



REPUBLIC OF KENYA



**Mbagaya v Stephen (Civil Appeal E182 of 2022)
[2024] KEHC 7556 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E182 OF 2022
RE ABURILI, J
JUNE 19, 2024**

BETWEEN

MELVIN KHADASIA MBAGAYA APPELLANT

AND

JUMA STEPHEN RESPONDENT

*(An appeal arising from the Judgment and decree of the Honourable
Kiniale in the Senior Principal Magistrate's Court at Nyando
delivered on the 5th October 2023 in Nyando CMCC No. 183 of 2019)*

JUDGMENT

Introduction

1. The appellant Melvin Khadasa Mbagaya was sued by the respondent Juma Stephen vide a plaint dated 15th July 2019 seeking general damages following injuries he sustained following an accident that occurred on the 14th December 2018 along the Kericho – Kisumu road at Rai area involving motor vehicle registration No KCQ 261H in which he was a lawful passenger that was recklessly driven by the appellant's driver. The respondent implied negligence on the part of the appellant's driver thus leading to the accident.
2. The appellant entered an appearance and filed a defence dated 28th January 2020 denying any attribution of negligence on her part and conversely imputing negligence on the part of the respondent and put him to strict proof.
3. The trial court after hearing the suit found the appellant 100% liable for causing the accident and after considering the authorities relied on by the parties, proceeded to award the respondent Kshs 80,000 as general damages and Kshs 500 special damages.



4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 25th October 2023 raising the following grounds of appeal:
 1. That the trial magistrate erred in law and in fact by awarding general damages for the alleged injuries sustained despite there being no treatment notes to prove them.
 2. That the trial magistrate erred in fact and in law by relying on the police abstract and P3 as basis of the respondent's injuries despite the P3 being dated 9 months after the occurrence of the accident.
 3. That the learned trial magistrate erred in fact and in law in the assessment of quantum by awarding Kshs 80,000 for general damages an award which was excessive and an erroneous estimate of the damages awardable.
 4. That the learned trial magistrate erred in law and in fact in the assessment of quantum by awarding Kshs 80,000 for general damages an award that was not supported by evidence on record.
 5. That learned trial magistrate erred in fact and in law in failing to consider the defendant's submissions and authorities supplied on the issue of quantum.
 6. That the learned trial magistrate erred in fact and in law in failing to consider the evidence that was tendered on quantum during hearing of the suit.
 7. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case he was deciding.
 8. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.
 9. That the learned trial magistrate erred in law and in fact by apportioning the appellant's liability at 100%
5. The parties agreed to file written submissions to canvass the appeal.

The Appellants' Submissions

6. On behalf of the appellant, her counsel submitted that this court should make a wholesome scrutiny of the evidence before it and makes its own conclusion as was held in the case of *Ndungu Dennis v Ann Wangari Ndirangu & another* Civil Appeal No 54 of 2016 [2018] eKLR.
7. On liability, it was submitted that the respondent failed to prove on a balance of probability that he was a passenger on the appellant's motor vehicle as he did not call an independent witness to support his allegations and further that the P3 form he relied on was filled 270 days after the accident.
8. It was submitted that the respondent failed to prove that he suffered injury from the accident without any proof whatsoever as he failed to produce any treatment notes. Reliance was placed on the case of Kakamega Civil Appeal No 43 of 2017 *Michael Busakhala Luta v West Kenya Ltd & 3 others*, *Timsales Limited v Patrick King'ori Mwangi* [2015] eKLR & *Peter Migiro v Valley Bakery Limited* [2015] eKLR where it was held inter alia that lack of treatment notes showing injury even with a P3 form indicating injuries was not proof that the plaintiff was injured during the accident.
9. The appellant thus submitted that the respondent's case ought to have been dismissed with costs and the instant appeal allowed.



The Respondent's Submissions

10. On liability, it was submitted that the respondent was merely a passenger as stated by Plaintiff and the Police Officer and that it was trite law that a passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident as was restated in *West Kenya Sugar Co. Limited v Joyce Mayabi Jatushi* [2020] eKLR where the Honourable Court restated the position as held in *Rosemary Wanjiku Kungu v Francis Mutua Mbuvi & another* (2014) eKLR.
11. The respondent's counsel submitted that accordingly, the evidential burden shifted to the Appellant who failed to discharge the same as was stated in the case of *Mbutia Macharia v Annah Mutua & another* [2017] eKLR where the court discussed the burden of proof.
12. It was submitted that the P3 Form was produced by the maker, PW3 who testified that he relied on treatment notes and medical sheets. Reliance was placed on the case of *Andrew Momanyi Omwenga v Erick Siambe Mokaya* [2022] eKLR where the Honourable Court threw out an appellant's challenge of production of a P3 form on the basis that there was no objection of the same at the lower court. The respondent further relied on the case of *Esther Chepkemoi Ngecher v John Kung'u & Charles Muthoka* [2022] eKLR.
13. It was further submitted relying on the case of *Henry Binya Oyala v Sabera Oitira* [2011] eKLR where the court held that the primary source of information on injuries sustained is by the victim, and that evidence of a medical officer is not mandatory. Further, that a victim's own statement with regard to injuries should not be dismissed merely on ground that it was not matched by initial treatment from hospital.
14. On quantum of damages, reliance was placed on the case of *Peter Nyangacha v Nyagaka Bisera Peter* [2018] eKLR where the Respondent sustained multiple lacerations, blunt trauma to the neck, contusion on the chest and foot and the High Court upheld the amount of Kshs 280,000.00 as awarded by the trial Court in 2016.

Analysis and Determination

15. This being a first appeal, this Court's role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).
16. The issues I will determine in this appeal, arising from the grounds of appeal are whether the respondent proved his case against the appellant on a balance of probabilities on both liability and quantum and therefore what orders should this court make?
17. On liability it is well settled that a passenger cannot be held liable when a vehicle he/she is travelling in is involved in an accident – See Rosemary Wanjiku Kungu supra. The respondent submitted that there was no independent witness to prove that the respondent was a passenger in the accident motor vehicle. That the accident occurred on the material day at 5.am when he was travelling to Siaya in the appellant's hired motor vehicle and that his seatbelt was on. PW2 PC Elijah Mwenesi testified that on the material day, an accident report was received at Sosiot Police Station, involving a passenger vehicle travelling to Siaya and that the driver stated that there was an unknown lorry that was overtaking and



it hit the back of the vehicle which the driver was driving making it to roll. PW2 stated that victims were taken to Awasi and JOOTRH and they visited the said victims. He produced a Police abstract as PEx 2 issued by Sosiot Police Station, in which the respondent herein Juma Stephen is named as one of the injured passengers. He stated in cross-examination that the respondent's name was in the OB, although he had not produced the OB as an exhibit.

18. The appellant testified that the accident was as a result of another car hitting him from behind. I am in agreement with the trial court that there was nothing stopping the appellant from instituting third party proceedings against the purported third party. A police abstract contains an OB report number and the police having confirmed that the respondent was among the passengers who were injured in the material accident involving the appellant's motor vehicle, it is futile to claim that there was no independent witness to confirm that the respondent was a passenger in the accident motor vehicle. Furthermore, the police could not have issued the respondent with a P3 Form if the respondent was not confirmed to be one of the persons injured in the material accident. A P3 form was issued on the basis of the first report and with PW2 confirming that they visited the injured and the appellant was among those injured. He also confirmed in cross examination that some of the injured were also taken to Kericho hospital.
19. The driver of the accident vehicle did not disown the respondent as a passenger and in his defence, he clearly stated that the respondent did not contribute to the accident. Further, PW2 the appellant's witness too testified that in the material accident, there were 16 passengers and the respondent was passenger number 14. The respondent also testified of how the driver of the accident motor vehicle was driving very fast and that he was in a hurry to reach Siaya and return. Further, that the respondent told the driver to stop and the driver slowed down but as the respondent dosed off, the vehicle lost control and rolled.
20. In the circumstances, I find no reason to interfere with the trial court's finding on liability as there was evidence that the respondent was a lawful passenger in the accident motor vehicle and that he was injured.
21. The final issue that arises for determination is whether the learned trial magistrate was wrong in awarding damages in the absence of initial treatment notes and therefore whether the respondent was injured or not.
22. The common thread in the Appellants' submissions is that the non-production of initial treatment documents was fatal to the Respondent's case. It is their contention that the treatment notes were the only nexus between the accident and the injuries and that in their absence, there could be no causal link between the accident and the injuries.
23. The appellant's further contention was that the P3 itself would not suffice as it was filled 270 days after occurrence of the accident. According to the appellant, the P3 form can only be filled with reference to the initial treatment documents.
24. I have extensively perused the trial court record in this appeal. The Respondent adopted his witness statement dated 15th July 2019 as his testimony. It was his testimony that after the accident, he was rushed to a hospital at Awasi and first aid was provided. However in his written statement which he adopted as his evidence in chief, the respondent testified that after the accident he was taken to the Ministry of Health Kericho Hospital where he was treated and discharged. The respondent pleaded that he suffered a swollen right shoulder with tenderness as well as injuries to the chest and head.



