



**Musembi & another v Mwai (Civil Appeal E001 of 2024)
[2024] KEHC 8740 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E001 OF 2024**

**JN ONYIEGO, J
JULY 22, 2024**

BETWEEN

DOMITILA NDINDA MUSEMBI 1ST APPELLANT

EQUITY BANK (KENYA) LIMITED 2ND APPELLANT

AND

THOMAS MUNJUGA MWAI RESPONDENT

*(Being an appeal against the judgment of Otuke S. Hon.
delivered on 08.12.2023 in Garissa CMCC No. E043 of 2022)*

JUDGMENT

1. By a plaint dated 04.11.2022, the respondent(plaintiff) averred that on or about 30.09.2020, he was lawfully travelling in motor vehicle registration number KCH 256Z Lorry/truck FRR owned and registered in the joint names of the appellants along Mwingi – Garissa Road when their agent/driver so negligently drove, controlled and /or managed the said motor vehicle thus losing control and caused a traffic road accident consequence whereof he sustained serious bodily injuries.
2. The particulars of negligence and the injuries were set out at para6 of the plaint as follows:
 - i. Driving too fast in the circumstances.
 - ii. Failing to slow down or apply brakes, steer, swerve motor vehicle registration number KCH 256 so as to avoid the accident.
 - iii. Driving in a manner that in the circumstances was careless and in breach of its duty of care to the plaintiff.
 - iv. Failing to maintain a proper lookout or any adequate control of the motor vehicle registration number KCH 256Z.



- v. Exposing the plaintiff to danger.
 - vi. Failing to observe the Highway Code.
 - vii. Causing accident.
3. The particulars of injuries were listed in para 8 of the plaint as follows:
- i. Blunt head injury.
 - ii. Traumatic brain injury.
 - iii. Blunt chest injury.
 - iv. Degloving injury/wound on the left forearm.
 - v. Massive soft tissue injury with complete damage of left forearm muscles.
 - vi. Mild head injury with brain oedema.
4. That as a consequence of the said injuries he incurred various expenses Particularized as special damages as hereunder;
- i. Medical expenses Kes. 39,000/-.
 - ii. Medical Report Kes. 5,000/-.
 - iii. Transport Kes. 25,700/-.
 - iv. Cost for motor vehicle search Kes. 550/-.
 - v. Cost of the police abstract Kes. 20
- Total Kes. 70,945/-
5. The plaintiff sought for a judgment against the defendants jointly and severally for:
- i. General damages for pain, suffering and loss of amenities.
 - ii. Special damages Kes. 270,945/-.
 - iii. Cost of future medical care of Kes. 200,000/-.
 - iv. Costs of the suit.
 - vi. Interest on (a), (b) and (c) at court rates.
6. The appellants entered appearance and further filed a defence dated 06.12.2022 denying every allegation that the respondent traveled in the suit motor vehicle. It was further urged that the motor vehicle in question was hired out to the respondent who directed the driver to such places as the respondent appointed and for the respondent's own purposes. That without prejudice; if the accident occurred, then the same happened without any negligence on the part of the driver.
7. Further, on a without prejudice basis, it was contended that the alleged accident was inevitable as the driver of the suit m/vehicle was forced off the road by an oncoming probox mv which encroached into his rightful ran as it hooted while flashing lights thus forcing their driver to swerve to the extreme left side to avoid head on collision hence causing the mv to overturn giving rise to the accident and the resultant injuries.



