**Latema 22 Travellers Sacco Society Limited v Nyakwara & 2 others (Civil Appeal E071 of 2022) [2024] KEHC 5415 (KLR) (Civ) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5415 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E071 OF 2022**

**WM MUSYOKA, J**

**MAY 6, 2024**

**BETWEEN**

**LATEMA 22 TRAVELLERS SACCO SOCIETY LIMITED ..... APPELLANT**

**AND**

**LAMECK OSANO NYAKWARA ..... 1ST RESPONDENT**

**WILLIAM OMONDI NYAMBAWE ..... 2ND RESPONDENT**

**ROYAL MILLERS LIMITED ..... 3RD RESPONDENT**

***(An appeal arising from the judgement of Hon. MW Murage, Principal Magistrate, PM, delivered on 17th March 2023, in Milimani CMCCC No. E9800 of 2021))***

## JUDGMENT

1. The suit at the primary court was initiated by the 1st respondent, against the appellant and the 2nd and 3rd respondents, for compensation, arising from a road traffic accident, which allegedly happened on 20th July 2018, along Kinyanjui Road, Nairobi, involving the 1st respondent and 2 vehicles, allegedly owned by the appellant and the 3rd respondent, while the 2nd respondent was one of the drivers of the said vehicles. The 1st respondent suffered serious injuries, and attributed negligence on the appellant and the 2nd and 3rd respondents, or their agents or servants. He alleged that he had just alighted from the vehicle belonging to the appellant, when the 2nd respondent drove or handled the vehicle belonging to the 3rd respondent in such a manner that he got squeezed between the 2 vehicles, occasioning the injuries. The appellant filed a defence, in which it denied liability, and attributed negligence on both the respondents. The 2nd and 3rd respondents did not appear nor file defences to the claim.

2. A trial was conducted, wherein 2 witnesses testified for the 1st respondent, while 2 witnesses testified for the appellant. A judgement was delivered on 28th January 2022. Liability was assessed against

the appellant at 100%. Damages were awarded at Kshs 2,500,000.00, for pain and suffering; Kshs 150,000.00 for future medical expenses; and Kshs 3,720.00, for special damages.

3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 11th February 2022, revolve around the trial court deciding against the weight of the evidence and based on wrong principles; failing to consider the evidence, authorities and submissions presented by the appellant; dismissing the case against the 2nd and 3rd respondents despite those respondents not tendering any evidence; and awarding damages that were excessive in the circumstances.

4. Directions were given on 12th February 2024, for disposal of the appeal by way of written submissions. There has been compliance, by the appellant and the 1st respondent.

5. On liability, the appellant submits that the 1st respondent did not adduce evidence from an eyewitness to the accident, and, therefore, negligence was not proved against it to the required standard. Margaret Kannes Muyanga v Jamal Abdulkarim Musa [2020] eKLR (Chepkwony, J) and *Farida Kimotho v Ernest Maina* [2002] eKLR (Hayanga, J) are cited. On quantum, it is submitted that the award of Kshs 2,500,000.00 was excessive, and *Jane Muthoni Nyaga v Nicholas Wanjohi Thuo* [2010] eKLR (W. Karanja, J) is cited, where Kshs 300,000.00 was awarded for a fracture to the right superior and inferior rami of the pelvis, a cut on the right leg and a central dislocation of the hip. Filed simultaneously with the submissions are judicial decisions that are not mentioned in the body of the written submissions. In *Michael Okello v Priscilla Atieno* [2021] eKLR (Aburili, J), Kshs 225,000.00 was awarded for blunt injuries to the forehead, left lower limb, right upper limb, left upper limb, left shoulder, neck and chest; fracture to the first rib; bruises to the left shoulder, left upper limb and right upper limb; and a cut wound to the right lower limb. In *Godfrey Wamalwa Wamba & another v Kyalo Wambua* [2018] eKLR (J. Kamau, J), Kshs 700, 000.00, with future medical expenses of Kshs 150,000.00, was awarded for a compound fracture of the right distal tibia/fibula, cut wounds to the scalp and the chest, and a cut on the lower lip.

6. In his written submissions, the 1st respondent largely supports the judgement of the trial court, on both liability and quantum. He explains that *Margaret Kannes Muyanga v Jamal Abdulkarim Musa* [2020] eKLR (Chepkwony, J) does not support the submission by the appellant that the police abstract is not good evidence of negligence.

