



REPUBLIC OF KENYA



**Transline Classic Safaris Limited v Cleophas (Civil Appeal E030 of 2021)
[2024] KEHC 1517 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E030 OF 2021
GL NZIOKA, J
FEBRUARY 14, 2024**

BETWEEN

TRANSLINE CLASSIC SAFARIS LIMITED APPELLANT

AND

CHARLES RIOBA CLEOPHAS RESPONDENT

*(Being an appeal from the decision by Hon. Martin Mutua Resident
Magistrate (RM) dated 28th May 2021, delivered vide Civil Case
No. 348 of 2019 at the Chief Magistrate's Court at Naivasha)*

JUDGMENT

1. By a plaint dated 23rd May 2019 the plaintiff (herein “the respondent”) sued the defendant (herein “the appellant”) seeking for judgment for:
 - a. Special and general damages for pain, suffering and loss of amenities.
 - b. Costs of the suit and interest at court rates.
 - c. Any other or further relief that this Honourable court may deem just to grant.
2. It was the respondent’s case that, on 11th February, 2019 he was lawful driving a motor vehicle registration No. KAR 885U along the Maai Mahiu-Narok Road towards Narok and at around 3:30pm his motor vehicle was involved in an accident with motor vehicle KCG 207P.
3. That, at the time of the accident, the appellant was the registered owner of motor vehicle registration No. KCG 207P and it was being driven by his employee, servant, agent and/or authorized driver.
4. Further, the appellant’s motor vehicle was driven negligently and/or in a careless manner in that; the driver failed to slow down, swerve or brake to avoid the accident, failed to keep proper look out for



other road users or note the other motor vehicle, driving on the wrong side of the road and in a zig zag manner.

5. That as a result of the accident the appellant sustained the following bodily injuries:
 - a. Fractured right clavicle
 - b. Dislocation of left ankle joint
 - c. Blunt injury to the anterior chest wall leading to soft tissue injuries
 - d. Deep cut wounds on the forehead
 - e. Permanent disability 20%
6. However, the appellant filed a statement of defence dated 22nd July 2019 and denied liability for the accident. He further denied the occurrence of the accident, the alleged injuries sustained by the respondent and that he was the registered owner the motor vehicle.
7. However, on a without prejudice basis, the appellant pleaded that, if the accident ever occurred at all, it was caused solely or substantially contributed to by the respondent. Further, the respondent failed to take adequate precaution to protect himself, or heed the safety precautions, or traffic rules.
8. That, in the alternative, the accident was caused by the negligence of the driver of the motor vehicle registration No. KCN 986F, as he failed to keep proper look out for other road users, disregarded traffic rules, failed to stop, slow down, swerve or in any other manner avoid the accident.
9. The appellant argued the doctrines of res ipsa loquitor does not apply in this matter and relied on the doctrine of volenti non fit injuria.
10. The case proceeded to full hearing and by a judgment dated 28th May 2021, the trial held that the appellant was 100% liable and awarded damages as follows:

General damages - Kshs 700,000

Special damages -Kshs 9,550

Total award -Kshs 709,550

The respondent was also awarded costs and interest.
11. However, the appellant is aggrieved by the decision of the trial court on both liability and quantum and appeal against it on the following grounds:
 - a. That the learned magistrate erred in law and fact in holding that the defendant was 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same;
 - b. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to pay general damages of KShs.700,000 which was excessive in the circumstances and comparable injuries.
 - c. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and



erroneous conclusion condemning the defendants to excess quantum and special damages without concrete documentary evidence.

- d. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding conclusion, in particular relating to damages;
 - e. The learned magistrate erred in law and fact in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages;
 - f. That the learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish her case more especially on quantum;
 - g. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice;
 - h. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions p filed by the appellant;
 - i. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;
12. The appeal was disposed of through filing of submission. The appellant in submissions dated, 10th January 2023, submitted that the assessment of quantum of damages is discretionary, but the discretion should be exercised judicially, with circumspect, and on legal principles.
 13. Further, that an appellate court will only interfere with the exercise of such discretion where the trial court took into account irrelevant factors, left out relevant factors, or where the is inordinately too high or too low that it is a wholly erroneous estimate of damages
 14. The appellant submitted that the award must be consistent and within limits. That the court must take into account comparable or similar injuries and relied on the cases of; Denshire Muteti Wambua vs Kenya Power and Lighting Company Ltd [2013] eKLR, and Godfrey Wamalwa Wamba & another vs Kyalo Wambua [2018] eKLR
 15. He argued that the amount of damages of Kshs. 700,000 awarded by the trial court is inordinately high and that the trial court failed to give a satisfactory explanation on how it arrived at the figure.
 16. Further, that the respondent sustained a fracture injury and an award of Ksh. 400,000 would be wholly sufficient. The appellant relied on the cases of; Harun Muyoma Boge v Dr. Daniel Otieno Agulo, Migori HCCA No. 86 of 2012 quoted in Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR where the appellate court set aside an award of Kshs. 150,000 and substituted it with an award of Kshs. 300,000 wherein the plaintiff sustained multiple injuries and fracture of right tibia and fibula
 17. Further, reliance was placed on the cases of;



- a. Naomi Momanyi vs. G4S Security Services Kenya Limited [2018] eKLR where the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Kshs. 300,000.
 - b. Wakim Sodas Limited vs. Sammy Aritos [2017] eKLR where the appellate court upheld the trial court award of Kshs. 400,000, where the respondent sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula,
 - c. Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR where the High Court refused to enhance the amount of Kshs. 300,000 awarded as general damages by the trial court wherein the appellant sustained a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula, cut wound on right leg below the knee without fracture and a cut wound on the face. She was hospitalized for nine days The soft tissue injuries were cleaned and dressed and she was put on antibiotics, analgesics and sedatives for the head injury. She was left with scars on the face and on both lower limbs, and mild headaches from the head injury. The soft tissues were said to have had fully healed.
18. The appellant submitted that court have awarded Kshs. 400,000 where the claimant has suffered more severe injuries and relied on the case of; Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR where Majanja J set aside the lower court award of Ksh. 1,000,000 for general damages for 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 and substituted it with Kshs. 450,000.
 19. The other cases cited are: Zachariah Mwangi Njeru v Joseph Wachira Kanoga, Nyeri HCCA No. 9 of 2012 quoted in Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR the Plaintiff sustained comminuted fracture of the tibia and fibula. The court set aside an award of Kshs. 800,000 and substituted it with an award of Ksh. 400,000 and Mbithi Muinde William v Rose Mutheu Mulatia [2019] eKLR the respondent was awarded a sum of Kshs. 400,000 as compensation for a swollen, tender left wrist and left leg, fracture of the left 5th metacarpal bone and fracture of the right tibia.
 20. The appellant urged the court to allow the appeal and award him the costs of the appeal on the ground that costs follow the event as stipulated under section 27 of the *Civil Procedure Act*.
 21. However, in submissions dated 27th February 2023, the respondent argued that, he proved the appellant's driver was negligent and caused accident. That he gave evidence of how the appellant's driver in attempt to overtake two trailers entered his lane without ensuring there was enough space for him to overtake safely and as a result he collided with the respondent's motor vehicle.
 22. Further PW2 fully blamed the appellant's driver for the accident. He relied on the case of; Kenya Power and Lighting Ltd v Kenneth Lugalia Imbugua (2016) eKLR where Aburili J held that well maintained and driven vehicles do not just get involved in accident and in absence of evidence to prove otherwise the driver is deemed to be negligent.
 23. That, furthermore the appellant had a duty of care to the respondent to be extra careful while driving, which duty he failed to discharge. He relied on the case of; Kikambala Fish Station vs Peris Wanjala Magnaga Civil Appeal 37B of 2001 where the court quoted with approval from Charlesworth on Negligence 6th Edition paragraph 678 and stated that the driver of a vehicle has a duty to keep a good look out for other traffic, pedestrians and children, that may be expected on the road.



