



**Masai v Kimfay East Africa Limited & another (Civil Appeal E654 of 2023)
[2024] KEHC 10640 (KLR) (11 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E654 OF 2023
RC RUTTO, J
SEPTEMBER 11, 2024**

BETWEEN

GEOFFREY MANG'USHO MASAI APPELLANT

AND

KIMFAY EAST AFRICA LIMITED 1ST RESPONDENT

SAMUEL NDOLO 2ND RESPONDENT

*(Being an appeal from the judgment delivered by Hon. L. Njora (SPM) on
31ST January 2023 in Milimani Commercial Court No. E11893 of 2021)*

JUDGMENT

1. This is an Appeal seeking to set aside the decision of the trial Court in Nairobi Milimani Commercial No. E11893 of 2021 dismissing the plaintiff's case with costs to the defendant.
2. By a plaint dated 25/9/2021 the appellant sued the respondents herein for general damages, special damages amounting to Kshs 3,550/=, costs of the suit, and interest for bodily injuries sustained out of a road accident that occurred on 21/5/2021 along ICD Road.
3. The appellant, claimed that while riding on a motorcycle, he was struck by Motor Vehicle Registration Number KCG 497F, which was being recklessly and carelessly driven.
4. The respondents in their response denied the particulars of negligence attributed to them and stated that if the accident occurred the same was wholly caused and contributed by the rider of an unknown motor cycle which collided into Motor Vehicle Registration No KCG 497F.
5. During the hearing, the appellant called three witnesses, while the respondents called only one witness.
6. After hearing and analyzing the evidence before court, the trial court held that the Appellant had failed to prove that the 2nd Respondent was negligent in colliding with his motorcycle, which was either



unknown or nonexistent. Consequently, the trial magistrate dismissed the Appellant's case with costs to the Respondent.

The Appeal

7. The memorandum of appeal dated 17th July 2023 is based on eight (8) grounds of appeal as follows: -
 - a. That the learned trial Magistrate erred in law and in fact in finding that the Plaintiff had not proved his case on liability against the Defendant.
 - b. The Learned trial Magistrate erred in law and in fact by failing to appreciate that the police abstract filed by the Plaintiff and produced in court did not blame the Plaintiff for the accident.
 - c. The Leaned trial Magistrate erred in law and in fact by relying only on insufficient evidence thus dismissing the Plaintiff's suit.
 - d. The Learned Magistrate erred in law and in fact by failing to appreciate that the doctrine of *res ipsa loquitor* was applicable.
 - e. The Learned Magistrate erred in law and in fact by failing to assess any awardable general damages.
 - f. The Learned Magistrate erred in law and in fact by misdirecting herself by failing to consider all the submissions made before her by counsel for the Plaintiff thereby reaching an erroneous finding on liability.
 - g. In all circumstances of the case, the finding of the learned trial Magistrate on liability was characterized with misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion thus erroneously proceeding to dismiss the suit in Milimani- CMCCC No, E11893 of 2021.
 - h. The Learned trial Magistrate erred in law and in fact by not addressing the issue of quantum otherwise awardable to the Plaintiff.
8. Reasons whereof, the appellants prayed for the following reliefs: -
 - a. The appeal be allowed.
 - b. The judgment dated 31st January, 2023 in Milimani CMCC No. E11893 of 2021 and order dismissing the suit therein be set aside and/or varied as the court may deem fit.
 - c. The Honourable court be pleased to set aside the judgement dated 31st January 2023 in Milimani CMCC No. E11893 of 2021 in its entirety and substitute it with this Honourable court's judgment.
9. The Court directed that this Appeal be canvassed by way of written submissions. The Appellant's filed their submissions dated 9th April, 2024 in support of the Appeal. Notably, as at the time of writing this judgment the Respondents had not filed their submissions despite being notified of the Judgment date vide a notice dated 6th June, 2024 by the Deputy Registrar.

Appellant's submissions

10. The Appellant sets out two issues for determination namely; whether the appellant proved its case against the respondents on a balance of probability and whether the appellant was entitled to an award of damages.



11. On the first issue, the Appellant referred to section 107 of the *Evidence Act* and submitted that he was carefully riding his motor cycle along ICD Road when motor vehicle registration No. KCG 497 F was so recklessly driven hence knocking the Appellant's motor cycle from behind and occasioning him severe body injuries. Further that, PW3 produced the police abstract in support of the Appellant's case, which was unchallenged.
12. The Appellant argues that the Respondent did not witness the accident or see the appellant but just heard a bang. Further, the Respondent did not call any eyewitnesses to corroborate the circumstances of the accident as testified by him, thus the Respondent's testimony were mere allegations, while the Appellant's testimony remained uncontroverted.
13. It is the Appellant's submission that the trial magistrate erred in finding that he failed to prove his case as he did not produce proof of ownership of the motorcycle. In doing so, the trial court considered irrelevant issues and reached a wrong conclusion, as no party had disputed the fact of the accident between a motor vehicle and a motorcycle. He made reference to the case of Miller vs Minister of Pensions (1947) 2 All ER 372. He urged the court to find that the respondents were 100% liable for the accident.
14. On the issue of quantum, the Appellant submitted that he sustained injuries as per the medical report by Dr. Cyprianus Okere dated 26th July, 2021 which then follows that he is entitled to the award on quantum which the trial court did not assess.
15. The Appellant proposed a sum of Kshs 380, 000/=. Reliance was placed on the cases of Hauliers Limited v Emmanuel Soita Simiyu [2013] eKLR Civil Appeal 07 of 2010 (Appellant was awarded Kshs 200,000/=), *Joseph Kimani Gathaga & Another v Dickson Ndungu Njoroge [2019] eKLR, Civil Appeal 103 of 2017* (Plaintiff awarded 240, 000/=) and Civil Suit No. 320 of 1998 Catherine Wanjiku Kingori & Another v Gibson Thueiri Gichubi (Plaintiff was awarded Kshs 350, 000/=)

Analysis and Determination

16. 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*.
17. The issue for determination herein is whether the Appellant proved his case on a balance of probability hence deserving of the orders on damages.
18. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlined 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.”
19. This appeal simply concerns a dispute over who was to blame for the accident. The scope and extent of the fundamental legal principles on this subject 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 Courts on this issue 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.”

20. Taking into account the above principles, I will proceed to examine the evidence presented before the learned trial magistrate. From the record, it is undisputed that an accident occurred involving a motorcycle and Motor Vehicle Registration Number KCG 497F. The motor vehicle belonged to the 1st Respondent and was being driven by the 2nd Respondent. The Appellant was riding on the motorcycle.
21. During the trial, the Appellant blamed the 2nd Respondent for the accident that caused his injuries. He stated that his motorcycle was hit from behind by the 2nd Respondent who also took him to the hospital. PC Hassan Molid (PW3) produced the police abstract confirming the occurrence of the accident and stated that no one was to blame as the incident was still under investigation. Additionally, the police abstract mentioned the involvement of an unknown motorcycle.
22. On the other hand, the 2nd Respondent testified that he was driving on the left lane of the dual lanes and was suddenly hit from behind by a motor cycle. that the motorcycle had a rider and two lady passengers which was against the law and likely to have caused the Appellant to lose control.
23. After analyzing the evidence of the parties, the honourable magistrate found that the appellant was 100% to blame for the accident. The trial court in its judgment held that;

“It is my finding that the plaintiff in this case failed to prove that the 2nd defendant was in any way negligent in hitting his unknown motor cycle or better the non-existent motorcycle. His pleadings and evidence proves mischief by the plaintiff in failing to provide any proof whatsoever that he owned and/or riding an alleged motorcycle on that day that he was hit from behind by the 2nd defendant who was driving the stated motor vehicle. It is the plaintiff's own conduct that which tilted the balance of probability in the defendants' favour as he deliberately withheld information which this court would perceive would favour the defendants. I therefore dismiss the plaintiff's case with costs to the defendants.”
24. It is the above statement that formed the basis of the trial court's finding and apportioning liability upon the appellant. However, from the record, the claim before the Court was one of negligence whereby the appellant was seeking general damages compensation for injuries suffered out of an accident involving motor vehicle registration number KCG 497 F and an unknown motor cycle. Notably the issue of the identity and ownership of the motor cycle was not one in issue for determination.
25. Both parties in their testimonies admitted that indeed the alleged accident did occur. The 2nd respondent testified that there was an accident and he took the appellant to hospital. This was further corroborated by the Police abstract confirming that the accident did occur and was reported. It is therefore not in dispute that an accident occurred, and the identity of the victim and that of the driver of the motor vehicle are known. Thus, the issue of negligence is what remains to be determined.
26. From the evidence before court, it is the appellant's evidence against that of the 2nd respondent. Notably, none of them called a witness to corroborate their respective versions of how the accident occurred. The trial court in its judgment acknowledged that there was no dispute that the accident occurred on 21st May 2021 involving the 1st respondent motor vehicle KCG 497 E which was being driven by the 2nd respondent and unknown motorcycle which the appellant was riding.



27. Thus, it is my considered view that the trial Court erred in dismissing the appellant's case on the basis of failure to provide proof of ownership of the motorcycle instead of assessing who was at fault or negligent thus causing the accident.
28. Within this case there are two possible scenarios of how the accident occurred. Both the appellant and the 2nd respondent have their version of what transpired. The evidence of the investigating officer PW3 and the police abstract, which would have shed light on what transpired on that day, did not provide much details. In the case of *Salmin Mbarak Awadhi v Emma Nthoki Mutwota* (2017) eKLR the court apportioned liability equally when it was faced with two versions of how the accident occurred.
29. Also, in the case of *Stephen Obure Onkanga v Njuca Consolidated Limited* (2013) eKLR the Court of Appeal when faced with similar situation held that both the appellant and respondent be held equally liable.
30. Consequently, I find and hold that the appellant shall shoulder 50% liability while the respondents shall jointly and severally shoulder 50% liability.
31. On quantum, the medical doctor confirmed the injuries sustained by the appellant and produced a medical report indicating that he sustained soft tissue injuries with bruises on his hand, finger, and knee, which also had a deep cut. The appellant while making reference to several authorities submitted that an award of Kshs 380,000/- was sufficient.
32. I have observed that the trial court did not make any assessment on quantum hence the need to assess the same.
33. In *Lilian Anyango Otieno v Philip Mugoya Ogila* [2022] eKLR, the court awarded Kshs. 150,000/- as general damages for minor soft tissue injury, and a concussion for a few minutes coupled with a head injury.
34. In *Kitale Hauliers Limited V Emmanuel Soita Simiyu*[2013]eKLR a sum of Ksh. 200,000.00 was awarded for painful shoulders, bruises on right forearm and left upper arms, bruises on the knee and painful back.
35. Having analysed the above cases with comparable injuries, and drawing inference to the Court of Appeal decision in *Odinga Jacktone Ouma vs Moureen Achieng Odera* [2016] eKLR which stated that "comparable injuries should attract comparable awards", I award the appellant damages of Kshs 150,000/- in general damages."
36. On special damages the appellant is awarded Kshs. 3000 as proved with the receipt for payment of medical report of kshs. 3000/- dated 26th July 2021. The payment receipt for Kshs. 550/- payment for motor vehicle inquiry fee has not been provided. What is attached is an invoice dated 21st June 2021.
37. The upshot of the above is that this appeal succeeds as follows;
 - a. The liability is apportioned at 50% for the appellant and 50 % for the respondents which shall be borne jointly and severally.
 - b. The appellant is awarded general damages of Kshs. 150,000/- less 50% liability.
 - c. The appellant is awarded special damages of Kshs. 3,000/- less 50% liability.
 - d. Each party shall bear their own costs.
38. Orders accordingly



RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED, THIS 11TH DAY OF SEPTEMBER, 2024.

For Appellant:

For Respondent:

Court Assistant:

