



REPUBLIC OF KENYA



**Mwongela & another v Angila (Civil Appeal E694 of 2023)  
[2024] KEHC 7382 (KLR) (Civ) (10 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7382 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E694 OF 2023**

**DKN MAGARE, J**

**JUNE 10, 2024**

**BETWEEN**

**EMMANUEL MAKAU MWONGELA ..... 1<sup>ST</sup> APPELLANT**

**MOGE NJUGUNA KENNEDY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**STEPHEN ONYANGO ANGILA ..... RESPONDENT**

*(Being an appeal from the Judgment on Liability and Quantum by Hon. B. Kabanga  
- SRM in Milimani CMCC No. E3519 of 2021, delivered on 31st March, 2023)*

**JUDGMENT**

1. The court delivered judgement on 31<sup>st</sup> March, 2023. The court awarded the respondent as doth:-
  - a. Special damages Kshs.196,684/-
  - b. General damages Kshs.1,000,000/-
  - c. Future medical expenses Kshs.200,000/-
  - d. Costs and interestsSub-total - Kshs.1,396,684/-
2. From the pleadings, the Respondent suffered the following:-
  - a. Compound fracture of tibia and fibula.
  - b. Fracture of right femur for which he underwent interlocking nail.



- c. Right heel bed sore.
3. The Appellant filed a memorandum of Appeal where they raised 3 issues namely:
    - a. Liability
    - b. Quantum of damages
    - c. Future medical expenses
  4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
  5. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:
 

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
  6. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-
 

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
  7. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
  8. In the case of Peters v Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-
 

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
  9. In Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others [2019]eKLR , Justice D.S Majanja held as doth:
 

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”



10. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.
11. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows as paragraph 8.
 

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”
12. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.
13. The court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another* 1957 KLR 27 as follows: -
 

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.
14. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-
 

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”
15. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.
16. So my duty as the appellate court is threefold regarding quantum of damages: -
  - a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
  - b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
  - c. The award is simply not justified from evidence.
17. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.



18. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

19. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

20. The delivery was on 31/3/2023 in the presence of Mr. Otieno for the Respondent and Mr. Korir for Mr. Arusei for the Appellants. There was no appeal by 30/4/2024. The appeal was filed 88 days out of time.

21. The Respondent filed submissions dated 4/3/2024 seeking dismissal of the appeal. The appellant did not raise any issue with time of filing of the appeal. I shall address this shortly.

22. The respondent submitted that the appellant did not tender evidence in the alleged abstract. They relied on the case of *Embu Road Services Ltd v Riimi* [1968] EA 22 and *Mzuri Muhhidin v Nazzar Bin Seif* [1961] EA 201. It was their case that in *Amani Kazungu Karema v Jackmash Auto Ltd* and *Another* the court posited as doth:

“Where the circumstances of the accident give rise to inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence.”

23. They submitted that though the appellant pleaded that the road was under construction, no evidence was tendered. It was their case that pleadings are not evidence neither are submissions. They relied in the case of *Erustus Wade Opande v Kenya Revenue Authority & Another*, Kisumu HCCA 46 of 2017.

24. It was their case that Justice G.V. Odunga held doth in *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR. They stated that the Respondent had a right of way. They relied on the case of *Ndatho v Chebet (Civil Appeal) 8 of 2020* [2022] KEHC 346 KLR. He stated that the appellant knew the terrain.

25. The court awarded Kshs.1,000,000/-. The Respondent was hospitalized for a month. The court was invited to rely on the case of *Patrick Kinyanjui Njama v Evans Juma Mukweyi* [2017] eKLR.

26. On future medical expenses the respondent submitted that a sum of Kshs.200,000/- is sufficient and placed reliance on *Coast Bus Service Ltd v Murunga Danyi Civil Appeal No. 192 of 1992 (UR)*.

27. On special damages it is their case that the award of damages was proper.



28. On liability they stated that the appellant did not rebut contributory negligence.

### **Analysis**

29. On liability the Appellant testified and adopted his statement. He blamed the Plaintiff for not escaping. This alone is evidence of negligence. It is not the duty of the plaintiff to escape but that of the driver not to put him in a position to escape.

30. The respondent testified that the road was not under construction. It was the Appellant who was overtaking dangerously. The police testified that the said motor vehicle was overtaking and hit a cyclist on the opposite side. It is agreed that the motorcyclist was hit while on the opposite side. The Appellant gave an explanation that the road was under construction, while the Respondent had a different explanation. The respondent pleaded that the Appellant was attempting to overtake and did not exercise caution. On the other hand, the Appellant never raised the issue of construction in their defence. Parties must know that before attempting to prove, they must plead.

31. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

32. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and



cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

33. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

34. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

35. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the judges of Appeal held that:

“Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other



which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

36. The court has analyzed the evidence and on a balance of probabilities the entire evidence points towards 100% liability. There was no proof of contributory negligence. In the circumstances, the Appeal on liability based on matters which were not pleaded is untenable and consequently dismissed.
37. On future medical expenses a sum of Ksh 200,000/= was pleaded. This amount was proved from the medical report. The plaintiff was not cross examined on the amount for future medical expenses. The court below made a conscious decision on one aspect. The court preferred the report indicating 200,000/= as the cost of future medical expenses.
38. I have no reason to differ. Secondly, the 75,000/- are subject to qualifications of the kind of hospital. It is the respondent who was injured and must be treated and left as he is.
39. The court cannot constrain a party from getting treatment submitted by an orthopedic surgeon because the same can be obtained cheaply in a low level hospital. This court cannot substitute exercise of discretion by the court below unless the court misdirected itself. In this case, I see no misdirection.
40. There is no Appeal on special damages and as such it shall be left as it is.
41. On general damages, the court awarded a sum of Ksh.1,000,000/=. It must be recalled that damages cannot fully repair broken bones or remove pain and suffering. Damages are not to fully remove the effects of the accident. Damages must as such be kept moderate with regard to the nature of the injuries. Reasonableness of the award is called for in particular the nature and extent of injuries, permanent disability and the life threatening and changing nature of the injuries. In the case of *H West and Son Ltd v Shepherd* [1964] AC 326 the House of Lords in England stated that:-

“ ... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ...”
42. The injuries suffered were compound fracture of tibia and fibula, fracture of right femur for which he underwent interlocking nail and Right heel bed sore. The last of which is a consequence that is expected for long hospitalization and immobilization.
43. In the case of *Teresiah Ngugi & another v Michael Masia Kimende* [2018] eKLR, Justice Kariuki awarded 1,500,000/= on 3/10/2018 for mild head injury with facial bruises, blunt chest injury with fractured ribs, and compound fracture of the right tibia fibula with 7% disability.
44. The injuries suffered by the Respondent herein were more serious. They are in the range of authorities referred by the Respondent. However, there is no cross Appeal.
45. The authorities referred to by the Appellant do not relate to the current injuries.
46. In the circumstances I dismiss the appeal on quantum. The award was within range.

### **Determination**

- a. The appeal lacks merit and is accordingly dismissed with costs of Kshs.145,000/-



- b. The amounts deposited on 11/7/2023 be released to the Respondent's advocates.
- c. 45 days stay of execution.
- d. The file is closed

**DATED, SIGNED AND DELIVERED AT NYERI ON THIS 10TH DAY OF JUNE, 2024.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

**Kibet for the Appellant**

**Otieno for the Respondent**

**Court Assistant - Jedidah**

