHC 1262 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 81 OF 2022
PJO OTIENO, J
FEBRUARY 9, 2024**

BETWEEN

RAJAB AKIDA APPELLANT

AND

RASHID HAJO MUKOYA RESPONDENT

*(Being an Appeal from the Judgment of Hon. G. Ollimo (SRM) in
Butere SPMC Civil Suit No. 92 of 2019 dated 22nd September 2022)*

JUDGMENT

1. By way of the plaint dated 5th September, 2019, the respondent sued the appellant for general damages, special damages in the sum of Kshs. 8,550/- costs of the suit and interest. The respondent's case was that on 24/3/2019 he was riding a motor cycle along Mumias-Bungoma road when the appellant negligently drove Motor Vehicle Registration Number X GKN 606 Land Rover 110 thus knocking the respondent as a result of which the respondent sustained serious injuries.
2. In a statement of defence dated 3rd March, 2021, the respondent denied the appellant's claim and stated that if at all the accident occurred, then it was occasioned by the negligence of the appellant.
3. In a judgment of the trial court delivered on 22nd September, 2022, it was a finding of the court that the appellant was to blame for the accident and proceeded to award the respondent Kshs. 180,000/- as general damages, Kshs. 8,000/- as special damages, interest from the date of filing the suit and costs.
4. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 13th October, 2022 setting out a whopping seventeen grounds of appeal. That huge number of grounds notwithstanding, in the submissions filed, the appellant has identified only two issues to fall for determination by the court. The two issues are; whether the decision on liability was supported by evidence on record and if the assessment of damages was in accordance with the principles applicable.



5. It is thus the appellant's prayer that the judgment of the trial court in favour of the respondent, together with all consequential orders be set aside and substituted with an order that the suit is dismissed with costs and further that the costs of this appeal be to the appellant.
6. Having directed that the appeal be canvassed by way of written submissions and the parties having so complied, the court has read the respective submissions and derived great deal of assistance. For that, the parties are commended for the industry.
7. Very briefly, the submissions by the appellant collapses the grounds of appeal into two issues for determination namely;
 - a) Whether the trial court erred in the attribution of liability and;
 - b) Whether the trial court erred in the assessment of the quantum of damages.
8. On whether the trial court erred in the attribution of liability, the appellant submits that the burden to prove negligence laid on the respondent and that he failed to discharge the same by giving contradicting evidence on how the accident occurred in that in examination in chief he stated that the motor vehicle rammmed into the motor cycle as a result of which the motor cycle fell on the left side facing Mumias and that he lost consciousness and could not recall the exact position of the motor vehicle after the accident. In reexamination he stated that he visited the scene after being discharged and found glass particles on the left side and believed he fell on the left side. The respondent's observation of the scene after five days from the date of the accident that he wants the court to rely on to get a picture of what happened and that there was no proof that the shattered glass came from the impugned accident. He contends that the trial magistrate ignored the undisputed sketch map in the police file whose probative value was stressed in *Shah Ramji Punja Lts v George Nambili Wanyonyi* (2020) eKLR in that it was the only baseline for the trial court to gauge which version of events was factual.
9. He contends that the driver of the suit motor vehicle testified that the accident occurred in the right hand side of the road while facing Mumias and that the motor vehicle had straddled the mid white line separating the two lanes of the road when the respondent suddenly swerved to the front of the motor vehicle. He claims that the police sketch map shows that the skid marks of tyres on both sides of the motor vehicle also straddled the white mid line separating left and right lanes of the road and that the respondent's assertion that he was riding the motor cycle one foot from the edge of the road while facing Mumias town does not stand since the police sketch map indicated that the left of the motor vehicle while facing Mumias was about 2 meters from the edge of the white line on the extreme left side of the road.
10. He submits that if the width of the land rover vehicle was 2 meters and the skid marks were about 2 meters from the edge of the road and the motor cycle one foot from the edge of the road, then the motor vehicle driver had left enough space for the motor cycle.
11. He claims that the motorcycle was being driven in a different position as testified by DW2 that is, it hit the motor vehicle when being ridden from the right side of the mid white line of the road while facing Mumias town as the cyclist attempted to cross the road and join a murram road on the extreme right side of the road while facing Mumias. He further claims that the motor vehicle could not sustain damage on its right side only is the motorcycle was ridden on the left side of the road.
12. He submits that the evidence contained in the police sketch map was not rebutted by the respondent and puts it that uncontroverted evidence bears a lot of weight to which regard he cites the case of *Daniel Kenga Katana & 4 others v Dzitu Totot Bokole & 3 others* (2022) eKLR.



13. He argues that having demonstrated negligence on the part of the respondent, the respondent should be 100% to blame for the accident.
14. On whether the trial court erred in the assessment of the quantum of damages, the appellant submits that the trial magistrate erred in law and in fact in doubling an award of Kshs. 90,000/- made in 2018 in the authority she relied on to award Kshs. 180,000/- under the guise of factoring inflation. He contends that if at all the respondent is entitled to damages, then the rightful damages ought to be in the sum of Kshs. 90,000/- which is assessing by comparing decisions where a plaintiff suffered similar injuries.

Issues, Analysis and Determination

15. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the respondent and discerns the following issues for determination: -
 - a. Whether the finding on liability against the appellant at 100% was supported by evidence?
 - b. Whether the general damages awarded were excessive to merit interference?

Analysis

Whether the Appellant was 100% Liable for the Accident

16. In *Stapley –v- Gypsum Mines Limited (2)* (1953) A.C 663 at P. 681 Lord Reid reasoned as follows on the task of the court in determining liability for a tort: -

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally.”

17. To establish liability, the respondent stated that the motor vehicle was driving behind him at a high speed and it hit them from behind as a result of which they landed on the left side of the road and that he lost consciousness on his way to hospital.
18. The appellant’s driver on the other hand testified that on the material date he was driving along the Bungoma-Mumias road while keeping to his left lane while the motorcycle was slightly ahead of him riding along the edge of the same left lane when the motorcycle suddenly veered to the right lane at great speed without indication and in order to avoid a collision, he swerved to the left and fell on a ditch, swung again back to the main road and the motor cyclist who was now on the right lane again moved to the left thus hitting his motor vehicle as a resulted of which it land on a ditch on the left side.
19. To determine the level of contribution between the cyclist and the motorist, the court must decide which of the two versions is true or more credible.



20. According to the sketch map found at pages 59-61 of the record of appeal, which according to the statement of PC Cosmas at page 53 was prepared immediately following receipt of information that an accident had occurred, there was blood stains about 4.3 meters and 4.5 meters from the edge of the road. This corroborates the evidence of the respondent that he was driving on the left side of the road. The skid marks begin at point D to E which measures about two meters and the appellant in his submissions has confirmed that the width of the motor vehicle was two meters. The skid marks can be seen all the way to point H which had traces of blood with the motor vehicle then turning to the right. This information discredits the information of the appellant's driver who stated that the motor bike swerved from the right lane to the left lane as a result of which the land rover fell on a ditch on the left. There is no evidence from the sketch plan that the motor vehicle moved and swerved in the manner described by the appellant's witness
21. Having re-appraised and re-evaluated the entire record, I find no fault with the conclusion by the trial court that the appellant was wholly to blame. On that basis the finding on liability is upheld.

Whether the General Damages Awarded were Excessive

22. The court of appeal in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR had this to say on an appellate court overturning the amount of damages awarded by a trial court;

“...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, J.A 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.’”

23. According to the evidence of PW1 to be found at page 102 of the record of appeal, the respondent sustained moderate soft tissue injuries following the accident which included a scar about 6cm on the right side of the head, a scar about 7cm on the forehead, a scar 4cm long on the shoulder with abrasion marks on the same shoulder.
24. For this injuries the trial court awarded the respondent general damages in the sum of Kshs. 180,000/- citing the case of *Godwin Ileri v Franklin Gitonga* (2019) eKLR. In the cited case, the plaintiff suffered almost similar soft tissue injuries and factoring in inflation the court awarded the plaintiff a sum of Kshs. 90,000/-.
25. In the said case the court observed that in awarding damages, the court takes into account the nature and extent of injuries in relation to awards in similar cases to ensure consistency of awards. That principle was duly observed by the trial court.
26. To this court the law is tritely settled that the difficult duty of assessing damages in personal injury claims is discretionary upon the trial court and it takes a very strong case for an appellate court to



substitute its discretion for that of the trier of fact. The appellant must demonstrate error in principle or that the assessment disclose outright error. In this matter, the court finds no justification to interfere for it considers the sum awarded not too high as to demonstrate an error in principle.

27. The appeal is determined to lack merit and is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF FEBRUARY, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Shikanda for the Appellant

Ms. Anono for the Respondent

Court Assistant: Polycap Mukabwa

