



**Kiage v Nyamongo (Civil Appeal E066 of 2021)  
[2024] KEHC 12580 (KLR) (Civ) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12580 (KLR)

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

**CIVIL**

**CIVIL APPEAL E066 OF 2021**

**RC RUTTO, J**

**OCTOBER 18, 2024**

**BETWEEN**

**ALFAYO KENG'AYA KIAGE ..... APPELLANT**

**AND**

**JUSTINE MOSE NYAMONGO ..... RESPONDENT**

*(Being an appeal from the Judgment delivered on 5th February,  
2021 by Hon. A N Makau () in Milimani CMCC No. 2349 of 2019)*

**JUDGMENT**

1. This is an appeal against liability and quantum. By way of a Memorandum of Appeal dated 12<sup>th</sup> February 2021, the Appellant seeks that the judgment in respect of the liability and quantum delivered on 5<sup>th</sup> February 2021 be set aside and/or reviewed and that the Respondent herein bear the costs of the Appeal.
2. In that judgment, the trial court set out three issues for determination: first was the issue of liability in which the court held that the Appellant was to bear 90% of the blame while the Respondent bears 10%. Second was quantum where the trial court awarded general damages of Kshs. 1,000,000/- less 10% liability for pain and suffering and loss of amenities. And third was Special Damages where the court held that the Respondent had strictly proven Kshs 154,050/- less 10%. The court awarded the Respondent with costs of the suit as well as interest from the date of judgment.
3. Aggrieved by the said determination, the Appellant lodged this Appeal on the following grounds;
  - i. That the Honourable Magistrate erred in law and fact in finding the Appellant 90% liable for causing the accident completely disregarding the testimony tendered by the Appellant.



- ii. That the Honourable Magistrate erred in law and fact by awarding the Respondent Kshs. 1,000,000/- as General damages for pain and suffering which award was excessive in light of the evidence that was adduced by the defence and in relation to the injuries allegedly sustained by the Plaintiff.
  - iii. That the Honourable Magistrate grossly misdirected herself in completely ignoring the principles applicable and relevant authorities on liability and quantum cited in the written submissions presented and filed by the appellant.
  - iv. That the Honourable Magistrate erred in law and fact in awarding special damages without strict proof by production of credible receipts.
4. In support of the Appeal, the Appellant relied upon the Record of Appeal dated 24<sup>th</sup> May 2023, supplementary Record of Appeal dated 19<sup>th</sup> June 2023 and submissions dated 30<sup>th</sup> November 2023. The Appellant submitted that the trial court ought to have found that the Respondent was equally to blame as he was driving on the wrong side of the road and had failed to wear protective gear and a reflector jacket and apportioned liability at 50:50. Further that the impact of the accident was on the left side of the motor vehicle which supports the Appellant case that he had head on collision with the Respondent motor cycle. He made reference to the case of *Ndatbo v Chebet* (Civil Appeal 8 of 2020 (2022) KEHC 346(KLR)) where on appeal, the court apportioned liability at the ratio of 50:50 where there was no evidence on who was to blame for the accident.
  5. He urged the court to find that the officer who testified in the trial court did not conduct investigations, was not the investigation officer, she did not interview the driver and was not in possession of the police file or sketch plan of the accident.
  6. On quantum, general damages for pain and suffering and loss of amenities of life, the Appellant submission was that the amount awarded was inordinately high considering the nature of injuries sustained. That the trial court was misguided in relying upon the authority of *Maintenance Ltd & Another v W. A ( A minor suing through next friend and father S K H (2015)eKLR* since the nature of injuries in the said case were more severe.
  7. It was his submission that an award of Kshs. 250,000/- would have sufficed as general damages. He sought to rely upon the case of *Duncan Mwenda & 2 Others v Silas Kinyua Kitbela* (2018) eKLR where the plaintiff award of kshs 600,000/- was substituted with an award of Kshs 350,000/- for the following injuries: severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injury on the chest wall.
  8. The Appellant also relied upon the following authorities; *Specialized Aluminium Renovertors Limited & Another v Stephen Mutuku Musyoka* (2021)eKLR where an award of Kshs 800,000/- was set aside and replaced with a sum of Kshs 500,000/-. *Kisii Bottlers Limited v Josephine Akinyi Mwikwabe* (2011) eKLR where an award of Kshs 220,000/= was upheld for the following injuries; blunt head injuries, cerebral concussion, blunt injuries and bruises on the abdomen, fracture on the right hand and persistent pain on the right arm, headaches and dizziness.
  9. The Appellant urged the court to find that the award of Kshs 1,054,050/- was not reflective of the injuries sustained. He prayed that the appeal be allowed, the judgment of the trial court be set aside and substituted with an award of Kshs 250,000/-.
  10. On the other hand, the Respondent in urging the Court to dismiss the appeal with costs relied on his submissions dated 30<sup>th</sup> November 2023. He set out two issues for determination, namely; whether the apportionment of liability was fair, reasonable and justifiable and whether the award of Kshs



1,000,000/- as general damages was inordinately high as to present a wholly erroneous estimate of the damages for the injuries sustained.

11. On the first issue, the Respondent urged the court to revisit the evidence on record, re-evaluate it and come to its own conclusion. The Respondent submitted that it was his case that he was hit by the Appellant's motor vehicle registration No KCL 497 V being driven by the Appellant. That the Appellant confirmed that he hit the Respondent as he had not seen him, since visibility was poor at the time of the accident. Further that the Appellant did not give any credible evidence worth shaking the evidence of the Respondent on how the accident occurred. He relied upon the case of Stanely Oguti Attai v Peter Chege Mbugua (2019)eKLR which held that failing to see an appellant is a clear indication that the Respondent never exercised care of a duty expected of a driver.
12. Further, he submitted that the appellant having confirmed that he could not see properly, he had a greater duty to be on the look out and be extra careful.
13. It was the Respondent's submission that his evidence on how the accident occurred was corroborated by the police abstract issued which blamed the Appellant for the accident. Reference was made to the case of Swan Carriers Ltd v Damarise Wambui (Suing as the Legal representative to the estate of the late Maritim Mwangi Ngirigasha (2019) eKLR which held that Police abstracts lift the contents of the occurrence book.
14. He urged the court to find that the Respondent proved the particulars of negligence against the Appellant to the required standard and that the trial court correctly made a finding on liability which should be upheld.
15. On the second issue, the Respondent made reference to the case of Catholic Diocese of Kisumu v Tete (2004) 2 KLR 55 and submitted that an appellate court should not substitute an award by the lower court simply because it would have awarded a different figure. That an appellate court can only interfere if the trial court applied wrong principles or took into account some irrelevant factors or left out some relevant ones or misapprehended the evidence so as to arrive at a figure so inordinately high or low representing an erroneous estimate.
16. The Respondent submitted that the nature of the injuries were not disputed and based on the injuries sustained, the Respondent was subjected to severe pain, mental anguish and emotional stress. Hence considering all factors, the amount of Kshs 1,000,000/- was not inordinately high. They urged the court to be guided by the case of P.N Mashru Limited v Omar Mwakoro Makenge (2018) eKLR where the Respondent suffered loss of consciousness, fracture of the temporal bone with haematoma, head injury to the right frontal parietal bone with brain oedema and the court upheld the award of kshs.1,200,000/=. They urged this court to find that the trial court did not act on wrong principles, did not misapprehend the facts or make any erroneous estimate.

### **Analysis and Determination**

17. This being a first appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions. See the Court of Appeal case of Gitobu Imanyara & 2 Others – v- Attorney General [2016] eKLR.
18. I have considered the appeal in light of the material before the court and the issues for determination are:
  - a. Whether the Learned Magistrate erred in his finding on liability assessed at 90%:10% in favour of the Respondent as against the Plaintiff/Appellant.



- b. Whether the trial Magistrate erred in awarding general damages of Kshs 1,000, 000/= for pain and suffering.

**a. Whether the Learned Magistrate erred in his finding on liability**

19. The first issue for determination is who is to be held negligent and liable for the accident. In the cases of *Nandwa v Kenya Kazi Ltd* [1988] KLR 488 quoted in *Regina Wangechi v Eldoret Express Co. Ltd* [2008] eKLR the Courts 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. Considering the above principles, it is necessary to re-examine and re-look at the evidence presented before the learned trial magistrate with the view of determining who is to be held negligent and liable for the accident. The facts of the case were that on 22<sup>nd</sup> April 2018, the Appellant carelessly, negligently and at a very high speed caused his motor vehicle registration number KCL 497V to collide with the Respondent while lawfully riding his motor vehicle KMDM 247A along Mombasa Road causing him serious bodily injuries.
21. To support this assertion, the Respondent invited three witnesses. PW1 PC Jackline Naeku stated that the accident occurred and was reported at Embakasi Police Station, an abstract was issued which blamed the motor vehicle KCL 497 V for causing the accident. On cross examination she stated that she was not the investigating officer and did not have the police file with her. PW2 Dr. George Kungú Mwaura testified that the Respondent had sustained the following injuries: dislocation of the left knee, moderate head injury involving fracture of the nasal bone and frontal skull bone bleeding on the front aspect of the brain, loss of consciousness for one day. He concluded that the Respondent had sustained grievous harm injuries and assessed a permanent degree of incapacity of his lower limb at 15%. PW3 Justine Mose Nyamongo, the Respondent stated that he was hit by motor vehicle Reg. No. KCL 497V which was negligently and carelessly driven. On cross-examination he stated that he was wearing a helmet and reflective jacket and that he did not know if the driver of the vehicle was charged with any offence.
22. On his part, the Appellant testified that he was driving motor vehicle Reg. No. KCL 497 V at around 5.45am on 22<sup>nd</sup> April 2018. That it was raining and a bit dark. Visibility was poor and that he did not see the motor cycle until it hit the left side of his vehicle. He stopped the vehicle as the windscreen shattered. That the accident was caused by the motor cycle who was riding on the wrong side of the road.
23. The trial court in arriving at its decision held that; the defendant explained himself and I find both of them contributed to the occurrence of the accident. The defendant stated that visibility was poor and as such he was expected to take precautions while controlling the vehicle. He bears 90% of the blame as against the 10% on the part of the plaintiff.
24. In order to interfere with the trial court’s finding on liability, this court is guided by the principles governing this appellate court’s power on interference with the trial court’s findings on liability, as



established in cases such as *Khambi & Another v Mahithi & Another* [1968] EA 70 where 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.”

25. Flowing from the above, this court has to be satisfied that the trial court made an error in arriving at its decision. It is noted that the appellant has made a blanket allegation that the trial court erred without demonstrating the areas the court erred, or what the court failed to consider. Further, no erroneous factor has been shown which ought not to have been considered by the trial court inadvertently considered it.
26. This Court finds that, the trial court in its analysis considered the evidence of parties presented before it and arrived at the award of liability at the ratio of 90:10. In apportioning 90% liability against the Appellant, the court considered the evidence of both parties and apportioned greater liability to the Appellant. The trial court’s justification for this was that the Appellant having conceded to poor visibility ought to have taken extra precaution while controlling the vehicle.
27. I therefore, find no exceptional circumstances that would persuade this court to interfere with the trial court’s finding. On the same breath I find no error by the trial court in apportioning liability to both the Appellant and the Respondent.

**b. Whether the trial Magistrate erred in awarding general damages of Kshs 1,000, 000/= for pain and suffering**

28. The Appellant has submitted that the award of Kshs 1,000, 000/= general damages is inordinately high considering the nature of injuries sustained by the Respondent. He has urged the court to substitute the award with an award of Kshs 250,000/-. The Respondent on the other hand submitted that the award was not inordinately high to warrant interference.
29. This Court noted that the Respondent injuries have not been disputed. The Respondent suffered the following injuries; dislocation of left knee, moderate head injury involving fracture of the nasal bone and frontal skull bone bleeding on the front aspect of the brain, loss of consciousness for one day. He sustained grievous harm injuries and a permanent degree of incapacity of his lower limb at 15%.
30. In arriving at the quantum, the trial court made reference to the cases referred to by both the Appellant and the Respondent and made a blanket statement to the effect that it has been guided by the quoted case law. This court is at a loss as to which of the respective cases the trial court relied upon. Thus, this calls for this court to re-examine the same in order to determine whether the award was comparable to similar injuries or was inordinately higher to warrant substitution.
31. In the case of *Kisii Appeal No 52 of 2018 Maintenance Limited & Another v W.A Minor Suing through next friend and father SKH* the court upheld an award of Kshs. 800,000/-where a child sustained a depressed fracture of the skull on the left temporal area, brain concussion and soft tissue injuries and loss of consciousness for 3 hours. The injury was classified as causing the Respondent “grievous harm. The award was made in the year 2015.
32. In Eldoret Civil Appeal No 2 of 2010 *Julius Chelule & Another v Nathan Kinyanjui* (2013) eKLR the Respondent suffered a fracture to the skull, head injuries, injury to the left knee with small cut



wound and tenderness. The Respondent was awarded the sum of Kshs 600,000/= as general damages in the year 2013.

33. In *KK Security and Another v Henry Nyabute Mose*(2014) eKLR the court awarded a sum of Kshs.1,000,000/= as general damages for the injuries of gun shot wound on the right side of the head, intra-cerebral hemorrhage, left side hemiplegic. This was in the year 2014.
34. In Machakos C.A No 164 of 2002 *Philip Musyoka Mutua v Mercy Ngina Syovo* (2018)eKLR the Court made an award of Kshs.120,000/- to a claimant who had sustained blunt injury to the head, blunt injury to both shoulders, blunt injury to the ribs, blunt injury to the back, deep cut wounds both ankle joints and cut wound on the right knee in the year 2018.
35. Consequently, after careful perusal of the authorities provided by the appellant and the respondent, this court finds that the trial magistrate took into consideration relevant factors and comparable awards and finds that the award was not manifestly excessive nor was it off the mark. This court is guided by the case of *Kipkebe Ltd v Moses Kauni Masaki*, Kisii High Court Civil Appeal No.127 of 2004 where it was observed as follows:-

“It is trite law that an award of general damages is and exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however, be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such factors as previous awards of similar injuries and such other relevant factors.”

36. This Court finds no merit on this ground of appeal.
37. In conclusion, this court finds the appeal lacking in merit and it is hereby dismissed. The Respondent shall have costs.

Orders accordingly

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 18<sup>TH</sup> DAY OF OCTOBER 2024**

For Appellant:

For Respondent:

Court Assistant:

