



**Associated Construction Co (K) Limited & another v Cheruiyot (Civil Appeal E200 of 2023) [2024] KEHC 12469 (KLR) (Civ) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E200 OF 2023  
MA OTIENO, J  
OCTOBER 17, 2024**

**BETWEEN**

**ASSOCIATED CONSTRUCTION CO (K) LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JOHN WACHIRA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SHADRACK CHERUIYOT ..... RESPONDENT**

*(An appeal from the Judgement and Decree of Honourable M.W. Murage (Mrs), Principal Magistrate, delivered on 24th February 2023)*

**JUDGMENT**

**Background**

1. This is an Appeal from the decision of the magistrate's court delivered on 24<sup>th</sup> February 2023 in the Milimani CMCC No. E9513 of 2021 in which the Respondent, then a Plaintiff, sued the Appellants seeking compensation for injuries suffered in a road accident that occurred on 29<sup>th</sup> July 2019 involving the 1<sup>st</sup> Appellants' motor vehicle registration No. KAV 290T, then being driven by the 2<sup>nd</sup> Respondent.
2. In his plaint dated 31<sup>st</sup> May 2021, the Respondent stated that on 29<sup>th</sup> July 2019 he was a lawful pedestrian along Jogoo Road, Nairobi when the subject motor vehicle was negligently and carelessly driven by the 2<sup>nd</sup> Appellant thereby causing an accident, injuring the Respondent in the process. The Respondent therefore sought for compensation in general damages, special damages, loss of past, present and future earnings as well as costs of the suit.
3. The Appellants, then defendants, entered appearance in the suit and later filed their joint Statement of Defence dated 6<sup>th</sup> August 2021, denying liability and asked the court to dismiss the suit with costs.



4. On 24<sup>th</sup> February 2023, the trial court rendered its judgment in the dispute and found the Appellants 100% liable for the accident. The Court also awarded the Respondent a sum of Kshs 1,500,000/- in general damages; Kshs 300,000/- for loss of past, present and future earnings and a further Kshs 5,550 in special damages.

### **The Appeal**

5. Aggrieved by the decision of the trial court, the Appellants vide their memorandum appeal dated 10<sup>th</sup> March 2023 as amended on 23<sup>rd</sup> March 2023 lodged an appeal to this court, raising a total of thirteen grounds of appeal. A careful review of the grounds however reveals that the appeal is basically against the trial court's finding, both on liability and on quantum.
6. The appeal was canvassed by way of written submissions. The Appellants' submissions is dated 11<sup>th</sup> October 2024 whilst that of the Respondent is dated 2<sup>nd</sup> September 2024.

### **Appellant's submissions**

7. On liability, the Appellant submitted that the Respondent never adduced sufficient evidence at the trial court as to discharge his legal burden of proof to warrant the evidential burden being shifted to the Appellants, particularly on the question of involvement of the 1<sup>st</sup> Appellant's vehicle in the alleged accident.
8. Referring to the Respondent's testimony before the trial court, the Appellants submitted that there were manifest discrepancies on the description of the subject motor vehicle as to the colour and registration number. The Appellants stated that contrary to the Respondent's testimony before the trial court that he had been hit by a white vehicle, the 1<sup>st</sup> Appellant's vehicle is dark grey in colour as evidenced by a copy of the official. Further, it was the Appellants' submissions that the discrepancy was equally manifested in the Respondent's Advocate letter of 29<sup>th</sup> April 2021 to General Accident Insurance Co. Ltd which described the subject motor vehicle as KAV 290J while the 1<sup>st</sup> Appellant's motor vehicle is of registration No. KAV 290T.
9. The Appellants argued that in view of the discrepancies in the Respondent's testimony and the documents submitted at trial, there existed serious doubt as to whether the vehicle which caused the alleged accident was properly identified. The Appellants restated their position as was in the trial court that the subject motor vehicle was at all times relevant to this case (particularly on 29<sup>th</sup> July 2019 at 2200hrs) parked at the residence of the 1<sup>st</sup> Appellant's director to whom the vehicle is ordinarily assigned.
10. Additionally, the Appellants submitted that the police officer who was reportedly at the scene when the accident happened and noted the details of the accident motor vehicle was not called by the Respondent to give evidence in Court. Further, an extract of the OB Number 73 where the incident was recorded by the said police officer was not adduced as part of the Respondent's evidence to enable the Appellants cross-examine the said police officer on the contents thereof.
11. Citing the decision in *David Kajogi M'mugaa v Francis Muthoni* (2012) e KLR, the Appellants submitted that there was no causal link between the 1<sup>st</sup> Appellant's motor vehicle and the alleged accident. That the trial court's conclusion was based purely on hearsay and therefore cannot be the basis of finding the Appellants liable for the accident, particularly taking into account that the Respondent did also not call any independent eye witness in the matter.



