



**China Wu Yi Co. Ltd v Sigei (Civil Appeal E015 of 2022)
[2024] KEHC 7450 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E015 OF 2022**

**RL KORIR, J
JUNE 19, 2024**

BETWEEN

CHINA WU YI CO. LTD APPELLANT

AND

ALFRED KIBII SIGEI RESPONDENT

*(Being an Appeal from the Judgment of the Principal Magistrate, Kibelion K.
at the Principal Magistrate's Court at Bomet, Civil Suit Number 131 of 2019)*

JUDGMENT

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for General and Special Damages that arose from a road traffic accident involving Motor Vehicle Registration Number KBW 756Y that was registered in the Appellant's name and Motor Cycle Registration Number KMER 142E in which the Respondent was a pillion passenger.
2. The trial court conducted a hearing where the Respondent (then Plaintiff) testified in person and called three other witnesses and thereafter closed his case. The Defendant (Appellant) neither testified nor produced any witness or evidence.
3. In its Judgment delivered on 16th February 2022, the trial court awarded a total of Kshs 506,950/= as General and Special Damages to the Respondent (then Plaintiff).
4. Being aggrieved with the Judgment of the trial court, the Appellant filed its Memorandum of Appeal dated 15th March 2022 and relied on the following grounds:-
 - i. That the learned trial Magistrate erred both in law and in fact by finding the Appellant 100% liable contrary to the evidence on record; despite acknowledging in his Judgment that the Appellant had filed a Police Abstract whose contents blamed the Respondent.



- ii. That the learned trial Magistrate erred both in law and in fact by awarding the Respondent a sum of Kshs 500,000/= as general damages which sum was manifestly excessive outside the confines of reasonableness compared to the cited authorities and not commensurate with the nature of the case and the injuries sustained by the Respondent.
 - iii. That the learned trial Magistrate erred both in law and in fact by disregarding the evidence on record and the written submissions filed by the Appellant and proceeded to pronounce and make findings on issues which were neither pleaded nor which arose during the course of the trial to the benefit of the Respondent.
 - iv. That the trial Magistrate erred in fact and in law in disregarding the Appellant's evidence and in particular, the contents of a Police Abstract that was filed by the Appellant as prima facie evidence of liability on the part of the Respondent and failing to find that where a Police Abstract is not challenged its contents cannot be later rebutted.
 - v. That the learned trial Magistrate erred both in law and in fact by failing to appreciate the law and wrongly evaluating the evidence on record and hence coming to the wrong conclusion.
 - vi. That the learned trial Magistrate erred in law and fact in considering evidence that was never on record and issuing Judgment on presumption of issues not established in evidence.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify.

The Plaintiff's/Respondent's case.

- 6. Through his Complaint dated 10th September 2019, the Respondent stated that on 1st March 2019 while aboard Motor Cycle Registration Number KMER 142E as a pillion passenger, he was involved in a road traffic accident when Motor Vehicle Registration Number KBW 756Y veered off its lane, knocked him on his right leg and he fell and sustained serious injuries.
- 7. It was the Respondent's case that the Appellant was negligent in causing the accident. The particulars of the negligence were stated in paragraph 8 of the Complaint.
- 8. That as a result of the accident the Respondent suffered the following injuries:-
 - I. Multiple soft tissue injuries.
 - II. Right lower limb fracture.
- 9. The Respondent prayed for Special and General Damages against the Appellant.

The Appellant's/Defendant's Case.

- 10. Through its Statement of Defence dated 14th January 2020, the Defendant/Appellant denied the occurrence of the accident on 1st March 2019 and further denied that that it was the registered owner of Motor Vehicle Registration Number KBW 756Y. The Appellant also denied being negligent in the causing the road traffic accident.
- 11. It was the Appellant's case that if the accident occurred then it was caused by the negligence of the Respondent and rider of Motor Cycle Registration Number KMER 142E. The particulars of negligence were contained in paragraphs 4 and 5 of the Defence.
- 12. On 8th December 2022, this court directed that the Appeal be heard by way of written submissions.



The Appellant's Submissions.

