



REPUBLIC OF KENYA



**Shah & another v Mwema (Civil Appeal E664 of 2022)
[2024] KEHC 9319 (KLR) (Civ) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9319 (KLR)

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

CIVIL

CIVIL APPEAL E664 OF 2022

JM OMIDO, J

JULY 25, 2024

BETWEEN

SUJAY ANIL SHAH 1ST APPELLANT

SUNANDABEN A SHAH 2ND APPELLANT

AND

JULIUS MWEMA RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Selina Muchungi, SRM delivered on 22nd July, 2022 in Nairobi Milimani CMCC No. E9815 of 2021)

JUDGMENT

1. This appeal was preferred by Sujay Anil Shah and Sunandaben A. Shah (hereinafter referred to as “the Appellants”), against the judgement and decree of Hon. Selina Muchungi, Senior Resident Magistrate delivered on 22nd July, 2022 in Nairobi Milimani CMCC No. E9815 of 2021 which was a tortious liability claim.
2. In the matter before the lower court, the 1st and 2nd Appellants herein were the 1st and 2nd Defendants respectively while the Respondent herein was the Plaintiff.
3. Judgement on liability in the lower court was entered in favour of the Respondent at 100% against the Appellants. The trial court proceeded to assess and award the Respondent special damages at Ksh.8,290/-; general damages for pain, suffering and loss of amenities at Ksh.800,000/-; and future medical expenses at Ksh.80,000/-.
4. Being aggrieved with the judgement of the trial court, the Appellants presented the following grounds of appeal vide a Memorandum of Appeal dated 18th August, 2022:



1. That the learned trial Magistrate erred in fact and in law by awarding future medical costs of Ksh.80,000/- for an elective process in the absence of evidence substantiating the same.
2. That the learned trial Magistrate erred in fact and in law by failing to take into consideration case law on damages awarded for injuries comparable to those of the Respondent, thereby awarding excessive damages for pain and suffering.
3. That the learned trial Magistrate erred in fact and in law by failing to consider the totality of evidence, and in particular the Appellants' evidence and submissions on the circumstances surrounding the accident and Dr. Njalalle Baraza's medical report on the status of the Respondent.
4. That the learned trial Magistrate erred in fact and in law by making a finding of 100% liability on the Appellants (sic) based on mere assertions by the Respondent without evidence corroborating the same.
5. That the learned trial Magistrate erred in fact and in law by failing to find that the evidence adduced by the Respondent was insufficient to prove negligence on the part of the 1st Appellant.
5. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
6. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
7. Going back to the evidence before the trial court, the Respondent (the Plaintiff in the lower court matter), presented the suit vide a plaint dated 21st July, 2021, seeking for special and general damages, future medical expenses, costs of the suit and interest, arising out of injuries that he sustained in a road traffic accident that occurred on 17th June, 2021.
8. The Respondent called Dr. Washington Wokabi as PW1. The witness told the court that he examined the Respondent on 1st July, 2021 and prepared a medical report dated 6th July, 2021. The witness produced as an exhibit together with two receipts, one for Ksh.3,000/- for the report and the second for Ksh.10,000/- for court attendance.
9. As per the report, the Respondent sustained a fracture of the right femur. He was operated on and the fracture was fixed with a metal K-nail and was at the time using crutches. At the time of examination, he had difficulties getting around, could not walk or stand without external support and could not work gainfully. The doctor assessed disability at 10% and projected that the Respondent would fairly well recover, though not to the state that he was in before the injury.



