



**Muthanji v Ochwenda & 2 others (Civil Appeal 78 of 2020)  
[2024] KEHC 5640 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 78 OF 2020**

**OA SEWE, J**

**MAY 22, 2024**

**BETWEEN**

**CATHERINE NIERI MUTHANJI ..... APPELLANT**

**AND**

**KEVIN ODHIAMBO OCHWENDA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**GODFREY CHEGE KURIA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon.C.N. Ndegwa, SPM dated 22<sup>nd</sup> May 2020 at the Magistrates Court at Mombasa in Civil Case No.2248 of 2015)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant appeals against the findings of liability and quantum by the Subordinate Court in respect of an accident that occurred on 13.04.2015 along the Mombasa-Malindi road involving the 1<sup>st</sup> Respondent who was riding on a motorcycle registration number KMDD \*Q (“the motorcycle”) and motor vehicle registration number KBY \*S (“the motor vehicle”) driven by the Appellant. In his plaint, the 1<sup>st</sup> Respondent blamed inter alia the Appellant for the accident as he claimed that the motor vehicle was driven negligently that it knocked down the 1<sup>st</sup> Respondent who then sustained severe injuries, loss and damage. The 1<sup>st</sup> Respondent sought general and special damages, together with interest and costs of the suit.
2. In response, the Appellant generally denied the claims in the plaint. However, without prejudice and in the alternative, she proffered that the said accident was wholly caused or substantially contributed to by the 1<sup>st</sup> Respondent’s negligence and thus denied any responsibility for the accident and the loss claimed by the 1<sup>st</sup> Respondent. She urged the Subordinate Court to dismiss the suit.



3. When the matter was set down for hearing the 1<sup>st</sup> Respondent testified on his own behalf (PW 2) and also called Dr. Stephen K. Ndegwa (PW 1) and Corporal Abdulahi Dida (PW 3) from Bamburi Police Station. The Appellant testified on her own behalf as DW 1. Thereafter, the subordinate court rendered the judgment where it inter alia found the Appellant 100% liable for the accident based on her admission that she was convicted in a criminal court for driving without due care and attention and she was fined Kshs. 15,000.00. On quantum of damages, the Subordinate Court then held that considering the injuries sustained by the 1<sup>st</sup> Respondent, general damages of Kshs. 1,500,000.00 was sufficient as compensation.
4. The Appellant has grounded her appeal on her memorandum of appeal dated 19.06.2020. She has also canvassed the same by way of written submissions. The 1<sup>st</sup> Respondent has not responded to the appeal.

### **Analysis and Determination**

5. In determining this appeal, the court is guided by the principle that it is its duty to re-evaluate the evidence independently and reach its own conclusion as to whether to uphold the judgment. In doing so, the court must make an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123).
6. Even though the Appellant raises 11 grounds in her memorandum of appeal, she has condensed the same to two issues for determination in her submissions, that 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. The 1<sup>st</sup> Respondent, testified that he was travelling from Mtwapa heading towards the town/ Kenol direction when the motor vehicle hit him as it came from the opposite direction. PW 3 testified that the Appellant was charged with the offence of reckless driving and subsequently fined Kshs. 15,000.00 or 4 months in jail in default in Mombasa Traffic Case no. 402 of 2015. On her part, the Appellant testified that she was the one driving the motor vehicle when the motorcycle came from the Mtwapa direction and hit the motor vehicle on the right side as it was in the middle of the road. She blamed the 1<sup>st</sup> Respondent for the accident and reiterated that it is the motorcycle that rammed into her.
8. Whereas the Appellant admits that she was charged, convicted and fined, she submits that on re-examination, she clarified that the matter did not go for trial and that she pleaded guilty to save time and that is why she paid the fine. She reiterates that the motorcycle contributed to the accident. She submits that her evidence regarding entering the main road from Milele Beach Hotel after being allowed by a motorist to do so, the collision in the middle of the road, the fact that her vehicle was hit from the right side, remained unchallenged and uncontroverted.



9. Determination of this appeal turns on the meaning and application of section 47A of the [Evidence Act](#) which provides for the effect of a conviction as follows:

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

10. The purport of section 47 aforesaid is that the fact of conviction is a conclusive proof that such a person was convicted and that fact cannot be challenged. This means that in accident cases, a conviction connotes negligence on the part of the person convicted hence that person cannot deny negligence or otherwise assert that he is completely blameless (see [Robinson v Oluoch](#) [1971] EA 376 and [Chemwolo and Another v Kubende](#) [1986] KLR 492). However, I agree with the Appellant that in [Robinson v Oluoch](#) (supra) the court also stated that section 47 does not preclude a person ‘who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident’.
11. Whereas the Appellant stated that her plea of contributory negligence was not challenged, I note that the 1<sup>st</sup> Respondent in his reply to the Appellant’s defence denied the said particulars of contributory negligence and invited the Appellant to strict proof. From the record, the Appellant did not tender any evidence to demonstrate that the motor vehicle was hit on the right-hand side as a result of the 1<sup>st</sup> Respondent and the motorcycle encroaching on her lane and the accident happening in the middle of the road. PW 2 gave evidence that was corroborated by PW 3 that it was the Appellant to be blamed for the accident and this blameworthiness was confirmed by the Appellant’s conviction in the traffic case. In the absence of evidence of contributory negligence, no such blame can be apportioned to the 1<sup>st</sup> Respondent. I therefore find that the Subordinate Court did not err in finding the Appellant wholly to blame and liable for the accident.
12. Turning to the quantum awarded, this court can only disturb the awarded sum by the trial court if it is shown that the court took into account an irrelevant factor, or left out of account a relevant one, or the amount is inordinately low or inordinately high that it was wholly erroneous estimate of the damages (see [Kemfro Africa Ltd t/a Meru Express Services v Lubia & Another](#) [1982-88] 1 KAR 777). The court should also make fair and consistent awards in line with the principle that similar injuries must attract similar awards (see [Maore v Geoffrey Mwenda](#) [2004]eKLR).
13. The Appellant does not deny that as per the evidence on record, the 1<sup>st</sup> Respondent’s injuries were as follows: Displaced compound fracture of the right tibia  
Displaced compound fracture of the right fibula  
A deep cut wound on the palm of the right hand
14. The Appellant submits that the trial magistrate awarded Kshs. 1,500,000.00 without considering the 1<sup>st</sup> Respondent’s submissions which are on record, which submissions the Appellant submits were never served upon her to enable her respond and provide her views and proposals on quantum. She thus submits that in arriving at a figure of Kshs. 1,500,000.00, the trial magistrate erred in law and in fact, by failing to consider relevant factors or alternatively, considering irrelevant factors. She further submits that this finding was inordinately high and not based on any sound legal principles.
15. From the record, the trial magistrate, in the judgment stated that both sides were supposed to file written submissions by 24.03.2020 but that the same were not filed by the time of preparing the judgment thus there were no proposals on quantum the court could rely on. While I agree with the



Appellant that the 1<sup>st</sup> Respondent's written submissions are on record, I note that the same were filed in court on 22.05.2020, the same day judgment was delivered and not on 24.03.2020 as was ordered by the trial court. The Appellant too, did not file any written submissions by this date. I reject her submission that she was supposed to wait for the 1<sup>st</sup> Respondent to file written submissions for her to respond as the record indicates that the subordinate court's order was for both parties to have filed written submissions by 24.03.2020. Since both parties failed to file written submissions in a timely manner, none of them, including the Appellant can accuse the subordinate court of not considering the submissions when there was none on record. In any event, submissions are a mere guide to the court as they are not pleadings and their non-consideration cannot in itself be a basis to overturn a trial court's decision (see *M'inoti & another (Suing as Legal Representatives of the Estate of Charles Kithinji Ringera-Deceased) v Gitonga & another* [2024] KEHC 3180 (KLR)).

16. I note that in arriving at the sum of Kshs. 1,500,000.00, the Subordinate Court itself did not state the basis of this figure as it did not cite comparative decisions that informed its own decision. It is now left to this court to determine whether this sum was sufficient considering the injuries suffered by 1<sup>st</sup> Respondent. I have gone through a number of authorities where the injuries therein related to fractures of the tibia/fibula and cut wounds suffered by the 1<sup>st</sup> Respondent; In *Nabson Nyabaro Nyandega v Peter Nyakweba Omboga* [2021] eKLR the respondent was awarded Kshs. 650,000.00 for bruises on the face, compound fracture of the right tibia bone and cut wound on the right leg. In *Daniel Otieno Owino & another v Elizabeth Atieno Ouwor* [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 Orieno 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.
17. Based on the above authorities, it is evident that the sum of Kshs. 1,500,000.00 awarded by the subordinate court was inordinately high considering the injuries suffered by the 1<sup>st</sup> Respondent. Comparative authorities indicate that damages for such compound fractures of the tibia and fibula rarely go past Kshs. 1,000,000.00. Therefore, considering inflation, I find that a sum of Kshs. 800,000.00 would be adequate in the circumstances.

### **Disposition**

18. For the reasons I have set out, the Appellant's appeal succeeds but only to the extent that the award of Kshs. 1,500,000.00 is set aside and substituted with an award of Kshs. 800,000.00. The Appellant is awarded costs of this appeal assessed at Kshs. 20,000.00.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MAY 2024.**

**OLGA SEWE**



**JUDGE**

