



REPUBLIC OF KENYA



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**Ombui & another v Shilibwa & another (Civil Appeal 12 of 2010)  
[2024] KEHC 13970 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 13970 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 12 OF 2010  
SM MOHOCHI, J  
JULY 16, 2024**

**BETWEEN**

**PAUL OMBUI ..... 1<sup>ST</sup> APPELLANT**

**PETER SINGOMBE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BENARD CHAVALEJI SHILIBWA ..... 1<sup>ST</sup> RESPONDENT**

**AL-GINZA AUTOMOBILE LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the whole Judgement delivered by the Honourable Soita- Principal Resident Magistrate on 22nd December, 2009 in MOLO CMCC NO. 10 OF 2008)*

**JUDGMENT**

1. The Appellants were the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in a suit wherein the 1<sup>st</sup> Respondent by Plaintiff dated 8<sup>th</sup> March, 2008 claimed general and special damages, costs and interest on costs plus 16% VAT in regard to personal injuries sustained in an accident that occurred along the Molo - Olenguruone Road on 18<sup>th</sup> February, 2008 involving motor vehicle registration No. KAY 847D and a bicycle in which the 1<sup>st</sup> Respondent was a pillion passenger. The 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Appellant were vicariously enjoined for the Acts of the 2<sup>nd</sup> Appellant.
2. The 2<sup>nd</sup> Respondent filed his statement of defence dated 6<sup>th</sup> May 2008, while the 1<sup>st</sup> and 2<sup>nd</sup> Appellants filed their joint Statement of Defence on 19<sup>th</sup> June, 2008 denying any liability and blamed the occurrence of the accident on the 1<sup>st</sup> Respondent and that the accident was contributed too by negligence on the part of the 1<sup>st</sup> Respondent.



## The Evidence

3. PW1, Benard Chavaleji Shilibwa stated that on the 18<sup>th</sup> February 2008 he was going to work as a pillion passenger on a bicycle from Molo to Molo town. There were two lorries coming from the opposite direction while there was matatu registration number KAY 847D behind them. That the Matatu suddenly came to their side to join a feeder road and knocked them down.
4. He was injured on the left leg treated at the Nakuru PGH where he was admitted for five (5) days. Produced his discharge summary No. 389367 (P. MB 1). That at the hospital he was X-rayed. Produced his request form for X-ray (Mt 2) which he spent Kshs 1,050/- and was issued with a receipt (Exhibit 3). That he also spent Kshs 200/- and was issued with a receipt (Exhibit 4). Later he was treated at St Mary's Mission Hospital on 23<sup>rd</sup> February, 2008. Produced his card No.003587 from St. Mary, Hospital (P. MFI 5). And that he paid Kshs 4,000 as deposit and was issued with a receipt (Exhibit 6).
5. That he incurred another 31/- and was issued with a receipt (Exhibit 7).and was ultimately examined by Dr. Kiamba who prepared a report (Exhibit 8). The doctor was paid Ksh. 2,000 and he issued a receipt (Exhibit 9), the witness reported the accident at Molo Police Station and was issued with an abstract. The owner of the vehicle is Paul Ombui according to the abstract (Exhibit 10) he was also issued with a P3 which completed (P. MFI 11). he did a search "on the ownership of the vehicle establishing the owner is AL GINZA AUTOMOBILES LTD who had sold the vehicle to Paul Ombui and he produced the copy of records Exhibit 12. That Since he was injured, he is unable to work and he uses a walking stick for which he blamed the driver of matatu registration number KAY 847 D, for moving into the feeder road without warning. He had sustained a fracture on the same leg in 1996 and a plate was removed and another longer one inserted. He prayed for compensation.
6. In cross-examination by Mr. Onsarigo for Defendant he stated that he stayed in Molo, was not working at the time and that prior to the accident he was a Mason, using tools with his bare hands. That on the fateful day he was using a boda boda bicycle and could not recall the riders name. that they were coming down-hill. The matatu was coming from Molo direction.
7. That they were not following any vehicle, they were on the left side. The vehicle hit them the light on the left side and that he could not tell the distance between the lorries and the matatu as he was a pillion passenger seeing in front, that he just found himself down. That they were not speeding and were going downhill. He denied stating that the matatu was over speeding
8. That he was taken to hospital by the same vehicle and was unaware if the driver was charged with committing an offence and that he was examined by Dr. Kiamba at the offices of the advocate. Paul Ombui is the owner of the vehicle the search having been conducted by his advocate, it showed the owner was Al Ginza. He had not healed yet and that he was examined by Dr. Malik who told him he was about to heal and he reiterated his claim to be compensated with costs
9. In Re-examination: the witness stated that Dr. Kiamba examined him and wrote a report.
10. PW2 No. 84053 PC David Matewere attached to Molo Police Station, Traffic duties, produced Police Abstract issued to the 1<sup>st</sup> Respondent PExh10 and confirmed the accident happened on 18<sup>th</sup>February, 2008.
11. That the pedal cyclist was heading to Molo township while the motor vehicle was from Molo. At Molo the pedal cyclist had one pillion passenger who is the 1<sup>st</sup> Respondent. That at the point of accident the vehicle veered to the right while turning and hit the pedal cyclist. The accident was on the left side on the way to Molo.



12. In Cross-examination by Mr. Mulenje for Defendant, the witness indicated that they have not completed investigations and that he had the Police file with him. According to it the case is pending arrest of known accused and results of investigations are shown that pedal cyclist to be blamed for the accident is known to the police.
13. Investigations are not complete. At the moment the person to charge is the cyclist. The driver of the Matatu was driving towards Olengururne
14. PW3, Dr. Obed Omuyuma, a medical practitioner based in Nakuru and who on the 7<sup>th</sup> March 2008 examined the Respondent filed the P3 form noting the injuries as a fracture of the proximal third of the femur which degree of injury he classified as “grievous harm” he prepared and signed a medical report which he produced as Exhibit 8.
15. He was paid kshs 5,000/- and he produced a receipt for the payment as Exhibit 9. That his examination was anchored upon the medical treatment card from Molo and a discharge Summary from the Nakuru PG Hospital.
16. PW4 Gabriel Mburu a records officer at Nakuru Provincial General Hospital confirmed that the Respondent was admitted on 1<sup>st</sup> December, 2017 and discharged on 8<sup>th</sup> February 2008 and he produced the discharge summary Exhibit 1, a radiological report Exhibit 2.
17. PW5 was Lawrence Ongadi an Employee of Afripack International in Nakuru, he testified knowing the 1<sup>st</sup> Appellant well and that his company sold the motor vehicle No. KAY 847D in 2007 to the Appellant for a consideration of Kshs. 950,000/- and produced an agreement for the sale dated 30<sup>th</sup> August 2007.
18. DW1, No. 63322 PC Devid Ngetich produced a police abstract as Defence Exhibit 1 and stated that the accident happened on 18<sup>th</sup> February, 2008 involving motor vehicle registration number KAY 847D and a pedal cyclist carrying a pillion passenger (the 1<sup>st</sup> Respondent) and that the 1<sup>st</sup> Respondent and 1<sup>st</sup> Appellant recorded their statements, they conducted investigations and recommended the close of the file as pedal cyclist was at large and that they could not charge the driver of motor vehicle registration number KAY 847D.
19. The Witness admitted not being the investigator in cross-examination and that the evidence gathered could not sustain a charge of careless driving.
20. By a judgment dated and delivered on 22<sup>nd</sup> of December, 2009 in favour of the 1<sup>st</sup> Respondent the Court ordered as follows: - Liability 100%, General damages Kshs 350,000/-, Cost of Future Treatment Kshs 20,000/-, Special damages, Kshs. 10,000/- and Total Kshs 380,000/-.
21. Being aggrieved by the said judgment, the Appellants’ preferred this appeal in a memorandum of Appeal dated 13<sup>th</sup> January 2010 which is premised on grounds that: -
  - a. The Learned Magistrate erred in fact and in law in making a finding that the Defendant was liable and yet no evidence was led as to the Defendants negligence;
  - b. The Learned Magistrate erred in fact and in Law in making a finding that the Defendant was liable and yet evidence was led as to the contrary.
  - c. The Learned Trial Magistrate erred in law and in fact, in wholly disregarding failing to accord due and proper consideration upon the defence witnesses’ evidence.



- d. The Learned Trial Magistrate erred in law and in fact, in wholly disregarding or failing to accord due and proper consideration upon the Plaintiffs witnesses testimonies under cross-examination.
  - e. The Learned Trial Magistrate erred in law and in fact, in wholly disregarding or failing to accord due and proper consideration upon the defence counsel's written submissions,
  - f. The Learned Trial Magistrate erred in law and in fact, in wholly disregarding or failing to accord due and proper consideration upon the defence witness's evidence.
22. The Appellants urged the Court to allow the Appeal, set-aside the Respondent's suit, be dismissed with the costs of this appeal be borne by the Respondent.
  23. The Appeal was admitted on the 7<sup>th</sup> March 2024, to be heard by way of written submissions. The Appellants filed their submissions dated 21<sup>st</sup> March 2024, whereas the Respondents filed their written submissions dated 9<sup>th</sup> April, 2024.

### **Appellants Submissions**

24. The Appellants in their written submissions, submit that, the Appeal arises from the judgment delivered on 22<sup>nd</sup> December, 2009 in Molo CMCC No. 10 of 2008 whereby the award was rendered as follows;
  - i. General damages at Kshs. 350,000.
  - ii. Future medical cost-Kshs. 25,000
  - iii. Special damages at Kshs. 10,000
  - iv. Liability had been apportioned at 100% in favour of the Plaintiff.
25. That the background of the matter is that on 18<sup>th</sup> February, 2008 the Plaintiff sustained injuries as a result of an alleged road traffic accident. It was alleged that the plaintiff was a pillion passenger along Molo-Olenguruone road when motor vehicle KAY 847D belonging to the Appellants was negligently driven hitting the plaintiff.
26. That, being aggrieved by the aforementioned judgment, the Appellant herein instituted this Appeal.
27. That, no eye witness was ever called by the Respondent to testify as to how the accident occurred.
28. "He who alleges must prove", the Respondent failed to prove his case on a balance of probability as circumstances of the accident were not brought out clearly to the Court for proper determination as who was to blame.
29. That, the Respondent called a police officer PW2 David Matwere who testified that another file had been opened at the police station blaming the cyclist.
30. That, DW1 police officer from Molo station testified and produced the Court file where the investigating officer did not find any sufficient reason to charge the insured driver, he further proceeded to produce a police abstract blaming the cyclist.
31. That the Appellants in their defence had denied ownership of motor vehicle registration number KAY 647D.



32. That, the Respondents failed to prove ownership of the vehicle as no copy of records from the registrar of motor vehicle confirming ownership was produced. In *Thuranira Vs Agnes Ncheche (1996)* Court of appeal held that.

“The Plaintiff did not prove that the vehicle which was involved in the accident was involved by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before a judge a certificate or search signed by the registrar of motor vehicle showing the registered owner of the lorry, Mr. Kimathi for the plaintiff submitted that the information on the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject” It is the Respondent’s humble submission that the Appellant failed to prove his case on how negligent the driver was. In *Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd. (1991)* it was held that “there is a s yet no liability without fault in the legal system in Kenya, and the plaintiff must prove some negligence against the defendants where the claim is based on negligence”

33. That, the injuries pleaded by the Plaintiff were as follows:

- a. Fracture of the left femur proximal 1/3
- b. Severe soft tissue injuries of the left thigh

34. That, it is trite law that, assessment of quantum of damages in a claim for general damages is a discretionary exercise. However, the law has set dimensions for an exercise of discretion; must be exercised judicially, with wise circumspect and upon some legal principles. The said dimensions are vital such that when the Trial Court has violated a legal principle(s), the Appellate Court will interfere with the exercise of discretion by the Trial Court.

35. That, the discretion in assessing the amount of general damages payable will be disturbed if the Trial Court;

- i. Took into account an irrelevant factor or,
- ii. Left out of account a relevant factor or, short of this
- iii. The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

36. That, it is also trite law that awards must be within consistent limits and Court awards for damages must be made taking into account comparable injuries or similar injuries and awards. In *Denshire Muteti Wambua vs. Kenya Power & Lighting Co. ltd {2013} eKLR* was held that:

“the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

37. Reliance was placed on the case of *Power Lighting Company limited & another Versus Jennifer Zakayo Saitoti Naingola & another (2008) eKLR* cited in the case *Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR*. The Court held:

“On quantum Court in determining whether to interfere with the same of not, the Court has to bear in mind the following principles on assessment of damages:

- a. Damages should not be inordinately too high or too low



- b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
- c. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
- d. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shillings, then at the time of the judgment....

38. That, the Appellants submit to this Court that the sum of Kshs. 350,000.00 be substituted with the sum between Kshs. 50,000.00 and Kshs.100,000.00.

### **Respondent's Submissions**

39. The Respondents submit that, it is not enough for the Appellants to challenge a Judgement of Court without providing justifiable ground as to why their appeal has merit.
40. That, according to the evidence of the Plaintiff (PW1) during trial (Page 2 of the Record of Appeal), he stated that, he was a pillion passenger on a bicycle, heading to Molo town.
41. That, there were two Lorries from the opposite direction, behind them was a Matatu Reg. No. KAY 847D, which suddenly came to their side while joining a feeder road and knocked them causing them serious injuries.
42. That, according to the testimony of DW1, PC David Ngetich (Page 9 of the Record of Appeal), it is not indicated who was to blame in the accident, and that the statement of the pedal cyclist was never recorded. DWI also indicated that investigations were not over.
43. That, the Honourable Trial Magistrate in his wisdom and after, careful examination of the facts on records, held the Defendants liable for the accident and stated as follows at Page 11 of the Record of Appeal:
- “I have carefully appraised the evidence on record. It was the testimony of the Plaintiff that the driver of the Defendant's motor vehicle turned suddenly into a feeder road thereby knocking them. The Defence witness called did not witness the accident.”
44. That, the witness only blamed the pedal cyclist because he did not record accident. In any event, the pillion passenger was not the cause of the accident. I hold the second and third defendant 100% liable.”
45. That, from the foregoing, the Respondents submit and pray that this Court to dismiss this instant appeal and uphold the decision of the Honorable Trial Court on the issue of Liability.
46. That, on ground number 7 of the said appeal, the Appellant claims that the trial magistrate erred in law and in fact in awarding quantum at Kshs. 350,000 which according to the Appellant was inordinately high.
47. That, given the nature and extent of the injuries, and comparable award made for analogous injuries, the Respondent herein, vehemently oppose this Appeal for reasons that the same is malicious and lack merit in the circumstance.
48. That, during trial, the plaintiff (the 1<sup>st</sup> Respondent herein) testified that he was injured on his left leg, which crashed with fracture on the femur, with other soft tissue injuries. He testified that he was taken to Molo District Hospital, then later referred to Nakuru Provincial General Hospital where he was



- admitted for 5 days while undergoing treatment. The Plaintiff also stated that he also visited St. Mary's Mission Hospital for further treatment.
49. That, Surgery was done on his leg and a metal plate affixed in the said leg. The Respondent produced the following documents to support his claim:
    - a. Treatment card from Molo District Hospital
    - b. Patient care report.
    - c. Treatment card from Provincial General Hospital.
    - d. P3 form.
    - e. Police Abstract.
    - f. Medical report by Dr. Kiamba.
  50. That, the Appellants did not lead any evidence to challenge the Respondent's case on quantum neither did they produce any medical reports to the contrary. The Respondent's case, therefore remains unchallenged as far as the testimony of the Respondent and the medical documents on record is concerned.
  51. That, the Plaintiff was also examined by Dr. Wellington K. Kiamba whose medical report is dated 11<sup>th</sup> March, 2008. According to Dr. Kiamba, the 1<sup>st</sup> Respondent suffered 'Grevious Harm'. The Doctor also confirmed the injuries suffered as per the medical reports. This evidence has not been challenged by the Appellants.
  52. That, the Trial Court's judgment at page 12 of the Record of Appeal has clearly elaborated on the 1<sup>st</sup> Respondent's injuries and proceeded to award General Damages of Kshs. 350,000 plus Special Damages of Kshs, 10,000. The Respondents submit therefore that, the Trial Court's award was in line to the injuries suffered and not inordinately high or unreasonable to be interfered with by this Honourable Court.
  53. That it is a general principle that, the figure reached by the Trial Court should not be disturbed on appeal unless, it is based on some erroneous principle, which must be proven. That is to say, an award of general damages should not be interfered with unless the trial judge has acted on an erroneous principle or the award is too high or too low as to amount to an entirely erroneous estimate. This principle of law was enumerated in the case of Robert Musyoki Kitavi V Coastal Bottlers Ltd (1985) 1 KAR 891).
  54. That, the Respondent pleaded at the Trial Court that, he had sustained the following injuries: -
    - a. Fracture of the femur proximal 1/3.
    - b. Severe soft tissue injuries of the left thigh.
  55. That, the said injuries were supported by medical reports produced before the trial Court, and the same were not opposed.
  56. That, the award reached by the trial magistrate was not inordinately high to represent an entirely wrong estimate based on the foregoing. We submit that the injuries sustained by the Respondent were of the magnitude as indicated by the Trial Court and that the award was proportional to the injuries suffered.
  57. That, the award by the Trial Magistrate was actually inordinately lower than what other Courts of competent jurisdiction have awarded for the same injuries.
  58. Reference is made to the following decided authorities:



- i. Peter Namu Njeru v Philemone Mwangoti [2016] eKLR the Court held that Kshs 700,000/- was sufficient as general damages where the plaintiff sustained a fracture of the humerus and soft tissue injuries.
  - ii. David Kimathi Kaburu v Dionisius Mburungu Itirai [2017] the Court held that Kshs. 630,000/- was appropriate where the respondent sustained fracture of the femur and soft tissue injuries.
59. That these decisions vary in time with the case at hand. As stated in the case of Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR, the Court in making an award for general damages must always consider the prevailing inflation.
  60. The Respondents submit that, the said award of Kshs. 350,000 was inordinately low than expected to injuries involving fractures. The Appellant's claim that the said award was inordinately high is thus malicious and a mare test on the hands of justice.
  61. That, in light of the above-mentioned authorities, it is evident that this Appeal before you lack merit, as the Appellants have not provided sufficient evidence before this Honorable Court to challenge the Judgment of the Trial Court as delivered on 22<sup>nd</sup> September 2009.
  62. The Respondents submit that, should the Court be inclined to substitute the Lower Court's Judgment, then same should be substituted with a higher award commensurate to the injuries suffered. Any amount lower the Trial Court's award will with no doubt amount to a great injustice on the part of the Respondent herein.
  63. That, it is for the above reasons that Respondents pray that the said Appeal be dismissed in its entirety with costs.

### **Analysis and Determination**

64. Being a first appeal this Court lays emphasis on the principles as set out in *Selle and Another Vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123:
 

“...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
65. The issues for determination that spawn from this appeal are as follows: -
  - a. Whether the 1<sup>st</sup> Respondent discharged the burden of proof to the required standards.
  - b. Whether the award of general damages was excessive in view of the injuries sustained.
  - c. Who bears costs of the suit.
66. The 1<sup>st</sup> Respondent was a pillion rider, on a bicycle and could not thus have either caused the accident, or in any way contribute to the same, it was his credible eye-witness account as to the manner in which the accident occurred, his evidence is corroborated by three other witness testimonies including a medical report on the injuries sustained. In comparison to the evidence by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants



who only called a lone witness that was not an eye-witness, which to this Court on a balance of probability would suffice to find for the liability as was found in the Trial Court.

67. I have Considered the Appeal and note the following;

- i. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants did admit in paragraph 2 of statement of defence dated 19<sup>th</sup> June 2008 of being beneficial owner and driver of motor vehicle KAY 847D respectfully.
- ii. Negligence was proven by the 1<sup>st</sup> Respondents testimony That, "the 2<sup>nd</sup> Appellant turned suddenly into the feeder road suddenly Knocking them and occasioning upon them bodily injuries" I am thus Persuaded that the Judgment dated 22<sup>nd</sup> December, 2009 was sound and the same is upheld.

68. Accordingly, the Appeal fails for want of merit;

- a. The award liability and that of general damages is upheld.
- b. The award of special and that of future medical treatment cost, is upheld;
- c. The Respondent shall have costs of the Appeal

It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 16<sup>TH</sup> DAY OF JULY, 2024.**

**MOHOCHI S.M**

**JUDGE**