10. The Respondent called Police Constable Jeremy Kinoti of Runda Police Station as the second witness (PW2) before the trial court. The witness told the trial court that he attended to a road traffic accident that occurred on 17th June, 2021 along the Northern Bypass. The Respondent, who was a licensed motor cyclist, had been hit by motor vehicle registration number KBY 300Y and had sustained injuries and rushed to hospital. The driver of the motor vehicle fled from the scene but was intercepted and apprehended by members of the public.
11. The witness stated that there was an intention to charge the driver of the motor vehicle for failing to give way but did not state the actual nature of the charges.
12. The Respondent testified before the trial court as PW3 and adopted the contents of his witness statement dated 21st July, 2021. In his statement, the Respondent stated that on 17th June, 2021, he was riding his boda boda registration number KMEU 805P along the Northern Bypass. Upon reaching Githogori area, the first Defendant's motor vehicle registration number KBY 300Y joined the road at a high speed and without giving way as a result of which the vehicle knocked down the Respondent. He sustained injuries and was treated at Kiambu Level 5 and St. Peter's Orthopedic Hospitals.
13. The Respondent blamed the driver for the accident and stated that he was negligent and reckless by failing to give way.
14. The Respondent produced the following documents in support of his case: Demand letter dated 7th July, 2021. Statutory notice dated 6th July, 2021. Police abstract dated 17th June, 2021. P3 form dated 17th June, 2021. Discharge summary from St. Peter's Orthopedic Hospital. Case summary from Kiambu Level 5 Hospital. Kiambu Level 5 Hospital history and physical examination. Copy of the Respondent's driving licence. Copy of records. Dr. Wokabi's medical report dated 5th July, 2021. Receipt for Ksh.108,290/-.
15. The 1st Appellant testified and adopted the contents of his statement dated 30th September, 2021. He stated in his statement that on 17th June, 2021, he was driving along the Northern Bypass and on reaching the Githogoro junction, a matatu that approached from the Kiambu Road side stopped to give the Appellant way. That as he made his way past the matatu, the Respondent's motor cycle suddenly approached at a high speed and rammed into the side of the 1st Appellant's vehicle. He did not see the motor cycle approaching.
16. The 1st Appellant told the trial court that upon the occurrence of the accident, a group of boda boda operators attacked the first Appellant with stones, forcing him to speed away to safety. He then proceeded to Runda Police Station where he was released on cash bail.
17. The 1st Appellant told the trial court that on 19th June, 2021, he visited the Respondent at Kiambu Level 5 Hospital to check on his condition where he paid the hospital bill of Ksh.1,050/-. He then offered to take the Respondent to St. Peter's Orthopedic Hospital for further specialized treatment. He settled the hospital bill of Ksh.100,000/- at St. Peter's and gave the Respondent Ksh.10,000/- to facilitate the Respondent to go back to his home.
18. Upon cross examination, the 1st Appellant stated that he was aware that the police officer(s) who investigated the matter blamed him for the accident. He stated that he settled the Respondent's hospital bills and gave him cash against the advice of his (the 1st Respondent's) insurers. He stated that the Respondent sustained injuries that included two fractures.
19. The first Appellant produced the following documents in support of the defence case: Invoice from St. Peter's orthopedic Hospital. 1st Defendant's Mpesa statement. Medical report from Aga



- Khan University Hospital. Receipts from Aga Khan University Hospital. Photograph depicting motor vehicle registration number KBY 300Y. Certificate under Section 106B of the *Evidence Act*. Copy of 1st Appellant's previous driving licence. Copy of 1st Appellant's current driving licence. Copy of 2nd Appellant's driving licence.
20. Having considered the Memorandum of Appeal, the submissions filed by the parties and the record in its entirety, the issues for determination are whether the trial Magistrate reached proper findings on liability and quantum.
 21. On the issue of liability, from the evidence on record, it is clear that accident occurred when the 1st Appellant drove onto the Northern Bypass and failed to give way to the Respondent's motorcycle which had the right of way. Police investigations confirmed this position and the 1st Appellant was wholly blamed for causing the accident, thereby corroborating the Respondent's testimony that the accident occurred when the 1st Appellant failed to give way to the Respondent. The 1st Appellant did not discount or in any way deny or challenge the findings of the police investigations when he testified before the trial court. There is nothing on record to show that the Respondent contributed to the accident in any way.
 22. I take guidance from the decision of *Mburu & 6 others v Kirubi (Civil Appeal E246 of 2021)* [2023] KEHC 3599 (KLR) (20 April 2023) (Judgment) in which L.N. Mugambi, J. stated thus:

“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.”
 23. The finding of the trial magistrate that the 1st Appellant was 100% to blame for joining the road without first ascertaining that it was safe to do so cannot in the circumstances be faulted. The copy of records produced confirmed that the motor vehicle was registered in the name of the 2nd Respondent and liability therefore attached against the 2nd Respondent to the same tune. This court has no basis, therefore, of interfering with the said findings as they were based on the evidence adduced.
 24. With regard to quantum of damages, the evidence that was placed before the trial court was that the Respondent sustained a double fracture of the right femur that resulted in 10% disability. The trial court awarded the Respondent Ksh.800,000/- as general damages for pain, suffering and loss of amenities; Ksh.80,000/- as future medical expenses; and Ksh.8,290/- as special damages.
 25. Although the Appellants raised in the Memorandum of Appeal the ground that the awards made by the trial court were excessive, I note that from the submissions filed they did not challenge the above awards. Rather, the position that the Appellants took was that the awards were not payable as liability to the extent of the finding by the trial court was not proved. But as I have found, the trial court reached the proper finding on the issue of liability. I will not therefore interfere with the findings of the trial court on quantum under the different heads.
 26. Being of the foregoing persuasion, I find that the appeal herein lacks merit. I proceed to dismiss it with costs to the Respondent.

DEIVERED (VIRTUALLY), DATED & SIGNED THIS 25TH DAY OF JULY, 2024

JOE M. OMIDO

JUDGE

For The Appellants: Ms. Wangeci.



For Respondent: Ms. Anyango Holding Brief For Mr. Onyango.

Court Assistant: Ms. Njoroge.

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