13. In its submissions dated 7th March 2023, the Appellant submitted that the trial court erred when it held that the Appellant was 100% liable for causing the accident. The Appellant submitted that the burden of proving that the Appellant was negligent in causing the accident lay with the Respondent and he failed to discharge that burden. He relied on Section 107 of the *Evidence Act, Nandwa v Kenya Kazi Ltd* [1988] KLR 488 and *Jamal Ramadhan Yusuf & another v Ruth Achieng Onditi & another* [2010] eKLR.
14. It was the Appellant's submission that there was no credible testimony which chronologically gave an account of how the accident occurred. That it produced a Police Abstract which blamed the rider of Motor Cycle Registration Number KMER 142E for the accident and this Police Abstract remained uncontroverted.
15. The Appellant submitted that the rider of Motor Cycle Registration Number KMER 142E disappeared and was not found at the scene. That the logical explanation was that either the Respondent's claim was fictitious or the Respondent used the Appellant as a scapegoat.
16. It was the Appellant's submission that there were two Police Abstracts produced with different facts pertaining the same accident. That the matter was ripe for dismissal because the Respondent failed to sue the correct party on account of the Police Abstract which blamed the rider of Motor Cycle Registration Number KMER 142E for the accident.
17. The Appellant submitted because of the production of the two Police Abstracts, it was uncertain who was to blame for the accident. That in such cases, courts apportion the blame equally. It relied on *Haji v Marair Freight Agencies Ltd* [1984] KLR 139.
18. In regards to quantum, the Appellant submitted that the award of Kshs 500,000/= was excessive. The Appellant implored this court to lower the award on general damages to Kshs 250,000/= and relied on *Eldoret Steel Mills Limited v Elphas Victor Espila* [2013] eKLR and *Kenyatta University v Isaac Karumba Nyuthe* [2014] eKLR.

The Respondent's Submissions.

19. Through his submissions dated 1st October 2023, the Respondent submitted that the trial court did not err when it found the Appellant wholly liable for the accident. That the Respondent's evidence showed that he was aboard Motor Cycle Registration Number KMER 142E and was hit while on the left side of the road and this was corroborated by PW2. The Respondent further submitted that the Investigating Officer (PW4) stated that according to the investigation, the accident occurred on the motor cycle's lane and that the Appellant's driver was to blame for the accident. That the Respondent was a pillion passenger and could not have contributed to the cause of the accident. He relied on *David Kabesa v Harriet Kemunto* [2020] eKLR.
20. It was the Respondent's submission that even though there were two Police Abstracts, the evidence adduced was enough to show that the Appellant's driver was liable for the accident. That the Appellant did not testify or bring any witness. It was the Respondent's further submission that his evidence was uncontroverted and that he had proved his case on a balance of probability. That the Appellant tendered nothing to counter his cogent evidence.
21. The Respondent submitted that the trial court correctly awarded Kshs 500,000/= as general damages. That this court could only interfere with the award by the trial court if it was demonstrated that the



trial court acted on a wrong principle or took into account irrelevant factors. The Respondent further submitted that he will never fully recover 100% functionality.

22. In support of the award of Kshs 500,000/=, the Respondent relied on *Jane Njeri Macharia v Godfrey Murimi Muya* [2020] eKLR and *China Road and Bridge Corporation (Kenya) v Job Mburu Ndungu* [2021] eKLR.
23. I have perused and considered the Record of Appeal dated 18th November 2022, the Appellant's written submissions dated 7th March 2023 and the Respondent's written submissions dated 1st October 2023. The only issue for my determination was liability was apportioned correctly and whether the quantum was inordinately high.
24. The burden of proof in the trial court lay with the Plaintiff (now Respondent). The standard of proof is on the balance of probabilities. In *James Munuu Mucheru v National Bank of Kenya Ltd* [2019] eKLR, the Court of Appeal stated as follows: -

“Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable.”

Liability

25. The Respondent (PW1) testified that on the material day, he was a pillion passenger on Motor Cycle Registration Number KMER 142D when Motor Vehicle Registration Number KBW 756Y (lorry) veered off from its lane and came on to the motor cycle's lane and hit his right leg, threw him off the motor cycle thereby sustaining serious injuries. PW1 blamed the driver of the lorry for the accident. When PW1 was cross examined, he reiterated his evidence and further stated that Mr. Too (PW3) witnessed the accident and took him to hospital.
26. PW1 produced a copy of motor vehicle records as P.Exh 7a which showed that Motor Vehicle Registration Number KBW 756Y was registered in the name of the Appellant. The production and authenticity of P.Exh 7a was not challenged by the Appellant and it is my finding therefore that the Motor Vehicle Registration Number KBW 756Y belonged to the Appellant.
27. Vincent Kipngetich Rono (PW2) and Gideon Cheruiyot Too (PW3) were witnesses to the accident. They corroborated PW1's evidence and further added that when the accident occurred, the lorry (Motor Vehicle Registration Number KBW 756Y) did not stop and the rider of Motor Cycle Registration Number KMER 142D ran away. They blamed the driver of lorry for the accident. Gideon Cheruiyot Too (PW3) stated that together with Vincent Rono (PW2) they took PW1 to hospital. When he cross examined, PW2 reiterated his testimony and further corroborated PW3's testimony that they took PW1 to hospital.
28. No. 72xxx PC Reyland Lwembe Nzai (PW4) who was the Investigating Officer testified that the accident occurred at a sharp corner where the driver of the lorry (Motor Vehicle Registration Number KBW 756Y) failed to keep to his lane when negotiating a corner and hit the oncoming Motor Cycle Registration Number KMER 142D. PW4 produced a Police Abstract as P.Exh 8 which did not show who was to blame for the accident. When PW4 was cross examined, he stated that the Police File (P.Exh 9) contained two Police Abstracts. He reiterated that according to the investigations, the driver of the lorry was to blame for the accident.
29. I have looked at the two Police Abstracts in the file, one dated 2nd March 2019 and the other 1st July 2019. The Police Abstract dated 2nd March 2019 indicated that the Motor Cycle Registration



Number KMER 142D was to be blame for the accident and it is this Police Abstract that the Appellant stated that it produced and was not challenged by the Respondent.

30. It is clear from the record that the Appellant did not testify or produce any documents in support of its case. There is a difference between filing of documents and producing them as exhibits as explained by the Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR where it held:-

“Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.” (Emphasis added)

31. In essence, the Respondent’s case in the trial court was unchallenged. However, courts must take extra caution when dealing with such cases as the burden of proof always lay with the claimant (Respondent). Even in the absence of testimony and evidence from the Appellant, the Respondent still had to prove his case. The Court of Appeal in the case *Charterhouse Bank Limited (under statutory management v Frank N. Kamau* [2016] eKLR stated that:-

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

32. From my analysis of the evidence, the Respondent (PW1) testified that he was hit by the lorry (Motor Vehicle Registration Number KBW 756Y) when it veered off its lane and onto their lane. That the lorry was to blame for the accident. This testimony was corroborated by two eye witnesses, Vincent Kipngetch Rono (PW2) and Gideon Too (PW3).

33. I have noted the presence of the two Police Abstracts in the Police File (P.Exh 9). It is highly irregular and unprofessional for the Police to issue two Police Abstracts for a similar accident and this court is left to speculate as to the reasons why. However, this did not blot the overwhelming evidence that the Motor Vehicle Registration Number KBW 756Y caused the accident. This was provided by the cogent and corroborative testimonies of PW1, PW2 and PW3, whose testimonies stood unshaken after cross examination.

34. Flowing from the above, it is my finding that the trial court did not err when it apportioned 100% liability on the Appellant and I so uphold.



Quantum

35. The trial court awarded the Respondent Kshs 500,000/= as general damages and Kshs 6,950/= as special damages.
36. As per the Plaintiff, the Respondent suffered the following injuries:-
- i. Multiple soft tissue injuries.
 - ii. Right lower limb fractures.
37. In proving the said injuries, a Medical Report by Dr. Erick Kibet Mutai was produced by consent as P.Exh 10. The Medical Report confirmed the injuries sustained by the Respondent and at the time of examination which was 30th July 2019, the Respondent's right leg had healed but he continued experiencing some pain. There was no contest on the type of injuries suffered by the Respondent.
38. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there had been a miscarriage of justice.
39. In the present case, the Appellant submitted on the issue of general damages that the award of Kshs 500,000/= was inordinately high and it proposed an award of Kshs 250,000/=. On the other hand, the Respondent asked this court to uphold the award of Kshs 500,000/= as it represented a fair award.
40. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards.
41. The Respondent suffered a fracture to his right leg and soft tissue injuries. I have found the following cases quite helpful in terms of comparison:-
- I. *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR where the award of Kshs.800, 000/= was substituted with an award of Kshs.500,000/= on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.
 - II. *Pauline Gesare Onami v Samuel Changamure & another* [2017] eKLR where the plaintiff suffered fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, Laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft and the court upheld the trial court's award of Kshs. 600,000/=.
 - III. In *Tirus Mburu Chege & another v JKN & Another* [2018] eKLR, the sum of Kshs.800,000/= was reduced on appeal to Kshs.500,000/= for fracture on tibia and fibula on both legs, blunt injury on forehead, broken upper right second front tooth, nose bleeding and loss of consciousness.
42. I have considered the authorities above and the nature of the injuries suffered by the Respondent and I find that the Kshs 500,000/= awarded as General Damages by the trial court was reasonable and I so uphold.
43. With regards to the Special Damages, the Respondent particularized them as follows:-
- Medical Report Kshs 6,000/=
- Search Kshs 550/=



Certificate of postage fee Kshs 400/=

44. It is trite law that Special Damages ought to be specifically pleaded and proved. I have looked at the trial court file and found that the Respondent produced receipts for the Medical Report, the Motor Vehicle Search and the postage fee all totalling to Kshs 6,950/=.
45. In the final analysis, it is my finding that the trial court arrived at the correct figures when assessing and awarding the General and Special Damages and there was no reason for this court to interfere with the same.
46. In the end, the Appeal dated 15th March 2022 is dismissed with costs to the Respondent. Costs in the trial court remain as awarded by the trial court.
47. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 19TH DAY OF JUNE, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms Cheloti for the appellant; Ms Chemutai for the respondent and Siele(Court Assistant)

