



Mule v Heven (Civil Appeal 127 of 2018) [2024] KEHC 5641 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 127 OF 2018
DAS MAJANJA, J
MAY 22, 2024**

BETWEEN

MARTIN NDOLO MULE ALIAS MARTIN MULE NDELO APPELLANT

AND

LYDIA SHIRIWA HEVEN RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. M.O. Rabera, SRM dated 12th June 2018 at the Magistrates Court at Mombasa in Civil Case No.1205 of 2013)

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal by the Appellant stemming from the judgment of the Subordinate Court dated 12.06.2018 where the court apportioned liability at 50:50 between the parties in respect of an accident that occurred on 07.04.2013 where the Appellant was knocked down along Mombasa – Malindi road near Engen Petrol Station by the Respondent’s motor vehicle KAZ E (“the motor vehicle”). On quantum of damages, the Appellant was awarded Kshs. 450,000.00 as general damages.
2. In his case before the Subordinate Court, the Appellant stated that he was a pedestrian when he was knocked down by the Respondent’s motor vehicle which was driven carelessly. He averred that he sustained a fracture of the right tibia and right fibula leg bone and a fracture of the right humerus arm bone. In response, the Respondent generally denied the claim against her and averred on a without prejudice basis that the accident was solely caused and/or substantially or contributed by the negligence of the Appellant.
3. The matter was set down for hearing where the Appellant testified on his own behalf (PW 1) and also called Dr. Ajoni Adede (PW 2) and Cpl. George Nyamweya (PW 3) of Nyali Police Station. The Respondent testified on her own behalf (DW 1). In its judgment rendered on 06.07.2018, the Subordinate Court apportioned liability equally in light of the parties’ conflicting positions as to how



the accident happened. On quantum of damages, it noted the injuries pleaded by the Appellant, the submissions and authorities cited by the parties and as such, the court relied on the decision of Andrew Mbuvi Kilonzo v Antony Luleyi Madara & Another JCCC N 1637 of 1990 to award general damages of Kshs. 450,000.00.

4. In this appeal, the Appellant challenges the findings on liability and quantum of damages in respect of the general damages awarded. The appeal has been canvassed by way of written submissions to which I will make relevant references in my analysis and determination below.

Analysis and Determination

5. As this is the first appeal, this court is required to re-evaluate and re-examine the Subordinate Court record and the evidence presented before it in order to arrive at its own conclusion (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
6. With the above in hindsight, I will now proceed to determine whether the subordinate court erred in its determination of liability and quantum. On liability, a court's finding is dependent on the facts and evidence available and in assessing the same, the court considers causation and blameworthiness (see *Wanjiru Karanja v Washington Malele* [1983]eKLR). Proof in such cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd* [2019] eKLR simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'
7. In his testimony, the Appellant stated that he was hit from behind by the motor vehicle and that he was hit while walking on the left side of the road, off the road. He stated that the motor vehicle did not hoot to warn him and that he was careful while walking and he did not see the motor vehicle before it hit him. PW 3 confirmed the occurrence of the accident and stated that the Appellant was to blame as he was crossing the road in a hurry from one side to the other. He averred that the motor vehicle slowed down before hitting the Appellant. PW 3 stated that the motor vehicle was inspected and it was noted that the front body plate was damaged and the view mirror was smashed. There was no pre-accident noted. PW 3 reiterated that the accident happened while the Appellant was crossing the road. On her part, the Respondent testified that she was driving near Engen petrol station after Nyalı Bridge when she heard a loud bang on the left side of the motor vehicle. That when she came out to check what had happened, she saw that she had knocked down the Appellant and that he was on the left side of the road. The Respondent stated that there were other people running after him and that she took the Appellant to hospital and then went to the police station to report the accident. She reiterated that the Appellant was crossing the road and that there was no zebra crossing or bumps and that people were not to cross that road. She stated that there was no traffic jam and that she was not overlapping, neither was she at high speed but at 40kph. The Respondent stated that she was in the middle lane when the accident happened and that she never saw the Appellant cross until the motor vehicle hit him.
8. My summation of the above evidence leads me to conclude that neither of the parties can claim to be blameless for the accident. While the Appellant states that he was hit from behind while walking on the pavement, there was no evidence that the motor vehicle had veered off the road or was overlapping or driving illegally on the pavement when it hit him. The Appellant admitted that there was no evidence of skid marks on the road. I find that it is plausible as testified by PW 3 and the Respondent that the



Appellant was knocked in the middle lane of the road and not on the pavement as advanced by the Appellant. The damage on the motor vehicle also lends credence that the Appellant must have been hit on his side and not from behind. The Appellant does not deny that the motor vehicle was largely damaged on its left-hand side as opposed to the front side which could have made it possible that he was outrightly hit from behind. Further, the Appellant did not dispute that the Respondent did not realize that she had hit someone. This means that the Appellant was not in plain view site in front of her and fortifies my conclusion and that of the subordinate court that the Appellant was not hit from behind but on his right side as he was crossing the road.

9. At the same time, the Respondent's testimony that the Appellant was crossing in an undesignated spot which had no zebra crossing or bumps was also not challenged. There was no evidence that both parties were properly looking out and exercising caution as they used the road at the time. The Respondent could not also state to have been driving at 40kph as with such a speed, he could have seen the Appellant crossing the road. The Appellant also had no business crossing the road at an undesignated spot and without properly looking out for motor vehicles passing by. As the Court of Appeal in *Isabella Wanjiru Karanja v Washington Malele* (supra) held, "...there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car". I too come to the conclusion that both parties were to blame for the accident. I do not find any fault in the Subordinate Court conclusion.
10. On the Appellant's submission that the Respondent did not have a valid driving license at the time of the accident, it was held in *Elizabeth Gathoni Thuku* (suing as the legal representative of the estate of Charles Gitonga Wathuta) v Peter Kamau Maina & another [2021] eKLR that in a civil claim, liability trickles down to the question of who actually caused the accident. Primarily, the same would need to be determined by analyzing who acted in a careless and reckless manner to cause the accident. Lacking a driving license is not ultimately what caused the accident and did not cause the Appellant to contribute to the occurrence of the accident. The Appellant's contributory negligence is what partly caused the accident and that the accident would have still occurred as it did regardless of whether the Respondent had a valid driving license at the time of the accident. This ground of appeal by the Appellant is dismissed.
11. On quantum of damages, it is trite that an award of damages is an exercise of discretion of the court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment (see *Bwire v Wayo & Sailoki* [2022] KEHC 7 (KLR)). The court is also to examine the extent and gravity of the injuries suffered by the plaintiff, relevant and comparative case law to ensure fairness. In sum, as was stated by the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016]eKLR, "comparable injuries should attract comparable awards." However, this 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 trial court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low (see *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5).
12. It is not in dispute that the Appellant sustained fractures of the right tibia and right fibula leg bones and a fracture of the right humerus arm bone. PW 2 produced a medical report where he concluded inter alia that the Appellant had a 15% permanent partial disability. The Appellant sought to be compensated with a sum of Kshs. 2,000,000.00 whereas the Respondent proposed a sum of Kshs. 400,000.00. As stated, the subordinate court awarded the Appellant Kshs. 450,000.00 for these injuries and it relied on the 1990 case of *Andrew Mbuvi Kilonzo v Antony Luleyi Madara* (Supra) that was cited by the Respondent. Whereas this case was relevant as it provided for similar injuries suffered by the



Appellant, I find that the same was dated and could not have been helpful in guiding the subordinate court on the appropriate damages payable to the Appellant for his injuries. I have also gone through the authorities cited by the Appellant and find that although they were relevant to the injuries he sustained, they are also dated and could not offer proper guide to the subordinate court. In any event, I have gone through a number of decisions relating to fractures of the tibia and fibula; In Nahson Nyabaro Nyandega v Peter Nyakweba Omboga [2021] eKLR the respondent was awarded Kshs. 650,000.00 for a compound fracture of the right tibia bone and cut wound on the right leg. In Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR the court reduced an award of Kshs. 600,000.00 to Kshs. 400,000.00 for compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose and blunt chest. In Zachariah Mwangi Njeru v Joseph Wachira Kanoga [2014] eKLR the plaintiff sustained comminuted fracture of the tibia and fibula and the court set aside an award of Kshs. 800,000.00 and substituted it with an award of Kshs. 400,000.00. In Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR the plaintiff sustained multiple injuries and fracture of right tibia and fibula the appellate court set aside an award of Kshs. 1,500,000.00 and substituted it with an award of Kshs. 300,000.00. In Amritlal S. Shah Wholesalers Ltd & another v Joshua Ekeno [2012] eKLR the plaintiff sustained compound fractures of the tibia and fibula and the appellate court upheld an award of Kshs. 350,000.00.

13. Considering the injuries suffered by the Appellant which apart from the fractures of the tibia and fibula also included a fracture of the humerus arm bone, the partial permanent disability of 15%, the aforementioned authorities and while factoring inflation, I am of the view that the sum of Kshs. 450,000.00 awarded by the subordinate court was inordinately low. I find that a sum of Kshs. 800,000.00 would be appropriate in the circumstances.

Disposition

14. The Appellant's appeal succeeds to the extent that the sum of Kshs. 450,000.00 awarded by the Subordinate Court is hereby set aside and substituted with an award of Kshs. 800,000.00. The Appellant is awarded costs for this appeal assessed at Kshs. 40,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MAY 2024.

OLGA SEWE

JUDGE

