



REPUBLIC OF KENYA



**Ndung'u v Kibiri (Civil Appeal E252 of 2021)
[2024] KEHC 1050 (KLR) (Civ) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E252 OF 2021

JN MULWA, J

FEBRUARY 8, 2024

BETWEEN

BENSON M. NDUNG'U APPELLANT

AND

LUCY WAIHIRA KIBIRI RESPONDENT

JUDGMENT

1. The Respondent was awarded Kshs. 6,872,640/= by the trial court as damages for injuries she sustained following an accident with the Appellant's motor vehicle registration No. KYV 993 that is alleged to have veered off the road and knocked her down on the 25/09/25004. The trial court in its judgment dated 16/04/2021 found the Appellant wholly to blame for the accident and awarded costs and interests to the Respondent as stated above.
2. Being dissatisfied with the judgment, the Appellant preferred this Appeal by a Memorandum of Appeal dated 12/05/2021 proposing that the said judgment be reviewed and or set aside upon two main grounds on liability and excessive award of damages as to be an erroneous estimate in view of the injuries and pleadings.
3. The awards granted by the trial court are as follows: -
 - i. Liability – 100% against the appellant
 - ii. General damages for pain & suffering – Kshs. 2,300,000/=
 - iii. Loss of earning capacity – Kshs. 3,680,640/=
 - iv. Future medical expenses – Kshs. 750,000/=
 - v. Special damages – Kshs. 142,000/=



Total Kshs. 6,872,640/=

Plus costs and interests.

4. Three medical reports were prepared in respect of the injuries the Respondent sustained by -
 - a. Dr. C. O. Okere report dated 15/06/2010
 - b. Dr. Calisto Odongo dated 2/06/2005
 - c. Dr. Bodo dated 22/06/2007.

All the medical reports were produced and admitted as exhibits by consent.

5. The doctor's reports agree on the injuries except for the degree of permanent incapacitation. The respondent's injuries are stated as severe compound fracture of the right tibia and fibula, fracture of the left metacarpal bone of middle finger; and extensive soft tissue injuries and skin loss.

Dr. C.O. Okere placed degree of permanent incapacity at 40%

Dr. Bodo in June 2007 placed level of permanent incapacity at 25% to 30%.

6. For the above injuries, the Respondent in her Amended Pleint dated 8/7/2007 sought: -
 - a. Special damages Kshs. 2,813,980/= (on medical expenses.)
 - b. General damages
 - c. Cost and interest.

7. Being the first appellate court, it is my duty to re-examine, re-evaluate and re-analyze the evidence adduced before the trial court, and come up with my own findings and conclusion but keeping in mind that i neither saw or heard the witnesses testify – *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1986] EA123.

Further, this court is not bound to necessarily accept the findings of the trial court.

8. The Respondent's case before the trial court was adduced by the Respondent herself as PW1, who also produced her documents as listed in her bundle of documents dated 4/03/2014 and 29/07/2019. She did not call any witness.

At her witness statement dated 15/06/2012, which she adopted as her evidence in chief, the Respondent stated that she was standing at a bus stop when she saw a vehicle with its lights on coming towards her, that she tried to avoid it by running away but unfortunately it hit her on her right leg upon which she fell. She blamed the driver of the vehicle for careless driving without regard to other road users.

9. Before the trial court on cross examination, her evidence collaborated the witness statement and added that the vehicle was at a high speed and that despite running away to avoid being hit, it hit her on her leg and police officers assisted her and took her to Agakhan Hospital.
10. The Appellant's evidence before the trial court was adduced by one Laben Muchiri Ndung'u as DW1. He relied on his witness statement dated 16/08/2018 and produced the Defendant's documents dated 27/10/2020 as exhibits. He was the driver of the accident motor vehicle KYV 993 Toyota Hilux Pickup, and was heading to Thika, driving on the left lane of the road, when suddenly at a bus stop a passenger emerged running to cross the road on a no zebra crossing when he swerved to avoid the accident as there was a bus on the left so he could not see the person crossing. On cross examination, he agreed



that at a bus stop, a driver is expected to stop as pedestrians could cross any time but insisted that the pedestrian was crossing while running and that he swerved to the right to avoid hitting her.

He confirmed that he was charged for the offence of careless driving, pleaded guilty and was fined. No other witness was called to testify for the defence.

11. The Appellant's advocates filed written submissions. I have considered them.

The issues that present for determination in my view are: -

- a. Whether the trial Magistrate erred in law and fact in finding the Appellant wholly liable for the accident.
- b. Whether the damages awarded by the trial court are excessive in view of the injuries sustained.

Analysis And Determination.

