



**Sunny Hauliers Limited v Mulindi (Civil Appeal 733 of 2019)
[2024] KEHC 1702 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1702 (KLR)

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

CIVIL

CIVIL APPEAL 733 OF 2019

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

SUNNY HAULIERS LIMITED APPELLANT

AND

JOSPHAT MUSYOKA MULINDI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D.O Mbeja, SRM dated 13th December 2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 400 of 2019)

JUDGMENT

Introduction and Background

1. The Appellant is dissatisfied with the judgment of the Subordinate Court dated 13.12.2019. The Appellant was found fully liable for injuries sustained by the Respondent as a result of an accident that occurred on 31.07.2017 along the Eastern by-pass involving motor vehicle registration number KBJ ***T in which the Respondent was a passenger and motor vehicle registration number KBR *L** owned by the Appellant. The Subordinate Court awarded the Respondent Kshs. 1,800,000.00 and Kshs. 3,550.00 as general and special damages respectively and future medical expenses of Kshs. 400,000.00, costs and interest.
2. The Appellant is dissatisfied with the judgment and appeals against the findings on liability and quantum of damages. The appeal is anchored in its memorandum of appeal dated 16.12.2019 which has been canvassed by way of written submissions.
3. In determining this appeal, I am cognizant of the role of the first appellate court which is to re-evaluate and re-assess the evidence before the court of first instance and at the same time, keeping in mind the



fact that the trial court interacted first hand with the parties (see *Selle v. Associated Motor Boat Co.* [1968] EA 123)

4. On the issue of liability, the Appellant faults the trial magistrate for finding it was 100% liable and submits that the Respondent did not discharge the burden of proof that the Appellant was negligent. That the Respondent did not adduce any material evidence to establish how the accident occurred. The Appellant complains that the trial magistrate failed to apportion liability between the parties. The Appellant also submits that the trial magistrate should have endeavored to establish which party was to blame for the accident and at best liability should have been apportioned equally between the parties. The Respondent testified that he was a passenger in motor vehicle registration number KBJ *T **and that the Appellant's motor vehicle which was coming from Embakasi lost control and hit the motor vehicle registration number KBJ *T** in which the Respondent was a passenger. He stated that the Appellant's motor vehicle was moving in a "zig zag manner" and veered off the road. He blamed the Appellant's driver for the accident and denied contributing to the occurrence of the accident. At the end of the day, the Respondent was a passenger and could not contribute to the accident in a way. The Appellant was at liberty to seek contribution and indemnity from the owner and driver of motor vehicle registration number KBJ XXXXT it did not join as a party to the suit. The appeal on liability is dismissed.
5. On quantum of damages, I am reminded of the principles governing an appellate court's discretion to interfere with an award of damages by the trial as stated in the case of *Kemfro Africa Limited t/a Meru Express Services & another v. A.M Lubia and another* (No. 2) [1982-88]L KAR 727 that an appellate court cannot interfere with the trial court's discretion to assess damages simply because it would have awarded a different figure if it had tried the case at first instance. An appellate court may disturb a trial court's award of general damages when it is so manifestly high or inordinately excessive or so manifestly or inordinately low indicating that the trial court proceeded on a wrong principle or misapprehended the law. As it is, damages are always to be pegged on injuries suffered and guided by comparable cases (see *Maore v Geoffrey Mwenda* [2004] eKLR).
6. Before the trial court, the Respondent stated that he suffered a fracture-left femur, a fracture-left humerus, swollen, painful, tender-left upper arm, swollen painful, tender left thigh, deep cut wound-occipital region and bruises/wounds-face. The Respondent was examined by Dr. Mwaura who prepared a report dated 02.01.2019. He noted that the Respondent could not run and could only lift light objects and that he would require removal of the metal implants at a cost of Kshs. 400,000.00.
7. Before the Subordinate Court the Respondent had proposed a sum of Kshs. 2,000,000.00 as general damages. He relied on the cases of *Henry Moriasi Osiemo v Quid J. Mohamed & Merali Mfadhul* [2001]eKLR where the plaintiff had suffered a head injury – concussion, multiple lacerations on head, fracture humerus (left arm), fracture femur (right thigh), fracture ribs 4th & 5th right side, fracture trochanter right hip, fractures pelvis (pubis and right sacro -iliac joint). He was unconscious on admission at Pandya Memorial Hospital and after initial treatment, he underwent operations of "Open reduction – K Nail" on right leg and "plating" on left humerus. He was discharged after two weeks to attend as an out - patient. He was still under treatment and remained offwork. He was awarded Kshs. 1,500,000.00 in 2001. He also relied on *Roy Mackenzie v Cartrack Kenya Limited & another* [2012] eKLR where the plaintiff sustained a severe injury to his left shoulder which required major surgery under general anesthesia. Despite post-operative physiotherapy, shoulder movements were grossly reduced and there was persistent pain. He had impingement and most likely a tear of the rotator cuff tendon which required urgent arthroscopic surgical correction to prevent further deterioration of function and alleviate his pain. The cost of surgery and rehabilitation was approximately Kshs. 550,000. The court awarded him Kshs. 700,000.00 for general damages.



8. On its part, the Appellant proposed a sum of Kshs. 300,000.00 and relied on Hassan Farid & another v Sataiya Ene Mepukori & 6 others [2018] eKLR where the court awarded Kshs. 450,000.00 for a respondent who had suffered a deep facial cut wound, blunt injury to the back, fracture of the metacarpal bone of the right thumb, comminuted fracture of the right humerus and blunt injury to both thighs. The court also awarded sums of between Kshs. 100,000 to Kshs. 200,000.00 for soft tissue injuries for the other respondents. Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR where the respondent sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. In this case, the court awarded Kshs. 450,000.00. In Paul Kithinji Kirimi & another v Gatwiri Murithi [2018] eKLR, the respondent sustained a cut on the upper lip, (hyperaemic) red right eye, fracture of the right mandible and the distal third of the right femur. The court awarded Kshs. 450,000.00.
9. From the decisions I have outlined, I find that the decisions cited by the Appellant involved far less serious injuries than those sustained by the Respondent while those cited by the Respondent represented far more serious injuries. I therefore find the award of Kshs. 1,800,000.00 inordinately high and I accordingly reduce it to Kshs. 1,000,000.00.

Disposition

10. In conclusion, I allow the appeal on the following terms:
 - a. The award of general damages by the Subordinate Court in the Judgment of the Subordinate Court dated 13.12.2019 is set aside and substituted with an award of Kshs. 1,000,000.00.
 - b. The Respondent shall bear costs of the appeal assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Mr Sewe instructed by Okwach and Company Advocates for the Appellant.

Mr Kiptanui instructed by Waiganjo Wachira and Company Advocates for the Respondent.

