**Mugacha v Kyenza (Civil Appeal E085 of 2023)**
**[2024] KEHC 10651 (KLR) (Civ) (13 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10651 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL E085 OF 2023**

**RC RUTTO, J**

**SEPTEMBER 13, 2024**

**BETWEEN**

**SAMUEL THARA MUGACHA ..... APPELLANT**

**AND**

**JACKLINE WAENI KYENZA ..... RESPONDENT**

***(Being an appeal from the judgment and order of the Senior Resident Magistrate Court, Milimani Commercial Court No. E13378 of 2021delivered by Hon. S.N Muchungi (SRM) on 30TH January 2023 in)***

## JUDGMENT

1. This is an Appeal seeking to set aside the decision of the trial court on liability and quantum. The Appellant seeks that the appeal be allowed and judgment on quantum of the lower court be set aside in its entirety, the costs of the appeal and of the court below, as well as such further or other orders the Honourable court may find fit to issue.

2. By a plaint dated 17/12/2021 in Nairobi Milimani Commercial No. E13378 of 2021, the Respondent sued the Appellant herein for general damages, special damages of Kshs 4, 950/=, costs of the suit, and interest for bodily injuries sustained out of a road accident that occurred on 22/6/2021 along ICD Peponi Road area.

3. The Respondent claimed that she was a pedestrian walking along Peponi road when Motor Vehicle Registration Number KCE 285M Toyota S. Wagon, which was driven by the Appellant lost control and hit her causing her to sustain serious injuries.

4. The Appellant in his response denied the particulars of negligence attributed to him and stated that if the accident occurred the same was wholly caused by the negligence of the Respondent.

5. During the hearing, the Respondent called three witnesses, while the Appellant did not call any witness.

6. After hearing and an indepth analysis of the evidence before court, the trial court found both parties equally liable for the said accident. The trial court proceeded to award the following: -

    i. General damages Kshs. 1, 300, 000/=

    Less 50% contribution Kshs 650, 000/=

    ii. Special damages Kshs 4, 950/=

    Total Kshs 654, 950/=

    Plus, costs and interest

**The Appeal**

7. The memorandum of appeal dated 5th June 2024 is based on seven (7) grounds of appeal as follows: -

    a. The learned trial magistrate erred in law and in fact in finding that the Appellant was 50% liable for the accident in view of the evidence on record.

    b. The Learned trial Magistrate erred in law and in fact in failing to apportion liability and disregarded the appellant's submissions while arriving at her judgment.

    c. The Leaned Trial Magistrate erred in law and in fact by making an award of general damages that was manifestly excessive in the circumstances thereby occasioning miscarriage of justice.

    d. The Learned Magistrate erred in law and in fact and ended up misdirecting herself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards.

    e. That the Learned Magistrate's award on damages was so high as to be entirely erroneous.

    f. The Learned Magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the Respondent and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence presented before court.

    g. That the whole judgment on liability and quantum was against the weight of evidence before the court.

8. The Appeal was canvassed by way of written submissions. The Appellant's filed their submissions dated 5/6/2024 while the Respondent's submissions were dated 7/6/2024.

**Appellant's submissions**

9. The Appellant sets out two issues for determination namely; whether the Learned Magistrate erred in law and in fact in finding that the Appellant was 50% liable for the accident in view of the evidence on record and whether the Learned Magistrate erred in law and fact in making an award of general damages that was manifestly excessive in the circumstances.

10. Notably, while the appellant submits on liability and quantum the prayers sought in the Memorandum of Appeal only address the quantum awarded by the lower court.

11. On the first issue, the Appellant submitted that the Respondent failed to prove her case against the appellant as pleaded in the plaint. That the allegations mentioned in the plaint remained unproved since no evidence was adduced to prove the particulars of negligence. To support this argument reference was made to the case of D.T. Dobie & Co. Ltd v Wanyonyi Wafula Chebukati [2014] eKLR, cited with approval in the case of Miller v Minister of Pensions [1947] 2 ALL ER 372, which sets out the standard of proof in civil cases as on a balance of probabilities.

12. The Appellant submits that the evidence of PW1, PC Long'ole, contradicted what was recorded in the police abstract. The police abstract indicated that the Respondent was to blame for the accident, but PW1 testified that it was the Appellant who was at fault. He argues that the contents of the Police Abstract are normally derived from the occurrence book and in the absence of the Occurrence Book there is no way that the information contained in the abstract can be erroneous.

13. The Appellant submitted that the Respondent ought to have ascertained whether the road was safe before attempting to cross to the other side. He urges the court to take note of the evidence of PW2, the Respondent herein, who in her testimony confirmed she had not fully crossed the road when she was hit by the Appellant's motor vehicle. Further, that she had not sighted the motor vehicle before and that there was no zebra crossing or footbridge. Reference was made to the case of Embu Public Road Service Limited V Riimi (1968)EA 22 to show that the plaintiff in those circumstances does not have to show any specific negligence but merely that an accident of that nature should not have occurred.

