



**Obwogi v Motende (Civil Appeal E031 of 2022)
[2024] KEHC 4450 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E031 OF 2022
JM CHIGITI, J
MARCH 5, 2024**

BETWEEN

ABIGAELE OBWOGI APPELLANT

AND

MILICENT BISIERI MOTENDE RESPONDENT

JUDGMENT

Background

1. This appeal emanates from the judgment of Honourable D.O. Mac'andere delivered on 11th April, 2022 sitting in Kisii in CMCC No. 649 of 2019 wherein the Respondent filed suit seeking general, special damages, costs and interest.
2. The Appellant filed an Amended statement of defence denying the Respondent's allegations as indicated in the Amended defence.
3. The matter proceeded to hearing and the Court delivered its judgment on 11th April, 2022 against the Appellant as follows:
 - i. General damages - Kshs. 1,500,000/=
 - ii. Loss of expectation of life -Kshs. 15,460/= together with interests at court rates from the date of the judgment until payment in full.
 - iii. The Plaintiff was also awarded costs of the suit.

The Appellant's case

4. Being dissatisfied with the judgment, the Appellant lodged this appeal citing 11 grounds of appeal which can be condensed into two broad issues:



1. Whether the trial magistrate erred in its finding on liability
2. Whether the trial magistrate in its award on quantum

Whether the trial magistrate erred in its finding on liability

5. The Respondent in her pleadings attributed the occurrence of the accident to the of the Appellant in the manner in which the subject motor vehicle was being driven or managed.
6. It is the Appellants case that it was incumbent upon the Respondent to prove the negligence under section 107 and 108 of the *Evidence Act*, Cap 80. Reliance is placed in the case of *Karugi & Another v. Kabiya & 3 Others/1983*] eKLR, where the Court held as follows:

“ the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.

7. The Appellant believe that the is liable because The Respondent conceded to the fact that no traffic charges had been preferred against the Appellant as a result of the accident and the fact that, NO independent eye witness was called by the Respondent to explain how the accident occurred and whether the Appellant was to blame for it.
8. The appellant argues that the police abstract is not proof of the occurrence of an accident and neither is it proof that the Appellant caused an accident due to negligence on her part.
9. Reliance is placed in the case of *Sally Kibii & another v Francis Ogaro [2012]* eKLR

“The Plaintiff in the trial court only produced two witnesses who admitted they did not witness the accident and could not tell how it happened. The Police Abstract showed that the accident was by collusion of two vehicles and investigations were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to be blamed and the absence of an eye witness evidence diminishes the Appellant’s chance to prove a case for negligence against the Defendant.

The Plaintiff also elected or failed to call the witnesses listed in the police abstract and the investigating officer also listed with all their addresses. I am uncertain if those witnesses would have helped the court since the blame could not be apportioned at the scene by the police officers who stated in the police abstract that investigation was still pending.

In the *Kenital* case (above) I held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. The Plaintiff simply did not adduce any evidence before the trial court on liability. They could have called eye witnesses and/or the investigating Police Officer. Proof of negligence was material in this case and the burden of proof was upon the Plaintiff. She did not discharge the burden and the appellant’s Counsel Submission before me that ‘someone, has to explain how the accident took place, is telling. That ‘someone’ is the Plaintiff who alleges negligence on the part of the Defendant.”



And also the case of Kennedy Nyangoya v Bash Hauliers (2016] eKLR where the Court held as follows:

"In this matter, a police abstract was produced by PW1 to show that DW1 was to blame for the accident. DWI was however not charged with a traffic offence. PW1 in his evidence informed the court that he was not the Investigating Officer. In my considered view, his evidence did not assist in any way to build the plaintiff's case.

PW1 did not visit the scene of the accident or take any sketch plan or map of the area where the accident happened for production in court. Even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it. Another shortcoming in the appellant's case was the unexplained failure to call the Driver who was driving the matatu at the time of the accident.

10. The appellant also raises issues with the evidence tendered by PW2, PC Moses Kasera which according to him was hearsay and did not have any probative value in so far as determining liability since PW2 conceded that he did not witness the accident and was not the investigating officer.
11. It is his strong persuasion that the Respondent did not prove her claim and this suit ought to have been dismissed.

