



**Sunny Hauliers Limited v Wambua (Civil Appeal 161 of 2020)
[2024] KEHC 1705 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1705 (KLR)

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

CIVIL

CIVIL APPEAL 161 OF 2020

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

SUNNY HAULIERS LIMITED APPELLANT

AND

CHARLES WAMBUA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. I. Orange, SPM dated 5th March 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 8444 of 2018)

JUDGMENT

1. The Appellant is dissatisfied with the judgment of the Subordinate Court dated 05.03.2020. It found the Appellant 100% liable for injuries the Respondent sustained as a result of an accident that occurred on 31.07.2017 involving motor vehicle registration number KBJ T driven by the Respondent and motor vehicle registration number KBR L owned by the Appellant. The Respondent was awarded Kshs. 1,200,000.00 and Kshs. 3,550.00 as general and special damages respectively together with costs and interest.
2. Being dissatisfied with the judgment, the Appellant appeals against the findings on liability and quantum of damages. The appeal is anchored in his memorandum of appeal dated 17.04.2020 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 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.
5. The circumstances of the accident were narrated to the Subordinate Court by the Respondent (PW 1). He testified that he was heading to Utawala from Ruai when the Appellant's motor vehicle, coming from the opposite direction hit the front end of his motor vehicle. That there was a third vehicle, which he did not see that was overlapping and hit the Appellant's motor vehicle which then swerved and thus hit the Respondent's motor vehicle. He stated that he did not collide with the third vehicle and that he could not blame it for the accident. From the documents produced by the Respondent, the Police abstract indicated in the "results of investigations" that it was the Appellant's motor vehicle that was to be blamed for the accident.
6. The testimony by PW 1 was direct evidence as to how the accident happened. This testimony was not controverted by any other direct evidence. The Appellant did not actually call any evidence in rebuttal. The effect of a defendant not calling evidence to challenge a plaintiff's testimony renders not only the defence unsubstantiated but also leaves the plaintiff's case unchallenged (see *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* ML HCCC No. 834 of 2002 [2009] eKLR and *Autar Singh Babra and another v Raju Govindjl*, HCCC No. 548 of 1998 (UR)). In the circumstances, I like the trial court, find that the Appellant was fully liable. It was of course open for the trial court to apportion liability based on the circumstances but the totality of the Respondent's evidence did not support any inference of contribution. I also hold that Appellant was at liberty to seek contribution and indemnity from the third party vehicle but it did not do so. The Subordinate Court did not err by finding the Appellant fully liable. The appeal on liability therefore fails.
7. Turning to the issue of quantum of damages, it was not disputed that the Appellant sustained a fracture of the left lateral malleolus, bruises and swelling on both legs and right foot and blunt injury(tender) of the anterior chest wall. Dr. Mwaura, in his report dated 21.07.2018, classified the injuries as 'grievous harm' and awarded the Respondent 5% permanent incapacity.
8. After considering the authorities cited by the parties, the learned magistrate stated that he was guided by the cases of *Joseph Kitheka v Stephen Mathuka* NBI HCCC No.1750 of 99 (UR) and *Michael Maina Gitonga v Serah Njuguna* [2012]eKLR to award the sum of Kshs.1,200,000.00. The Subordinate Court stated that the Respondent had also proved the pleaded special damages of Kshs. 3,550.00.
9. I am reminded of the principles governing an appellate court's discretion to interfere with an award of damages by the trial court 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 (see also *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5). General damages are damages at large and in making an award, the court considers the nature and extent of injuries suffered and is guided by comparable cases where the courts have awarded damages while at the same time ensuring a claimant is fairly compensated (see *Maore v Geoffrey Mwenda* [2004] eKLR).



10. As stated, in awarding Kshs. 1,200,000.00, the Subordinate Court relied on, inter alia, *Michael Maina Gitonga v Serah Njuguna (supra)* where the plaintiff therein suffered multiple fracture of the pelvis, dislocation of the right hip with displaced fracture of the right acetabulum, comminuted fractures of the right tibia and fibula on the proximal end with fracture of the tibia plateau and soft tissue injuries of the chest. He was awarded Kshs. 1,500,000.00 as general damages for these injuries. Comparing the Respondent's injuries to the above case, I agree with the trial court that they were indeed more severe than those suffered by the Respondent in this case. However, the Appellant submits that the awarded sum was still inordinately high as he had proposed as a sum of Kshs. 150,000.00 and he relied on *Nabashon Chege v Stephen Makabila & another* [2018] eKLR where the appellant had sustained a dislocation on the left leg ankle joint and bruises on the right leg and *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 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.
11. In my view, all the above decisions, including the one relied on by the Subordinate Court did not provide a proper guide as the injuries in those cases were not comparable to those suffered by the Respondent. In *Civicon Limited v Richard Njomo Omwancha & 2 others* [2019] eKLR, the court set aside an award of Kshs. 1,300,000.00 with Kshs. 500,000.00 for a single fracture of the right tibia and fibula and fractures of the upper teeth. In *Savanna International Ltd v Muka* [2022] KEHC 675 (KLR) where the respondent therein suffered a fracture medial malleolus of the left ankle joint and Severe soft tissue injuries of the left ankle joint, an award of Kshs. 500,000.00 was set aside and substituted with an award of Kshs. 400,000.00.
12. I agree with the Appellant that the award of Kshs. 1,200,000.00 is inordinately high considering the injuries the Respondent sustained. I would find an award of Kshs. 600,000.00 to be more appropriate in the circumstances. This ground of appeal by the Appellant therefore succeeds.
13. I decline to award costs on the ground that the appeal would have been avoided had the parties cited more recent, appropriate and relevant cases to guide the court.
14. The Appellant's appeal succeeds and is allowed on the following terms:
 - a. The award of general damages in the Judgment of the Subordinate Court dated 05.03.2020 is set aside and substituted with an award of Kshs. 600,000.00.
 - b. Each party shall be their own costs.

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.

