



REPUBLIC OF KENYA



**Mwangi v Peter (Civil Appeal E040 of 2023)  
[2024] KEHC 10704 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E040 OF 2023  
FROO OLEL, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**BENARD GACHANJA MWANGI ..... APPELLANT**

**AND**

**EUNICE PETER ..... RESPONDENT**

*(Being an appeal from the judgment of Hon F. Nekesa (SRM) delivered on 17th May 2023 in the Kitui Chief Magistrate Court Civil suit No. 45 of 2019 Being an appeal from the judgment of Hon F. Nekesa (SRM) delivered on 17th May 2023 in the Kitui Chief Magistrate Court Civil suit No. 45 of 2019)*

**JUDGMENT**

**A. Introduction**

1. This appeal challenge's the judgment/decree of Honourable E. O Nekesa, Senior Resident Magistrate delivered on 17<sup>th</sup> May 2023 in Kitui Chief Magistrate Court Case no. 45 of 2019, where she found the appellant 100% liable for the accident that occurred on 2<sup>nd</sup> June 2018, and proceeded to awarded the respondent a total sum of Ksh.185,550/= as General and Special Damages.
2. The Respondent had filed her claim as against the appellant claiming damages in tort. In the plaint and her witness statement, the respondent averred that on the 2<sup>nd</sup> May 2018, she was a lawful passenger in appellants motor vehicle registration Number KCH 067S-Toyota Hiace (hereinafter referred to as the suit motor vehicle) and was travelling along Kitui- Kabati road, when the Appellant's authorized driver negligently and carelessly drove the said suit motor vehicle as a result allowed it to violently collide with another motor vehicle registration Number KBP 100H ( herein after referred to as the second suit motor vehicle) and as a result caused her to suffer severe injuries, loss and damage.
3. The appellant on his part did file a statement of defense where he denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. The appellant further denied all the



particulars of negligence, carelessness and recklessness attributed to him and/or his servant, employee or agents and put the respondent to strict proof thereof. In the alternative he blamed the respondent for being negligent and contributing to the said accident and further pleaded particulars of her negligence.

## B. Evidence

4. PW1 Eunice Peter testified and adopted her witness statement as part of her evidence in chief. she recalled that on 2<sup>nd</sup> June 2018, she was travelling aboard the suit motor vehicle which was being driven along Kitui – Kabati road by the appellant’s driver. The said suit motor vehicle was driven in a careless, reckless and negligent manner by the said driver, that he allowed the same to violently collide with the second suit motor vehicle thereby causing her to suffer sever bodily injury. After the said accident, she was rushed to Kitui County Hospital where she was treated and discharged in fair condition. Later she reported the incident to the police and recorded her statement and prayed to be compensated for the injuries sustained.
5. The respondent produced all her claim supporting documents into evidence as exhibits and further stated that as a result of this accident, she had suffered injuries including; Mild headache, Neck pains, Mild chest pains, lower back pains, left knee joint deep cut wound with obvious hematoma noted, cut wound on the right knee with bruises around it. In cross examination PW1 confirmed that indeed she was a passenger aboard the first suit motor vehicle, which had collided with the second suit motor vehicle, which was a probox. She had sustained the injuries aforementioned and was rushed to Kitui County Hospital, where she was treated and discharged on the same day. Her current complaints included having pain on the neck and back and still took pain killers to manage the pain.
6. DW1 PC Mary Wangare produced the police abstract relating to the accident but stated that she was not the investigating officer. According to the O.B report the accident was reported to have occurred on 2<sup>nd</sup> June 2018 at about 19.30hrs at Soweto area of Kitui- Kabati road. The 1st suit motor vehicle had been hit by the 2<sup>nd</sup> suit motor vehicle, whose driver had failed to keep to his lane and as a result of the said accident, the driver of the 2<sup>nd</sup> suit motor vehicle had died on the spot. Upon cross examination DW1 confirmed that she did not have the accident scene sketch plan and had no other document to prove what she had stated in her evidence. She had just read what was reported in the O.B.
7. Upon considering the evidence presented, the submissions of the parties filed, the trial court did enter judgment in favour of the respondent as against the appellant’s in the following terms;
  - i. Liability 100%
  - ii. General Damages Ksh.180,000/=
  - iii. Special damages Ksh. 5,550/=Total Ksh.180,550/=
- Plus, cost and interests
8. The appellant being wholly dissatisfied by the said judgement did file his memorandum of appeal dated 15<sup>th</sup> July, 2023 and raised the following grounds of appeal;
  - a. That the learned magistrate erred in fact and in law in finding the Defendant/Appellant 100% liable for the accident.
  - b. That the learned trial Magistrate erred in law and fact by failing to exonerate the Appellant from any wrong doing in view of the actions of the respondent.



