



**West Kenya Sugar Co Ltd v Murunga (Civil Appeal E038 of 2023)
[2024] KEHC 8299 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E038 OF 2023
REA OUGO, J
JULY 3, 2024**

BETWEEN

WEST KENYA SUGAR CO LTD APPELLANT

AND

HARRISON MUYEKHO MURUNGA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Gladys Adhiambo
(SPM) delivered on 11/4/2023 in Kimilili PMCC No 194 of 2019)*

JUDGMENT

1. The respondent was the plaintiff at the subordinate court. He sued the appellant, the registered owner of motor vehicle registration number KTCB 852T. It was alleged that on 14/8/2018 the respondent was a pillion passenger on motorcycle registration number KMEB 834Y. The appellant's motor vehicle and the motorcycle were along the Kamkuywa- Ndivisi road. In the Nakalia area, the appellant's driver negligently controlled the vehicle causing it to lose control and knocking the motorcycle. The respondent sustained a deep cut wound on the forehead, fractured 3 ribs, and fractured the left neck femur and he sued for damages.
2. The appellant on its part denied the occurrence of the accident. It was further averred that if any accident occurred at all, the same was substantially contributed to by the respondent.
3. Upon considering the evidence before the subordinate court, the trial magistrate found the appellant 95% liable for the accident. She awarded the respondent general damages of Kshs 2,000,000/- and special damages of Kshs 55,000/-.
4. The appellant dissatisfied with the findings of the lower court has filed the instant appeal on the following grounds:



1. That the learned trial magistrate erred in law and fact in apportioning liability at 95%:5% against the appellants in view of the evidence adduced and/or on record.
 2. That the learned trial magistrate erred in law and fact in adopting the wrong principles in the assessment of the damages awardable and/or payable to the respondent.
 3. That the learned trial magistrate erred in law and fact in failing to take into account relevant authorities with comparable injuries like the ones the respondent sustained thereby arriving at an excessive award for general damages.
 4. That the learned trial magistrate erred in law and fact in taking into account consideration irrelevant factors in making a determination as to the damages payable thereby awarding manifestly excessive award in damages.
 5. That the learned trial magistrate erred in law and fact in failing to analyse the facts and make a finding on the facts in making a determination on the issues of liability thereby awarding manifestly excessive award in damages.
 6. That the learned trial magistrate erred in law and fact by failing to consider the appellant's submissions on both liability and quantum thereby arriving at an erroneous decision.
5. The appellant seeks that the court set aside the lower court judgment and that the general damages be re-assessed.
 6. The appellant submits that its driver testified that when he saw the two motorcycles, he applied emergency brakes which swayed the vehicle to the left side of the road then the overtaking motorcycle knocked the front guard of the tractor. The appellant submits there were two versions of the occurrence of the accident. The testimony of the appellant's driver is that the motorcycle rider contributed immensely to the occurrence of the accident. The respondent did not have any eye witness to substantiate his claims. The onus was on the respondent to prove any alleged negligence on the part of the appellant's driver that led to the accident. The appellant further submitted that the testimony of the police officer didn't help the court in determining liability as he was not the investigating officer and did not visit the accident scene. He also pointed out that the traffic proceedings where the appellant driver was convicted of the charge of careless driving were not availed. In *Alex Njoroge and another v Florence Nduku Mutua* [2021] the court held:

“It must always be remembered that the decision of whom to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable.”

7. It is the appellant's submission that the learned magistrate erred in law and in fact in holding the appellant 95% liable and the respondent 5% liable based on the fact that he was not wearing a helmet and that the appellant driver was charged with two counts of careless driving contrary to section 49(1) of the [Traffic Act](#) Cap 403 laws of Kenya in Traffic Case No.796 of 2018.
8. On the award of damages, the appellant submitted that the Kshs 2,000,000 awarded as general damages for the pain was excessive. The authorities cited by the trial magistrate, *F.G v John Mwangi Ndunge and another* [2019] eKLR and *Christine Mwigune Akonya v Samuel Kairu Chege* [2017] eKLR were of injuries that were not comparable to the ones the respondent. The appellant submits that an award of Ksh300,000 – Kshs 500,000 would be reasonable compensation to the respondent and cited the case of *Makueni HCCA 132 of 2017 Blue Horizon Travel Co. Ltd v Kenneth Njoroge* [2020] eKLR.



9. The respondent opposed the appeal. It is submitted that the learned magistrate was correct in holding the appellant 95% liable and urged the court to find no merit in the appeal. Pw3 testified that the investigating officer found that the appellant's agent was to blame. The driver was charged and convicted. On damages, they submit that the trial magistrate relied on two authorities where the plaintiffs therein sustained similar injuries. The trial magistrate was therefore correct in her finding on the award of damages.

Analysis And Determination

10. This being the first appeal, the court must reconsider and reevaluate the evidence and draw its conclusion. However, the Court must make due allowance for the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another v Associated Motor Boat Company Ltd.& Others* [1968] EA 123:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 made 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955], 22 E.A.C.A. 270).

