



**Trakana Mombasa Limited v Wamunye (Civil Appeal E049 of 2022)  
[2024] KEHC 8326 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8326 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E049 OF 2022  
JM NANG'EA, J  
JULY 11, 2024**

**BETWEEN**

**TRAKANA MOMBASA LIMITED ..... APPELLANT**

**AND**

**MERCY WAMUNYE ..... RESPONDENT**

*(Being an appeal from the judgement and decree of the Senior Principal  
Magistrate's court at Limuru (Hon. I. F Koome (SRM) delivered on 23/02/2018)*

**JUDGMENT**

**Grounds of Appeal and reliefs sought.**

1. By a Memorandum of Appeal filed on 17/01/2023, the appellant faults the above trial court's judgment on grounds that may be summarized as hereunder:
  1. That the Learned Magistrate erred in law and fact in holding the appellant, the defendant in the suit before the trial court, 100% liable for the claim against the weight of evidence adduced.
  2. That Learned Trial Magistrate erred in law and fact in making an award of general damages that is manifestly excessive in the circumstances of the case after taking into account irrelevant factors in assessing the damages.And
  3. That the Learned Trial Magistrate erred in law and fact by granting the respondent, the plaintiff in the suit, the costs of the suit which order was unwarranted in the circumstances.
2. The appellant therefore seeks the following orders;
  - a) That the trial court's judgement on liability be set aside and "substituted with a finding that the driver of motor vehicle registration number KBF 485 B was solely to blame at 100 % (sic).



- b) That the Lower Court’s judgement of Ksh. 1,000,000 in general damages be reviewed downwards to Ksh. 350,000.
  - c) That the suit brought against the appellant be dismissed with costs.
- And
- d) That the costs of this appeal and the primary suit be granted to the appellant in any event.

**Analysis and determination.**

3. It would appear that only the respondent filed submissions which I have perused together with the trial court’s record. In the impugned judgment, the trial magistrate found the appellant wholly liable for the claim and awarded the respondent Ksh. 1,000,000 in general damages for pain , suffering and loss of amenities. The respondent was further granted special damages of Ksh. 48,720 as well as the costs of the suit and interest. Based on medical evidence presented before the trial court, the respondent suffered blunt injuries to the head with loss of consciousness; fracture of the right humerus; blunt chest injuries; right haemothorax ( blood collection in the chest cavity) and blunt laceration injuries on the right shin. A plaster cast was applied on the right arm for 2 months and a chest tube was inserted into the left chest cavity to drain the pneumothorax. According to Dr Wokabi who examined the respondent 5 months after sustaining the injuries, the fracture re-united albeit resulting in stiffness of the right shoulder which would remain in a semi – frozen state permanently. She would not be able to engage in activities like digging or cutting and as a result the doctor opined that she suffered a permanent disability of 25 %.
4. The respondent testified before the trial court 2 years after she was examined for the medico-legal report and stated that she was admitted in hospital for 2 months. Barring the complications noted by her doctor, she stated that she had otherwise healed.
5. The respondent’s injuries allegedly arose in a road traffic accident in which the appellant’s motor vehicle registration number KCA 490 U/ Trailer number ZF 1093 Mercedes Actross (“the lorry”) is said to have collided with motor vehicle registration number KBF 485 B Nissan Matatu (“the matatu”) in which the respondent was a fare paying passenger owing to negligent driving as a result of which it occasioned personal injuries to her. The appellant traversed the allegation of negligence and all other material particulars of the suit putting the respondent to strict proof.
6. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court’s findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle v. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd v. Oakdale Commodities Ltd* (1997) eKLR.
7. Beginning with the issue of liability, the appellant contends that the lower court’s finding that the respondent proved its case on a balance of probabilities is against the weight of evidence. Limuru SPMCC NO. 94/2019 filed by one of the victims of the road accident from which this cause of action herein arose was adopted as a test suit for the purpose of determination of the issue of liability for the accident in all the related claims including the suit instituted by the respondent herein. The respondent also testified in the stated test suit in which the court found the appellant 100 % liable for the claims arising from the cause of action. The evidence as recorded in the test suit is that on the material date at about 7.30 pm the matatu was descending when the lorry suddenly appeared from a feeder road and joined the main road. The lorry then allegedly stopped on the matatu’s lane. According to the Matatu’s conductor (PW 2) their driver attempted to avoid a collision with another oncoming vehicle by swerving to the left but knocked the lorry in the process. The respondent herself had only heard



a bang before she lost consciousness and later finding herself in hospital. A police officer who visited the scene of the accident ( PW 1 ) tendered the police abstract reports of the accident. The lorry driver is said to have fled the scene of the accident and was still at large at the time of the officer's testimony. Because of the missing lorry driver police investigations were not concluded but PW2 said the lorry was to blame for the mishap although this conclusion is not shown on the abstract reports .

