



**Ngau v Ongoro (Civil Appeal E018 of 2022)
[2024] KEHC 1345 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E018 OF 2022
PN GICHOHI, J
FEBRUARY 15, 2024**

BETWEEN

JOEL ODHIAMBO NGAU APPELLANT

AND

ALPHONSE ONYANGO ONGORO RESPONDENT

*(Being an appeal from the judgment and decree in Kisii CMCC
993 of 2019 by Hon. S.Onjoro (PM) on 11th February, 2022)*

JUDGMENT

1. On 30th December, 2019, Alphonse Onyango Ongoro (Respondent) filed suit against Joel Odhiambo Ngau (Appellant) seeking damages for bodily injuries which he pleaded he suffered on 15th October, 2019 while he was travelling as a fare paying passenger in Appellant's motor vehicle KCF 855G allegedly due to the negligence of Appellant's driver.
2. At the hearing, Respondent (PW3) adopted his recorded statement whereby he stated that the accident occurred after the driver of the subject motor vehicle lost control of the vehicle as a result of which it landed in ditch and he sustained injuries.
3. He was rushed to Kisii Teaching and Referral Hospital and then taken to Tenwek Hospital where he admitted for 11 days treated and discharged.
4. The police officer (PW2) who tendered the police abstract (PExh. 4) stated that he visited the scene in company of the investigating officer on 15th October, 2019 and confirmed that indeed motor vehicle KCF 855G was involved in that accident. He explained that the accident was self-involving. The Driver veered off the road and hit an electric post and the Respondent who was a passenger therein was rushed to hospital and a P3 Form was later issued.
5. The Doctor (PW1) produced the P3 Form , medical report and the receipt for fees for medical report.



6. Although the Appellant denied the Respondent's claim, no evidence to rebut Respondent's testimony was offered at the hearing.
7. After the trial, the court rendered its judgment on 11th February 2022 whereby the Appellant was found liable at 100% and Respondent was awarded damages as follows: -
 1. General damages Kshs. 1,500,000/=
 2. Special damages Kshs. 416,273/=
8. The Respondent was also awarded costs and interest.
9. The Appellant was dissatisfied with the lower court's decision and has preferred this appeal on both liability and quantum and prayed that :-
 1. The Appeal be allowed.
 2. The trial court's judgment be set aside and the suit in the lower court be dismissed.
 3. The costs of the appeal and the suit be borne by the Respondent.

Analysis And Determination

10. This is a first appeal and this Court's duty is to review and analyse the evidence on record and arrive at its independent conclusions bearing in mind that unlike the trial court, this Court did not have the opportunity of hearing the witnesses give evidence- (See *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123).
11. This Court has considered the evidence on record and written submissions filed on behalf of both the Appellant and Respondent together with the authorities cited therein.
12. Regarding the issue of ownership of motor vehicle KCF 855G, Appellant denied he owned the accident motor vehicle. The police abstract indicated the Appellant as the owner of the said motor vehicle. The abstract also stated the address of the owner and the particulars of the insurance company.
13. In the case of *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR, the Court of Appeal relied on the case of *Joel Muga Opinja v East Africa Sea Food Ltd* [2013] eKLR and restated thus: -

“We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied”.
14. In this case, the Appellant did not challenge the evidence adduced in the abstract and therefore, this Court finds that Respondent proved on a balance of probability that Appellant was the owner of the accident motor vehicle.
15. On liability, Appellant whilst not denying that the accident occurred, submitted that Respondent did not adduce any evidence to demonstrate that the subject motor was driven negligently and has cited various authorities to support this contention. In *Dharmagma Patel & Anor v T.A (a minor suing through the mother and next friend HH)* [2014] eKLR that the Appellant relied on, the Court of Appeal emphasised that if a case is based on negligence, then there is need to prove negligence.
16. Further, in *Stapley v Gypsun Mines Ltd (2)*(1953) AC 663 that the Appellant relied on and which was cited in *Ndatho v Chebet* (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16th March, 2022), the