24. The respondent further submitted that, the appellant did not adduce any evidence nor did he call any witnesses to controvert his evidence, or to prove that he was negligent. That the appellant cannot resort to submissions as they are not a substitute for evidence as stated in the case of; Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi & Another [2014] eKLR that many cases have been decided based on facts and without hearing of submissions.
25. On the injuries sustained, the respondent submitted that Dr. Obed Omuyoma produced the medical report detailing the injuries he sustained. That, the appellant's doctor, Ruth (DW1), despite stating that Dr, Omuyoma's assessment of permanent disability of 20% was erroneous, she confirmed during cross-examination that the level of disability decreases as a patient recover.
26. On the issue of quantum, the respondent submitted that while his submissions were not placed in the file at the trial court, the trial Magistrate relied on the case of; Dennis Mwendwa Mbithe Kathuku vs George M. Mwangi (2016) eKLR where the court enhanced the award from Kshs. 180,000 to Kshs. 450,000 for less severe injuries.
27. Additionally, the trial court relied on the case of, Civicon Limited vs Richard Njooora Omwancha & 2 others (2019) eKLR where the appellate court upheld the award of Kshs. 450,000 as sufficient for less severe injuries than those sustained by the respondent in the present case.
28. That the award by the trial court was reasonable and not excessive as the trial court took into account the gravity of the injuries, permanent disability, and inflation. He urged the court to uphold the award as granted and dismiss the present appeal with costs to himself.
29. I have considered the appeal in the light of the record of the trial court, the submissions of the parties therein and herein. I recognise the role of the appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
30. The court thus observed: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
31. In the instant matter, the appellant has contested the court's decision on both liability and quantum. As regards liability, I have considered the statement of the respondent filed in the trial court in support of the plaint. He stated therein that the driver of the motor vehicle registration No. KCG 207P was overtaking two trailers on the lane on which he was driving thus causing a collision with his motor vehicle. That he tried to swerve to avoid the accident but in vain and his motor vehicle was hit on the right side damaging it accordingly. The respondent adopted his statement as his evidence in chief.
32. In addition, I have considered the results of investigation of the accident as stated in the police abstract and it indicates that, the matter was still under investigation but at the left corner of the document is



written “To blame KCG 207P. Insurance No. A8892255, No 08607348, Comm. 27/01/2018, Exp. 26/2/2019 INSURANCE; DIRECTLINE ASSURANCE CO. LTD”.

33. The police abstract was produced by No 88987 PC Abed Aboki who also testified that the driver of motor vehicle KCG 207P was to blame.
34. It is noteworthy that, the appellant did not adduce any evidence in chief to support the statement of defence or rebut the respondent’s case. Therefore the finding of the trial court that, the appellant was liable at the percentage of 100% is proper.
35. As regards quantum, I note that, the plaintiff pleaded that, he suffered injuries as stated and tabulated below: -
 - a. Fractured right clavicle;
 - b. Dislocation of left ankle joint;
 - c. Blunt injury to the anterior chest wall leading to soft tissue injuries;
 - d. Deep cut wounds on the forehead.
36. The doctor who examined the respondent testified as (PW2) Dr. Obed Omuyoma and produced a medical report he prepared after examining the plaintiff which indicates that, he suffered inter alia, a fracture right clavicle, dislocation of the left ankle joint, blunt injury to the anterior chest wall leading to soft tissue injuries and deep cut wound on the forehead.
37. It suffices to note that the doctor has indicated in his report that, he relied on the outpatient card from Naivasha County Referral Hospital OP No. 023124/19 dated 18th February 2019. The doctor concluded that the respondent sustained the afore injuries and a permanent disability of 200%. He classified the degree of injury as harm.
38. In cross-examination he stated that, there is a “possibility the plaintiff could have healed” The respondent did not re-examine the witness to clarify the assertion that he might have healed.
39. The appellant on its part led evidence through the testimony of Dr. Ruth Ichamwenge, who examined the respondent and indicated that he sustained a fracture of right clavicle and soft tissue injury and was in the process of healing. That he would have no disability upon healing.
40. In cross-examination she stated that the patient sustained injuries as stated in Dr. Omuyoma medical report but the degree of permanent disability should be awarded after complete healing has occurred. She added “patient had recovered”
41. In awarding Kshs 700,000 as general damages, the trial court stated that it had considered both medical reports and the one of Dr Obed, that upon healing the permanent disability would be 20%. and in addition, that the court was privileged to see the respondent physically and he had difficult moving his hand and reduced function of the hand. That, the doctor classified injuries as grievous harm.
42. The trial court also considered the appellant’s submission on quantum proposing 150,000 as general damages. The respondent did not file any submissions.
43. Having considered the aforesaid I note the following
 - a. The accident occurred on 11th February 2019;
 - b. The plaintiff was examined and P3 form filed on 18th February 2019. It confirms the injuries of a fracture on the right clavicle, a dislocation of the left



ankle, deep cut wound on the forehead, and the tenderness on the anterior part of chest. Fracture confirmed by X-ray;