12. Further, the Appellant submitted that the Respondent's witness, DW1, PC Naomi who produced the police abstract dated 19<sup>th</sup> April 2021 had no personal knowledge of the matter since she was not at the scene and was also not the investigating officer. That this made her evidence weak, especially taking into account that she did not also produce in evidence an extract of the occurrence book entry where the incident was initially recorded on the night of the accident. The Appellant asserted that police abstract alone, without more, cannot be a basis of apportioning liability in accident cases.
13. It was therefore the Appellant's case that the Respondent failed at trial to prove his case to the required standards. The Appellant cited among others the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR in support of his arguments and prayed that the trial court's finding on liability be wholly reversed by this court.
14. On the damages awarded by the trial court, the Appellants maintained that the Respondent is not entitled to any award, taking account that no sufficient evidence was adduced before the trial court to prove liability against the Appellants. As an alternative argument, the Appellants submitted that the damages awarded by the trial court were excessive.
15. It was the Appellants' position that in awarding general damages, the trial court appears to have solely relied on the medical report dated 20<sup>th</sup> April 2021 prepared by the Respondent's doctor and ignored the second medical report prepared at the behest of the Appellants by Dr Wambugu of 3<sup>rd</sup> March 2022 which latest in time and therefore provided a more accurate assessment of the Respondent's healing curve.
16. Citing the case of *Kerandi & another v Okong'o* (Civil Appeal E028 of 2023) [2024] KEHC 3823 (KLR) (18 April 2024) (Judgment) and other cases relied on by at the lower court, the Appellants submitted that a sum of Kshs 400,000/- would be sufficient to compensate the injuries suffered by the Respondent as a result of the accident.
17. Regarding the Respondent's prayer for 'Loss of past, present and future earnings', it was the Appellants' submissions that no evidence was adduced by the Respondent to prove the claim that the Respondent was before the accident working as was alleged and that he was no longer able to work. Consequently, the Appellants maintained that the Kshs 300,000/- awarded by the trial court was not based on evidence. The case of *Butler v Butler* [1984] KLR 225 was cited by the Appellant in support of this argument.
18. In the premises, the Appellants urged this court to allow the appeal, set aside the trial court's Judgment delivered on 24<sup>th</sup> February 2023 and in its place, make an order dismissing the Respondent's suit with costs. That in the event that liability is found to have been proven, then the trial court's award on general damages be set aside and assessed downwards and that the trial court's award on loss of future earnings be set aside in its entirety.

### **Respondent's submissions**

19. On liability, the Respondent submitted that his evidence before the trial court was clear that the was knocked down by the 1<sup>st</sup> Appellant's motor vehicle registration No. KAV 290T while crossing Jogoo Road on a zebra crossing. That the 2<sup>nd</sup> Appellant who was then driving the said motor vehicle negligently and recklessly drove the same in total disregard of the zebra crossing marks thereby hitting and injuring the Respondent. That after hitting the Respondent, the 2<sup>nd</sup> Appellant did not stop at the scene but sped off instead.