7. On liability, the only witness, of the 4 presented by both sides, who was at the scene of the accident, was the 1st respondent, who testified as PW2. He was an eyewitness to it. It happened to him. He witnessed it. He testified that he was alighting from the vehicle belonging to the appellant, when another vehicle, which he alleged belonged to and was controlled by the 2nd and 3rd respondents squashed or squeezed him against the appellant's vehicle. The appellant did not avail his driver to testify on what happened. Instead, it called a police officer, who produced a police abstract, which placed the appellant's vehicle at the scene, and another vehicle. That witness, DW1, testified that that other vehicle was blamed by the investigators for the accident. The 1st respondent blamed the driver of the appellant's vehicle too for the accident, for he drove off while he was still alighting from the vehicle. No other evidence could be possibly superior to that of the 1st respondent, who testified that he was at the scene, he saw what happened, and that it was he who was in the middle of it all. There was really no need for the 1st respondent to call any other eyewitness to the accident. If the appellant felt that the narrative did not add up, then the burden was on it to call alternative witness evidence. That of its driver would have provided a very good counter-narrative to that given by the 1st respondent. It transpired, however, that that driver was not called to the stand.

8. Should the appellant have been found to have been 100% liable? As indicated above, its witness, DW1, placed its vehicle and the 1st respondent at the scene, although he blamed the driver of the other vehicle

for the accident. The vehicle belonging to the appellant was registration mark and number KCK 040F. According to the police abstract relied upon by the 1st respondent, the vehicle belonging to the 2nd and 3rd respondents was registration mark and number KBV 033Q. That is the vehicle reflected in the plaint. The 1st respondent testified that that was the vehicle that squashed him against KCK 040F. At the trial , DW1 mentioned a KBV 035Q as appearing in the police abstract. He stated that he was not aware of that vehicle, for what was recorded in the police occurrence book was KBV 033Q. The trial court hang on KBV 035Q, despite DW1 stating that he was not aware of it, and that the records in the occurrence book, from which the police abstract was extracted, referred to KBV 033Q. It is not clear which abstract DW1 was referring to, because the one placed on record by the 1st respondent referred to KBV 033Q, and not KBV 035Q, and I have not come across any other. It should have been clear to the trial court that the accident vehicles were KCK 040F and KBV 033Q, from the evidence tendered by DW1. Anyhow, it was the appellant who presented DW1 as its witness, who then introduced KBV 035Q into the matrix, and the trial court believed that testimony, and eliminated KBV 033Q from the picture, leaving only KBK 040F. The 1st respondent testified that he was a passenger in that vehicle, and that the accident occurred as he was alighting from it, when it was driven off before he could fully do so, hence forcing him to be squashed or squeezed between it and the other vehicle, which he was positive was KBV 033Q, which, I am persuaded, is supported by the testimony of DW1. The act of driving off a vehicle before a passenger has fully alighted, and in a manner that does not take into account the safety of such a passenger, paints a picture of lack of care, and is negligent. The removal of KBV 033Q from the picture by the trial court, meant that the appellant bore full liability.

9. On quantum, I note from the plaint, the medico-legal report by Mr Wokabi, the police P3 form and the treatment notes, that the 1st respondent had suffered very grave injuries. Mr. Wokabi summarised them as multiple fragmented fractures of the right superior and inferior public rami, fracture of the left acetabulum, fracture of the left iliac bone, fracture of the sacrum, fracture of the transverse process, partial dislocations of the left sacral iliac joint and the midline of the pelvis, and anal rectal injury. The radiological report, by Dr. Rodrigues, dated 24th July 2018, noted multiple pelvic fractures, being a communited fracture of the right superior pubic ramus, oblique fracture of the right inferior pubic ramus, communited fracture of the left posterior acetabular wall, fracture of the left ilium, fracture of the anterior aspect of the sacrum, and fracture of the left transverse process. The report by DW2, Dr. Jennifer Kahuthu, is also on record. Based on the medical history and the medical records availed, it noted a fracture of the superior and inferior rami, fractures of the pelvic bones, and a fracture of the left transverse process. So, the injuries noted by all these doctors were very serious. The authorities cited by the appellant understate these injuries, and are not comparable, for they relate to lesser, largely soft tissue injuries. The 1st respondent has not helped much, in terms of citing more recent decisions on comparable injuries.

10. I have considered the following authorities on comparable injuries. In *Wurano Tosha & another v DMK* [2021] eKLR (Chitembwe, J), the appellant had sustained complex pelvic fractures, a fracture of the left transverse process, a fracture of the coccyx, a fracture of the 4th metatarsal and fractures of the 2nd to 4th ribs, with permanent disability at 22%, and an award of Kshs 2,500,000.00 was made. In *Penina Waithira Kaburu v LP* [2019] eKLR (Ngaah, J), the appellant had sustained multiple fractures of the pelvis, and an award of Kshs 2,000,000.00 was made. I am persuaded that the award of Kshs 2,500,000.00 was within the range.

11. In view of the above, the appeal herein has no merit, and it is hereby dismissed. The respondent shall have the costs. The appeal herein is disposed of in those terms. Orders accordingly.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 6TH DAY OF MAY 2024**

**WM MUSYOKA**

**.....**

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Nanjira, instructed by Kimondo Gachoka & Company, Advocates for the appellant.

Mr. Kaburu, instructed by Nelson Kaburu & Company, Advocates for the 1st respondent.