25. In cross-examination, the respondent acknowledged the variance in his written statement in court and testimony but did not expound on the same. He testified that the P3 form was filled but that he had not produced the same, although the P3 was later produced by the Clinical Officer,
26. PW2 No 71146 PC Elijah Mwenesi testified that on 14.12.2018 a road traffic accident was reported at Sosiot Police Station involving the respondent with some of the victims being taken to Awasi and to JOOTRH. In cross-examination, he stated that some of the injured were taken to Kericho.
27. The P3 form was produced by PW3 Robert Kipyegon Lagat a Clinical officer at Kericho Referral Hospital who testified that he filled the P3 form for the respondent. He testified that the respondent was sent from Sosiot hospital and that the injuries had healed when the respondent saw him. In cross-examination, PW3 testified that he filled the P3 form 7 months after the accident and that he had used the medical records to fill them.
28. I have read the authority provided by the Appellant. In my opinion, the circumstances in that case are very different from those in this appeal. First and foremost, in that case the initial treatment documents were not produced and the doctor who filled the P3 form was not called to give evidence. In this case, the Clinical Officer was called and gave evidence on the injuries and it was clear that the respondent did not just go to Kericho for the filling of the P3 form but was referred with treatment notes from Sosiot Hospital, where the accident occurred. As I stated earlier, this court did not have the opportunity, unlike the trial court, to examine the demeanor of the respondent to appreciate his level of understanding of matters and what follows after an accident of this nature. The injuries that he sustained were listed in the P3 form and there were no questions put to him regarding the said injuries.
29. Indeed, in the authorities quoted by the appellant, it is evident that the courts note inter alia that the fact of an injury, and without any other corroboration by way of witnesses, could not be proved.
30. The Respondent testified and proved the injuries suffered on a balance of probabilities. PW1 and PW3's evidence on the injuries remain uncontroverted and unshaken in cross-examination.
31. This Court as an appellate court will only interfere with a finding of fact by the trial court if it is based on no evidence, or on a misapprehension of the evidence, or where the trial court is shown demonstrably to have relied on wrong principles in reaching the findings he did. (see the Court of Appeal case of *Ephantus Mwangi and another v Duncan Mwangi Wambugu* (1982) – 88) IKAR).
32. In the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* (1987) KLR 30, the Court of Appeal held that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.” see also *Butt v Khan* (1981) KLR 349 and *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No 284 of 2001; (2004) eKLR.
33. Nothing in the magistrate's decision points to it having been arrived at through misapprehension of evidence, reliance on wrong principles or that it was based on no evidence.
34. I thus find that the respondent proved on a balance of probabilities that he sustained soft tissue injuries to the right shoulder.



35. As regards quantum, In the case of in the case of *Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others* [2019] eKLR the court assessed damages at Kshs 100,000 for soft tissue injuries.
36. The trial court awarded the respondent general damages of Kshs 80,000 which I find were not inordinately high. I find no reason to interfere with the same. It is upheld. Special damages are equally upheld as there was no challenge to the same.
37. In the end, I find this appeal both on liability and on quantum of damages to be devoid of any merit. It is dismissed and the trial court judgment and decree is upheld.
38. The Respondent shall have costs of the appeal assessed at Kshs 30,000 payable within 30 days of today and in default, the respondent is at liberty to execute.
39. This file is closed subject to the payment of the appeal costs as assessed above.

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

R.E. ABURILI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