- c. That the learned Magistrate erred in law and in fact in failing to consider the defendants submissions on the issue of liability.
  - d. That the trial Magistrate erred in law and in fact in failing to consider the evidence which was tendered by the defence on liability during hearing of the suit and submissions filed.
  - e. That the trial Magistrate erred in law and in fact in finding that the respondent was entitled to General Damages of Kshs.180,000/=.
  - f. That the learned trial Magistrate grossly misdirected herself in treating the evidence presented before her on liability and consequently coming to a wrong conclusion on the same.
  - g. That the learned trial Magistrate erred in awarding a sum in respect of damages which was inordinately high and excessive in the circumstances occasioning miscarriage of justice; and
  - h. That the learned trial Magistrate failed to adequately evaluate the evidence provided on liability and thereby arrived at a decision unsustainable in law.
9. The Appellant urged the court to find that this appeal has merit, it be allowed and the award of the trial Magistrate be set-aside and/or be varied and in the alternative the quantum assessment be made afresh.

### **C. Analysis and Determination**

10. I have considered the entire record of Appeal, the pleadings therein, evidence presented and submissions filed by the parties in this appeal, and find that this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
11. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.
12. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316.

#### **(i) Liability**

13. The appellant in his memorandum of appeal has challenged both quantum and liability. As regards liability, it is trite law that he who alleges must prove. Indeed as stated by the Appellant, section 107 and 109 of the *Evidence Act* provide that;
107. Burden of proof
- 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

14. The Halsbury's laws of England, 4<sup>th</sup> Edition, Volume 17 at para 13 and 14 states that;

“The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.

{16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitution evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence.”

15. The respondent did on a balance of probability prove her case through the evidence tendered together with her claim supporting document all of which were produced as exhibits. The evidential burden of proof therefore shifted on the Appellant to disapprove this evidence. The appellants' only witness DW1, testified that it was the driver of the 2<sup>nd</sup> suit motor vehicle, who was on the wrong and cause this accident by driving off his lane and as a result crushed into the 1<sup>st</sup> suit motor vehicle, where the respondent was a passenger. As a result of the said accident, the said driver of the 2<sup>nd</sup> suit motor vehicle had died on the spot from injuries sustained.
16. The appellant did not enjoin the estate of the driver of the 2<sup>nd</sup> suit motor vehicle as a 3<sup>rd</sup> party in this suit to enable them shift liability to them. Secondly, DW1 confirmed that she was not the investigating officer, did not visit the accident scene nor did she have the accident sketch map of the accident scene to back her claim. Her evidence therefore remained hearsay and was not proved. The appellant should have made an effort to call his driver or an eye witness to back the evidence of DW1 and therefore, failed to shift the evidential burden which had been placed on him. The trial magistrate therefore cannot be faulted for finding him 100% liable for the accident as she did.



## (ii) Quantum

17. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004] eKLR 55 set out circumstances under which an appellate court can interfere with an award of damages in the following terms: -

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case in the first instance. The appellate court can justifiably interfere with quantum of damage’s awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate”.

18. Similarly, in *Jane Chelagat Bor vs Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

19. The appellant challenged the General damage award of Kshs.180,000/= and stated that the same was inordinately high and was not commensurate with the injuries suffered. The Appellant stated that the respondent had suffered soft tissue injuries and it was necessary for courts to award damages that were within limits set out by previously decided cases and also within the limits that the Kenyan economy could afford. The award given was excessively high and urged the court to reduce the same to a more reasonable figure. Reliance was placed on *George Mugo & Another Vrs AKM (Minor suing through next friend and mother of A.N.K (2018) , George Kinyanjui T/A Climax coaches & Another Vrs Hussein Mahad Kuyala (2016) eKLR, Ndungu Dennis Vrs Ann Wangari Ndirangu & Another (2018) eKLR and PF (suing as next friend and father of SK (Minor) Vrs Victor Kimadi & Another (2018) eKLR, where average award was given between 80,000/= to 100,000/= for similar injuries suffered the appellant urged this court to reduce the General damages awarded to match similar awards.*
20. The respondent on the other hand urged this court to uphold the award as the respondent did suffer multiple soft tissue injuries which were proved. The award of Kshs.180,000/= was fair considering that similar injury claims had attracted far much higher awards. Reliance was placed on *Joseph Wambura vrs Joseph Mwangi obai (2018) civil Appeal No 9 of 2017 & Joseph Kimani Gathaga & Another Vrs Dickson Ndungu Njoroge (2019) eKLR, Civil Appeal No 103 of 2017*. Where awards given for similar were in the range between Kshs.240,000/= to Kshs.380,000/=
21. Considering the circumstances of this case and the evidence adduced, it has not been proved by the appellant that the trial magistrate acted on wrong principle of law, or has misapprehended the facts herein, and/or had made a wholly erroneous estimate of the damages suffered The award of Kshs.180,000/= awarded for the injuries suffered is not excessive when considered with other similar awards.



**D. Disposition**

22. This appeal therefore lacks merit and the same is dismissed with costs to the respondent.
23. The said costs are assessed at Kshs.150,000/= all inclusive.
24. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 16<sup>th</sup> day of September, 2024.**

**In the presence of:-**

No appearance for Appellant

No appearance for Respondent

Susan/Sam Court Assistant