- Court held that causation of an accident is a question that must be determined by applying common sense to the fact of each particular case.
17. On the other hand, the Respondent submitted that he was only a passenger and that the accident occurred after the driver of the subject motor vehicle lost control of the vehicle and hit an electric post not having been controverted, the doctrine of *res ipsa loquitur* applies.
 18. In support of this proposition, reliance was placed on [Christine Kalama v Jane Wanja Njeru & Anor](#) [2021] eKLR where the Court held that the doctrine of *res ipsa loquitur* has to be proved by evidence and [Baro Ngo Sevelius Yopben v Jared Ndemo](#) [2020] eKLR where the Court found a pillion passenger who was not in control of the accident motor cycle not liable.
 19. This Court has considered the judgment of the trial court and whereas the trial magistrate did not specifically address the doctrine of *res ipsa loquitur*, the court rightly found that Appellant did not disapprove that the accident occurred in the manner described by the Respondent who was only a passenger and had no control of the subject motor vehicle.
 20. It is trite that drivers when driving carefully do not ordinarily lose control of the vehicles they are charged with. It is upon the driver to explain what led him to lose control of the vehicle and where no such evidence is forthcoming, it must be presumed that the driver was negligent- (See [Samuel Mukunya Kamunge v John Mwangi Kamuru](#) Nyeri HCCA No. 34 of 2002).
 21. In this case, the Respondent was a passive passenger in the subject motor vehicle. His evidence that the driver lost control of the vehicle as a result of which it hit an electric post has not been controverted. In the circumstances, the learned trial magistrate correctly applied the holding in [Trust Bank Limited v Paramount Universal Bank Limited & 2 others](#) [2009] eKLR that Appellant's pleadings were not substantiated and correctly found that the driver was liable at 100%.
 22. On quantum, Dr. Ombati's report dated 4th November, 2019 demonstrates that Respondent suffered:-Chest pain on exertion.Deep cut wound on temporal region of head which was sutured.Loss of consciousness with patient being admitted in ICU.Bruises on abdomen.Intermittent headache.Fracture of the upper end of the Humerus "anatomical neck" great tuberosity proximal end.Multiple fractures of the femur
 23. The doctor noted multiple cut wounds and scars .He indicated that ORIF was applied to align bones and that further surgery would be required to remove the metal implants at cost of Kshs. 200,000/= and he assessed permanent incapacity at 50%.
 24. Before the trial court, the Respondent sought an award of Kshs. 2,000,000/= while relying on the case of [David Kimathi Kaburu v Dionisius Mburugu Itiari](#) [2017] eKLR where the court upheld an award of Kshs. 630,000/=, where the claimant had suffered fragmental fracture mid shaft femur and intertrochanteric fracture. The Respondent also relied on the case of [Ndathi Mwangi & 2 others v Benson Lumumba Ndivo](#) [2018] eKLR where High Court substituted the award of Kshs. 1,500,000/= with Kshs.1,250,000/= for fracture of the ulna, compound fracture of the femur in the middle one third, compound displaced fracture of the left tibia and fibula and soft tissue injuries.
 25. On his part, the Appellant proposed a sum Kshs. 300,000/= and cited [Civicon Limited v Richard Njomo Omwancha & 2 others](#) [2019] eKLR where the 2nd Respondent suffered a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint. She was awarded Kshs.450,000/= as general damages.



26. Further, he relied on the case of *Mwavita Jonathan v Silvia Onunga* [2017] eKLR where the Respondent sustained injuries to the left hip, commuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back and deep wound on the left lower leg. He was awarded general damages of Kshs. 400,000/= .
27. The Appellant therefore urged the Court to find that the award on damages was not commensurate to the injuries suffered by the Respondent.
28. The principles to guide an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were settled by the Court of Appeal. An appellate court must be satisfied that either 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 an erroneous estimate of the damages (See *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor v Lubia & Anor, No. 2* [1985] KLR).
29. Further, it is settled law that the general approach is that comparable damages should, as far as possible, be compensated by comparable awards. It is also settled that quantum is a matter of judicial discretion which can only be interfered with if the Court is satisfied that the trial court's decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shah* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor v Lubia & Anor No 2* [1987] KLR 30).
30. The authorities cited by Appellant herein concerned incomparable injuries to those suffered by Respondent herein and were therefore of no assistance to the trial court.
31. On the contrary, the injuries suffered in *David Kimathi Kaburu vs Dionisius Mburugu Itiari* (*supra*) are comparable in so far as they relate to fractures of the femur. There was no permanent incapacity. That decision was made in November, 2019 and the Respondent had not suffered permanent incapacity unlike in this case where the Respondent suffered 50 % permanent incapacity.
32. Although the trial did not make any reference to inflation, it considered the seriousness of the injuries sustained by the Respondent but nevertheless, the ward of Kshs. 1,500,000 was unjustified and calls for interference by this court. It is hereby substituted with an award of Kshs. 1,000,000/=.
33. Concerning costs, Section 27 (1) of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya provides that:-
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
34. Costs being at the discretion of the court, an appellate Court will not ordinarily interfere with the exercise of discretion by a trial Court unless it is shown that the exercise was based on no evidence at all, or on a misapprehension of facts or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).



35. This Court therefore finds that the discretion was exercised judiciously and decline to interfere with the exercise of such discretion.
36. In the end, the appeal partially succeeds and therefore, it is hereby ordered that:-
1. The order on liability at 100% against the Appellant is upheld.
 2. The award on special damages and costs are upheld.
 3. The award of general damages being Kshs. 1,500,000/= is hereby substituted with the sum of Kshs. 1,000,000/=.
 4. Each party shall bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 15TH DAY FEBRUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Ojonga for Appellant

N/A for Respondent

Lauren Njiru / Aphline , Court Assistant