14. As to, whether the Learned Magistrate made an award of general damages that was manifestly excessive in the circumstances of the case, the Appellant relied on the Court of Appeal case of Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR, which held that comparable injuries should attract comparable awards.

15. In proposing a sum of Kshs 700,000/= for the injuries sustained by the Respondent—namely, blunt injuries to the forehead and nasal bridge with tenderness and bruises, blunt injuries to the left wrist and elbow with tenderness and bruises, blunt injuries to the left knee and ankle with lacerations, fractured left distal fibula, fractured pelvis-pubic rami, dislocation of the left elbow, and blunt injuries to the pubic region—the Appellant relied on the cases of Godfrey Wamalwa Wamba & Another v Kyalo Wambua [2018] eKLR (where the court awarded general damages of Kshs 700,000/=) and Joseph Mwangi Thuita v Joyce Mwole [2018] eKLR (where the court increased an award from Kshs 100,000/= to Kshs 700,000/=)

**Respondent's submissions**

16. The Respondent summarily submitted specifically on the issue of liability and quantum as below.

17. On liability, the Respondent submits that the same should not be interfered with for the reason that they both owed each other a duty of care. Reference was made to the case of Isabella Wanjiru Karangu v Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142.

18. On quantum, the Respondent relied on the case of Southern Engineering Co. Ltd v Musungi Mutia [1985], where the court held that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate. She further submits that during the trial, the Respondent's injuries were corroborated by the doctor's testimony, who additionally stated that a person cannot fully recover from the nature of the injuries she sustained. Consequently, the Respondent argues that the court, in recognizing these factors, the award of Kshs 1,300,000/= for general damages, is justified and should not be disturbed.

19. The Respondent also made reference to the cases of Butt v Khan [1977] 1 KAR and Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia [1985] 1 KAR 727, where the Appellate judges laid out the principles to be observed by an Appellate Court when deciding whether to disturb the quantum of damages awarded by a trial court.

**Analysis and Determination**

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424).

21. After careful analysis of the record of appeal and the submissions of parties the following issues arise for determination:

    a. Whether the issue of liability was properly determined;

    b. Whether the Trial Magistrate misdirected itself in assessment of damages.

**a. Whether the issue of liability was properly determined**

22. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlines as;

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

23. The scope and extent of the fundamental legal principles on who is to blame for negligence are settled. In the cases of Nandwa v Kenya Kazi Ltd [1988] KLR 488 and Regina Wangechi v Eldoret Express Co. Ltd [2008] eKLR the Court held that:

> " In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of the trial there is proved a set of facts which raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides same answer adequate to displace that inference."

24. From the record, it is undisputed that on 22/06/2021 an accident occurred between the Respondent and the Appellant's Motor Vehicle Registration KCE 285M being driven by the Appellant.

25. While the Respondent called three witnesses to support its case, the Appellant closed its case without calling any witness but in his defence blamed the Respondent for the accident.

26. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR the court in setting out the legal burden of proof in civil cases stated;

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that

fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

27. Further in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 Kimaru J as he then was) stated that:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. In this instance, the only evidence placed before court on how the accident occurred is that of the Respondent who in her witness statement states that she was a lawful pedestrian along Peponi road when Motor Vehicle Number KCE 285 that was being driven at a high speed, recklessly and carelessly without proper look out lost control and knocked her down. On cross-examination she stated that she was almost through crossing the road, and had not reached the pedestrian path when she was hit. That when she started crossing, she had not seen the motor vehicle and the driver of the motor vehicle did not hoot. Further, that there were no other vehicles on the road. She also confirmed that there was no Zebra crossing but pedestrians used the area to cross. When referred to the Police Abstract, dated 7/10/21 she confirmed that it stated that it was her to blame for the accident.

29. PW1, the investigating officer, confirmed that the accident occurred but he did not visit the scene. He further testified that the area where the accident occurred is frequently used by pedestrians and that the Appellant should have seen her crossing. PW1 also stated that, the abstract contained an error. That despite it indicating that the Respondent was to blame, it is the driver of the vehicle who was actually at fault. However, other than the police abstract, PW1 did not produce any additional evidence to confirm his assertions.

30. The court is therefore required to weigh this evidence on a balance of probabilities to determine who was to blame for the accident. Notably the respondent urges the court not to interfere with the award of liability. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that:-

> It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

31. After analyzing the evidence of the parties, the trial court held that both parties were to blame for the accident. The trial court in its judgment observed;

> "I am in agreement with the Plaintiff and the police officer that the driver ought to have noticed the presence of the plaintiff on the road even though there was no zebra crossing at the scene especially since the accident occurred during the day. Had he been careful he could have managed to slow down and/or swerve to avoid hitting the plaintiff since there were no other vehicles on the road as stated by the plaintiff and/or could have managed to stop in time to avoid hitting the Plaintiff. The Plaintiff further blamed him for not hooting. Had he done so, the plaintiff could have been alerted and taken measures to prevent the accident

> for example by hastening to get off the road..... That said though this court cannot shut its eyes to the blameworthiness of the plaintiff even though the defendant failed to testify. She had a duty to cross the road only after ascertaining that it was safe to do so especially since the accident scene did not have a zebra crossing...Further, she together with the police officer failed to reconcile the contradicting information in the police abstract to the effect that she was blamed for causing the accident. The police officer merely said that it was an erroneous entry but failed to avail evidence proving that their investigations infact blamed the defendant. In light of the foregoing, I find it fair to apportion liability between the parties equally."

