



REPUBLIC OF KENYA



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**Nyambok v James (Civil Appeal E035 of 2022)
[2024] KEHC 841 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E035 OF 2022**

KW KIARIE, J

FEBRUARY 5, 2024

BETWEEN

JULIUS NYAMBOK APPELLANT

AND

SARAFINA YANIKE JAMES RESPONDENT

(Being an Appeal from the Homa Bay Chief Magistrate's CMCC No. 63 of 2022 judgment by Hon. R.B.N. Maloba –Principal Magistrate)

JUDGMENT

1. The appellant herein was the defendant in Homa Bay Chief Magistrate's CMCC No. 63 of 2022. This was a claim from a road traffic accident involving motor vehicle registration number KCE xxxL and an unknown motorcycle where the respondent was a pillion passenger. The respondent sustained injuries. In the judgment delivered dated the 26th day of May 2022, the learned trial magistrate apportioned liability at 80:20 in favour of the respondent and awarded Kshs—1,502 606/=, favouring the respondent before factoring in contributory negligence.
2. The appellant was aggrieved by the judgment and filed this appeal. He was represented by G.S Okoth & Company Advocates. He raised grounds of appeal as follows:
 - a. The learned trial magistrate misdirected herself on several matters of law and fact in that:
 - i. She accepted the false evidence adduced by the plaintiff that the defendant's vehicle rammed from behind into the motorcycle on which she was a pillion rider when the same evidence is not corroborated and when the same is contradicted by the evidence of eyewitnesses as well as the evidence of the police officer.
 - ii. She failed to note that the evidence of PW3, Cpl, contradicted the plaintiff's evidence. Nicholas Muthama (who was also not an eyewitness) on how the accident happened.



- b. The learned trial magistrate erred in the law of evidence in giving admissibility to the uncorroborated, wrong, and misleading evidence of the plaintiff and the conflicting evidence of a police officer who failed to investigate the case and find out the particulars of the motorcycle that carried the plaintiff or the details of the rider of the same and who was also not an eye witness while rejecting the evidence of 2 eyewitnesses who were at the scene when the accident happened.
 - c. The learned trial magistrate erred in law in holding the plaintiff guilty of contributory negligence of 20% contrary to the decision in *Adolf Muyoti & Another v Thoma Mida Sawe* (2018) eKLR, which the magistrate had herself cited in her judgment.
 - d. The learned trial magistrate erred in the law of evidence in holding the appellant liable for the negligence that caused the accident against the weight of evidence, which clearly showed that the rider of the motorcycle on which the plaintiff was a pillion rider failed to switch on his headlights when riding on a public road and therefore bumped into the appellant's vehicle.
 - e. The learned trial magistrate erred in the law of the highway Code in failing to note that a motorcycle rider is required at all times he is riding on a public road to light his headlights.
 - f. The learned trial magistrate erred in law in holding that what is stated in a witness statement constitutes a matter of afterthought whereas, in paragraph 7 of the statement of defence, it was expressly stated that the rider of the motorcycle was "without any knowledge of the Highway Code" which was expounded in the witness statement (which is evidence) as required by Order 2 Rule 3 of the [Civil Procedure Rules](#).
 - g. The learned trial magistrate erred in the law of evidence in deciding the case against the weight of evidence.
 - h. The learned trial magistrate erred in law in awarding damages, both special and general, that was excessive concerning the injuries sustained.
3. The respondent opposed the appeal through the Wangira Okoba & Company, Advocates firm. It was argued that the appeal lacked merits.
 4. This Court is the first appellate court. I am aware of my duty to evaluate all the evidence on record, bearing in mind that I had no advantage of seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.
 5. Sarafina Yanike James, the respondent herein, was a pillion passenger. If the boda-boda rider was liable in any way, this liability could not be attributed to her. In the case of [Adolf Muyoti & another v Thomas Micha Sawe](#) [2008], eKLR J.R. Karanja J said:

The respondent was a pillion bicycle passenger under a third party's control. He was not expected and could not have contributed to an accident involving a bicycle taxi and motor vehicle collision. He was a victim of other people's negligence. The allegation in the defence that he jumped off a moving bicycle was not established at all. If anything, the actual cyclist should have been joined by the defendants as a third party now that the defence attributed the accident to his negligence. [emphasis added]
 6. I agree with the appellant when he faulted the learned trial magistrate for "holding the plaintiff guilty of contributory negligence of 20% contrary to the decision in *Adolf Muyoti & Another v Thoma Mida*



Sawe (2018) eKLR”. I, therefore, set aside the finding and substitute with a finding of 100% liability on the part of the appellant.

7. The appellant contends that the judgment on quantum was excessive. The appellant, in his submissions during trial, did not make any proposal for damages. However, the respondent proposed Kshs. 1, 800,000.00 general damages, pleaded Kshs. 284,000.00 special damages and Kshs. 500,000.00 for future medical expenses.

8. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan* [1981] KLR 349 on page 356, Law JA stated:

...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 a figure which was either inordinately high or low.

9. The respondent sustained the following injuries:Compound fractures in right mid-tibia fibula bonesDeep cut wound on the right knee jointMultiple bruises on right legSeptic wound right tibia-fibula regionMassive loss of tissue on the right leg posteriorly

The learned trial magistrate awarded Kshs 1 300 000.00 general damages.

10. In urging for an award of Kshs. 1 800,000.00 general damages, the respondent relied on the following three cases.

a. *Kennedy Oseur v Musa Locho & 2 others* [2009] eKLR

The Plaintiff sustained severe compound fractures of the right tibia and fibula with extensive loss of skin muscles, bones, tendons, and nerves. The skin loss was from the mid-leg interiorly and extended to the mid-foot anteriorly. About 60% of the muscles of the anterior compartment of the leg were damaged and lost in the accident. He also suffered generalized body soft tissue injuries and bruises. He underwent several major operations to repair and reconstruct the limbs. The first operation involved the removal of dead muscles and other tissues and the stabilization of bones with an external fixator. There was severe sepsis, and the Plaintiff had to be taken to the theatre and repeat surgical debridement done several times. He was awarded Kshs.2,089,479/= general damages for pain and suffering.

b. *Athumani Simiyu v Ludovica Mwandoe & 2 others* [1999] eKLR

The plaintiff was awarded Kshs. 565,000 general damages for the following injuries:
Head injuryScalp out 2" long, deep*Multiple superficial and deep cuts on both hands with loss of two tails (index and thumb right side) *Multiple superficial cuts over both knees*Fracture left tibia and fibulaPotts fracture - right ankleLarge wound eight footCut 2" long, deep foot

c. *Ndathi Mwangi & 2 others v Benson Lumumba Ndivo* [2018] eKLR, an award of Kshs 1,250,000.00 was given for the following injuries:Fracture of the ulnaCompound fracture of the femur in the middle one-thirdCompound displaced fracture of the left tibia and fibulaSoft tissue injuries

* Laceration on the right leg

11. After considering the injuries suffered by the respondent herein, the passage of time since the above-cited decisions were made, and factoring in the inflation, I find no reason to interfere with the award. The appeal is dismissed with costs.



DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF FEBRUARY 2024

KIARIE WAWERU KIARIE

JUDGE

