



REPUBLIC OF KENYA



**Maina & another v Mudongoi & another (Civil Appeal  
E004 of 2021) [2024] KEHC 4971 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL E004 OF 2021**

**JR KARANJA, J**

**MAY 14, 2024**

**BETWEEN**

**SAMUEL MAINA ..... 1<sup>ST</sup> APPELLANT**

**SOLOMON KIPKEMBOI MAIYO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LINET MUDASHI MUDONGOI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH EMBEKO OVULULE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Honourable B.W. Wachira (Resident Magistrate) delivered on 4<sup>th</sup> May 2021 in Kapsabet CMCC NO. 203 of 2017)*

**JUDGMENT**

1. The amended memorandum of appeal filed herein on 2<sup>nd</sup> September 2021 proffered nine (9) grounds of appeal against the decision and judgment of the Resident Magistrate in Kapsabet CMCC NO. 203 of 2017, delivered on the 4<sup>th</sup> May 2021.

The two appellants, Samuel Maina and Solomon Kipkemboi Maiyo were the Defendants in the case having been sued by the first Respondent, Linet Mudashi Mudongoi, who was the Plaintiff.

2. The claim was for damages arising from a road traffic accident which occurred on 4<sup>th</sup> November 2017, involving the Defendant Motor Vehicle Registration NO. KAV 522Y Toyota Hiace Matatu, in which the Plaintiff was lawfully travelling as a fare paying passenger. It was pleaded in the plaint that on the material date the said motor vehicle was driven so negligently that it lost control, veered off its path or road and violently collided with a third party Motor Vehicle Registration No. KAP 719N Toyota Corolla thereby causing the Plaintiff to suffer bodily injuries as a result of the ensuing accident.
3. The Plaintiff blamed the Defendants for the accident and prayed for both general and special damages together with costs of the suit against them.



The Defendants denied the Plaintiff's allegations against them and blamed the Third Party vehicle for the accident.

In that regard, the Defendants took out a third party notice against the third party Josephat Embego Ovulule, the Second Respondent herein.

4. The Third Party in his statement of defence denied the allegations made against himself by the Defendants and contended that the accident was solely and exclusively caused by the Defendant's negligence and/ or recklessness. He prayed for dismissal of the Defendant's case against him.
5. The suit was set for hearing after the closure of the pleadings. Thereafter, the trial court delivered the impugned judgment in favour of the Plaintiff against the Defendants and the third party. Thus liability was apportioned between the Defendants and the third party at 50% each and the Plaintiff was awarded general damages in the sum of Kshs. 220,000/- and special damages in the sum of Kshs. 6,300/- together with costs of the suit.
6. Being dissatisfied, the Defendants filed the present appeal praying that the judgement of the trial court be set aside and substituted for a judgment dismissing the Plaintiff's case with costs or that the award on damages be reviewed upon re-assessment of the evidence. While grounds one (1) to three (3) of the appeal dwell on liability, the rest of the grounds i.e. four (4) to nine (9) dwell on quantum of damages. All grounds were opposed by the first Respondent/ Plaintiff.
7. The appeal was canvassed by way of written submissions. Both the Appellant and the first Respondent filed their submissions through Kimondo Gachoka & Company Advocate and Morgan Omusundi Law Firm Advocates, respectively.

The rival submissions were given due consideration by this court as against the appeal and its supporting grounds. It was this court's role as the first appellate court to reconsider the evidence and draw its own conclusions having in mind that the trial court had the advantage of seeing and hearing the witnesses (See *Selle Vs. Associated Motor Boat Company Limited* (1969) EA 123)

8. In that regard, the Plaintiff/ First Respondent (PW3) testified that she was a pastor by occupation and that she was inside the Appellant's motor vehicle on the material date of the accident. She indicated that she was seated in front of the vehicle when the accident occurred and blamed the driver for the mishap. She stated that the driver was overspeeding when the vehicle hit a pothole and swerved to the opposite side of the road where it collided with the other vehicle.
9. A traffic police officer, PC Christopher Kosgei (PW2), confirmed that the first Respondent was a passenger in the Appellant's vehicle when the accident occurred. He also confirmed the accident occurred. He also confirmed that the accident involved the Appellant's vehicle and the third party's vehicle and that some passengers in the Appellant's vehicle including the first Respondent/Plaintiff suffered injuries. He indicated that the accident was reported to the police but the investigations were not carried out by himself but fellow officers. He also indicated that the police investigation were pending at the time.
10. Dr. Joseph Sokobe (PW1), confirmed that the first Respondent suffered soft tissue injuries as a result of the accident. He produced the necessary treatment notes, the medical report and supporting documents (P. Exhibit 1 – 3). None of the Appellant's testified. They only called a traffic police officer, CPL Priscilla Chesang (DW1) as their witness.
11. The Officer (DW1) confirmed that the accident occurred on the material date and that it involved the Appellants motor vehicle and that of the third party. She confirmed that the second Appellant was the driver of their vehicle and after carrying all the necessary investigations she concluded that the Third



Party was to blame for the accident for failing to keep to his lane thereby causing his vehicle to collide with the Appellant's vehicle. She, however, indicated that the Third Party was never charged with any offence pertaining to the Accident which occurred at about 7:30pm.

12. The evidence foregoing did not, in the opinion of this court, raise any particular or substantial dispute with regard to the occurrence of the accident and the ownership of the Appellant's motor vehicle as well as that of the Third Party's motor vehicle.

What therefore emerged as the basic issue for determination was whether the Appellants were responsible for the occurrence of the accident and if so, whether they were liable to the first Respondent for damages arising from the accident and to what extent of compensation.

13. On the question of liability, the trial court addressed itself fully on the basis of the evidence and the principles of law applicable in the circumstances of the case and found that the Appellants were to blame for the accident but in conjunction or equal measure with the third party. Liability was thus equally apportioned between the Appellants and the Third Party at 50% each. This finding had the effect of settling the issue of liability as between the Appellants and the Third Party second Respondent who was never sued by the First Respondent but was enjoined as a party to this case by the Appellants.

14. In arriving at its findings on liability the trial court rendered itself as follows: -

“the point of impact was critical as it could have indicated with certainty on whose side of the road the accident occurred. However, this was where (sic) not produced and the parties in the case all blaming each other for the accident.”

The trial court heavily relied on and cited the relevant paragraphs in the decision of the Court of Appeal in Micheal Mubert Kloss and Another Vs. David Seroney and the Others (2009) eKLR in arriving at the aforementioned finding. The trial court further stated that: -

“its further indicative that none of the 2 drivers indicate what evasive action they took to avoid the accident despite the 2 vehicles coming from opposite directions and therefore the drivers could see each other's vehicle well.”

15. In the authority aforementioned, the Court of Appeal relied on the English Case of Stapley Vs. Gypsum Mines Limited (2)(1953) AC 663 where it was stated that: -

“To determine what caused an accident from the point of view of legal liability is a most difficult test. If there is any valid logic 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 .....

Further: -

“in determining liability the court must consider the facts of the case and come to a conclusion as to what mostly contributed to the cause of the accident. The court will consider the manner of driving, identify the person who was at fault and place blame on him.”



16. Clearly, the trial court concluded that both Appellants and the third party were to blame and responsible for the accident and relying on the decision in the case of *Lakhamshi Vs. Attorney General* (1971) EA 118, the trial court observed that: -

“where negligence has been established and where there is a head on collision the court is required to make a call (sic) on apportionment of liability.”

The trial court therefore apportioned liability between the Appellants and the Third Party in equal measure.

17. As the Plaintiff/ First Respondent was merely a passenger in the Appellant’s Motor Vehicle causation of the accident could not be attributed to her in any manner. That is why the question of liability revolved around the Appellants and the Third Party/ Second Respondent in as much as they blamed each other for the accident and the police investigations could also not determine who between them was the contributor or major contributor of the accident.

18. The Appellants submitted herein that the Respondents ought to have been held fully liable for the accident and therefore, the trial court’s apportionment of liability at 50:50 was erroneous. This line of submission was however unsustainable as it did not accord with the evidence availed by both sides at the trial. In any event, the driver of the Appellant’s vehicle did not lead any evidence to exculpate himself from the accident and show how the third party was fully responsible for the accident.

On the question of liability, this court fully agrees with the findings of the trial court and would have nothing useful to add as the trial court properly directed itself in that regard.

19. Both the Appellants and by extension the Third Party/ Second Respondent were thus liable to the First Respondent in damages arising from the accident. The quantum of damages was therefore the next issue for determination by the trial court. In that regard, the trial court took into consideration the injuries suffered by the Plaintiff/ First Respondent and the evidence availed in relation thereto, in particular that of the doctor (PW1) which showed that the Plaintiff suffered soft tissue injuries for which she was expected to fully recover.

20. The trial court also considered the authorities cited by both sides and opined that an award of Kshs. 220,000/- for general damages was reasonable and fair.

As for special damages the trial court awarded the sun of Kshs. 6,300/- which was specifically proved by necessary documentary evidence in the form of receipts.

21. The Appellate submitted that the award for general damages was inordinately high and ought to be reduced to Kshs. 80,000/- since the Plaintiff suffered soft tissue injuries. On the other hand, the first respondent submitted that the award for general damages ought not be interfered with since it was based on the nature of the injuries suffered by the Plaintiff, comparable authorities of the superior courts on quantum and the trend of inflation.

22. Basically, in awarding general damages a trial court exercises its discretionary powers and in principle, an Appellate Court would not interfere with the exercise of such discretion unless a trial court misdirected itself in that regard by applying wrong principles or that the award is so inordinately high or low as to be a wholly erroneous estimate of the injury (See, *Mbogo Vs. Shah and Another* (1968) EA 93 and *Kemfro Africa Limited t/a New Express Service and Another Vs. A.M. Lubia, and Another* (1982 – 85) 1 KAR 727).

23. Although the first Respondent/Plaintiff suffered minor soft tissue injuries, the extent of the injuries, the comparable decisions of the superior courts and the rising trend of inflation in the country weighed



heavily upon the trial court in awarding general damages in the sum of Kshs. 220,000/-. The amount was reasonable and adequate compensation for pain, suffering and loss of amenities. As the trial court did not misdirect itself nor apply wrong principles in arriving at the award, this court upholds it.

24. In sum, none of the Appellant's grounds of appeal are sustainable thereby rendering the entire appeal lacking on merit. It is therefore dismissed with costs to the first Respondent.

**Delivered and Dated this 14<sup>th</sup> day of May, 2024**

**J. R. KARANJAH,**

**JUDGE**

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