Liability

12. The evidence before the trial court was very brief by both parties and was not corroborated by any witnesses. Being a road traffic accident, the Police Investigating Officer or a Police Officer from the station where the accident was reported and police abstract filled ought to have been presented to the court to testify and produce the police file and the Investigation Report or at least, the sketch plan of the accident scene. None of the two parties found it necessary to avail these documents to the court to enable it make or come up with a well-informed Judicious decision on liability. On the scanty evidence the trial Magistrate in her judgment placed all the blame on the driver of the motor vehicle, citing the case *Isabella Wanjiru Karangu v Washington Malele C. A. No. 50/1981* for the proposition that the Appellant's driver, being in control of a lethal machine owed a duty of care to the pedestrian.

13. A Police Abstract in which the Appellant's driver was blamed is but a record of the events, the parties involved in an accident, but without the investigation report and findings very little evidential value can be attached to it. The fact that one party is charged and either pleads guilty, or is found guilty after hearing of the traffic case does not in itself absorb civil liability from the other party in a civil case for damages.

I have read the trial court's analysis and findings on liability, with the above material facts adduced before the court. The trial Magistrate appreciated that indeed the accident occurred, and the driver was charged with the offence of careless driving was convicted and fined.

14. My re-evaluation of evidence before the court and by the witness statements by both parties, I find the trial magistrates findings not wholly supported by the evidence adduced. First, none of the parties called witnesses to support their divergent evidence on how the accident occurred. The Respondent then Plaintiff failed to call the Investigating Officer to produce the sketch plan and Investigation Report. In the same breath, the 2nd Appellant/2nd Defendant and driver of the vehicle had another occupant in the vehicle when the accident occurred. He opted not to call the eye witness nor the police officer to shed more light on the occurrence of the accident. Each stood their ground.

15. It is settled and trite law that if the evidence adduced by all parties is insufficient to establish negligence of any party both parties ought to be held equally to blame. At the face of conflicting evidence as is the case herein, a judge is under a duty to reach a fair conclusion, based on the evidence of both: That the Respondent testified that she was hit off the road at a bus stop and the driver says that the accident was on the road when she was crossing the road. The police Investigating Officer produced no sketch plan to show the point of impact and no witnesses were called by either despite the driver having been charged for careless driving. For that kind of evidence, I am persuaded otherwise than to find that the



driver was wholly to blame. Further, the circumstances and cause of the accident are so speculative that no probable inference can be drawn that either the driver or the pedestrian was wholly at fault.

16. In the case *Lakhamshi v Attorney General* [1971] EA 118, the court held: -

“It is NOT settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame...”

17. Additionally, in *Damaris Wanjiru Nderi v George Ngero Kanyi* [2017] eKLR, in similar circumstances where the court could not reasonably establish who was to blame for the accident both parties were found equally to blame.

The court of Appeal in *Farah v. Lento* [2006] KLR 123, held that where it could not be possible to decide on the evidence adduced who is to blame for the accident, both drivers were held equally to blame.

18. The principle across the decisions of the superior courts is that when it is not reasonably possible to determine how and by which party an accident occurred, both parties/drivers must be held liable, equally or liability is apportioned according to the circumstances of each case.

Among them is *Shedrack Kilonzo Kavoi v Gacheru Peter & 3 others* [2020] eKLR, *Wiliam Kabogo Gitau vs. George Thuo & 2 others* [2010] I KLR 526.

In the circumstances, I am constrained to interfere with the trial court's finding on liability and conclude that each of the two parties contributed to the occurrence of the accident, albeit at different proportions.

I proceed to set it aside, and apportion liability between the 2nd Appellant and the Respondent at 60:40 basis in favour of the Respondent.

Quantum Of Damages

19. In *Butt v Khan* [1982-1988] KAR 1 the court held 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 arrived at a figure which was either inordinately high or low”

Based on the above principles, the Appellant submits that the awards granted by the trial court are excessive and do not compare with comparable awards for similar injuries.

20. The injuries sustained by the Respondent have been tabulated at paragraph 5 above. Apart from the Respondent's testimony before the trial court, I have looked at her witness statement dated 15/06/2012 and the two Doctors' medical reports.

Special Damages

21. A sum of Kshs. 2,813,980/= was pleaded as special damages at the Amended Pleint. It is trite that special damages must be pleaded and strictly proved –*Swalleh C. Kariuki & Another v Violet Owiso Okuyu* [2021] eKLR.

