



**Abdalla v Kombo & another (Civil Appeal E134 of 2022)  
[2024] KEHC 12642 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12642 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E134 OF 2022  
JK NG'ARNG'AR, J  
OCTOBER 23, 2024**

**BETWEEN**

**ALI SALIM ABDALLA ..... APPELLANT**

**AND**

**JUDITH EGGA KOMBO ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN CHIGUMBA JUMAA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment and decree of the Hon. J. B. Kalo (CM) delivered on 18th August 2022 in Mombasa Chief Magistrate's Court Civil Suit No. 1196 of 2005, Judith Egga Kombo v Ali Salim Abdalla & Stephen Chigumba Jumaa)*

**JUDGMENT**

1. The background of the appeal is that at all material times to the suit, the Appellant was the registered owner of motor vehicle registration number KAM 710B Kia mini bus while the 2<sup>nd</sup> Respondent was his driver. That on or about the 9<sup>th</sup> day of October 2004 along Mazeras – Kinango Road at Bombolulu Secondary School, the 2<sup>nd</sup> Respondent drove the said motor vehicle so carelessly and negligently that it caused an accident occasioning serious injuries to the 1<sup>st</sup> Respondent. That the Appellant was therefore vicariously liable to the 1<sup>st</sup> Respondent for the damage. That the Plaintiff endured such suffering and loss of amenities and expended money for medical examination and police abstract report. The 1<sup>st</sup> Respondent therefore prayed for judgment against the defendants jointly and severally for general damages, special damages of Kshs. 2,100.00, costs and interest of the suit, and any other relief that this court may deem fit and just to grant.
2. The suit was heard in the trial court and judgment delivered on 18<sup>th</sup> August 2022 where the court found on liability that it was a self-involving accident as the driver is said to have driven the vehicle carelessly thereby causing it to overturn after it developed mechanical problems. The Defendants were held 100% liable for the accident while the 1<sup>st</sup> Defendant was held vicariously liable for the negligence



- of his driver. On quantum, the court made an award of Kshs. 150,000 for pain, suffering and loss of amenities. The Plaintiff was also awarded Kshs. 2000 special damages which were pleaded and proved.
3. Being dissatisfied, the Appellant appealed against the whole decision through the Memorandum of Appeal dated 31<sup>st</sup> August 2023 on grounds that the learned magistrate erred in law and in fact by holding the Appellant liable for causing the accident and the resultant injuries to the Respondent, by failing to appreciate, assess and weigh the evidence tendered by the Appellant and the Respondent, in misinterpreting the relevance and the application of the evidence tendered by the Appellant, in failing to appreciate and consider the evidence and submissions filed by the Appellant regarding the ownership of the motor vehicle, the subject matter of the case, in failing to appreciate and apply the relevant law and authorities submitted by the Appellant, in basing his judgment entirely and exclusively on the evidence adduced by the Respondent, by ignoring and failing to take into account the whole evidence adduced by the Respondent, in shifting the onus of proof on the Appellant and in arriving at a decision against the weight of the evidence, and by awarding the Respondent a sum of Kshs. 150,000.00 general damages which was excessive given the circumstance.
  4. The Appellant prayed for orders that the appeal be allowed with costs setting aside the judgment and decree of the subordinate court and substitute the same with dismissal of the Respondent's claim as against the Appellant in the subordinate court with costs, that the Appellant's appeal be allowed with costs and that such and any other order as this court may deem fit.
  5. The Appeal was canvassed by way of written submissions. The Appellant in their submissions dated 10<sup>th</sup> June 2024 argued that the main issue raised is the question of ownership of the motor vehicle which is the subject of this appeal. That the evidence produced by the 1<sup>st</sup> Respondent in the primary suit did not prove that the motor vehicle was registered under the Appellant's name. That instead the Police Abstract indicated the vehicle was registered under Ali Bhatas. That similarly, the NTSA M/V copy of records also did not show who owned the vehicle. The Appellant relied on Section 8 of the [Traffic Act](#) as well as authorities in *Kennedy Nyangoya v Bash Hauliers* (2016) eKLR, *Stephen Wasike Wakhu & Anor v Security Express Limited* (2006) eKLR and *Fredrick Wichenje Ikutwa v Florence Mwikali* (2020) eKLR. The Appellant submitted that in civil cases, the degree of burden of proof is on a balance of probabilities and that the evidence of PW3 was not credible as he was not the investigating officer, he was not in possession of the police file and the OB and he did not know the circumstances that led to the alleged accident.
  6. The Appellant contended that the award of Kshs. 150,000 in favour of the 1<sup>st</sup> Respondent herein as against the Appellant was excessive in the circumstances. The Appellant therefore invited the court to find as such and set aside the award. That while it is not in dispute that an award for damages is an exercise of discretion by the court, the same should be within limits set out in decided cases and the same must not be inordinately so low or so high to reflect an erroneous figure. The Appellant relied on the case of *Butt v Khan*, Civil Appeal No. 40 of 1977 (1978) eKLR as cited in *Francis Ochieng' & Another v Alice Kajimba* (2015) eKLR where the court laid principles in determining whether to interfere with an award of damages. The Appellant suggested an award of Kshs. 100,000 by citing the cases of *Ndungu Dennis v Ann Wangari Ndirangu & Another* (2018) eKLR and *Ephraim Wagura Muthui & 2 Others v Toyota Kenya Limited & 2 Others* (2019) eKLR where similar injuries were suffered. The Appellant urged the court to allow the appeal herein with costs.
  7. The 1<sup>st</sup> Respondent in their submissions dated 25<sup>th</sup> June 2024 contended that the abstract produced by PW3 indicated the owner of the offending motor vehicle as Ali Bathes, subsequently the Defendant in a different case where another victim of the said accident sued in Civil Suit No. 1195 of 2005, swore an affidavit confirming that his name is Ali Salim Abdallah Bathes, that he admits the name Bathes is the family name, though the admission is done grudgingly during cross examination. That however, the



- evidence that connects him without a doubt as the owner of the said motor vehicle was the application on page 21 of the Record of Appeal which confirms that Invesco Insurance were the insurers and even stated the policy number in paragraph 3 of the application. That it is as a result of the evidence that the court after hearing the parties was able to arrive at the correct conclusion. On proof of ownership of the motor vehicle, the 1<sup>st</sup> Respondent relied on decisions of the court in Civil Appeal No. 37 of 2018, Peter Gichira v Lucy Wambura Ngaku & Another and Muhambi Hoja v Said Mbwana Abdi (2015) eKLR.
8. On the award, the 1<sup>st</sup> Respondent submitted that she suffered blunt object injuries to the chest (contusion) and bruises on the forehead, and that it is by sheer luck that she was able to deliver safely 5 days later as she was in the final term of her pregnancy. That the Kshs. 150,000 awarded by the court was modest, and that the courts will often consider the nature of the injury sustained, similar authority with the case at hand, the effluxion of time and any other factor. That in Civil Appeal No. 25 of 2020, Justine Nyamwa Ochoki v Juma Karisa Kipingwa, the court considered a number of cases where the Plaintiff suffered such soft tissue injuries and was awarded the sum of Kshs. 150,000. The 1<sup>st</sup> Respondent prayed for dismissal of this appeal with costs of both matters to them.
  9. The duty of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... 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 make due allowance in this respect ...”
  10. I have considered the Record of Appeal dated 25<sup>th</sup> November 2023 and submissions by the parties. The issues for determination are: -
    - a. Whether the Appellant was the owner of the subject motor vehicle
    - b. Whether the award by the trial court was excessive in the circumstances
    - c. Who should bear costs.
  11. On the first issue, the Appellant denied ownership of the motor vehicle and that evidence produced by the 1<sup>st</sup> Respondent did not prove that he was the owner of. The Appellant argued that the Police Abstract indicates that the vehicle was registered under Ali Bathes and not the Appellant herein. That the NTSA M/V copy of records does not show who owns the vehicle.
  12. This court has perused the Record of Appeal and the Supporting Affidavit to the Notice of Motion application dated 21<sup>st</sup> June 2011 therein and sworn on the same day by Paul Gichuhi for Invesco Assurance Co. Ltd. It is pleaded that the owner and insured of the motor vehicle is Abdalla Ali Salim Bates. The Appellant in his defence evidence admitted that he is Abdalla Ali Bathes and that Bathes is a clan name. This court is made to believe that Ali Salim Abdalla, Ali Salim Abdalla Bathes and Ali Bathes are one and the same person. The NTSA M/V records that the Appellant has made reference to disputing ownership of the motor vehicle was filed in the Appellant’s list of documents in the trial court and dated 10<sup>th</sup> December 2020, approximately 16 years after occurrence of the accident and the possibility of transfer of ownership of the motor vehicle to a different party. This court concludes that the motor vehicle at the time of the accident was indeed the Appellant’s.
  13. On the second issue, the Medical Report prepared by Dr. Ajoni Adede shows that the 1<sup>st</sup> Respondent who was expectant at the time sustained blunt object injury to the chest (contusion), bruises on the forehead and was admitted at Coast General Hospital for 6 days for pain and wound care. The trial



court awarded Kshs. 150,00 for general damages and Kshs. 2,000 for special damages. The Appellant challenged this award and proposed an award of Kshs. 100,000.

14. The court in considering an appeal against damages, the appellate court is required to meet certain conditions to avoid interfering with discretion of the trial court. The conditions have been set out in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 (1985) eKLR* as follows: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

15. This court has observed that comparable awards were made in the following cases:-

- a. *Fred Barasa Matayo v Channan Agricultural Contractors (2013) eKLR* where the court reviewed downwards an award of Kshs. 250,000/= to Kshs. 150,000/= to moderate soft tissue injuries that were expected to heal in eight months’ time
- b. *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd (2015) eKLR* where the award of Kshs. 700,000/= was reduced to Kshs. 150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.

16. This court is persuaded that the award made by the trial court was reasonable in light of the injuries sustained and consistent with comparable awards. The appeal therefore has no merit and is disallowed. The Appellant to bear costs of the appeal.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>RD</sup> DAY OF OCTOBER, 2024.**

.....

**J.K. NG’ARNG’AR, HSC**

**JUDGE**

In the presence of: -

Kayatu for respondents

Court Assistant – Mr. Samuel Shitemi

