



**Mwiraria v Ouda (Civil Case E007 of 2023)
[2024] KEHC 805 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL CASE E007 OF 2023
LW GITARI, J
FEBRUARY 1, 2024**

BETWEEN

RAYMOND MWIRARIA APPELLANT

AND

KELVIN OMONDI OUDA RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment entered in Chuka Magistrate’s Court Civil Suit No. E053 of 2022 on 27th February, 2023. The suit was a claim for general damages for pain and suffering, special damages, as well as costs and interest in respect of a road traffic accident that occurred on 6th December 2021.
2. In the impugned judgment, the Appellant was held to be 100% liable for the accident and the Respondent was awarded damages as follows:
 - a. General damages for pain and suffering – Kshs. 800,000/-;
 - b. Future medical expenses - Kshs. 250,000/=;
 - c. Special damages – Kshs. 55,560/= with interests at the court’s rate from the date of filing of the suit;
 - d. Cost of the suit with interest at the court’s rate from the date of the judgment.
3. Aggrieved by the said judgment, the Appellant lodged this appeal which is based on the grounds spelt out in the Memorandum of Appeal dated 22nd March, 2023. These are:
 - a. That the learned trial magistrate erred in law and in fact in finding that the Defendant is vicariously liable for the injuries and loss suffered by the Plaintiff and apportioning liability at 100% against the Defendant.



- b. That the learned trial magistrate erred in law and in fact in entering judgment against the Defendant for general and special damages as well as costs of the suit.
 - c. That the learned trial magistrate erred in law and fact by failing to appreciate that comparable injuries should as far as possible attract comparable awards and thereby made an award of Kshs. 800,000/= in respect of general damages for pain and suffering, which award is manifestly too high, inordinate and excessive in the circumstances.
 - d. That the learned trial magistrate erred in law and in fact and grossly misdirected himself in awarding the plaintiff excessive and unjustified damages of Kshs. 250,000/= for future medical expenses which had not been proved as required by law and without any regard to the applicable principles as established by precedents that bound him.
 - e. That the learned trial magistrate erred in law and in fact in failing to consider the evidence of DW1 on record and a police abstract produced, indicating that the Plaintiff's motorcycle registration number KMCJ 800P was to blame for the accident.
 - f. That the learned trial magistrate erred in failing to consider that the authenticity of the police abstract had not been rebutted.
 - g. That the learned trial magistrate erred in law and in fact in disregarding the evidence adduced by the Applicant that the accident was not caused by the Appellant.
 - h. That the learned trial magistrate erred in law and in fact in failing to appreciate or consider the written submissions of the Defendant and authorities cited on liability and quantum.
 - i. That the learned trial magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general damages and future medical expenses.
 - j. That the learned trial magistrate erred in law by writing a judgment that is not based on proper evaluation of pleadings, evidence on record, submissions and applicable law and principles for award of damages.
 - k. That in the circumstances, the judgment of the learned trial magistrate is a miscarriage of justice.
4. The Appellant thus prays that the instant appeal be allowed by setting aside the judgment of the lower court and replaced by a judgment of this Court and that the costs of the appeal be granted to the Appellant.

The respondent opposed the appeal and filed written submissions.

The Submissions

5. It was submitted on behalf of the Appellant that the Respondent, being the rider of motor cycle registration number KMCJ 800P was to blame for the accident as per the police abstract dated 9th December, 2021. That as such, the lower court's finding that the Appellant was 100% liable for the accident was not substantiated by evidence.
6. On quantum, the Appellant submitted only on the award under the head of general damages for future medical expenses. It was his submission that although future medical expenses are awarded as general damages, the same are in the nature of special damages in that they should be quantifiable and need not only to be pleaded but also proved.



7. In this regard, the Appellant placed reliance in the holding in *Tracom Limited v. Hassan Mohammed Adan* [2009] eKLR and submitted that the Respondent did not lead any evidence in support of the claim for future medical expenses of Kshs. 250,000/= that was awarded. Further, that the medical report relied on by the Respondent stating that he would require removal of implants did not state the amount that would be required for the removal of the said implants. The Appellant thus urged this court to find that the award of future medical expenses was unwarranted and unjustified.
8. On the part of the Respondent, it was submitted that the learned magistrate applied the correct principle in assessing liability and damages under all the heads and that the award was not so inordinately high as to be wholly erroneous estimate of the damages in the circumstances of the case. The Respondent referred this Court to the case of *Francis Ndungu Wambui & 2 Others v VK* (a minor suing through next friend and mother MCWK) [2019] eKLR where the plaintiff suffered injuries including soft tissue injuries to the upper limbs, compound fracture of distal fibula as well as loss of consciousness and the severity of the fracture was at risk of secondary fracture on the same sight. In that case, the plaintiff was asking Kshs. 1 Million in general damages on appeal and that was in November 2019. The Respondent thus urged this Court to dismiss the appeal with costs to the Respondent.

Issues for Determination

9. I have considered the grounds of appeal, the record of appeal as well as the submissions by the parties. The main issues that arise for determination by this Court are:
 - a. Whether the finding that the Appellant was 100% liable for the accident was erroneous; and if not,
 - b. Whether the award of damages by the trial was excessive or erroneous in the circumstances of this case.

Analysis

10. Being a first appeal this Court is empowered to proceed by way of a retrial with full mandate to make its own independent findings based on the evidence adduced before the trial court while being cognizant of the fact that this Court neither saw nor heard the witnesses testify [See: *Selle v. Associated Motor Boat Co. Ltd* [1968] E.A.].

It was stated:

“An appeal to this court from the High Court is by way of a retrial and the principles upon which this court acts in such an Appeal are well settled. Briefly put, they are; that this court must consider the evidence, re-evaluate itself and draw its own conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistency with the evidence in the case generally.”

11. The applicable principles for determination of this matter as a first appeal were also set out in the case of *Peters v Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order



to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion...”

In *Ephantus Mwangi & Another –v- Duncan Mwangi Civil Appeal No. 77 of 1982 (1982- 1983) 1 KAR* quoted in the case of *Florence Mutheu and Geoffrey Mutunga Kimiti –v- Francis Karengu (2021) eKLR*, the Court of Appeal stated that-

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that;

- a. he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence or
- b. if the impression based on a demeanor of a witness is inconsistent with the evidence of the case generally.”

12. PW1, Corporal Jackline Kerubo testified that as per the investigations, the driver of the motor vehicle registration number KCR 334U lost control of the vehicle causing it to veer off its lawful lane and hit the Respondent who was riding his motorcycle on the opposite lane. That she visited the scene of the accident and found that both the said motor vehicle and the motor cycle were extensively damaged. She further testified that after conducting investigations, she established that the driver of the motor vehicle was to blame for the accident. To substantiate her testimony, PW1 produced a police abstract dated 5th January, 2022 as P.Exhibit 1.

However the police abstract has not indicated as to who was to blame for the accident. It is indicated “P.U.I” to mean Pending Under Investigations.

13. On cross-examination, it was the testimony of PW1 that there are two police abstracts in this case. That the first one is dated 9th December, 2021 and indicates that the motor cycle was to blame for the accident. That on the other hand, the second police abstract that is dated 5th January, 2022 indicates that the matter was still pending investigations. The witness admitted that the two police Abstracts state that she was the investigating officer, that the abstract indicates that the rider was to blame and there is a reason for blaming driver of the motor cycle.
14. The Respondent testified as PW2. He adopted his witness statement as his evidence and stated that on the material day, he was coming from Meru general direction towards Chogoria direction when at Muthangani area, the Appellant’s motor vehicle veered off its lane and hit the Respondent’s motorcycle, throwing the Respondent into the air and off the road. According to the respondent, he did not see the police abstract. He did not produce his driving licence in court.
15. On the other hand, Lydia Mwiraria (DW1) testified as the sole witness in support of the defence case. She admitted that she was the driver of motor vehicle registration number KCR 334U on the material day when the subject accident occurred. According to her, when she reached Muthangani area, a motor cycle registration number KMCJ 800P came from the left side of the feeder road and hit her motor vehicle. That despite the rider of the said motor cycle joining the highway without stopping, DW1 managed to stop her motor vehicle while maintaining her lane. That subsequently, police officers went to the scene and DW1 was issued with a police abstract which blamed the motor cycle for causing the accident.



On liability

16. On the issue of liability, it was alleged that on the material day, the Respondent was riding motor cycle registration number KMCJ 800P along Meru-Chuka road when at Muthangani area, the Appellant being the driver of motor vehicle registration number KCR 334U drove the vehicle so negligently that it veered off its lane and hit the Respondent's motorcycle throwing the Respondent into the air and off the road.
17. When asked to clarify why the two abstracts on record contained contradicting information as to the position of the investigations into the matter, it was the evidence of PW1 that the earlier police abstract was filled while placing reliance on the information that was provided by the driver of the motor vehicle in question. It was her evidence that when an abstract is filled a few days after the accident, it can be erroneous. On re-examination, PW1 stated that when the earlier abstract was filled, the Respondent was still in the hospital and the police had not interviewed the eyewitnesses. She further stated that, "if the abstract indicates that the rider is to blame, there must be a reason or blaming the motor cycle." That after investigations were conducted, they found that the person who should be blamed for the accident was the driver of the subject motor vehicle. This is incredible because even that abstract does not say investigations were concluded. It states that the matter is "P.U.I"
18. Based on the evidence on record, it is not in dispute that an accident occurred on the material day involving the aforesaid motor vehicle and motor cycle. It is also not in dispute that the Appellant is the owner of the subject motor vehicle whereas the Respondent was the rider of the subject motor cycle. The contested issue is on the apportionment of liability for the accident.
19. In *Karanja -vs- Malele* (1983) eKLR 147, the court considered the two elements to be considered when assessing the issue of negligence, that is causation and blame worthiness. The court rendered that:

“--there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence is not seeing it before hand, and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion.”
20. In the persuasive case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR), Mativo, J. stated as follows:
 - “28. ... Eyewitness testimony is critical in both criminal and civil trials, and is frequently accorded high status in the courtroom.
 29. Direct evidence is evidence, that if believed, directly proves a fact in issue. Directly means that a person does not have to make any inferences or presumptions as to proof. Direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts....”
21. In this case, the direct evidence tendered before the lower court was that of the Respondent who was the rider of the subject motorcycle was to blame. He in turn blamed the driver of the subject motor vehicle for losing control of the vehicle and veering off the road thus hitting the Respondent. This evidence was rebutted by the driver of the Appellant's motor vehicle (DW1). From the two accounts given, it is clear that although there was evidence that an accident occurred, there is no clear evidence of which party was to blame.



The learned trial magistrate held that on a balance of probabilities, the plaintiff was able to prove breach of duty of care. That the defendant did not prove his case to the required standard. The learned trial magistrate based his finding on a wrong finding that the defendant did not call the police officer who filed the police Abstract which blamed the Rider for the accident whereas PW1- testified that she was the one who filed the two police abstracts as he was the investigating officer. It is therefore clear that the learned trial magistrate misapprehended the evidence and arrived at wrong conclusions. The evidence of PW1 at page 60 of the record shows that she was the maker of the two police abstracts, one which she filled soon after the accident and another she filled on 9/12/2021 long after the accident. The PW1 admitted that there was no conclusion as to who was to blame for the accident as the matter is still pending under investigations. The finding by the trial magistrate was not supported by the evidence.

On appeal the court is not obligated to accept the finding by the trial magistrate if it is clear that he failed to appreciate the circumstances of the case or ignored material facts which were relevant in determining the matter in issue. In this case the respondent had the burden to prove the issue of liability on a balance of probabilities. It is trite that the legal burden of proof lies on upon the person who invokes the aid of the law and asserts the affirmative of the issue. Section 107(1) of the *Evidence Act* provides:

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

On the other hand, the evidential burden is on the party who desires the court to believe in the existence of facts and would fail if no evidence is given. This is provided under Section 109 of the *Evidence Act*, it provides:

“ 109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Based on these provisions, the respondent had the burden of proving the facts constituting negligence on the part of the appellant even if the appellant did not tender any evidence. In this case the respondent was the sole witness who testified on how the accident occurred. He did not call any other witness. The only other witness was PW1 who went to the scene after the accident. On the other hand the appellant blamed the respondent for suddenly joining the road without due care and attention based on the evidence of PW1, and that of the appellant, it is most probable that the version of the appellant was probable as PW1 blamed the rider and did not conduct further investigations. There is no basis for the learned trial magistrate to place blame on the appellant. If the court were to go by the evidence of PW1, both drivers were to blame. The PW1 did not conduct further investigations and did not conclude her investigations. I find that the police abstracts which had conflicting findings was not sufficient for the learned trial magistrate to come to a conclusion that the respondent proved liability on the part of the appellant at 100%.

22. In the circumstances of the case and on a balance of probabilities, I find that the trial court had no basis for finding that liability had been established on 100% basis as against the Appellant. This is where the



parties should have shared liability at 50%. In this regard, I am persuaded by the case of Susan Mumbi Waititu v. Kefala Grebedhin Nairobi HCCC No. 3321 of 1993 where the court stated as follows-

“In that instant case there was a collision between two motor vehicles and in the absence of any evidence as to how the accident occurred the Court of Appeal has held that liability be apportioned on 50/50 basis. I therefore hold that the defendant was 50% to blame for the collision.”

The apportionment of liability has to be based on comparing the aspect of the negligent conduct of the tortfeasors to determine the level at which one was at fault. On the question of contributing negligence, the question is based on the circumstances of the case, who bears the greatest responsibility. In this case I find that the evidence placed before the trial was that both of the drivers were to blame. The respondent was blamed instantly by the investigating officer while he blames the appellant. There is no evidence to support the finding by the learned trial magistrate as respondent was to blame. The parties blamed each other and gave a version of how the accident occurred.

Each must therefore shoulder some blame. Liability must therefore be apportioned on 50/50 basis.

On quantum of damages

23. This Court is mindful of the fact that the duty to assess damages is in the realm of discretion and an appellate court can only intervene if the award meted out is too large or too small as to demonstrate a wholly erroneous estimate of damages [See: Child Welfare Society of Kenya v. Republic, Exparte Child in Focus Kenya & AG & Others [2017]eKLR]

24. In Bashir Ahamed Butt-v- Uwasi Ahmed Khan 1982-1988 KAR 4

“An Appellate court will not disturb an award of damages unless it is so inordinately high or low as to present 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.”

25. In this case, it is not disputed that the Respondent sustained soft tissue injuries and fracture left femur. These injuries are contained in the medical report of Dr. Nicholas Nkonge that was prepared on 17th June, 2022.

26. As stated herein above, the Appellant has not made a case in support of the claim in ground No. 3 of the appeal that the award of Kshs. 800,000/= as general damages for pain and suffering was manifestly too high, inordinate, and excessive in the circumstances. That notwithstanding, I have considered the submissions presented by the parties before the trial court.

27. The starting point in the assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards, taking into account that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda, Nyeri CA Civil Appeal No.147 of 2002 [2004] eKLR that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”



28. It was the Appellant's submission that had the Respondent proved his case against the Appellant, which the Appellant denied, he would have been adequately compensated by an award of Kshs. 600,000/=. To this end, the Appellant relied on the case of Pestony Limited & Another v Samuel Itonye Kagoko [2022] eKLR where the court made an award of Kshs. 800,000/= for a case where the Plaintiff had sustained fracture of the left femur (mid-shaft) and swollen left tender thigh with early onset osteoarthritis and permanent incapacitation assessed at 5%.
29. The Appellant further relied on the case of Reuben Mongare Keba v. LPN [2016] eKLR where an award of Kshs. 800,000/= was made for a case where the Plaintiff sustained fractures of the right femur and tibia fibula bones, dislocation of the right hip joint, bruises of the chin, degloving of the right leg and physical disability assessed at 20%.
30. The Appellant subsequently submitted that two cited cases related to injuries that were more severe than those sustained by the Respondent in this case and that as such, an award of Kshs. 800,000/= would have been excessive in the circumstances and that an award of Kshs. 600,000/= is more reasonable.
31. The trial court in its judgment did consider the authorities cited by the parties and actually found that the authorities that the Respondent referred to injuries that were not comparable to those sustained by the Respondent herein. The trial court actually relied on the case cited by the Appellant, that is the case of Pestony Limited & Another (supra), and found that it referred to injuries that were more comparable to those sustained by the Respondent in this case. In the circumstances, it is my view that the appeal against the award under the head of general damages for pain and suffering fails.
32. On the award of damages under the head of future medical expenses, the Respondent pleaded for an award of Kshs. 250,000/= under this head for removal of metal implants. As per the aforementioned medical report of Dr. Nkonge, the doctor formed the opinion that the Respondent "Sustained severe tissue injuries and fracture femur which will require future removal of implant and some level of disability of the affected limb."
33. While the production of the said medical report into evidence was contested, the report was silent on the estimate of future medical costs and the assessment of disability. To the extent that the doctor's report did not give an estimate of the cost of the removal of metal implants, it is my view that the pleading of future medical cost alone failed to satisfy the requirement for an award of future medical costs. In *Fracom Limited -v- Hassan Mohammed Adan* (2009) eKLR. It was held that a claim for future medical expenses needs to be specifically pleaded and proved before a court law can award. Accordingly, there was no basis to make an award under this head. It was not specifically proved.
34. Finally, as there was no challenge on special damages founded on any arguments, there is no basis for interfering with that award which was based on receipts produced in court.

Conclusion

35. From the foregoing analysis, it is my view that the present appeal succeeds only in respect of apportionment of liability and the award damages under the head of future medical costs. I opine that liability should be apportioned in the ratio of 50:50 and that the award of Kshs. 250,000/= as damages for future medical expenses should be set aside.

I order as follows:-

1. The appeal is allowed.
2. The finding on liability is set aside and substituted with apportion of liability on 50:50 basis.



3. The award of Kshs.250,000/- damages for future medical expenses is set aside and substituted with an order that the claim is dismissed.
4. Costs be shared on 50:50 basis.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF FEBRUARY 2024.

L.W. GITARI

JUDGE

1/2/2024

Mr. Kuria for Appellant

Ms Wanjiku for Mr. Muthomi for Respondent.

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

1/2/2024