32. The Appellant, having not testified, called any witnesses, or produced evidence to disprove the Respondent's case, the court is left to apply logic based on the evidence of how the accident occurred. This court is also required to examine whether there exists an error in principle when the court apportioned liability.

33. In this instance I do concur with the finding of the trial court that indeed, the Appellant owed a duty of care to other road users and given that he did not provide any evidence, it remains unknown on the actions taken to avert the accident which include, whether he slowed down or adhered to the speed limit. This therefore makes it difficult for the court to ascertain whether he took any measures to avoid the accident. Be it as it may I also find that, the Respondent too ought to have exercised extra caution before crossing the road.

34. Thus, I am satisfied that both the Appellant and the Respondent contributed to the accident and were therefore rightly held equally liable by the learned trial magistrate. I am guided by the Court of Appeal decision in the case of Stephen Obure Onkanga v Njuca Consolidated Limited (2013) eKLR where the Court of Appeal when faced with similar situation held that;

> " Accordingly, in the instant appeal, as there was no concrete evidence to distinguish between the blameworthiness or otherwise of the Appellant or the Respondent, both should be held equally to blame."

35. To this end, I am satisfied that the learned trial magistrate correctly apportioned liability between the parties in the manner she did, and I see no need to interfere with her finding on liability. To this extent, the appeal fails.

**Whether the Trial Magistrate misdirected herself in assessment of damages.**

36. On general damages, the Appellant proposed the sum of Kshs 700,000/= and cited, among other cases, George Wamalwa Wamba & Another v Kyalo Wambua [2018] eKLR, where the appellant sustained a compound fracture of the right distal tibia/fibula, cut wounds on the scalp and chest, and a cut on the lower lip, and underwent surgery for repair of the fibula. An award of Kshs 700,000 was given in that case. The Respondent argued that since the injuries are not disputed, the award should be maintained as it is commensurate with the injuries sustained.

37. In her judgment, the learned trial magistrate awarded the Respondent a sum of Kshs 1,300,000/=, less 50% contribution, amounting to Kshs 650,000/=.

38. Upon re-examining the authorities, I note that the cases cited by the Appellant are all over five years old. I also observe that the learned trial magistrate did not cite any guiding authorities in arriving at her award, except to state that she was relying on the authorities provided by the parties.

39. The injuries pleaded and supported by the medical evidence on record are as follows:

a. Blunt injuries to the forehead and nasal bridge with tenderness and bruises

b. Blunt injuries to the left wrist/elbow with tenderness and bruises

c. Blunt injuries to the left knee/ankle with lacerations

d. Fractured left distal fibula

e. Fractured pelvis-pubic rami

f. Blunt injuries to the public region

g. Dislocation to the left elbow

40. In seeking comparable awards, I have examined other relevant decisions.

41. In Thomas Owiti v Wilson Kayeli Keiza [2020] eKLR the Respondent sustained tenderness in the scalp forehead and back, pelvis and right lower limb; scars on the scalp and forehead; double fractures of the right femur; double fractures of the right tibia; and treble fractures of the right fibula. The High Court awarded him general damages Kshs. 700,000/= in April 2020.

42. In Wilson Matu & another v Stanley Muriuki Wamugo [2021] eKLR where the respondent sustained a fracture of the right midshaft femur and fracture of the right proximal tibia and fibula boxes. The High Court awarded him general damages of Kshs 800,000/= in May 2021

43. In Daneva Heavy Trucks & another v Chrispine Otieno [2022] eKLR the Respondent sustained a fracture of the pelvis and fractures of the left fibia and tibula the High Court awarded him Ksh. 800,000 in January 2022.

44. Guided by the above cited recent decisions of similar injuries I find that the award by the trial Court of Ksh. 1,300,000 was excessive.

45. In view of the foregoing, taking into account the passage of time and rate of inflation I find that an award of Ksh. 850,000 would suffice as general damages.

46. Since the award of special damages has not been contested, I will not address it.

47. In the end the Appeal partially succeeds. I set aside the award of general damages of Ksh. 1,300,000 and substitute it with an award of Ksh. 850,000. The said amount shall be subject to the respondent's 50% liability which translates to Kshs 425,000/- in general damages. The award in special damages of Kshs 4,950/- is upheld. The total sum to the respondent shall be Kshs 429,950/-.

48. Each party to bear own cost of the Appeal.

Orders accordingly

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 13TH DAY SE*PTEMBER OF 2024***

For Appellant:

For Respondent:

Court Assistant: