



REPUBLIC OF KENYA



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**Wambugu v Mwangi (Civil Appeal E076 of 2022)
[2024] KEHC 4858 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E076 OF 2022**

FROO OLEL, J

MAY 9, 2024

BETWEEN

JANET MUTHONI WAMBUGU APPELLANT

AND

DAVID MWANGI RESPONDENT

*(An Appeal from the Judgment and decree of Honourable Stephen Jalango (PM)
in Mavoko CMCC No 908 of 2019 delivered on 12th day of May, 2022)*

JUDGMENT

A. Introduction

1. This appeal arises from the judgment of Honourable Stephen Jalango (PM) dated 12th May 2022, delivered in Mavoko CMCC No. 908 of 2022 where he awarded the Respondent herein damages arising from a road traffic accident in the sum of Ksh.2,567,400/= plus costs and interest.

B. The Pleadings

2. The Respondent through his Amended plaint dated 3rd March 20213, sought for General and special damages arising from injuries sustained in a road traffic accident which occurred on 25.08.2019 and sued the Appellant as the beneficial owner of the lorry involved in the said accident. The respondent did aver that on the said date, he was a lawful passenger in motor vehicle registration Number KCN 844X Mistubishi Lorry, (hereinafter referred to as the 1st suit lorry) which was being driven along Mombasa road, from Mombasa to Nairobi. When they reached Mto wa Mawe area, the driver of the said 1st suit lorry recklessly, and/or negligently drove the said motor vehicle and allowed it to ram into the rear side of Motor vehicle registration Number KCT 117A Isuzu Lorry (hereinafter referred to as the 2nd suit lorry) which was being driven ahead of the 1st suit lorry and as a result he sustained and suffered serious



injuries. The respondent particularized the negligence alleged in his pleadings and the serious fracture injuries suffered and sought to be awarded compensation as pleaded.

3. The Appellant in response filed her Amended statement of defence wherein she denied liability for this accident either directly and/or vicariously and put the respondent to strict proof thereof. The appellant further denied owning the 1st suit motor vehicle and/or the fact that an accident did occur on the material date as between the 1st and 2nd suit motor vehicles. In the alternative and without prejudice to the above the appellant did aver that the respondent was carried in the 1st suit motor vehicle as an employee and concealed this fact. Finally she also deponed that if indeed an accident did occur then it was caused by the negligence of the driver of the 2nd suit motor vehicle, and therefore she/her driver was not to blame for the accident and prayed for the suit to be dismissed.

C. Evidence at trial

4. PW1 Copr Zephan Amdamy produced the police abstract and confirmed that indeed on 25.08. 2019 a road accident was reported to have occurred as between the two suit motor vehicles along Nairobi – Mombasa road at Mto wa Mawe area. Both Motor vehicles were from Mombasa directions heading towards Nairobi, when the 1st suit motor vehicle lost its breaks and knocked/rammed the 2nd suit motor vehicle from behind resulting in the respondent sustaining serious injuries. The matter was reported under OB12 of the said date and the investigations concluded that it was the driver of the 1st suit motor vehicle who was to blame for causing this accident. In cross examination PW1 confirmed that he was not the investigating officer nor did he visit the scene of the accident, but got the details of the accident from the OB.
5. PW2 David Mwangi Gathu adopted his witness statement, wherein he stated that on 25.08.2019 at about 8.00am he was lawfully travelling on the 1st suit motor vehicle as a passenger and they were enroute to Nairobi. When they reached Mto wa Mawe area, the driver of the said motor vehicle lost control and without warning rammed into the rear side of the 2nd suit motor vehicle and as a result he sustained serious injuries. He was rushed to shalom Hospital and later referred to Machakos level 5 Hospital where he was operated on and metal implants placed on both legs. He produced his claim supporting documents and blamed the driver of the 1st suit motor vehicle for driving at high speed and causing the said accident. He had not fully recovered as he could not sit for long and/or carry out heavy duty. He therefore prayed to be compensated.
6. In cross examination he stated that he boarded the 1st suit motor vehicle at sultan town enroute to Nairobi and that it was a luggage motor vehicle not designed to carry passengers. After the accident, he was admitted at Machakos level 5 Hospital where metal plates were inserted into his legs. His hip too was dislocated as a result of the said accident and was still painful. He denied being an employee of the Appellant. The Appellant did not call any witness to testify on her behalf but the medical report prepared by her doctor was admitted into evidence as DEXB1.
7. The trial court did consider the evidence adduced, the submissions filed and came to the conclusion that Appellant driver was to blame for causing this accident. He was held 100% liable and awarded Kshs.2,500,000/= as general damages, Special damages Ksh.67,400/= all totaling to Kshs.2,567,400/= plus costs and Interest. Being wholly aggrieved and dissatisfied by the judgment/decree issued, the appellant did prefer this appeal and raised four (4) grounds of Appeal namely;
 - a. That the learned trial magistrate misdirected himself and erred both in law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous vis a vis the injuries sustained by the Appellants



- b. That the learned trial magistrate misdirected himself and erred in law and in fact in falling to consider the Medical reports on record and hence arrived at an award that was not supported by the doctors finding and hence arrived at an erroneous award that was so manifestly excessive as to be erroneous.
 - c. That the learned trial magistrate misdirected himself and erred in law and in fact by not properly considering the severity of the respondents injuries and hence arrived at the wrong assessment of damages that are so manifestly excessive as to be erroneous.
 - d. That the learned trial Magistrate misdirected herself and erred in law and in fact by totally failing to consider the Appellants submissions on record thus arrived at an erroneous finding on quantum.
8. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect quantum awardable be set aside and the damages be reassessed afresh to reduce the said award. The Appellants also prayed for costs of this Appeal.

D. Submissions

(i).Appellant's Submissions

9. The appellant filed her submissions on 18.12.2023, and did submit that the respondent had chosen the wrong forum to ventilate his claim as he was injured in the cause of duty/employment and hence the right forum to was to have his injuries assessed by the directorate of safety and health as provided for under the section 16, as read with section 23 and 52 of the Work Injuries Benefit Act. Reliance was placed on Supreme court Petition No 4 of 2019, Law society of Kenya v The Attorney Gneral & Cotu , Joseph Muthee Kamau & Another Vrs David Mwangi Gichure & Another [2013] eklr & CA in Phoenix of E.A Assurance company ltd v S.M Thiga T/A Newspaper service [2019] eklr
10. Further the appellant faulted the respondent for bring a fraudulent claim by purporting to change the circumstances of the accident as he was a loader of the said 1st suit motor vehicle and not a passenger as alleged. In cross examination, the respondent had admitted that he was aware that the 1st suit motor vehicle was meant to carry goods and therefore he substantially contributed to the accident by voluntarily assuming risk associated with being ferried in a vehicle meant for carrying goods and not passengers. The evidence of PW1 was also unreliable as he only produced the police abstract without the accident sketch plan to assist court make a factual determination as to how the accident occurred. Negligence/burden of proof was therefore not discharged.
11. For the injuries suffered; Fracture of the tibia fibula, fracture of the left tibia fibula segmented fracture proximal right fibula, fracture of the pelvic, dislocation of right hip and degloving injuries to the lower limb, an award of Kshs.800,000/= would have been adequate compensation. Reliance was placed on Daneva Heavy Trucks & Ano v Chrispine Otieno [2022] eklr, Barnabas v Ombati (Civil Appeal No E43 of 2021) [2022] KEHC 12136 (KLR) and Third Engineering Bureau china construction group Limited Vrs Edwin Kinanga Afuya [2011] eklr
12. The Appellants therefore prayed that this Appeal be allowed on the said terms.

ii. Respondents Submissions

13. The respondent did file his submissions on 21st June 2023 wherein he stated that it was proved that indeed an accident did occur on 25.08.2019 along Nairobi – Mombasa road at Mto wa Mawe area and



as a result he had sustained serious injuries to wit; fracture of the right tibia and fibula, fracture of the left tibia and fibula bones, fracture of the right pelvic bone, dislocation of right hip joint and degloving injuries to the lower limb. The medical report of Dr Titus Nzima Ndeti dated 25.09.2019 did confirm the said injuries and he classified them as grievous in nature.

14. The respondent had also sustained soft tissue injures and all these caused him to suffer blood loss, deformities, extreme pain and suffering. He would still need between Kshs.100,000/= to Kshs.400,000/= to have surgery done to remove the implants depending on the public/private hospital attended. He was permanently incapacitated and could not resume his normal duties. Reliance was placed on Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another [2015] eKLR, Peace Kemuma Nyang'era v Micheal Thuo & Another [2014] eKLR, Milicent Atieno Ochuonyo v Katola Richard [2015] eKLR where for similar injuries the court awarded between Kshs.2,000,000/= to Kshs. 2,500,000/=.
15. The respondent thus prayed that this court finds that this Appeal has no merit and proceed to dismiss the same.

D. Analysis and Determination

16. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs [2001] 3 SCC 179.
17. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko v Varkey Ouseph AIR 1969 Keral 316.
18. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties. In this Appeal liability is not challenged in the grounds of Appeal but in the submissions filed the appellant did raise the issue of jurisdiction of the court to handle this appeal.
19. In this appeal it should be noted that the Appellant did not call any witness to testify on her behalf and only relied on the second medical report filed as Exhibit D1. It is trite law that he who alleges must prove. There was simply no evidence lead to show that the respondent was an employee of the Appellant as at the date of accident and therefore should have claimed under WIBA. His evidence that he was a passenger in the suit motor vehicle remains unchallenged and therefore has the right to access this forum to determine this dispute.

(I) Whether Quantum Awarded was Excessive.
20. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case Khambi & Another v Mahitu & Another (supra). Further the Court of Appeal in the case



“Those principles were well stated by Law, J.A in Bashir Ahmed Butt v Uwais Ahmed Khan, By M. Akmal Khan [1982-88] I KAR 1 at pg 5 as follows-

‘An Appellate 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 Judge proceeded “on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ...”

21. This court is also guided by the decisions of the Court of Appeal on the issue of interference with damages. In the case of Johnson Evan Gicheru vs Andrew Morton & another [2005] eKLR where it was stated that: -

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.

22. The respondent’s evidence was uncontroverted. He did produce all the documents relied on including discharge summary from Machakos level 5 hospital, P3 form, Medical report of Dr Titus Ndeti and receipts to prove that indeed he was severely injured. Dr Titus Ndeti report confirmed that the respondent sustained serious soft tissue injuries, fractured his right tibia and fibula bones, left tibia and fibula bones, fractured the pelvic bone, dislocated the right hip joint and had degloving injuries to the lower limbs. He was admitted in hospital for 20 days and discharged after surgery. The respondent still was in pain and could not walk without crutches. The injuries suffered were classified as grievous harm and he would still require further surgery to remove the implants, which would cost between Kshs.100,000/= to Kshs.400,000/= depending on the hospital he would attend to have the surgery done.

23. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.

24. I have considered the appellant’s submission and authorities relied upon. Most of them are based on injuries that are not similar to the ones sustained by the Respondent or at least are not as serious as the ones sustained by the Respondent. The respondent suffered multiple fractures on both legs and the pelvic bone. A sum of Ksh.800,000/= as proposed by the appellant would be too low an amount to award him as compensation for pain and injuries sustained. The average awards as delivered in Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another [2015] eKLR, Peace Kemuma Nyang’era v Micheal Thuo & Another [2014] eKLR, Milicent Atieno Ochuonyo v Katola Richard [2015] eKLR where for similar injuries the court awarded between Kshs.2,000,000/= to Kshs.2,500,000/= would be most appropriate given that he had lost 45% of functional capacity.



25. I find that the Respondent proved his case on a balance of probability. I also find that the Trial Court did not make any error in arriving at its finding. I also take into consideration the sentiments by Madan (JA) (as he then was), in *Ugenya Bus Service v Gachiki*, [1976-1985] EA 575, at page 579:

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculable. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.”

26. The appellant also alleged that the special damages were not specifically pleaded or proved. It has been held severally that reasonable expenses are awardable. The respondent did plead for special damages and produced receipts to prove the same. The award of Ksh.67,400/= incurred for the same is therefore justified.

Disposition

27. Having exhaustively analyzed all the issues raised in this appeal I find that this Appeal wholly lacks merit and proceed to dismiss the same with costs to the respondent.

28. Costs are hereby assessed at Kshs.250,000/= all inclusive

29. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 9TH DAY OF MAY, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 9th day of May, 2024

In the presence of:

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