- c. The subject injuries are reflected in Dr. Omuyoma medical report dated 4th April 2019.
- d. Dr. Ichamwenge Ruth's report is dated 23rd November 2019 and confirms the injuries sustained as stated in the P3 form. The X-ray taken on 2nd November 2019 indicated right and left ankle had adequately united fracture right clavicle hence conclusion that the physical disability resulting from injuries was not applicable.
- e. Dr. Ichamwenge explained that, the finding by Dr. Omuyoma that, the respondent suffered 20% permanent disability was informed by the fact that, the respondent was still in the process of healing, the fracture was still fresh when he examined him two (2) months after the accident, unlike her examination conducted seven (7) months later. That the fracture was well united and well reduced and the plaintiff had normal movements in all the limbs, hence no disability is expected upon complete healing.
- f. The above finding by Dr. Ichamwenge was not challenged by any other medical report.

- 44. In that case, the court is bound to find that the respondent has no permanent disability.
- 45. Be that as it may, the question is: is Kshs 700,000 too high. The principles under which an appellate court will interfere with the award of damages by the trial court are settled and have already been dealt with herein.
- 46. In the trial court, the appellant proposal of Kshs 150,000 as general damages. In my considered opinion, that amount was to say the very least and with due respect to the appellant not tenable and devoid of good faith.
- 47. However, in the submission herein the appellant has referred to cases where as much as Kshs 400,000 was awarded (see Wakini Sodas Ltd -Vs Sammy Anitos(Supra). But its noteworthy it is a 2017 case. Similarly in the case of Harun Muyoma Boge -Vs Dr. Daniel Otieno (Supra) an award of Kshs 300,000 was made in the year 2012.
- 48. The appellant now proposes Kshs 400,000 as general damages. The respondent urges the court not to interfere with the award.
- 49. First and foremost I have considered that it is now five (5) years since the accident occurred and the respondent has not been compensated for the same. Further the inflation factor and devaluation of the shilling due to inflation cannot be overlooked.
- 50. On comparable awards, I note in the case of, Lucy Muthoni Mucaki v Fridah Nyaguthii [2015] eKLR, the respondent suffered bruises at the base of the left big toe medially; spiral fracture of the tibia at left ankle joint; and dislocation of the left ankle joint. The court set aside the award of Kshs. 650,000 and substituted it with an award of Kshs 450,000.
- 51. In the case of, Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Adano Isacko [2019] eKLR the appellate court upheld the trial court award of Kshs. 700,000 where respondent, a police officer, suffered a fracture of the right clavicle and could no longer shoot his G3 rifle.



52. Further, in the case of, Lawrence Wairimu Wainyoike & another v Joseph Letting [2021] eKLR the court upheld an award of Kshs. 800,000 where the respondent suffered a deep cut wound on the forehead, fracture left clavicle, blunt injury to the chest, and blunt injury to the shoulder.
53. Additionally, in the case of, Lynn Kambua Enterprises v Edith Vaati Simon Kasika [2021] eKLR the respondent was involved in accident on 13th April 2010, and sustained blunt trauma to the neck, blunt trauma to the chest, blunt soft tissue injuries to the left shoulder, fracture of the left clavicle and blunt soft tissue injuries to the right lower rib. The appellate court upheld and confirmed the trial court award of Kshs. 350,000 as general damages.
54. However, having ruled the permanent disability is not applicable herein and the fact that the plaintiff was not , hospitalised, I hold and find that a sum of Kshs 550,000 as general damage is reasonable in the circumstances. The special damages is not contested.

55. The resultant Judgment is as follows;-

- a. General damages - Kshs 550,000
- b. Special damages - Kshs 9,550

Total amount - Kshs 559,550

- c. Costs of the suit
- d. Interest at court rates from date of judgment in the trial court

56. It is so ordered

DATED, DELIVERED AND SIGNED THIS 14TH DAY OF FEBRUARY, 2024

GRACE L. NZIOKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Kabila holding brief for Mr. Njuguna for appellant

Ms Amboko for the respondent

Ms Ogutu court assistant