On the issue of quantum if damages

12. In a bid to prove her injuries, the Respondent called PW1, Dr. Nyameino who stated that the Respondent sustained degloving injury to the right knee which led to exposure of the bone, abrasion to the right leg and contusion and abrasions to the left knee.
13. PW1 confirmed on cross-examination that the Respondent had recovered and that she had not sustained any fracture.
14. The Respondent proposed an award of Kshs. 1,500,000/= while the Appellant proposed an award of Kshs. 200,000/=. The trial Magistrate in addressing the issue of quantum made reference to the authority cited by the Respondent, to wit, Easy Coach Ltd vs Emily Nyangosi, Kisumu HCCA No. 20 of 2015 where the court awarded Kshs. 700,000/= and the authority cited by the Appellant, to wit, Maseno University College vs Elizabeth Kerubo Mokaya Civil Appeal No. 17 of 2019 where an award of Kshs. 200,000/= was made.
15. The trial magistrate disregarded the authorities which she thought were relevant to the case and went on to award general damages of Kshs. 1,500,000/= without any legal basis and especially when the injuries in issue were soft tissue injuries which had healed without any incapacity.
16. The award was excessively high and against the well-known principle highlighted in the Court of Appeal case of Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR in which the Court stated that "comparable injuries should attract comparable awards". According to him, the award ought to be set aside for being manifestly excessive and against comparable awards which reveal that such injuries ought not to attract awards of not more than Kshs. 200,000/=,
17. On the award of special damages of Kshs. 15,460/=, the only receipt produced by the Respondent were P.EX 2b for Kshs. 6500/= and P.EX 8 for Kshs 7,840/= both of which amounted to Kshs. 14,340/= . The said receipts in any event did not bear revenue stamp and ought not to have been admitted in evidence in view of the provisions of Section 19 of the [Stamp Duty Act](#).



18. Reliance is placed on the case of *Easy Coach Limited v Emily Nyangasi* [2017] eKLR where the Court while setting aside an award for special damages held as follows:

“The learned trial magistrate awarded special damages in the sum of Kshs. 21,335/- on the basis of a bundle of receipts that did not bear stamp duty which was contrary to the *Stamp Duty Act* Cap 480 Laws of Kenya.

Section 19 of the *Stamp Duty Act* provides:

- (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-
 - (a) in criminal proceedings; and
 - (b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped as correctly submitted by the appellant, the bundle of receipts marked PEXH. 5 for Kshs. 21, 335/- ought not to have been received in evidence and the sum thereof is hereby set aside.”

19. In view of the fact that the Respondent never proved her claim there was no basis for the damages awarded, we pray that the appeal be allowed and the lower court suit be dismissed with costs.

The Respondent's Case

20. The Respondent opposes the appeal.

21. On the question of Liability, the Respondent's case is that she was a pillion passenger on a motorcycle.

22. She blamed the appellant's motor vehicle for causing the accident due to over speeding; failing to keep his lane and therefore knocking down the suit motorcycle.

23. Her testimony was corroborated by that of PW2, PC Moses Kasera who also blamed the driver of the suit motor vehicle.

24. The appellant closed his case without calling any witness to rebut the respondent's testimony.

25. She submits that the trial court was correct in finding the appellant 100% liable. In any event, being a pillion passenger in the suit motorcycle the Respondent cannot be held responsible for the accident.

26. Reliance is placed in the case of *Janet Kathambi v Charity Kanja Njiru* [2021] eKLR where the court held:

“It is not in dispute that the deceased was a pillion passenger. Authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident from carrying since he does not have control over the motor cycle. This Court agrees as much.”

27. In the case of Civil Appeal No. 136 of 2019 *Kubai Kithinji Kaiga* (Suing as the legal representative of the estate of John Kaiga (Deceased) vs Kenya Wildlife Service. Other Courts have also held as much. High Court case of *David Kiprotich Bor v Kassim Maranga & another*, Civil Appeal No. 94 of 2011(2017) eKLR.



28. In the circumstances, being a lawful fare paying pillion passenger the Respondent cannot shoulder any liability.

On damages

29. The Respondent holds the view that the higher courts should not be quick in interfering with the amount of general damages awarded in the trial courts as the same is discretionary.

30. The principles to be applied in deciding whether or not to interfere with the trial court's discretion to assess damages are well set out as follows:

- i. When the award is inordinately high or low as to represent an entirely erroneous estimate.
- ii. The trial court proceeded on wrong principles or misapprehended evidence in some material respect. See the case of Texcal House Service Station Limited and another Vs. Jappien and another (Nairobi CA NO. 134 of 1998).

31. As a matter of principle damages should be guided by previously decided cases and also within limits the Kenyan economy can afford. There must be uniformity in awards in cases involving similar injuries.

32. The amounts awarded as showcased are not inordinately excessive so as to warrant this honorable court to overturn the award.

33. He invites the court to consider that at paragraph 5 of the plaint, the respondent pleaded the following injuries:

- a. Degloving injury to the right knee/exposed knee bone
- b. Abrasions to the right leg
- c. Contusion and abrasions to the left knee

34. As per the discharge Summary from RAM Hospital it confirms that the respondent sustained the pleaded injuries and was admitted for three (3) days as from 2/04/19- 05/04/2019.

35. The injuries were confirmed by medical report by Dr. Nyameino who categorized the injury as grievous harm.

36. The respondent wishes to rely on the authority cited in the trial court and further in the authorities cited herein under to buttress his arguments.

37. In Bomet HCCA NO. 25 of 2019 Irene Chebotuya vs. Shadrack Kiplangat Ngeno, the court held that Kshs. 1, 500,000/= shall suffice where the respondent sustained similar to 1 the injuries sustained by the plaintiff herein.

38. The appeal herein on the issue of quantum lacks merit and the same should be dismissed with costs.

Analysis and determination

39. In *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA The court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.



40. This principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

41. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated; “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

42. Upon hearing the evidence as adduced by the parties herein, the trial court awarded damages in the following terms:

- i. General damages - Kshs.1,500,000/=
- ii. Loss of expectation of life -Kshs. 15,460/= together with interests at court rates from the date of the judgment until payment in full.
- iii. The Plaintiff was also awarded costs of the suit.

43. The Supreme Court of India on the 27th day of April, 2015 in the case of *K. Anbazhagan v. State of Karnataka and Others*, as follows;

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind - sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

On the issue of liability

44. The court has reevaluated and scrutinized with care and caution the evidence of the respondent and in particular where she testified that;

“I am not completely healed I cannot stand for long or walk long distances. I have not been compensated. I blame the driver. I was a pillion passenger. The driver lost control and came to our lane and she was on phone at the time of the accident. I was heading to Keumbu and



she was heading to town and she lost control at Bobaracho corner from the left hand side as you face Kisii.

The court has also looked and analysed the police abstract and the evidence of PW -2.

I am satisfied that, indeed, the respondent established and proved the particulars of negligence is set out in paragraph four of the plaint on a balance of probabilities.

I find that the respondent as a pillion passenger, she could not have caused the accident.

No evidence was adduced towards showing how the Responded contributed or caused the accident.

I am satisfied that the accident was caused by 100% negligence on the part of the Appellant and I so hold.

In the circumstances, I find no justification or reason to disturb the finding on the issue of liability by the trial court.

45. On the issue of general damages this court is guided by the cases of Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 (UR) which was cited in the case of Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR where the court said:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs. Musila [1984] KLR 257).”

46. The Respondent pleaded that she sustained the injuries as pleaded at paragraph 5 of the Plaint.
47. I have reevaluated the evidence of PW 1 the doctor who examined the respondent. During the said exercise, he relied on the treatment notes, the x-ray, discharge summaries, and the P3 form as well as the physical examination of the patient, before preparing the medical report.
48. During cross-examination the doctor confirmed that the respondent did not suffer any fracture. The Medical Report confirms the injuries sustained by the Respondent.
49. Upon assessing the nature of the injuries sustained by the Respondent I find that The appellant has demonstrated that the trial court made an erroneous estimate of the damages awardable for the injuries suffered by the respondent.
50. In so holding, I am guided by the case of Easy Coach Ltd vs Emily Myanga Kisumu HCCA NO. 20 of 2015 where the court awarded a sum of Kshs. 700,000 for injuries more or less similar to the present ones.
51. This court is of the view that the sum awarded by the trial court is inordinately high as to represent an entirely erroneous estimate.
52. The sum of Kshs.1,000,000 is sufficient to compensate the respondent for the injuries sustained and I so hold.



Special Damages:

53. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985/ KLR 716, at P. 717, and 721 where the Learned Judges of Appeal — Kneller, Nyarangi JJA, and Chesoni Ag. J.A. — held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved. For they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

54. The Respondent pleaded special damages in the paint. During the hearing the respondent, indicated that she produced a receipt for the medical report for Ksh. 6500.

55. No receipt was produced for the police abstract or for the search for the motor vehicle. The respondent did not produce evidence to prove the treatment expenses.

56. I have carefully gone through the entire record of appeal. I did not find any receipts that would have helped this court reassess the special damages.

57. In the circumstances the claim for special damages falls by the wayside and I so hold.

Disposition;

58. The appeal succeeds partly.

Order

The following are the orders of this court:

1. General damages Kshs .1,000,000
2. Special damages - nil.
3. Costs of the appeal to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024

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J. CHIGITI (SC)

JUDGE

