



REPUBLIC OF KENYA



**Musyoka v Dominic (Civil Appeal E169 of 2020)
[2024] KEHC 5165 (KLR) (Civ) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5165 (KLR)

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

CIVIL

CIVIL APPEAL E169 OF 2020

HI ONG'UDI, J

MAY 17, 2024

BETWEEN

MORRIS MUTINDA MUSYOKA APPELLANT

AND

KIHUMBA KIMANI DOMINIC RESPONDENT

(Being an appeal from the Judgment and decree of Mrs A.M. Obura Senior Principal Magistrate in Milimani Commercial Civil Case No. 5280 of 2017, delivered on 24th July 2020)

JUDGMENT

1. Morris Mutinda Musyoka the appellant herein was the plaintiff in the lower court while Morris Mutinda Musyoka the respondent was the defendant. The appellant vide the plaint dated 24th July 2017 sued the respondent claiming general and special damages together with costs for future medical expenses and /or surgery as assessed by the doctor. This was as a result of the injuries he sustained as a pillion passenger on motor cycle registration number KMDL 792L when he was hit by motor vehicle registration No. KBV 288P owned by the respondent, on 17th April 2020.
2. The claim was fully defended and the trial magistrate delivered a Judgment on 24th July,2023 in which she apportioned liability in the ratio of 50:50 between the appellant and respondent. Further, the court awarded general and special damages of kshs. 300,000/= and kshs. 4050/= respectively subject to the 50% contributory negligence, special damages kshs. 4050/= . The plaintiff was also awarded costs of the suit plus interests.
3. The appellants being aggrieved by the whole judgment lodged this appeal dated 13th August, 2023 setting out the following grounds: -



- i. That the learned magistrate erred in law and in fact by apportioning liability between the appellant and the respondent when the appellant was neither the owner or the rider of motorcycle registration number KMDL 792L.
 - ii. That the learned magistrate erred in law and in fact by failing to appreciate that without preferring third party proceedings against the owner of motorcycle registration number KMDL 792L liability could not be apportioned between the respondent and any other party.
 - iii. That the learned magistrate erred in law and in fact by failing to appreciate that the evidence tendered by the Respondent was not against the Appellant but a stranger who was not a party to the proceedings before the court.
 - iv. That the learned magistrate erred in law and in fact by apportioning liability to the appellant when his evidence was not controverted by that of the respondent.
 - v. That the learned magistrate erred in law and in fact by failing to appreciate the full nature of the appellant's injuries and authorities cited, thus making an award that was manifestly low.
 - vi. That the learned magistrate erred in law and in fact by taking into account irrelevant factors in coming up with the award of quantum.
4. The Appeal was canvassed through written submissions.

Appellant's submissions

5. The appellant's submissions were filed by Mulu advocates and are dated 4th September, 2023. Counsel submitted on the grounds as listed in the memorandum of appeal.
6. On the first ground, counsel submitted that the trial magistrate erred in law and in fact in apportioning liability at 50:50 when the respondent had an opportunity to enjoin a third party for the said issue to be determined between them. Further, that the respondent blamed the said third party who not a party to the suit and the court apportioned blame to the appellant who was a passenger.
7. On the second ground, counsel submitted that both the trial court and the respondent ignored the provisions of Order 1 rule 5 of the *Civil Procedure Rules* which provides for issuance of notice to third and subsequent parties. On the third issue, he submitted that the trial magistrate erred by allowing the suit to proceed without taking third party directions and therefore the blame on liability could not be shifted to the appellant.
8. On the fourth ground, counsel submitted that the evidence by the appellant at the trial court was never rebutted, yet the trial court proceeded to apportion liability with no support from the pleadings or the evidence. On the fifth ground, he submitted that the trial court erred in awarding general damages amounting to kshs, 300,000/= contrary to the authorities relied on by the appellant. The authorities relied on by the appellant included; *Coast Bus (MSA) Ltd v Joseph Othiambo Makambora* [2017] eKLR and *Veronica Mwangeli Kilonzo v Robert Karume* [2003] eKLR, where the court therein awarded kshs. 300,000/= and kshs.500,000/= respectively. He proposed that the court awards the appellant general damages amounting to Kshs. 700,000/=.
9. Lastly, on the seventh ground, counsel submitted that the trial magistrate did not give reasons on how she arrived at the award of kshs. 300,000/= as general damages. He submitted further the appellant proved his case on a balance of probabilities as is required in civil cases. He relied on section 107 of the *Evidence Act* and the judicial decisions *Treadsettlers Tyres Ltd v John Wekesa Wepukhulu* [2010] eKLR and *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR.



10. In conclusion, counsel urged the court to allow the appeal and find the respondent 100% liable and assesses the quantum according to the injuries sustained by the appellant.

Respondents submissions

11. The respondent's submissions were filed by Julia Kariuki advocates and are dated 6th November, 2023. Counsel identified two issues for determination by this court.
12. The first issue was whether the trial court erred in fact and law in apportioning liability. Counsel submitted that both parties at the trial court gave contradicting versions of how the accident occurred. That no evidence was produced on how the accident actually occurred and for the said reason the trial court apportioned liability between them equally.
13. The court's attention was drawn to the case of *Hussein Omar v Lento Agencies* [2006] eKLR as quoted in the case of *Mulekye v Kovi* (Civil Appeal 27 of 2019) [2022] KEHC 3291 (KLR) (11 July 2022) (Judgment) where the Court of Appeal held that in situations where both parties to an accident gave conflicting versions of how the accident occurred and no side was able to establish the fault of the other, liability should be apportioned equally on each driver.
14. Counsel further cited the case of *Helle Sejer Hansen & 2 others v Julius Kakungu Mukavi* [2020] eKLR where the high court disagreed with the trial court's finding that a party who was not enjoined in a suit cannot be blamed for the accident.
15. On the second issue, whether the trial court erred in fact and in law in its award on quantum, counsel submitted that the trial court did not err in giving an award of kshs. 300,000/= as general damages as the same was very comparable to other cases with comparable injuries. She relied on the following cases in support of this position;
 - i. *Gladys Lyaka Mwombe v Francis Namatsi & 2 other* [2019] eKLR, where the plaintiff, had sustained a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, fracture of the lower tibia and fibula and a cut wound on the face. General damages were awarded at Kshs. 300,000.
 - ii. In *Naomi Momanyi v G4s Security Services Kenya Limited & another* [2018] eKLR, where the plaintiff sustained a fracture of the left -right condylar tibia, blunt injuries on the back and multiple injuries on the left arm. He was awarded Kshs. 300,000.
16. She thus urged the court to dismiss the appeal with costs to the respondent.

Analysis and Determination

17. This being a first appellate court, I am guided by the dictum in the case of *Selle v. Associated Motor Boat Co. Ltd. & others* [1968] EA 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.
18. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“An appeal to this Court from a trial by the High 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 allowances in this respect”

19. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find the issues for determination to be as follows:

- i. Whether the learned trial magistrate erred in law and in fact in apportioning liability at the ratio of 50:50 between the appellant and the respondent.
- ii. Whether the award on general damages was inordinately low.

20. In addressing the first issue, I refer to the Court of Appeal in *Michael Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR where it stated;

“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.”

21. Further, in *Farah v Lento Agencies* [2006]1 KLR 124,125, the Court of Appeal held that: -

“... Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame.”

22. Guided by the above cited authorities, it is my view that in determining liability this court must consider the facts of the case and find out what mainly contributed to the cause of the accident. The court will always consider the manner of driving, identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

23. I have considered the evidence adduced before the trial court. It is not in dispute that the appellant was hit by the respondent’s motor vehicle registration number KBV 288P while he was a pillion passenger aboard motorcycle registration number KMDL 792L. The appellant never told the court much about the occurrence of the accident. He blamed the respondent for the accident.

24. In cross examination, the appellant confirmed that the respondent’s vehicle was coming from the opposite direction when it lost control and veered into their path. He added that the accident happened



- at midnight and him together with the rider had helmets and reflector jackets on. He stated that him and the rider were not drunk.
25. The respondent testified as DW1. He blamed the rider of the motorcycle who carrying three pillion passengers and could therefore not control the motorcycle. He testified that the motorcycle hit him from the rear left side while he was entering Awori lane. He added that the rider of the motor cycle together with the passengers had no helmets or reflectors on.
 26. In cross examination, he confirmed he did not have any proof that the rider of the motor cycle and the passengers were drunk. He confirmed further that the abstract showed that only one passenger was injured.
 27. The trial magistrate in her judgment faulted the appellant for not enjoining in the suit the rider of the motor cycle. She equally faulted the respondent for not commencing third party proceedings against the said rider. She observed that there were no police investigations showing who between the rider of the motorcycle and the driver of the motor vehicle was at fault. For the said reasons, she proceeded to apportion liability at the ratio of 50:50 between the appellant and the respondent.
 28. After analysing all the evidence above, I find that the appellant's evidence did not prove on a balance of probability (which is the standard of proof in civil cases) that what mainly contributed to the cause of this accident was the manner of driving by the respondent. Further, as observed by the learned magistrate, this court equally notes that no police investigations showing either the rider of the motorcycle or the driver of the motor vehicle was at fault.
 29. For the said reasons, I find that the learned trial Magistrate analyzed the evidence well and arrived at the right conclusion which this court should not interfere with.
 30. Next is the issue on whether the award on general damages was inordinately low.
 31. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2)* (1987)) KLR 30 stated that:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”
 32. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated as follows: -

“comparable injuries should attract comparable awards”.
 33. In awarding quantum, the trial magistrate considered the medical report by Dr. John Mutunga produced as P exhibit 3 which indicated that the appellant had fully recovered. She noted that comparable awards ought to be made for comparable injuries. She went ahead and awarded general damages amounting to kshs. 300,000/= after considering the nature of injuries sustained by the appellant, the submissions together with authorities therein and the inflation trends.
 34. In the instant suit, the injuries suffered by the appellant as indicated in the medical reports by Dr. John Mutunga and Dr. Kiato was fracture of distal 1/3 of right fibula. The latest report by Dr. Kiato indicated that the appellant had recovered and he could resume his duties.



35. This court has considered the award of Kshs. 300,000/= as made by the trial magistrate based on the authorities cited by the parties in submissions at the trial court. The appellant cited case of *Coast Bus (MSA) Ltd v Joseph Othiambo Makambora* [2017] eKLR and *Veronica Mwangeli Kilonzo v Robert Karume* [2003] eKLR, where the plaintiffs therein were awarded general damages amounting to kshs. 300,000/= and kshs. 500,000/= respectively, plus the injuries sustained by the appellant which were similar to those sustained in the cited cases. However, the plaintiffs in the cited cases sustained multiple injuries which cannot be likened to what the appellant sustained. The said cases in my opinion cannot not justify his claim for the award of kshs. 700,000/=.
36. In view of the foregoing, it is my view that the award of kshs.300,000/= by the trial magistrate was not inordinately low.
37. The upshot is that the appeal lacks merit and is dismissed with no order as to costs. The lower court Judgment is hereby upheld.
38. Orders accordingly

DELIVERED, VIRTUALLY DATED AND SIGNED THIS 17TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

