



**Moturi & another v Obara; Obara (Appellant); Moturi & another (Respondent)
(Civil Appeal E070 of 2023) [2024] KEHC 2484 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E070 OF 2023
HI ONG'UDI, J
MARCH 12, 2024**

BETWEEN

ELIAS KAYAGA MOTURI 1ST APPELLANT

SANG CHARLES KIBII 2ND APPELLANT

AND

DOLPHIN KWAMBOKA OBARA RESPONDENT

AND

DOLPHIN KWAMBOKA OBARA APPELLANT

AND

ELIAS KAYAGA MOTURI RESPONDENT

SANG CHARLES KIBII RESPONDENT

(Being an appeal from the Judgment and decree of Honourable D.O Mac' Andere Senior Resident Magistrate in Kisii CMCC No. 853 of 2019, delivered on 29th June 2023)

JUDGMENT

1. This appeal arises from the judgment and decree entered in Kisii Chief Magistrate's Civil Suit No 853 of 2019. In the said suit, the respondent (who was the plaintiff) sued the appellants (who were the defendants) for both general and special damages arising from a road traffic accident in which he sustained severe bodily injuries.'
2. The 1st appellant was the driver of the motor vehicle registration number KAV 415N which allegedly hit motor vehicle registration number KBG 216A Toyota Matatu in which the respondent was lawfully aboard. The 2nd respondent in the Cross-Appeal was the registered owner of the motor vehicle driven



- by the 1st respondent. The claim was fully defended and the trial magistrate delivered a Judgment on 29th June,2023 in which he apportioned liability in the ratio of 80:20 in favour the respondent against the appellants.
3. The trial magistrate awarded general damages for Kshs 350,000/= subject to the 20% contributory negligence, special damages Kshs 7,600/= together with interest at court rates payable from the date of the judgement until payment in full. The respondent was also awarded costs of the suit.
 4. The appellants being aggrieved by the whole judgment lodged this appeal dated 21st July,2023 setting out the following grounds of appeal: -
 - i. The learned magistrate in law(sic)and misdirected himself when he failed to consider the appellant's submissions on both points of law and facts.
 - ii. That the learned 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.
 - iii. That the learned magistrate erred in law and misdirected himself when he failed to consider the provisions set out in The Insurance (Motor vehicle Third Party Risks) (Amendment) Act, 2013, CAP 405.
 - iv. The learned magistrate erred in law and fact in awarding the respondent Ksh. 350,000/= as damages for soft tissue injuries hence arriving at a wrong finding as regards the nature of injuries sustained by the plaintiff.
 - v. The learned trial magistrate erred in law and fact by awarding the respondent an inordinately high quantum as damages in the circumstances of this case.
 - vi. The learned magistrate erred in law and fact in awarding the respondent a sum that was so excessive as to an amount that is so erroneous as to the estimate of general damages suffered by the plaintiff.
 - vii. The learned magistrate erred in fact and in Law in failing to consider and rely on the appellant's submissions on quantum and legal authorities relied upon in support thereof.
 - viii. The learned magistrate erred in law and fact by overly relying on the respondent's submissions which were not relevant and without addressing his mind to the circumstance of the case.
 - ix. The learned magistrate erred in fact and in Law in failing to consider conventional awards in cases of similar nature.
 5. The respondent equally lodged a Cross Appeal through her memorandum of appeal dated 5th September 2023 setting out the following grounds of appeal: -
 - i. The Learned Magistrate erred in law and fact by apportioning liability at 70;20 (sic) in favour of the plaintiff without any legal justification and.or reasoning hence arriving at a wrong decision.
 - ii. The Learned Magistrate erred in law and fact by failing to consider the evidence and submissions by the plaintiff when arriving at a wrong decision on liability.
 6. Both the appeal and cross-appeal were canvassed through written submissions.



The Appellants submissions

7. The appellants' main appeal submissions were filed on 18th December 2023 by Kimondo Gachoka Advocates. Counsel submitted that their appeal was just on quantum. He submitted that the extra injuries allegedly sustained by the respondent as indicated in both the plaint and the medical report on 10th November 2020 had no basis since the same were not captured in the treatment notes.
8. Counsel placed reliance on the case of *Kenya Breweries Limited v Abraham Liam Kisii* HCCA No 23 of 2003 which cited with approval the Court of Appeal decision in *Mohamed Musa & another v Peter M Mailanyi & another* Civil Appeal No 243 of 1998, where it was held as follows;

“The plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the defendant as well as to the plaintiffs, that the sum must be commensurate with the injuries suffered. The onus lies with the plaintiff to adduce the evidence to enable the court make calculations or to reach a conclusion thereon otherwise the award cannot stand...”
9. Counsel submitted that the award of Kshs 50,000/= would be sufficient to compensate the respondent since she only suffered minor soft tissue injuries. The court's attention was drawn to the case of *HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another* [2021] eKLR, where the court upheld an award of Kshs 60,000/= to the plaintiff who suffered blunt object injury to the head and neck, thorax, abdomen and limbs. He urged the court to allow the appeal as prayed.

The Respondent's submissions

10. The said submissions were filed on 24th November 2023 by Ochoki and Company Advocates in respect of the Appeal and Cross-Appeal. Counsel identified two issues for determination. The first is whether the magistrate made an award that was manifestly high. Counsel submitted that the award of Kshs 280,000/= by the trial court was proper. In support of this position, he placed reliance on the cases of *Fred Barasa Matayo v Channan Agricultural Contractors* [2013] eKLR and *Dickson Ndungu v Theresia Otieno & 4 others* [2014] eKLR.
11. On the second issue, as to whether the trial magistrate erred by apportioning 20% liability to the respondent. Counsel submitted that the respondent could not be held liable when a vehicle she was traveling in was involved in an accident. He placed reliance on the case of *PAS v George Onyango Orodi* [2020] eKLR, where the court held that; -

“The minor was a pillion passenger. A pillion passenger cannot be held liable for the causation of an accident”

12. Counsel urged the court to find that it was unfair for the respondent to be held liable for occasioning the accident at a ratio of 20%.

Analysis and Determination

13. This being a first appellate court, I am guided by the dictum in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 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 own conclusions in the circumstances.



14. I will first deal with the main Appeal where the only issue is on quantum. This court is required to determine whether the award of general damages of Kshs 350,000/= in light of the injuries sustained by the respondent, was inordinately high to persuade it to interfere with the said award.

15. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 at a figure which was either inordinately high or low.’ (Emphasis mine).

16. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated as follows: -

“comparable injuries should attract comparable awards”.

17. In the instant case, the injuries suffered by the respondent were listed in the treatment notes, the P3 form and the Medical report by Dr. Morebu Peter Momanyi as:

- i. Deep cut wounds on the lower chin.
- ii. Chest contusion.
- iii. Bruises on the right leg.
- iv. Blunt trauma on the back.
- v. Bruises on the right forearm.
- vi. Bruises on the left leg.
- vii. Bruises on the left forearm.

18. It must be noted that injuries will never be fully comparable to other person’s injuries. What a court is to consider is that as far as possible comparable” to the other person’s injuries, are the after effects.

19. Upon re-evaluation of the evidence, I find that the learned trial magistrate well referred to the relevant evidence on record together with the parties submissions. Upon studying the cited authorities relied upon by the appellant, I note that the injuries therein were less severe in nature compared to the current case. I am therefore not persuaded to interfere with the award by the trial court.

20. In view of the foregoing the appeal is hereby dismissed with costs to the respondent.



Cross-Appeal

21. In the Cross-Appeal the appellant contends the apportionment of liability by the trial magistrate.

22. In *Khambi and another v Mahithi and another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

23. Further, in *Farah v Lento Agencies* [2006]1 KLR 124,125, the Court of Appeal held that: -

“...Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame.”

24. This court notes that the trial magistrate apportioned liability based on the evidence presented before the court. According to him the evidence adduced did not bring out clearly who was to blame for the accident between the appellant and the respondents.

25. The appellant who testified as PW2 stated that the respondents' vehicle hit the motor vehicle registration number KBG 216A which she was travelling in. She added that the said matatu was on its side and it was the driver of KAV 415N who was to blame for the accident since he was not keen.

26. Counsel for the appellant relied on the evidence of PW3 (CMCC No 854 of 2019) No 88300 PC Moses Kasera attached to Kisii police station. He testified on behalf of the Investigating officer who was engaged in other official duties. He stated that the driver of motor vehicle KAV 415N belonging to the respondents lost control while trying to avoid a pothole thereby hitting the oncoming motor vehicle KBG 216A and as result the appellant got injured. He added that the said driver took off and that OB indicated that motor vehicle registration number KBG 216A was to blame for the accident.

27. The respondents did not call any evidence during the hearing to deny liability on its part but only produced a second medical report by consent from both parties.

28. From my re-evaluation of the evidence, I find that the learned trial magistrate erred in apportioning liability in the ratio of 80:20 in favour of the appellant while it was clear from the evidence adduced that the driver of motor vehicle KAV 415N (1st respondent) was to wholly blame for the accident. The respondents in the Cross Appeal are 100% liable for the accident.

29. I therefore find the Cross-Appeal to have merit and I allow it with no order as to costs.

30. The following orders shall issue:

- a. The Appeal dated 21st July, 2023 is hereby dismissed with costs to the respondent.
- b. The Cross-Appeal is allowed with no order as to costs.

31. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.



H. I. ONG'UDI
JUDGE

