



**Ezekiel v Osindo (Civil Appeal E008 of 2021)
[2024] KEHC 2284 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E008 OF 2021
RPV WENDOH, J
MARCH 7, 2024**

BETWEEN

NGODE ABIRA EZEKIEL APPELLANT

AND

JEREMIAH OPIYO OSINDO RESPONDENT

*(An Appeal from the Judgement and Decree of Hon. R.K. Langat (PM)
dated and delivered on 22/12/2020 in Rongo PMCC No. 29 of 2019)*

JUDGMENT

- 1 This appeal arose from the judgement and decree delivered on 22/12/2020 in Rongo PMCC No. 25 of 2019 Jeremiah Opiyo Osindo (hereinafter the respondent) vs Ngode Abira Ezekiel (hereinafter the appellant).
- 2 By a Complaint dated 3/4/2019 the respondent instituted a suit, seeking general damages for pain and suffering and loss of amenities, special damages costs of the suit and interest on the aforementioned at court rates. The respondent pleaded that the appellant was the proprietor, the registered insured, equitable and beneficial owner of motor vehicle registration number KAJ 260P (suit motor vehicle) which was in his control and/or his agent, servant and/or employee.
- 3 It was further pleaded that on or about 14/1/2019, the respondent was cycling along the Homabay - Rongo Road when near Arujo area, the appellant and/or his driver, agent, servant, employee or assignee allegedly so negligently drove, managed and controlled the appellant's motor vehicle that he caused or permitted the same to knock the bicycle the respondent was cycling, thus causing him to sustain grievous injuries. It was contended that the appellant should be held vicariously liable for the tortious acts and omissions committed on him by his driver / agent.



- 4 The respondent particularized the negligence on the part of the appellant, his driver, servant and/or agent, the particulars of injuries and special damages. The respondent sought to rely on the doctrine of res ipsa loquitur.
- 5 The appellant filed a statement of defence dated 11/6/2019. He denied liability and put the respondent to strict proof. The appellant further particularized negligence on the part of the respondent and denied the doctrine of res ipsa loquitur was applicable and that the suit did not disclose any reasonable cause of action against him. The appellant asked the trial court to dismiss the suit with costs.
- 6 The suit proceeded for hearing with the respondent testifying as PW1. There was no evidence tendered on behalf of the appellant.
- 7 The trial court determined liability at 100% and an award in favour of the Respondent Kshs. 200,000/= as general damages, Kshs. 7,400/= as special damages in favour of the respondent, costs and interest of the suit.
- 8 Being aggrieved by the decision of the trial court, the appellant commenced this appeal and raised five grounds of appeal which will be broadly addressed on two grounds:-
- a. The trial Magistrate erred in law and in fact in apportioning liability at 100% in favour of the plaintiff as against the defendant despite overwhelming evidence to the contrary;
 - b. That the learned Magistrate erred in fact and in law in awarding the respondent a sum of Kshs. 200,000/= as general damages for minor soft tissue injuries which amount was manifestly excessive and high in the circumstances and connotes an erroneous estimate of damages suffered.
- 9 The appellant prayed:-
1. That the appeal be allowed with costs.
 2. This court set aside the decree and judgement of the subordinate court and substitute it with an order dismissing the entire suit with costs.
 3. That without prejudice to prayer (b) above, the findings Hon. R.K. Langat (SRM), delivered on 22/12/2022 on the issue of liability and quantum be set aside and the same be substituted with an award re - assessed downwards.
 4. Costs of this appeal and the trial court be awarded to the appellants.
- 10 Directions were taken that the appeal be canvassed by way of written submissions. Both parties complied.
- 11 The appellant filed written submissions dated 3/11/2023. On quantum, the appellant submitted that in view of the injuries suffered, a sum of Kshs. 80,000/= general damages would suffice. To support this position, the appellant relied on the cases of HB (Minor suing through mother & next friend DKM) vs Jasper Nchonga Magari & Another (2021) eKLR, Eva Karemi & 5 Others vs Koskei Kieng & Another (2020) eKLR and Homabay Civil Appeal No. E111 of 2021 James Kwanya Rege vs Lizy Awour (minor suing through the father & next friend George Adhiambo Arao).
- 12 The appellant did not address the issue of liability despite it being a ground of appeal. On costs, it was submitted that should the court set aside the decision of the trial court, the costs of the appeal should be granted to the appellant.



- 13 The respondent filed written submissions dated 10/11/2023. On the findings on liability, it was submitted that the appellant did not challenge the evidence adduced by the respondent on liability and therefore, the court was correct in finding that the appellant was solely responsible for the accident.
- 14 The respondent urged this court not to interfere with quantum based on the evidence of the injuries sustained by the respondent. It was stated that the evidence on the injuries was not challenged, The respondent relied on the cases of Francis Ochieng & Another vs Alice Kajimba (2015) eKLR and Charles Gichuki vs Emiliy Kawira Mbuba & Another (2018) eKLR. The respondent asked this court to uphold the decision of the trial court and dismiss the appeal with costs.
- 15 This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
- 16 It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -
- 17 An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”
- 18 Guided by the above principles, I have considered the record of appeal, the proceedings in the trial court and the submissions by both parties. The main issues for consideration are:-
- a. Whether the trial court’s finding on liability was proper;
 - b. Whether the trial court applied the correct principles in assessment of damages.
- 19 It is not disputed that the appellant did not call witnesses in support of his case. In *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* (2012) eKLR, Odunga, J. stated as follows on the consequences of failure by a party to call evidence: -
- 20 What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No. 834 of 2002 Justice Lesiit, citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 stated:-
- “Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
- 21 Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani)* HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”



- 22 The court record shows that the appellant’s Counsel was also not present in court to cross examine the respondent when he adduced his evidence on 27/1/2020. There was only the plaintiff evidence before the trial court to guide the court when making its finding on liability. It would not have been expected that the trial court would have taken the position of the appellant and argue its case its behalf. There is no need to belabor this point. The finding on liability is upheld.
- 23 On the issue of the general damages, this court is guided by the principles in assessing of damages which are that the appellate court will not ordinarily interfere with the award of damages because it’s an exercise of discretion or unless the award is ordinally high or law the same is based on some wrong principles of the law as it was held by the Court of Appeal in Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR 5. It was further held in Savanna Saw Mills Ltd vs Gorge Mwale Mudomo (2005) eKLR as follows:-
- “It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”
- 24 The injuries which the respondent suffered were, head injury, deep cut wound on the frontal region, bruises on the face and lips. The second medical report by Dr. Morebu dated 7/1/2019, confirmed the said injuries and the doctor opined that the respondent may later suffer post traumatic epilepsy.
- 25 I have considered the cases relied upon by the appellant. In HB (Minor suing through mother & next friend DKM) (supra) the appellant sustained blunt object injury to the head, and neck, thorax, abdomen and limbs. The injuries were classified as soft tissue thus the appellate court upheld the award of Kshs. 60,000/=. In James Kwanya (supra) the respondent sustained bruises on the right hand, blunt trauma to the right hand and chest contusion. The appellate court set aside the award of Kshs. 400,000/= and awarded Kshs. 80,000/=.
- 26 In the above cases which the appellant sought to rely on, the common denominator is that the injuries were all soft tissue in nature. In the present case, in as much as the respondent did not suffer any fractures, the extent of the soft tissue injuries border on grievous harm. For instance, the respondent herein suffered deep cut wounds in the frontal region of the head. In my view, the award of Kshs. 200,000/= as general damages was not inordinately high and it is commensurate with the injuries suffered.
- 27 It is the finding of this court that the appeal is devoid of merit. It is hereby dismissed with costs to the respondent. The judgement of Hon. R.K. Langat dated 22nd December 2020 is hereby upheld.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 7TH DAY OF MARCH, 2024

R. WENDOH

JUDGE

Judgement delivered in the presence of;

No appearance for the Appellant.

Ms. Kusa for the Respondent.

Emma & Phelix Court Assistants.