They are not direct natural or probable consequences of the act complained of and may not be inferred from the act. The Court of Appeal in *Hahn vs. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR, held



in respect thereof that “The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves” A party must produce actual receipts of payments not invoices which are not proof of payment but a demand for payment. The trial court awarded Kshs. 142,000/= particularized as Kshs. 6000/= - medical report by Dr. Odongo, Kshs. 1000/= medical report by Dr. Okere and Kshs. 135,000/= for taxi services provided by various receipts. This amount of Kshs. 135,000 is challenged. The Appellant faults the trial Magistrate for only one reason, that such receipts did not comply with the *Stamp Duty Act*. I have looked at the said receipts. They do not have revenue stamps affixed on them as required under the Act. The receiver of the payment [service provider] has a duty to affix revenue stamps and not the payee who should not be penalized for the omissions of the receiver, as held in the case Benjamin Muela Kimono v Daniel Kipkirong Tarus & Another [2015] eKLR.

22. I am satisfied that the award on special damages at Kshs. 142,000/= was strictly proved to that extent only as the amount pleaded in the amended complaint was way higher at Kshs. 2,819,980/=

General Damages For Pain & Suffering

23. The trial court’s award of Kshs. 2,300,000/= under this sub head is under attack. It is the appellant’s submission that the award is excessive and not comparable to awards for similar injuries.

I have considered the injuries sustained by the Respondent. There is no doubt that they were serious and decree of permanent incapacitation by the two doctors assessed at about 30-40%.

In its submissions before the trial court, the Appellant proposed Kshs. 500,000/= for pain and suffering, and Kshs. 500,000 for loss of earnings. The Respondent on her part proposed awards as follows:

General damages for pain and suffering – Kshs. 2,000,000/=

Loss of earning capacity – Kshs. 5,214,240/=

Special damages – Kshs. 892,100/= and cited numerous decisions in support which I have considered.

24. It is trite that when possible comparable injuries should be compensated by comparable awards, I have considered decisions cited by both parties in respect to comparable injuries.

In Mombasa CCA 141/2011 Alphonse Muli Nzuki v. Brian Charles Ochuodho, the court sustained a sum of Kshs. 800,000/- on appeal.

In Teresiah Ngugi & Another v Michael Masia Kamende [2018] eKLR, for slightly more serious injuries, but comparable, the court awarded Kshs. 1,500,000/= for pain and suffering.

25. The trial court considered the decree of permanent incapacitation of the Respondent and the nails in situ at the fracture sites that needed removal and awarded Kshs. 2,500,000 citing Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd and Another [2014] eKLR, where a sum of Kshs. 1.4 m was awarded in July, 2014.

In Joseph Musee Mua vs. Julius Mbogo [2013] eKLR, the court awarded Kshs. 1.3 million among others.

Looking at the said awards and awards in comparable decisions, I find that the same is indeed excessive to be a proper estimate of the damage. I am persuaded to interfere with the said awards, and reduce the same to Kshs. 1,800,000/= damages for pain and suffering, and loss of earning capacity.

26. In the Amended Complaint dated 7/08/2007, damages for loss of earning capacity are not pleaded separately yet the trial court in its wisdom and discretion awarded Kshs. 3,680,000/= to the respondent.



I find no justification for such an award separately. I am minded that damages for loss of earning capacity can be claimed and awarded as part of general damages for pain and suffering and loss of amenities, or as a separate head of damages.

In *Mumias Sugar Co. Ltd v Francis Wanalo* [2007] eKLR, the court held that such damage can be a token, modest or substantial depending on circumstances of each case, and that there is no formula for assessment of such loss. In the case the court awarded Kshs. 500,000/= for diminution of chances of employment.

27. In her evidence before the trial court the Respondent did not testify that her chances of employment in future were all lost. All she stated was that at the moment, she was unemployed and a little change of her life style in terms of dressing due to scarring on the leg. She did not testify that due to the injuries she was not able or could not find employment or engage in any earning venture, at least upon healing.

I am not persuaded that the award of Kshs. 3,680,640/= for loss of earning capacity was justified at all unlike the award of Kshs. 750,000/= for future medical expenses as recommended by the doctors in their reports.

28. The upshot is that I find that the appeal has merits and I shall interfere with the trial court's discretion to the extent appearing here below: -

1. Liability shall be and is hereby apportioned at 70:30 in favour of the Respondent
2. General damages for pain and suffering and loss of amenities shall be reduced from Kshs. 2,300,000/= to Kshs. 1,800,000/=
3. Loss of earning capacity; damages of Kshs. 3,680,640/= is dismissed as not pleaded and or proved.
4. Future medical expenses of Kshs. 750,000/- is upheld.
5. Special damages of Kshs. 142,000/= is upheld.

Total award Kshs. 2,692,000/=.

This sum shall be subjected to a 30% reduction of Kshs. 807,600/= leaving a sum of Kshs. 1,884,400/= to the Respondent.

29. The Appeal having succeeded the Appellant shall have costs of the Appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE

