



**Ng'ang'a & another v Mwangi (Civil Appeal 47 of 2018)
[2024] KEHC 3330 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 47 OF 2018
CW GITHUA, J
APRIL 3, 2024**

BETWEEN

STEPHEN NG'ANG'A 1ST APPELLANT

MARY NG'ANG'A 2ND APPELLANT

AND

FRANCIS NDUNG'U MWANGI RESPONDENT

*(Being an appeal from the judgement and decree of Hon. M. Kinyanjui (S.R.M),
in Kandara CMCC No. 238 of 2015 delivered on the 6th of September, 2018)*

JUDGMENT

1. This appeal emanates from the Judgement and decree of the lower court in which the trial court found the appellants 100% liable for an accident that involved their vehicle and the respondent Mr. Francis Ndung'u Mwangi and awarded the respondent a total sum of Kshs 702,000 as general and special damages.
2. The accident in question allegedly occurred on 26th October 2014 involving the respondent as rider of Motor Cycle registration no. KMCS 118U and Motor Vehicle registration no. KAN 908 G which, according to the respondent, was being negligently driven by the defendants' agent and or authorised driver.
3. Being dissatisfied with the trial court's decision on both liability and quantum, the appellants proffered the instant appeal through a Memorandum of Appeal dated 18th September, 2018.

In their Memorandum of Appeal, the appellants faulted the trial court for finding them 100% liable for the accident and for awarding the respondent what was in their view an inordinately high amount of general damages for pain and suffering. They also blamed the learned trial magistrate for ignoring their evidence as well as their written submissions.



4. The appeal was canvassed by way of written submissions following directions issued by the court on 27th September 2023. The Appellants filed their submissions on 20th November 2023, while those of the Respondent were filed on 19th December 2023. The submissions were orally highlighted before me on 5th February 2024.
5. On the issue of liability, the appellants submitted that there were two conflicting versions regarding how the accident occurred, one given by the respondent and the other one by the appellants and since there was no independent witness to corroborate either version, the learned trial magistrate erred in making a finding on liability against the appellants at 100 % instead of apportioning liability at 50: 50.
6. On quantum, the appellants faulted the learned trial magistrate for allegedly failing to analyse the two medical reports adduced in evidence in their totality and failing to appreciate that in the absence of production of a CT Scan, the evidence fell short of proving that the respondent sustained head injuries in the accident; that in the premises, the respondent was only entitled to damages for soft tissue injuries and an award of Kshs.700,000 was thus inordinately high. In their view, a sum of Kshs. 150,000 would have been sufficient compensation for the respondent.
7. The respondent on the other hand supported the trial court's decision on both liability and quantum. He submitted that the finding on liability was based on the credibility of witnesses. He asserted that the appellant's version regarding how the accident occurred could not be true as it was not consistent given that it kept changing whereas that of the respondent was consistent throughout the trial.
8. In addition, he submitted that from the evidence, it was common ground that the respondent's motor cycle and the appellant's motor vehicle were involved in a head on collision and that if the respondent's motor cycle turned in front of the motor vehicle as alleged by the appellant, there is no way that the vehicles could have had a head on collision. He maintained that the appellant's driver caused the accident by over speeding which made the vehicle loose control after hitting a bump on the murram road.
9. On the issue of quantum, the respondent submitted that he called two witnesses who proved that he had suffered head injuries as a result of the subject accident; that Dr. Wambugu's medical report was inconclusive and could not have assisted the court establish the actual injuries suffered by the respondent; that an award of Kshs. 700,000 for injuries which included a head injury with subdural hematoma with resultant complications was within previous court awards for such injuries and the same should be upheld.
10. Having carefully considered the grounds of appeal, the parties rival written and oral submissions together with all the authorities cited, I find that the issues arising for my determination are twofold, namely;
 - a. Whether the trial court erred in finding the appellants 100% liable.
 - b. Whether the award of Kshs.700,000 was manifestly excessive given the injuries sustained by the respondent.



11. This being a first appeal to the High Court, I am aware of my duty as the first appellate court which as well articulated by the Court of Appeal in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR is to

“ to re-evaluate, re-assess and re-analyze 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.....”
12. Starting with the issue of liability, the court record shows that the respondent testified in support of his case and although he called three additional witnesses, he is the only one who gave evidence relevant to the issue of liability. The appellants called only one witness.
13. From the evidence on record, it is not disputed that an accident occurred at the material time involving the respondent who was riding the aforesaid motor cycle and the appellants motor vehicle which was being driven by their authorised agent who testified as DW1. It is also not disputed that the accident was in the nature of a head on collision and that it happened at night.
14. It is also clear from the record that the only witnesses who gave material evidence on the issue of liability were only the respondent who testified as PW1 and the appellants’ witness (DW1) as the other witnesses called by the respondent did not witness the accident. PW2 and PW3 gave evidence in support of the injuries sustained by the respondent while PW4 produced a police abstract whose contents only confirmed occurrence of the accident only as it did not have any finding regarding who among PW1 and DW1 was to blame for the accident.
15. In the premises, the evidence on record on the issue of liability amounted to the word of PW1 against that of DW1 and therefore, the trial courts determination on the issue of liability largely depended on it’s finding regarding the credibility of either of the witnesses.
16. The difficulty in determining liability in circumstances such as those described in this case was well captured in *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR where the court stated as follows:

“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] AC. 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.”
17. It is now a well settled principle of law that an appellate court should be slow to interfere with findings of fact made by the trial court unless they were based on no evidence or a misapprehension of the evidence or unless the court was satisfied that the trial court acted on wrong legal principles in reaching



the findings. This principle was reiterated by the Court of Appeal in *Kiruga v Kiruga & Another*, [1988] KLR 348, in which the court expressed itself as follows:

“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 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. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court become of paramount importance and ought not to be disturbed.”

18. In his evidence, PW1 testified that at the material time, he was lawfully riding his motor cycle on his way home when he heard the sound of a moving vehicle which prompted him to stop and move to the left side of the road. He noted that the vehicle, which did not have its headlights on, was being driven at an excessive speed and when it hit bumps on the road, it lost control and swerved to the left side and hit him.
19. DW1 on the other hand denied causing the accident as alleged and claimed that he saw the respondent riding towards his direction at high speed; that he stopped but the respondent made a turn and hit the vehicle he was driving on the front centre part.
20. In making her finding on liability, the learned trial magistrate stated as follows;

“The plaintiff testified that initially he heard the sound of a moving vehicle but he couldn’t see the vehicle. He moved to the left since there was a bump and that is when a vehicle came at a high speed hit the bump and swerved to his side hitting him. Indeed the plaintiff knew the road well as he ran a shop at that area. He said the vehicle had no lights but they came on when it hit the bump. The defendant never mentioned if his headlights were on but he did confirm that the motor cycle had its lights on. The defendant (DW1) never mentioned if he heard the sound of a motorcycle approaching yet this would be expected at night. The defendant’s witness said he stopped when he saw the plaintiff coming at high speed and the question is why he would stop instead of avoiding the motor vehicle by swerving? I am indeed not convinced by his version of events. The plaintiff was clear that he moved to the side of the road but since the defendant’s car was on high speed it hit a bump and swerved to his direction hitting him. This version seems more logical and believable. I find the plaintiff is speaking the truth.”

21. From my own independent appraisal of the evidence before the trial court, I am unable to fault the learned trial magistrate for her finding on liability since it was based on the evidence on record. The learned trial magistrate believed and accepted the evidence adduced by the respondent finding that it was more credible than the evidence presented by the appellants’ authorised driver. A determination regarding the credibility of witnesses is a finding of fact which a trial court is best placed to make given that it has the advantage of seeing and hearing the witnesses as they testify which benefit an appellate court does not have. This court therefore being an appellate court should not interfere with such a finding unless it was convinced that it was not based on any evidence or that it was clearly wrong.
22. In this case, I am satisfied that the trial court’s finding on liability was justified given that DW1 did not contest PW1’s claim that though it was at night, he was driving the subject vehicle with its lights off. What is not denied is deemed to be admitted. In my opinion, driving a vehicle at night without its headlights was a clear indication of reckless driving and lack of care for self safety and that of other road



users since it is akin to driving a vehicle while being blindfolded without any idea where the vehicle was headed or what pitfalls lay on its path.

23. In any event, DW1's evidence was also not clear on how exactly the accident occurred. It was not clear whether his evidence was that the accident occurred because the respondent was riding at high speed on his lane or he suddenly turned from a junction or from some point on the road. In contrast, PW1's evidence was clear and straight forward on the circumstances in which the accident occurred.

Having found as I have above, I find no reason to disturb the trial court's finding on liability. The same is consequently upheld.

24. On the appeal against quantum, the appellants complained that the award of Kshs. 700,000 was inordinately high, as according to them, the respondent did not adduce any evidence to prove that he had sustained head injuries in addition to soft tissue injuries as pleaded in the plaint.

25. I with respect disagree with this submission by the appellants given that through PW3, the respondent produced a discharge summary from Kenyatta National Hospital showing that he was hospitalized on 27th October 2014 for treatment of a head injury following a road accident and was discharged on 30th October 2014.

26. The discharge summary also shows that a CT Scan done in the course of his treatment revealed that he had sustained a left frontal intracerebral haematoma which Dr. Wokabi noted in his medical report dated 13th September 2016 and classified it as a major head injury which predisposed the respondent to development of epilepsy in future. The same injury was noted in Dr. Wambugu's medical report with a qualification that having not seen the discharge summary or the CT Scan, he could not confirm whether or not the respondent had sustained the said injury.

27. In my view, the above qualification by Dr. Wambugu in his medical report did not refute the evidence contained in the discharge summary and Dr. Wokabi's oral and documentary evidence. I therefore find that the respondent offered sufficient evidence to prove that among the injuries he sustained in the accident was a head injury.

28. Having found that the respondent suffered a head injury as a result of the accident, I am not inclined to disturb the award of Kshs. 700,000 made by the trial court as compensation for his pain and suffering noting that he was admitted in hospital for around three days and he ran the risk of developing epilepsy in future. The learned trial magistrate while making the impugned award considered all these factors as well as the submissions and proposals made by each of the parties and the authorities they relied on.

29. Given the foregoing, I find no basis upon which to interfere with the trial court's award. The award was in my view reasonable and fair compensation for the injuries the respondent sustained. The award is therefore confirmed. As the award on special damages was not contested, the same will remain undisturbed.

30. In the end, I have come to the conclusion that the appellant's appeal lacks merit and it is accordingly dismissed in its entirety with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 3RD DAY OF APRIL, 2024.

C. W. GITHUA

JUDGE

In the presence of:



Mr. Nyoike for the Appellants

Ms. Munyua for the Respondent

Ms. Susan Waiganjo, Court Assistant

