**Omoke v Owino & 3 others (Civil Appeal E103 of 2023)**
**[2024] KEHC 2652 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2652 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL APPEAL E103 OF 2023**

**HI ONG'UDI, J**

**MARCH 12, 2024**

**BETWEEN**

**SEBASTIAN NYAKWARA OMOKE ..... APPELLANT**

**AND**

**CHRISPINUS OWINO ..... 1ST RESPONDENT**

**WANGWE NASIAKA ISABELLAH ..... 2ND RESPONDENT**

**WYCLIFFE ONDIEKI ONSONGO ..... 3RD RESPONDENT**

**KELVIN ONCHANGOI ..... 4TH RESPONDENT**

***(Being an appeal from the Judgment and decree of Honourable C. A Ocharo Senior Principal Magistrate in Kisii CMCC No. 468 of 2018, delivered on 10th August 2023)***

## JUDGMENT

1. This appeal arises from a judgment and decree entered in Kisii Chief Magistrate's Civil Suit No. 468 of 2018. In the said suit, the appellant (who was the plaintiff) sued the respondents (who were the defendants plus 3rd parties) for both general and special damages arising from a road traffic accident in which he sustained personal injuries and suffered loss and damage.

2. The 1st respondent was the driver of the motor vehicle registration No. KBG 162V Toyota Station Wagon which allegedly hit motorcycle registration number KMEG 511V and the appellant who was a pillion passenger. The 2nd respondent is the registered owner of the motor vehicle driven by the 1st respondent. The 3rd respondent was the rider of the motorcycle while the 4th respondent was the owner. The claim was fully defended and the trial Magistrate delivered Judgment on 10th August,2023 in which she found the 3rd and 4th respondents (third parties in the lower court suit) 100% liable for the accident. On quantum she awarded a sum of kshs. 120,000/= for general damages and special damages kshs. 7,050/=.

3. The appellant aggrieved by the whole judgment lodged this appeal on 25th August,2023 on the following grounds:

   i. That the Learned Trial Magistrate misdirected herself on several matters of law and fact.

   ii. The Learned Trial Magistrate failed to adequately evaluate the evidence adduced before court and thereby arrived at a wrong decision unsustainable in law.

   iii. That the Learned Trial Magistrate erred in law and fact in failing to consider the evidence adduced before court as regards to the issue of liability.

   iv. That the Learned Trial magistrate erred in law and fact by solely relying on the Respondents' testimony while disregarding that of the Appellant.

   v. That the Learned Trial Magistrate erred in law in deciding the matter against the weight of the evidence that had been adduced.

   vi. That the Learned Trial Magistrate erred in law and fact in awarding damages which were inordinately low.

   vii. That the Learned Trial Magistrate's decision on both liability and quantum albeit discretionary one was plainly wrong.

   viii. The Learned Trial Magistrate decision was unjust, against the weight of evidence, adduced and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice. Thus, the trial court award is unsustainable and baseless in the circumstances.

   ix. The Learned Trial Magistrate applied wrong principles of law in the entire judgment.

   x. That the judgement of the Learned Trial Magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.

4. The Appeal was canvassed through written submissions.

**The Appellants submissions**

5. The appellant's submissions were filed by G.B Shilwatso advocates and are dated 6th December, 2023. Counsel identified three issues for determination. The first issue is whether the apportionment of liability was erroneous. She submitted that the appellant's evidence and that of the investigating officer were in corroboration. Further that the appellant had established his case on a balance of probabilities to a percentage of 51% as opposed to 49% of the 1st and 2nd respondents.

6. Counsel submitted further that the trial court erred in holding the 3rd and 4th respondents 100% liable for the accident. It is her contention that from the evidence tendered before the trial court it was clear that the accident happened when the driver of motor vehicle registration number KBG 162V was diverting from the main road. She urged the court to set aside the apportionment of liability by the trial court and replace it with its own findings.

7. Reliance was placed on the case of Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, where the court held as follows: -

> " Apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

8. On the second issue as to whether the award was inordinately low, counsel submitted that the trial magistrate failed to apply the correct principles while assessing the damages payable. She added that regard was not given to previous decisions hence the court arrived at an award which was inordinately low.

9. The court's attention was drawn to the case of Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini v A.M.M Lubia & Another [1998] eKLR as cited in Mutungi v David Muasya Ndeleva [2015] eKLR, where the court held in part as follows;

> " ...it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."

10. On the last issue on whether the trial magistrate applied the wrong principles of law in the entire judgment counsel submitted in the affirmative and urged the court to review and/or set aside the entire decision of the trial court and replace it with its own findings. She prayed that the appeal be allowed with costs.

**The 1st and 2nd Respondent's submissions**

11. The said submissions were filed by Nyamori Nyasimi advocates and are dated 6th December, 2023. Counsel submitted that whereas the appellant submitted that the 1st and 2nd respondents were to blame for the accident, the evidence by the said respondents clearly showed that it was the 3rd and 4th respondents who were to blame for the accident. Additionally, that the rider of the motorcycle was carrying excessive pillion passengers, the appellant being among them which was in blatant breach of the law.

12. Counsel submitted further that the 4th respondent who was the owner of the motorcycle had been charged, convicted and penalized in Traffic case no. 689 of 2018. He added that the 1st and 2nd respondents had not been charged with any traffic offence by the police since they were not to blame for the accident. Counsel submitted that the burden of proof rested on the appellant to prove negligence on the part of the 1st and 2nd respondents. He placed reliance on section 107(1) of the *Evidence Act* and the case of Karugi & Another v Kabiya & 3 others [1987] KLR 347among others which this court shall not rehash.

13. On the assessment of damages, counsel submitted that awards made in comparable cases for such minor soft tissue injuries ranged between kshs. 50,000/= to kshs.120,000/=. In support of this position, reliance was placed on the following cases: -

    i. Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR, where the high court stated that the policy goal of court was to try to compensate comparable injuries as far as possible by comparable awards. An of kshs. 100,000/= was deemed to be adequate to compensate for the soft tissue injuries to the lower right leg and the back.

ii. Goerge Kinyanjui t/a Climax Coaches & Anorther v Hussein Mahad Kuyate [2016] eKLR, where the high court reviewed downwards an award of kshs. 650,000/= to kshs. 109,890 for soft tissue injuries.

14. Counsel urged the court to dismiss the entire appeal with costs and to uphold the award of kshs.120,000/= arrived at by the trial court.

**Analysis & Determination**

15. This being a first appellate court, I am guided by the dictum in the case of Selle vs. 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.

16. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that;

> " 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 allowances in this respect"

17. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are:

i. Whether the trial magistrate erred in finding the 3rd and 4th respondents wholly to blame for the accident.

ii. Whether the award on general damages was inordinately low.

18. On the first issue, I refer to the Court of Appeal decision in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR, where it was held: "The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....
>
> > "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

19. Further, in Farah Vs 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."

20. Guided by the above cited authority, this court in determining liability must consider the facts of the case and make a finding as to what mostly contributed to the cause of the accident. To be considered will be identification of the party that was at fault. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

21. This court has considered the evidence adduced before the trial court. It is not in dispute that the appellant was a pillion passenger on the motor cycle that was hit by the 2nd respondent's motor vehicle which was being driven by the 1st respondent. The appellant who testified as PW1 stated that the said motor vehicle KBG 162V which came from Kisii town towards Mosocho, left its lane and knocked them.

22. The investigating officer (PW6) No. PC Mulatia attached to Kisii traffic base, testified that the motor vehicle KBG 162V was heading to Mosocho direction from Kisii town while the motor cycle KMEG 511X TV's Star was heading towards Kisii direction from Mosocho. He stated further that as the motor vehicle was turning right to enter Cardinal Otunga high school it collided with the motorcycle which was on its lane. He added that the motor vehicle did not give way to the oncoming motor cycle.

23. The evidence of DW1 in Kisii CMCC No. 470 of 2018 was adopted. In that case he stated that there was a stationery matatu parked on the left side as one approached the school. It was offloading passengers. He turned to the right to enter the school gate and that was when a motor cycle carrying two passengers abruptly came and hit his vehicle.

24. He stated further that the motor cycle was coming from the opposite direction and overtaking the matatu on the left side, therefore he was not able to see him. He blamed the appellant for overtaking on the wrong side and not being licensed.

25. The trial court in its judgment faulted the 3rd and 4th respondents (third parties) for occasioning the accident. They were found to be 100% liable. The 3rd respondent being the rider of the motorcycle was equally faulted for being unqualified and having overtaken from the wrong side of the road.

26. The evidence by the DW1 was that the stationery matatu was parked on the left side as one approaches the school and he turned right which is the opposite direction to enter the school gate. I do not see how the matatu obstructed his view having turned in the opposite direction. Secondly DW1 and the motorcycle were moving from opposite directions same to the parked matatu and the motor cycle. It was not clearly explained how the motorcycle wholly caused the accident. Did DW1 ensure that the road was clear before overtaking the stationary matatu to enable him turn into Cardinal Otunga School? It was his evidence that the incident occurred at 7.30pm, and he admitted to not having seen the appellant before the accident.

27. The most reasonable thing he should have done would have been to remain behind the matatu until the road was clear including the departure by the matatu driver. DW1's statement on what happened contradicted his earlier statement which was that the motor cycle was from the opposite direction and overtaking the matatu from the left side. The fact that the rider of the motor cycle was not qualified as observed by the trial magistrate had nothing to do with the cause of the accident, but him overtaking

from the wrong side which contributed to the accident. This was DW1's word against that of the appellant since the police found the scene already interfered with.

28. This court notes that the appellant was not the only pillion passenger on the said motor cycle. The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law, the appellant exposed himself to danger. Such conduct cannot go un-condemned and it should not be rewarded. Additionally, the driver of the motor vehicle (DW1) who took a turn towards Cardinal Otunga school and in the process hit the motor cycle was equally to blame.

29. In view of the foregoing, it is my finding that the 3rd and 4th respondents (third parties) ought not to have been found to be 100% liable. I therefore set aside the said decision by the trial magistrate and substitute it with 70% liability for the 1st and 2nd respondents and 30% for the 3rd, 4th respondents together with the appellant.

30. Lastly, is the issue on whether the award on general damages was inordinately low.

31. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

32. Additionally, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated as follows:-

> " comparable injuries should attract comparable awards".

33. In the instant suit, the injuries suffered by the appellant were listed in the clinic cards and the Medical report by Dr. Morebu Peter Momanyi as follows;

    i. Bruises on the face.

    ii. Chest contusion.

    iii. Blunt trauma to the forearms.

    iv. Blunt trauma to the lower limbs

34. This court has considered the award of Kshs. 120,000/= as made by the trial magistrate based on the authorities cited by the parties in submissions at the trial court. The appellant cited cases which did not indicate the injuries sustained by the plaintiff therein and therefore the said cases in my opinion could not justify his claim for the award of kshs. 1,000,000/=. I have considered other comparative cases where awards for soft tissues injuries were made as follows:

    i. In Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others [2019]eKLR where Majanja J. set aside the lower court`s award of Kshs. 55,000/- for cut wound on the parietal

area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000/-.

ii. In Ndungu Dennis –vs- Ann Wangari Ndirangu & Another [2018] eKLR, the award was reduced from Ksh. 300,000/= to Ksh. 100,000/= where the respondent had sustained soft tissue injuries to the lower leg and soft tissue injuries to the back.

iii. In Simon Muchemi Atako & Another vs Gordon Osore (2013) eKLR the Court of Appeal awarded the 1st appellant a sum of Kshs. 120,000/= for injuries to the nose with nose bleeding, blunt injury to the chest, blunt injury to the right hip, cut wound on the base of the left thumb with partial loss of the nail and bruise wound on the right knee.

35. In view of the above cited authorities, I find the award of kshs.120,000/= by the trial magistrate not to be inordinately low.

36. On special damages, it is trite law that the same ought to be specifically pleaded.The Court of Appeal in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd (1992) KLR 177 stated that:-

> " ..... Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

37. Special damages were specifically pleaded by the appellant in the plaint for kshs. 7050/=. The receipts for the said amount were produced as exhibit in court and are found at pages 21 and 22 of the record of appeal. Therefore, the award on special damages was proved and is hereby confirmed.

38. The Appeal therefore partially succeeds and the following orders are issued.

i. The decision on liability is set aside and substituted as follows: 1st and 2nd Respondents – 70%; Appellant, 3rd and 4th Respondents 30%.

ii. The award on general (kshs 120,000/=) and special damages (kshs 7,050/=) by the learned trial magistrate is upheld.

iii. The ward on general damages shall be subject to contributory negligence.

iv. Interest shall be from the date of Judgment by the trial court.

v. No orders as to costs.

39. Orders accordingly

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

**H. I. ONG'UDI**

**JUDGE**