



**Mwanzia v Mulinge (Civil Appeal E067 of 2023)
[2024] KEHC 11059 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E067 OF 2023
GMA DULU, J
SEPTEMBER 23, 2024**

BETWEEN

BENJAMIN MULINGE MWANZIA APPELLANT

AND

WINFRED NDUMI MULINGE RESPONDENT

*(From the decision in Civil Case No. E064 of 2023 delivered by Hon.
C. K. Kithinji (PM) on 22nd November 2023 at Voi Law Courts)*

JUDGMENT

1. In a judgment delivered on 22nd November 2023, the learned trial Magistrate found in favour of the plaintiff, now respondent, on 100% liability and concluded as follows:-
 19. I thus entered judgment for the plaintiff against the defendant as follows:
Liability 100%
General damages Kshs. 2,200,000/=
Future Medical Expenses Kshs. 200,000/=
Special damages Kshs. 585,200/=
Total judgment sum Kshs. 2,985,200/=
The sums awarded will attract interest at court rates from the date of this judgment.
 21. Costs follow the event. The plaintiff is the successful party. He will have costs of the suit.”
2. Dissatisfied with the above decision, the appellant who was the defendant has come to this court on appeal through counsel Murimi, Mbago & Muchela Advocates on the following grounds:-



1. The learned trial Magistrate erred in law and fact in finding the appellant wholly liable for the accident.
 2. The learned Magistrate erred in law and fact and misdirected herself in finding the appellant 100% liable notwithstanding the evidence on record to the contrary in a claim of negligence.
 3. The learned trial Magistrate erred in law and in fact in failing to take into account relevant factors evaluating the evidence on record on quantum of liability.
 4. The learned trial Magistrate erred in law and in fact in totally disregarding the appellant's submissions and relying entirely on the respondent's submissions.
 5. The learned trial Magistrate misdirected himself (should be herself) in law by assessing damages that were manifestly excessive and incomparable to the current judicial awards for analogous injuries.
 6. The learned trial Magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Murimi Mbago & Muchela Advocates for the appellant, as well as the submissions filed by M. M. Uvyu & Company Advocates for the respondent. I have to acknowledge that both sides relied upon decided court cases.
 4. This is an appeal against both liability and quantum of damages.
 5. In determining this appeal, I have to be guided by the legal principle restated repeatedly and consistently by courts, as highlighted in the case of *Selle =Versus= Associated Motor Boat Company Ltd (1968) EA 168* wherein the East African Court of Appeal stated as follows:-

“An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression or demeanour of a witnesses is inconsistent with the evidence generally.....Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions.”
 6. With regard to assessment of the quantum of damages, I am bound to apply the legal principle stated by the Kenya Court of Appeal in *Catholic Diocese of Kisumu =Versus= Sophia Achieng Tete (2004) eKLR 55* wherein the Court of Appeal stated that assessment of general damages is at the discretion of a trial court and that an appellate court will only interfere with that discretion if satisfied that the trial court applied the wrong principles as by taking into account an irrelevant factor or leaving out of account a relevant factor or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate of the award.
 7. I also have to bear in mind that the legal burden was on the plaintiff (now respondent) to prove the allegations against the appellant. This legal burden is codified under Section 107, 108 and 109 of the [Evidence Act](#) (Cap.80). This being a civil case, the standard of proof was on the balance of probabilities.
 8. In proving their case, the respondent called two (2) witnesses PW1 PC Nicholas Kosgei and PW2 Winfred Ndumi Mulinge. On their part, the appellant did not call any witness, but a doctor's report was admitted in evidence by consent.



9. The evidence on liability or how the traffic accident occurred was only that of the respondent, who was plaintiff, Winfred Ndumi Mulinge (PW2) and a police officer PC Nicholus Kosgei (PW1) of Mackinon Traffic Base.
10. It was the evidence of PC Nicholus Kosgei, that at 0550hours on 17th July 2021 they received a report of a traffic accident along Nairobi – Mombasa highway involving motor vehicle KCP 530D Toyota Forte driven by Titus Mulwa and another motor vehicle KBD 070F/ZE 2937 Mercedes Benz Lorry, both of them heading in same direction.
11. They went to the scene and found that Mercedes Benz lorry KBD 070F/ZE 2927 was stalled on the road and was stationery, and that the Nissan KCP 530D rammed into it from the rear. He testified that Fredrick Mutua died on the spot, while Leah Muthoni and Wilfred Ndumi sustained serious injuries. They recommended that the driver of the Toyota KCP 530D to be charged with causing death by dangerous driving, as the driver of the Mercedes Benz lorry had put precautions to warn other drivers approaching.
12. On her part, Winfred Ndumi Mulinge (PW2) testified that she was a passenger in the Toyota vehicle KCP 530D and that the driver of that vehicle drove at high speed causing the accident. She insisted that the driver of the motor vehicle in which she was a passenger was to blame for the accident.
13. In my view, with the evidence of PW2 Winfred Ndumi Mulinge and the police evidence of PW1 PC Nicholus Kosgei, the trial Magistrate cannot be faulted for the finding of 100% liability in negligence for the accident attributed to the appellant; as Winfred (PW2) was a passenger and there is no evidence to show or even suggest that she was to blame in any way for the accident. There is also no evidence to suggest that anyone else was to blame for the accident.
14. Thus like the trial Magistrate, I find that the respondent proved liability against the appellant on the balance of probabilities, and it was 100% liability.
15. With regard to quantum of damages, I note that the appellant’s counsel has submitted for an award of Kshs. 700,000/= for general damages in the place of the Kshs. 2,200,000/= awarded by the trial court. Counsel relied on decided court cases, including the case of Joseph Mwangi Thuita =Versus= Joseph Mwole (2018) eKLR where Kshs. 700,000/= general damages was awarded to a plaintiff who had suffered fracture of right femur, compound fracture of tibula and fibula, and shortening of right leg.
16. In our present case, the respondent suffered traumatic scar on right side of face; multiple scars over the forehead, temperal area; and fractures of left arm and fingers; right hip, which necessitated several surgical operations. She sustained 20% disability.
17. Having stated as above on injuries suffered, I find that the award of Kshs. 2,200,000/= for general damages was excessive, though Kshs. 700,000/= is too low. Even taking into account the seriousness of the injuries suffered, and loss of value of the Kenya Shilling in my view an award of Kshs. 1,800,000/= general damages for the injuries suffered and 20% permanent disability sustained, would suffice compensation for pain suffering and loss of amenities. I will thus reduce the award of general damages to Kshs. 1,800,000/=.
18. As for the award for future medical expenses, having re-evaluated the medical evidence on record, I find that the learned Magistrate award of Kshs. 200,000/= cannot be faulted. I will uphold the award.
19. With regard to the special damages awarded, in my view, the learned trial Magistrate awarded what was pleaded and proved, that is Kshs. 585,200/=. I will uphold the award.



20. I thus allow the appeal in part with respect only to the general damages awarded.
21. Consequently, the final orders of this court are that I vary the award for general damages awarded, and enter judgment for the respondent against the appellant as follows:-
- Liability 100%
- General damages Kshs. 1,800,000/=
- Future Medical Expenses Kshs. 200,000/=
- Special damages Kshs. 585,200/=
- Total judgment sum Kshs. 2,585,200/=
- Plus interest at court rates till payment in full.
22. The parties will each bear their respective costs of this appeal. The appellant will pay the respondent's costs of the case in the trial court.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Ms. Atieno for the appellant

Mr. Uvyu for the respondent

