



**Mose & another v Ochieng (Civil Appeal E038 of 2022)
[2024] KEHC 4875 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E038 OF 2022**

KW KIARIE, J

MAY 14, 2024

BETWEEN

KENNEDY MOSE 1ST APPELLANT

ANDREW OGONGI OBONYO 2ND APPELLANT

AND

MARY ACHIENG OCHIENG RESPONDENT

*(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate’s
CMCC No. 36 of 2020 by Hon. J.S. Wesonga – Principal Magistrate)*

JUDGMENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate’s CMCC No. 36 of 2020 by Hon. J.S. Wesonga – Principal Magistrate).

1. Kennedy Mose and Andrew Ogongi Obonyo, the appellants, were defendants in the Chief Magistrate’s CMCC No.36 of 2020. This was a claim of general and special damages from a road traffic accident. The appellants, feeling aggrieved, decided to appeal the judgment. They were dissatisfied with the amount of Kshs.1,881,414.00 awarded to the respondent.
2. They filed this appeal through Kimondo Gachoka & Company Advocates. They raised the following grounds of appeal:
 - a. The trial magistrate failed to consider the appellants’ submissions on both points of law and facts, leading to a misdirection in law.
 - b. That the learned trial magistrate’s decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage



of justice, particularly the quantum awarded to the respondent herein, which was arrived at based on the wrong principles of law.

- c. That the learned trial magistrate erred in law and misdirected herself when she failed to consider the provisions set out in the *Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, Cap 405.*
 - d. The learned trial magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before her and thus arrived at an erroneous conclusion, contrary to and in contradiction of the evidence on record.
 - e. The learned trial magistrate erred in law in disregarding and/or ignoring the submissions mounted and/or filed by the appellants herein without assigning any plausible explanation and/or reason whatsoever. Consequently, the appellants herein strongly feel that they have been subjected to unfair treatment and, hence, suffered a miscarriage of justice.
 - f. The judgment of the learned trial magistrate is convoluted, and the issues raised by the learned trial magistrate are slanted and thereby camouflage the judicial mind of the trial court from appreciating, discerning and/or understanding the true nature of the dispute. Consequently, the judgment of the learned trial magistrate is a nullity.
 - g. The learned trial magistrate erred in law in disregarding and/or ignoring the medical report mounted and/or filed by the appellants herein and the evidence submitted by the appellants' witnesses without giving any justification or ration whatsoever for failing to consider the same.
 - h. The learned trial magistrate erred in law and fact by overly relying on the respondent's submissions, which were not relevant, and without addressing the circumstances of the case.
 - i. The learned resident magistrate failed to address her judicial mind to the salient and pertinent issues canvassed and/or ventilated by the parties and, in particular, by the appellants. Consequently, the decision by the learned resident magistrate has occasioned a miscarriage of justice and is thus a nullity.
3. The respondents opposed the appeal through the firm of Veronica Migai & Company Advocates. They urged for its dismissal.
 4. This Court is the first appellate court. I am aware of my duty to evaluate all the evidence on record, bearing in mind that I had no advantage of seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.
 5. When parties do not adduce sufficient evidence to guide the court on liability, the fact that there was a collision is enough for the court to decide on liability. Lord Denning L.J. (as he then was) in *Baker v Market Harborough Industrial Co-Operative Society Ltd* [1953] 1 WLR 1472 at 1476, observed inter alia as follows:

Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them...



6. This decision was followed by the Court of Appeal in *Hussein Omar Farah v Lento Agencies* [2006] eKLR. In the instant case, I find that despite the failure by both parties to adduce sufficient evidence of how the accident occurred, the learned trial magistrate applied the correct principle in the circumstances and apportioned liability equally between the two parties.
7. The appellant contended that the award to the respondents was inordinately high. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan* [1981] KLR 349 on page 356, Law JA stated:

...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.
8. The respondent was awarded Kshs. 1,800,000.00 general damages for pain and suffering. Following the accident, she sustained the following injuries:
 - a. Fracture mid femur bone.
 - b. Multiple lacerations on left knee.
 - c. Crash fracture left foot (distal tibia-fibula area)
 - d. Amputation below the left distal (tibia-fibula area) of the left foot.
 - e. Multiple soft tissue injuries.
9. In the trial Court, the respondent had pleaded for Kshs. 3,000,000.00 general damages for pain and suffering. She relied on the case of *Cosmas Mutiso Muema v Kenya Road Transporters Limited & another* [2014] eKLR. In this case, the Plaintiff suffered severe injuries. These were crushed left leg leading to amputation below the knee, fractures to the cervical spine, fractures to the skull, fractures to the ribs, and dislocation to the right knee and vertebrae, amongst other injuries. In 2014, the court awarded the Plaintiff a sum of 2,000,000/= for pain and suffering and loss of amenities.
10. The appellant proposed a sum of Kshs.400,000.00 for pain and suffering. They relied on the following three decided cases.
 - a. *Florence Njoki Mwangi v Peter Chege Mbitiru* [2014] eKLR, the appellant sustained the following injuries:
 - i) Fracture of the right mid-shaft femur.
 - ii) Fracture of the left mid-shaft femur.
 - iii) Degloving wound on the right tibia fibula necessitating skin grafting
 - iv) Amputation of the right foot behind the ankle joint.
 - v) Multiple cuts on the forehead.

She was awarded Kshs. 700,000.00 general damages on the 11th day of July 2014.
 - b. *Jane Wangui MuragevDakianga Distributors Ltd* [2012] eKLR where Kshs. 400,000/= was awarded for bruises on the face, cerebral concussion, bruised left arm, crushed injury to the left leg and trauma above knee amputation;



- c. *Silvanus Ondiek Ocholav Delta Haulage Services & Another* [2009] eKLR Kshs. 800,000/= was awarded for amputation of the right limb above the knee, deep cut wound on the medical aspect of the left knee, severe injury to the left eye and blunt injuries to the chest.
1. The cases relied upon by the appellant were of less severe injuries than the respondent in the present case suffered. The injuries are closely comparable to what the plaintiff in *Cosmas Mutiso Muema v Kenya Road Transporters Limited & another* (supra) sustained. I have no reason to interfere with the award.
 2. The difference between the appellant's and the respondent's proposal on the future treatment was Kshs. 50,000/. In my view, this will not call for any interference from this court.
 3. Compensation for diminution in earning capacity is awarded as part of general damages. This was held in the case *Fairly v John Thompson Ltd* [1973] Lloyds's Rep 40 at 41, where the Court stated as follows: -

It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.
14. Though the trial magistrate awarded it as a different head, I find no reason to interfere with it.
15. In her submissions, the respondent contended that the appellant should have been held 100% liable and that the award was inordinately low and sought enhancement. If she felt dissatisfied, she ought to have filed a cross-appeal. She cannot purport to challenge the award and apportionment of liability during submissions. This is equivalent to an ambush on the other party.
16. The upshot of the preceding analysis of the evidence on record is that the appeal lacks merit. It is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF MAY 2024

KIARIE WAWERU KIARIE

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JUDGE

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