8. The respondent filed an amended reply to the appellants' amended defence wherein he denied every allegation of fact and law in the amended defence. Further, he denied every allegation of negligence attributed to him and put the appellants to strict proof thereof.
9. The matter proceeded to full hearing and the trial magistrate after considering the relevant law and evidence entered a judgment against the defendants jointly and severally in the following terms:
 - i. Liability – 20: 80.
 - ii. General damages Kes. 700,000/-
(Less 20% contributory negligence Kes. 120, 0000/-)
 - iii. Future medical expenses Kes. 200, 000/-
 - iv. Special damages Kes. 68,355/-
 - v. Total Kes. 828,335.000/-
10. The general damages were to attract interest at court rates from the date of judgment while the special damages were to attract interest at court rates from the date of filing suit until payment in full.
11. The appellant being dissatisfied with the said judgment, listed two (2) grounds of appeal in the memorandum of appeal dated 24.01.2024. The following were listed as the grounds of appeal:
 - i. That the Honourable Court erred in law and fact by awarding the respondent an excessive sum in general damages for pain, suffering and loss of amenities which award was not within the range of conventional awards for similar injuries and by so doing, the trial court arrived at an erroneous figure.
 - ii. That the Honourable trial court erred in law and fact by failing to subject its awards for damages for future medical expenses and the award for special damages to its apportionment of liability.
12. It was thus prayed that:
 - i. The judgment and decree of the lower court delivered on 08.12.2023 be set aside.
 - ii. This court proceeds to assess general damages for pain, suffering and loss of amenities and to subject the entire quantum of damages, whether assessed herein or by the trial court to the court's apportionment of liability.
 - iii. The Honourable court be pleased to award the costs of this appeal to the appellants.
13. In my considered view, the appellants' grievance lies squarely on the quantum as awarded by the trial court and the discriminatory apportionment of liability.
14. The appeal was disposed off by way of written submissions.
15. The appellant via submissions dated 06.03.2024 and filed through the firm of J. M. Mwangi Advocates urged that while no two injuries are the same, the sum of Kes. 700,000/- is on the higher side. That the injuries sustained by the respondent did not include any fracture as the same were simply soft tissue injuries. That at the time of the judgment, the conventional award for tissue injuries had not exceeded Kes. 150,000/- and in reference to the case of *Ayoro vs Freight World Logistics Limited & Another* (Civil Appeal E009 of 2021). That the authorities used by the trial court to reach the impugned judgment were not comparable at all.



16. That the trial court ought to have found that the injuries suffered by the respondent were soft tissue injuries and that the appropriate award for soft tissue injuries at that time was Kes. 150,000. Owing to the component of muscle loss as a consequence of the Degloving wound, an amount of Kes. 200,000 would be adequate.
17. On the second ground, the trial court was faulted for having failed to subject the award of special damages and future medical expenses to the court's apportionment of liability. Reliance to that end was placed on the case of *Silverstone Quarry Limited & another vs Beatrice Mukulu Kang'uta & another (suing as administrators of the estate of Phillip Musyoka Mutboka* [2020] eKLR where the Court of Appeal subjected the entire quantum of damages to the apportionment liability. The appellants thus urged this court to award them costs of the appeal herein.
18. The respondent in opposing the appeal filed submissions dated 12.03.2024 urging that the respondent suffered very serious injuries as the same was evident in the medical report and medical treatment documents produced before the court. That the trial court had the advantage of seeing the said injuries and therefore, cannot be faulted for having reached the impugned determination. It was contended that the appellants did not avail any evidence to rebut the respondent's evidence hence the court arrived at its decision based on the evidence presented to it by the respondent's witnesses together with the documents adduced.
19. The respondent relied on the case of *Trust Bank Limited vs Ajay Shah & 2 others* Nairobi HCCC No. 875 of 2001 where the court held that 'it is not bestowed with the gift of omniscience; it can only make a finding on the defendant's state of mind on the basis of either a confession from himself or on the basis of an inference drawn from either fact to be proved otherwise.' It was submitted that the award of Kes. 700,000/- was fair for the severe injuries suffered by the respondent given the circumstances as herein. In that regard the court was referred to several authorities *inter alia Wycliff Lumula Mmasi vs Ernest v Ernest Waitbaka & another* (2020) where an award of Kes 800,000 was made for degloving injury on the right foot and extensive skinloss.
20. On the second ground, the respondent submitted that future medical treatment award and special damages is subject to the trial court's discretion. That the trial court exercised its discretion judiciously by not subjecting the amount to the apportionment in the liability. The appellant relied on the case of *Hashim Mohamed Said & another vs Lawrence Kibor Tuwei* [2018] eKLR, where the court held that special damages should not be subjected to the apportionment of liability. It was argued that the appellant did not show any reason why this court should interfere with the finding of the trial court and as such, the appeal ought to be dismissed with costs.
21. This court has considered the submissions by the appellants, the grounds of appeal and has re-evaluated the evidence as its required of it, being the first appellate court. [See *Peters v Sunday Post* 1958 (EA) 424].
22. PW1 Dr. Elvis Mwandiki testified that on 07.01.2021 he examined the respondent, filled and signed his medical report dated 07.01.2021 which he produced as Pex 5. He stated that the respondent had with him other medical documents to wit an X-Ray and CT-Scan. He added that the respondent sustained cut wound on the left frontal-parietal area and degloving wound on the left arm injuries. That the respondent still experienced frequent severe headaches, painful left upper limb with a chronic wound on the left forearm. Similarly, in his medical report, he noted that the respondent is yet to recover from the said injuries.
23. It was his evidence that he suffers from severe headaches, debilitating pain in his left upper limb and has to be continuously on pain medications. He added that the chronic wound which was yet to heal