20. Regarding the identity of the motor vehicle in question, the Respondent submitted that it was his testimony before the trial court was that he was hit by motor vehicle registration number KAV 290T which sped off but was later intercepted by the police 19<sup>th</sup> April 2021 after a report of the incident was reported and recorded at the Makongeni Police station by the police officer who was at the scene.
21. The Respondent further submitted that his testimony before the trial court on the identity of the vehicle was corroborated by the evidence of PC Naomi Nyamweya of Makongeni police station who testified as PW1 at trial and produced a police abstract dated 21<sup>st</sup> April 2021 which was issued after the subject vehicle was intercepted by the police.
22. The Respondent asserted that the Appellants did not submit sufficient evidence at trial to prove their allegation that the motor vehicle in question parked at the residence of the 1<sup>st</sup> Appellant's director as alleged in the 2<sup>nd</sup> Appellant's witness statement of 21<sup>st</sup> November 2021.
23. On quantum of damages awarded by the trial court, the Respondent submitted that the amount of Kshs 1,500,000/- awarded by the trial court took into account of the injuries suffered by him as a result of the accident and was also in line with past awards cases with comparable injuries cited by him in his submissions where awards of between 1,450,000/- and Kshs 2,000,000/- was made.
24. The Respondent also urged this court to maintain the award of Kshs 300,000/- on account of loss of present and future earnings on the basis the same was supported by the Respondent's evidence before the trial court that as a result of the injuries suffered in the accident, he is no longer able to undertake his work as a mason.
25. Regarding future medical expenses and special damages, the Respondent urged this court to award a sum of Kshs 200,000/- and 5,500/- as awarded by the trial court on the basis that the same was supported by the evidence submitted by the Respondent at the trial court.
26. The Respondent cited the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR on the circumstances and extent to which this court, in its capacity as an appellate court, can interfere with an award of damages made by a trial court.
27. The Respondent therefore urged this court to dismiss this appeal with costs.

### **Analysis and determination**

28. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion on the issue of liability and on quantum. I am however aware to the fact that unlike the trial court, I did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. I will therefore give due allowance for this. See the Court of Appeal decision in *Peters v Sunday Post Limited* [1958] EA where the court stated that; -  

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
29. At the same time, I will also bear in mind the fact that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage



of hearing the witnesses testify and seeing their demeanor as was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA where the court stated that: -

“...I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial court .....is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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...”

30. I have perused the memorandum of appeal and submissions by the parties in this appeal and note that there are only two issues for determination in this appeal, that is, the issue of liability and that of quantum of damages

### **Liability**

31. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the *same Act* on both parties. See *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, where the Court of Appeal stated that: -

“As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

32. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when it is clearly wrong and based on no evidence or on the application of wrong principle. This was the holding in *Khambi and Another v Mabithi and Another* [1968] EA 70, where the court stated 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 cases, 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.”

33. I have perused the pleadings and evidence in this matter. I note that in his plaint dated 31<sup>st</sup> May 2021, the Respondent stated that on 27<sup>th</sup> July 2019 at around 10.00pm, being a lawful pedestrian along Jogoo Road Nairobi, he was knocked down and injured by the 1<sup>st</sup> Appellant’s motor vehicle registration No. KAV 290T which was then being driven by the 2<sup>nd</sup> Appellant. That after the accident the police who was present at the scene got him an ambulance which took him to Kenyatta National Hospital for treatment. That the same police also booked the accident at the Makongeni Police Station under Occurrence Book No. 73/29/07/2019.
34. Regarding the identity of the motor vehicle in question, I note that the Respondent on cross-examination told court that despite the fact that the accident happened at 2200hrs, he was able to see the registration number of the of the subject motor vehicle. That the subject motor vehicle was white



in colour and big in size. That after hitting him, the driver of the said vehicle did not stop and the scene but sped off.

35. I also note that the Respondent called as a witness No. 81601 PC Naomi Nyamweya of Makongeni police station who testified as PW1 at trial and produced a police abstract dated 21<sup>st</sup> April 2021 which was issued after the subject vehicle was intercepted by the police (PEXH 1). The witness also produces a P3 issued by the police on 28<sup>th</sup> January 2020 (PEXH 2). She also told court that the driver of the subject motor vehicle sped off after the accident and was only intercepted on 19<sup>th</sup> April 2021. That according to the records in the occurrence book (OB), the driver of the subject motor vehicle, the 2<sup>nd</sup> Appellant herein was charged for the traffic offence. On cross-examination, she told court that she was not the investigating officer but was only reading from the record in the occurrence book maintained at the police station.
36. On their part, the Appellants called only one witness, the 2<sup>nd</sup> Appellant who testified as DW1 and adopted as evidence his witness statement of 21<sup>st</sup> November 2021. In his witness statement, the 2<sup>nd</sup> Appellant while admitting that he is ordinarily the driver the subject vehicle, denied being with the vehicle on Jogoo Road on the date of the accident. According to him, the vehicle was at all material time to the accident, parked at Runda where his boss, the 1<sup>st</sup> Appellant's director resides. That the said director to whom the vehicle is exclusively assigned was then out of the country and that in the circumstances, the 2<sup>nd</sup> Appellant being his assigned driver, was also not on duty on that day. The witness produced in evidence the documents in his list of documents dated 24<sup>th</sup> November 2021 as DEXH 1-4.
37. According to the 2<sup>nd</sup> Appellant, was only made aware of the accident on 9<sup>th</sup> April 2021 when his boss, the 1<sup>st</sup> Appellant's director instructed him to take the vehicle to Makongeni Police Station where a report had been made of an accident on 29<sup>th</sup> July 2019 involving the vehicle.
38. It is critical that at this point, I first dispose of the Appellants' argument that the testimony of No. 81601 PC Naomi Nyamweya of Makongeni police station who testified as PW1 at trial and produced a police abstract dated 21<sup>st</sup> April 2021 is not credible since she was not the investigating officer and that she also not present at the scene.
39. It is trite law that the purpose of a police abstract is to support the fact that an accident was reported. Equally settled is the principle that the mere fact that the police officer who testify is not the investigating officer is not a ground enough for dismissing a claim. See the case of *Techarad Steam & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR where the court held as follows: -
- “Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims...” [emphasis added]
40. I have reviewed the evidence adduced by the parties in support of their respective positions in this matter and note that the Respondent's version is more believable than that of the Appellants. First, the P3 form issued to the Respondent by the police on 28<sup>th</sup> January 2020, well before the subject motor vehicle was intercepted, indicates that the accident happened on 29<sup>th</sup> July 2019 at 2200hrs at was reported at the Makongeni Police Station on same date at 2230hrs under OB No. 73/29/07/2019. This position confirms the Respondent's version that the accident was reported at the station by the police who was at the scene at the time of the accident.



41. In their submissions in this appeal, the Appellants argued that there were manifest discrepancies on the description of the subject motor vehicle as to the colour and registration number. While I note that in his evidence before the trial court the Respondent described the subject motor vehicle as “white in colour” as opposed to “dark grey” which appears in the official search from NTSA, this court takes judicial notice that the accident happened at night and therefore the failure by the Respondent to identify and describe the exact colour of the motor vehicle in question cannot be fatal to his case. What is material in the court’s view is the registration number which appears to have been properly identified by the Respondent. Registration number of a motor vehicle is the unique and real identifier, not the colour.
42. Additionally, it was the Appellant’s submissions in this appeal that the discrepancy was further manifested in the Respondent’s Advocate letter of 29<sup>th</sup> April 2021 to General Accident Insurance Co. Ltd which described the subject motor vehicle as KAV 290J while the Appellant’s vehicle is of registration No. KAV 290T. Again, having carefully studied the documents produced in evidence, particularly, the police abstract and the copy of the official search, I conclude that this was a mere typographical error on the part of the Advocates and could not therefore affect the validity of the Respondent’s claim.
43. In the circumstances and bearing in mind the applicable principles on apportionment of liability, I find no reason to disturb the finding of the trial court on the issue of liability. I therefore sustain the same. The P3 produced as evidence in the case considered together with the police abstract, leads to a *prima facie* conclusion that the Appellant’s motor vehicle registration No. KAV 290T is the one that actually hit the Respondent on the material day.

## Damages

44. The general rule is that assessment of damages is within the discretion of the trial court and that an appellate court should only interfere in instances where the trial court, in assessing damages, erred in principle by either taking into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see *Mbogo v Shah* (1968) EA 93 and *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* [1982-88] 1 KAR 727).
45. In evaluating compensation for general damages, the Court has to evaluate the nature of the injuries and the awards given by other Courts. The Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that –

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
46. The Appellants submitted that general damages awarded by the trial court were high and excessive. According to the Appellants the trial court appears to have solely relied on the medical report prepared by the Plaintiff’s doctor dated 20<sup>th</sup> April 2021 and ignored the second medical report prepared by Dr Wambugu of 3<sup>rd</sup> March 2022 which latest in time and therefore provided a more accurate assessment of the Respondent’s healing curve.
47. I have reviewed the pleadings and evidence on record relating to the injuries suffered by Respondent. In his Complaint, the Respondent pleaded that he suffered bilateral proximal tibia fracture. The Medical report by Dr. Cyprianus Okoth Okere dated 30<sup>th</sup> April 2021 which was produced in evidence as PEXH 3 supports the injuries as pleaded. The doctor did a physical examination on the Respondent and established that he sustained bilateral fractures of tibia and that the injuries can be classified a



grievous harm. He assessed the degree of permanent incapacity as 40%. The second medical report by Dr Wambugu dated 3<sup>rd</sup> March 2022 agrees with that of Dr. Okere on the nature of the injuries save that it assesses the degree of permanent incapacity as 20%.

48. The Appellants urged this court to award a sum of Kshs 400,000/- in general damages and cited among others the cases of *Nabson Nyabaro Nyandega v Peter Nyakweba Omboga* [2021] eKLR where damages of Kshs 650,000/- was awarded to a Plaintiff who suffered bruises on the face, compound fracture of the right tibia bone, cut wound on the right leg. The other case cited by the Appellants in his submissions is that of *Kerandi & another v Okong'o* (Civil Appeal E028 of 2023) [2024] KEHC 3823 (KLR) (18 April 2024) (Judgment) where a sum of Kshs 450,000 was awarded suffered a fracture on his right leg among other soft tissue injuries which had healed over time.
49. The Respondent on the other hand cited the case of *Michael Njagi Karimi v Gideon Ndungu Nduribu & Another* [2013] eKLR where a sum of Kshs 2,000,000/- was awarded to a Plaintiff had suffered compound fractures of his right tibia and fibula, and that in the right upper limb he had closed fractures of the right radius and the right ulna. An x-ray confirmed that he had a closed fracture of the left femur. The Plaintiff in that case also had a urinary catheter in place. Another case cited by the Respondent is that of *Mwaura Muiruri v Suera Flowers Limited & another* [2014] eKLR where the plaintiff had sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left submaxillary), communicated fracture of the right humerus, and compound double fractures of the right upper leg and lower 1/3 tibia fibula. The court assessed general damages for pain, suffering and loss of amenities at Kshs 1,450,000.
50. I have considered the injuries suffered by the Respondent in this case and note that they were obviously more serious than those suffered in the case of *Kerandi & another v Okong'o* (Civil Appeal E028 of 2023) [2024] KEHC 3823 (KLR) (18 April 2024) (Judgment) cited by the Respondent where no permanent disability was expected. In the instant case the fracture was on both legs and the level of permanent disability assessed was 40%.
51. I find the injuries in the case of *Mwaura Muiruri v Suera Flowers Limited & another* [2014] eKLR cited by the Respondent where an award of Kshs 1,450,000/- in general damages to more comparable to the injuries suffered by the Respondent in the instant case.
52. In the circumstances, I find no reason to interfere with the award of Kshs 1,500,000/- in general damages given by the trial court in this case since the award is consistent with the nature and extent of injuries and is also comparable awards made in the past.
53. Regarding the Respondent's prayer for 'Loss of past, present and future earnings', it was the Appellants' submissions that no evidence was adduced by the Respondent to prove the claim that the Respondent was before the accident working as was alleged and that he was no longer able to work. Consequently, the Appellants maintained that the Kshs 300,000/- awarded by the trial court was not based on evidence. The case of *Butler v Butler* [1984] KLR 225 was cited by the Appellant in support of this argument.
54. I have reviewed the proceedings in the lower court and note that there was no evidence submitted by the Respondent in support for his claim for 'Loss of past, present and future earnings'. He simply stated that prior to the accident, he a mason and that he used to earn Kshs 30,000/- monthly. However, no material was placed before the court in support of the same. Additionally, the trial court did not in its judgment indicate how the award of Kshs 300,000/- was arrived at.



55. In the premises, I agree with the Appellants' submissions that the award of Kshs 300,000/- on account of 'Loss of past, present and future earnings' was not supported by evidence. I therefore set aside the award in its entirety.
56. No challenge was taken on the trial court's award Kshs 5,550. The same therefore remains undisturbed. I also note from the trial court's judgment that the cost of future medical expenses was not awarded by the court on the basis that the same had not been pleaded.

### **Conclusion**

57. In view of the foregoing, the appeal is partially merited. The judgement of the lower court dated 24<sup>th</sup> February 2023 varied is therefore set aside and hereby substituted with a Judgment of this court in the following terms; -
- i. Liability – 100%
  - ii. General Damages – Kshs 1,500,000/=
  - iii. Special damages – Kshs 5,550/=
58. Each party to bear their own costs.
59. It so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**ADO MOSES**

**JUDGE**

In the presence of:

Moses Court Assistant

Ms. Musyoka..... for the Appellants

Kulecho.....for the Respondent