8. The appellant called one of its drivers ( Simon Imbenzi Mulovi ). His evidence is that on the material date he was driving the appellant's motor vehicle registration number KCB 157J while the lorry subject of this case was behind him. Both vehicles were about 50 metres apart and joined the main road from a feeder road after ensuring it was safe to. The subject lorry's trailer was, however, slow because it was heavily loaded and was joining the road to go uphill according to the appellant's witness. The witness further stated that he then saw a matatu speeding towards their direction from the opposite lane and colliding with the lorry. He attributed the collision to speeding by the matatu in the circumstances.
9. The learned trial magistrate did not believe the appellant's evidence for reasons inter alia that the defence witness was not the accident lorry's driver and that no reason was given for the concerned driver's failure to testify. The trial court was of the view that the lorry driver was in a better position to explain the events leading to the fateful collision and perhaps rebut the opposite evidence before the trial court.
10. In the circumstances, I find common ground with the trial court and uphold its judgement on liability at 100 % against the appellant seeing that the respondent was only a passenger in the matatu . Ground 1 ) of the appeal thus fails.
11. Regarding Ground 2) on the quantum of general damages assessed in the lower court, it is not disputed that the respondent suffered the injuries as noted above . The trial court assessed general damages for pain, suffering and loss of amenities in the sum of Ksh. 1,000,000 in favour of the respondent. The appellant didn't file submissions and the learned trial magistrate was of the view that judicial decisions relied upon in the respondent's submissions were not comparable to the case before her. I have perused the decisions in *Duncan Kimathi Karagania v. Ngugi David & 3 Others* (2016) eKLR ; *Hussein Ali Shariff alias Hussein Ali v. ALL ( Minor suing through FTL )* (2018)eKLR and *Linus Shisaka Andakalu V. George Kang'ethe Mbugua & Another* (2019) eKLR the respondent relied upon in the lower court. Indeed the decisions are not quite comparable to the instant matter as they refer to more severe injuries involving multiple fractures unlike this case in which the respondent suffered a single fracture and some soft tissue injuries.
12. I have sampled the following decisions that I think are relevant. In *Nguku Joseph & Another v. Gerald Kibiu Maina* (2020) e KLR the claimant sustained a fracture of the right humerus and a host of soft tissue injuries. Khs 500,000 general damages were assessed.
13. For a pelvic fracture and soft tissue injuries to the right thigh and chest, Ksh. 500,000 general damages were also assessed in the case of *Peter Gakere Ndiangui v. Sarah Wangari Maina* (2021) eKLR.
14. In yet another case of a pelvic fracture and soft tissue injuries, the claimant in *Joseph Njeru Luke & 3 others v. Stellah Muki Kioko* (2020) was awarded Ksh. 750,000 in general damages for pain and suffering.
15. The above decisions are more comparable to the instant case. I must , however, take note that the respondent herein suffered a significant degree of permanent disability assessed at 25 %.
16. I will disturb the trial court's award of Ksh.1,000, 000 general damages for pain an suffering and substitute it with a sum of Ksh.700,000 having considered all the relevant factors including the incidence of inflation. Ground 2) of the appeal thus succeeds.



17. The appeal therefore only succeeds to the extent that the trial court's judgement on the quantum of general damages in the said sum of Ksh.1,000,000 is substituted with a sum of Ksh.700,000.
18. The parties will bear their own costs of the appeal while the costs in the court below will remain as directed in the trial court's judgement.

**JUDGEMENT ACCORDINGLY.**

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**J. M. NANG'EA**

**JUDGE**

Judgement delivered virtually this 11<sup>th</sup> day of July 2024 in the presence of :

The appellant's Advocate,.....

The respondent's advocate,.....

The Court Assistant,.....