would require skin grafting and continued physiotherapy that might cost approximately Kes. 200,000/= . Further, he was at risk of developing complications like contractures, disuse atrophy and loss of the functional capability of his left upper limb. In the end, he confirmed that he charged Kes. 5000/= to prepare the medical report and a further Kes. 5000/ to attend Court.

24. On cross examination, he stated that he relied on the medical history of the plaintiff and he conducted a further examination to confirm injuries suffered by the respondent. Additionally, that he is not licensed to conduct skin grafting in as much as he offers those services and therefore could estimate the costs.
25. PW2 No. 82xxx PC Hassan Omar testified that he was the Investigating Officer in this case and that he received a report that an accident had occurred along Garissa - Mwingi Road at Bisargesa area involving motor vehicle reg. no KCH 256Z Mitsubishi FFR Lorry. He confirmed having issued the respondent with a P3 form. He thus produced the Police Abstract as Pex 1 and stated that this was a self-involving accident hence he could not blame anyone. On cross examination he stated that no person was charged for causing the traffic road accident.
26. PW3 Thomas Munjuga Mwai adopted his witness statement dated 04.11.2022 as evidence in chief and further produced all the exhibits in his list of documents as Pex 2, Pex 7, Pex 8, Pex 10, Pex 11 and Pex 12. It was his evidence that he was on his way to pick water melons when he got involved in a road traffic accident at Bangale, Garissa road. That the driver was driving at a speed of about 80-100km/hr.
27. He claimed that he sustained injuries on his head, nose, hand and genital organs. He showed the Court a healed wound with a big scar on the hand and further stated that he could no longer have sex and satisfy his wife sexually as his genitals hurt as a result of the accident. That he needed money for future medical expenses of Kes. 200,000/= as advised by the doctors. He blamed the accident on the driver of the m/v KCH 256Z. It was his evidence that he be compensated since he has nine children who depend on him. On cross examination, he stated that he had hired the defendant's lorry.
28. The appellants on the other hand did not call any witness and therefore the case was closed.
29. From the memorandum of appeal herein, the court discerns that the issue of liability is not contested. The only issues for determination are; whether taking into account the nature of the injuries sustained by the respondent, comparable awards and inflation or passage of time the award of Kes 700,000 by the trial magistrate was inordinately excessive as to warrant this court to interfere with and; whether the special damages ought to be subjected to the apportionment on liability.
30. It is trite that circumstances under which a court can upset a determination on an award on damages have been settled by various superior courts. The Court of Appeal in the case of *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) IKAR 278 stated that:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”.
31. On general damages for pain and suffering, the respondent maintained that the injuries sustained were as follows:
 - i. Blunt head injury.
 - ii. Traumatic brain injury.
 - iii. Blunt chest injury.
 - iv. Degloving injury/wound on the left forearm.



- v. Massive soft tissue with complete damage of left forearm muscles.
32. In the case of *H. Young Construction Company Ltd vs Richard Kyule Ndolo* [2014] eKLR the court awarded a sum of Kshs. 250,000/= for degloving injury to the left leg with loss of skin over the calf muscles and blunt injury to the left ankle joint.
33. In the case of *Francis Ndung'u Wambui & 2 others v Purity Wangui Gichobo* (2019) eKLR where the Court of Appeal reduced an award of Kes 450,00/= to Kes 250,000/= for injuries involving deep laceration on the medial side of the left leg and degloving injury on the left thumb.
34. In the case of *Gusii Deluxe Limited & 2 Others vs Janet Atieno* (2012) eKLR in which the respondent sustained deep cut wound frontal head exposing the skull bone, unconsciousness for about 8 hours with brain concussion, bang to the right - upper and lower jaw loosening the right-lower incisors teeth, injury to the right shoulder with bruises over it, deep cut wound in right upper limbs just below right elbow, injury to the right big toe with bruises over it and blunt injury to the anterior part of the chest leaving the respondent with ugly keloid scars on the head and face the Court of Appeal upheld an award of Kes. 500,000/=.
35. In *Telkom Orange Kenya Limited vs I S O minor suing through his next friend and mother J N* (2018) eKLR the respondent had sustained head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. The child complained of chronic headaches and had occasional blurring of vision. His doctor concluded that the child sustained serious head injuries which put him at risk of developing seizures as a long-term complication together with disfiguration resulting from the scalp and leg scars. The High Court on appeal found an award of Kshs. 950,000/= to be excessive and reduced it to Kshs. 500,000/=.
36. Taking all factors into account, I am of the considered view that the trial court failed to take into account comparable awards in similar injuries in arriving at the award. The award was not within the range of awards made by various courts for comparable injuries. He actually relied on awards made on more serious injuries not similar with the case at hand. Based on the awards made in H. young case and Francis Wambui above and further considering the rate of inflation, I find a sum of Kes 500,000 suitable as damages for pain and suffering and loss of amenities and therefore substitute the sum Kes of 700,000 with the same.
37. On the second ground, the appellant's contention is not on the fact that the special damages and future medical expenses were neither pleaded nor proved, but that the same ought to have been subjected under the head liability as apportioned by the trial court. The trial magistrate apportioned liability on contributory negligence on the part of the plaintiff at 80:20 in favour of the plaintiff against the defendants jointly and severally.
38. The trial magistrate was thus faulted for having erred in law and fact in disregarding this fact and not subjecting the same to a liability of 20% contributory negligence. The court was thus urged to interfere and subject special damages to 20% contributory negligence.
39. From the determination arrived at by the trial magistrate, it is clear that the court did not indicate that the awards for special and general damages were subject to a 20:80 liability ratio that he had earlier determined. He ought to have done so in his final order. [See the Court of Appeal in the case *Silverstone Quarry Limited & another v Beatrice Mukulu Kang'uta & another (suing as Administrators of the Estate of Philip Musyoka Muthoka* [2020] eKLR and *Getembe Prime Distributors Ltd v Okeyo* (Civil Appeal 151 of 2021) [2023].



40. In my view, the whole amount ought to have been subjected to 20% contributory negligence. In view of the above holding, I am inclined to hold that the appeal herein is merited and therefore allowed with orders that;

- i. General damages of - Kes. 500,000/-
- ii. Special damages - Kes. 68,355/-.
- iii. Future medical expenses - Kes. 200,000/- = Kes 768,355
- iv. Less 20% contributory negligence = Kes 153,671
Total Net balance = Kes. 614,684/-
- v. Each party to bear own to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF JULY 2024

J. N. ONYIEGO

JUDGE