11. Christine Muyendo (Pw1) testified that he is a clinical officer working at Kimilili Sub-County Hospital. He testified that the respondent came to the clinic on 14/8/2018 with a history of headache, chest pain, and bleeding from the lower limb following an accident. Upon examination, he noted that the respondent had a cut wound on the forehead, and chest injuries and they sent him to have x-rays done. A surgery i.e. open reduction and internal fixation of the femur was done and another surgery was done at Lugulu Hospital.
12. Harrison Muyekho Murunga (Pw2) adopted his witness statement as his evidence in chief. He testified that on the material day, he was a pillion passenger on the motorcycle and they were on the left side of the road heading to Kamkuywa. The appellant's tractor was coming from the opposite direction. Pw2 testified that it was being driven at high speed and that it lost control thereby moving to their side of the road and it knocked the motorcycle. Pw2 blamed the driver of the tractor for causing the accident. No 75112 PC Edwin Kemboi (Pw3) testified that indeed an accident occurred and he produced the police abstract. On cross-examination, he testified that he did not visit the scene.
13. According to the witness statement of Tom Avomba (Dw1), he testified that he was in the opposite direction with 2 motorcycles. One motorbike was overtaking the other and Dw1 applied emergency brakes that swayed the vehicle to the left side of the road. The overtaking motorbike hit the front guard on one side.
14. The only witnesses to the accident were Pw2 and Dw1. Their testimony is that the vehicle swayed from its side of the road to the other side hitting the motorcycle. It is not in dispute that the respondent, in this case, was a pillion passenger and was not in control of the overtaking motorcycle and therefore



could not have contributed to the accident. The court in *Janet Kathambi v Charity Kanja Njiru* [2021] eKLR observed that:

“ 17. It is not in dispute that the deceased was a pillion passenger. Authorities have held time and again that there is nothing a pillion passenger could do to prevent an accident from carrying since he does not have control over the motorcycle. This Court agrees as much. This Court pronounce itself on this issue in the case of *Civil Appeal No. 136 of 2019 Kubai Kithinji Kaiga (Suing as the legal representative of the estate of John Kaiga (Deceased) v Kenya Wildlife Service.*”

15. Therefore, the assessment of liability at 95:5 could not be an error as there is nothing Pw2 could have done to prevent the accident since he did not have control over the motorcycle.

16. I now turn to consider the award of damages. I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“ An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

17. The appellant submits that an award of Ksh300,000 – Kshs 500,000 would be reasonable compensation to the respondent and cited the case of *Makueni HCCA 132 of 2017 Blue Horizon Travel Co. Ltd v Kenneth Njoroge* [2020] eKLR. The respondent supports the trial magistrate award. The trial magistrate relied on the case of *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR where the plaintiff sustained a fracture of the right femur and fracture of ribs 3-6. The court made an award of Kshs 4,000,000/- on account that she will suffer more pain as she undergoes future surgeries which were recommended by her doctors. In this case, there was no evidence to show that the respondent would require future surgeries.

18. The medical report by Dr. Joseph C. Sokobe was that the respondent who was 60 years sustained a deep cut wound on the head, fractured 3 ribs, and fractured the left neck of the femur. The report notes that he lost his hip joint and permanent disability was assessed at 20%. The second report by Dr. Walter Adero confirms that the respondent did indeed sustain the said injuries. The report further notes that the respondent underwent partial hip replacement of his fractured hip and is unable to ambulate without walking aids and walks with a noticeable short-leg gait. He assessed liability at 10%.

19. In this case, the injuries sustained by the respondent were serious necessitating a partial hip replacement. The injuries cannot be compared to simple fractures of the femur where courts award between Kshs 600,000/- to Kshs 700,000/-. The court in *Kibara & another v Mutuku (Civil Appeal 27 of 2018)* [2022] KEHC 15626 (KLR) (17 November 2022) (Judgment) affirmed the trial court’s award of Kshs 700,000 as general damages for a fractured femur and soft tissue injuries. In *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR, the court awarded Kshs 600,000/- to a plaintiff who fractured his femur and sustained soft tissue injuries.

20. The court in *Achacha v Litunya (Civil Appeal E044 of 2021)* [2022] KEHC 3332 (KLR) (30 June 2022) (Judgment) made an award of Kshs 1,200,000/- where the plaintiff sustained a fracture of the right humerus, fracture of the right femur, fracture of the left femur and disability assessed at 10%.

21. In this case, the respondent’s disability was assessed at 10-20% and it was noted that he uses walking aids and walks with a noticeable short-leg gait. The respondent also fractured 3 ribs and sustained soft



tissue injuries. Having considered, the awards by courts on comparable injuries, I find that the award of Kshs 2,000,000/- was excessive.

22. In conclusion, I find that the appeal is merited and I therefore allow it. I set aside the judgment of the trial court and enter judgment for the Respondent as follows:

1. Liability remains at 95:5 in favour of the respondent against the appellant
2. General Damages – Kshs 1,000,000/-
Less 5% contribution Kshs 50,000/-
950,000/-
3. Special Damages – Kshs.55,000/-
Total – Kshs 1,005,000/-

23. The appellant is awarded half the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF JULY 2024

R.E. OUGO

JUDGE

In the presence of:

Miss Nyabuto - For the Appellant

Mr. Okaka h/b for Mr. Mwebi - For the Respondent

Wilkister/ Diana -C/A

