



**Kinatwa Savings and Credit Ltd v Mwaniki (Civil Appeal E081 of 2023)
[2024] KEHC 11834 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E081 OF 2023**

RK LIMO, J

OCTOBER 3, 2024

BETWEEN

KINATWA SAVINGS AND CREDIT LTD APPELLANT

AND

EZEKIEL MAKAU MWANIKI RESPONDENT

JUDGMENT

1. This Appeal arose from the Judgement of Hon. P.M Mayova delivered on 7th September 2023 vide Mutomo PM.C Civil Case No. E050 of 2021. In that case the Appellant was sued by the Respondent owing to a road traffic accident involving Motor Vehicle Registration KCX 084A (owned by the Appellant and in which the Respondent was on board) and motorcycle Registration No. KMFF 982J. The said accident occurred on 4th May 2021 along Ikutha – Mutomo road. The Respondent blamed the Appellant’s driver for causing the accident which saw him suffer injuries. The Appellant on the other hand blamed the rider (the Third Party) for emerging from a feeder road without stopping and riding at high speed.
2. The trial court evaluated the evidence tendered and found that both the driver of the subject Motor Vehicle and the rider, who perished in the accident were equally to blame and that liability for the accident was to be shared at 50:50. On quantum the trial court awarded Kshs. 150,000/= as general damages and Kshs. 5,625/= in special damages.
3. The Appellant felt aggrieved and filed this appeal raising the following grounds namely;
 - i. That the learned Magistrate erred in law and fact in the manner he apportioned liability which was against the weight of the evidence.
 - ii. That the learned Magistrate exhibited open bias in favour of the 3rd Party by apportioning liability against the Appellant at 50% without basis.



- iii. That the award on general damages was too high and excessive.
 - iv. That the trial court ailed to consider its evidence and submissions.
4. In its written submissions through counsel, the Appellant contends that whereas it called two witnesses to defend itself at the trial, the 3rd party did not enter appearance despite service.
 5. It submits that the 3rd Party was to blame for entering a main road from a feeder road without giving way to the Appellant's Motor Vehicle which was on the highway and having the right of way.
 6. It adds that it's driver testified and laid blame on the 3rd party motor rider who unfortunately died in the accident. It contends that the rider was to blame and it was erroneous for the trial court to apportion blame on its driver. It relies on the following cases to battle their contentions;
 - a. Mary Wambui Kabugu v Kenya Bus Services (use citation given)
 - b. [*Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karengi*](#) [2021] eKLR
 - c. [*Benter Atieno Obonyo v Anne Nganga & another*](#) [2021] eKLR
 7. The above decisions are in regard to the burden of proof and the Appellant faults the Respondent for not discharging that burden fully. It submits that there was no evidence tendered to show that the Appellant's was to blame in any way for the accident.
 8. On quantum, the appellant submits that the injuries suffered by the Respondent were minor and that he did not suffer any head concussion. He contends that an award of Kshs. 50,000/= would have been reasonable and sufficient. It relies on the following authorities;
 - a. [*H.B \(Minor suing through next friend DKM\) v Jasper Nchonga Magari & another*](#) [2021] eKLR where the Plaintiff was awarded Kshs. 60,000/= for blunt injury to the head, neck, thorax, abdomen and limbs.
 - b. [*Ndungu Dennis v Ann Wangari Ndirangu & Another*](#) [2018] eKLR where it submits that the Plaintiff was awarded Kshs. 100,000/= for injuries similar to the ones suffered by the Respondent.
 - c. [*Eva Karemi & 5 Others v Koskei Kering & another*](#) [2020] eKLR where it claims that the court awarded the Plaintiffs various sums ranging from Kshs. 40,000/= to 70,000/=.
 9. The Appellants further claims for costs in this appeal.
 10. The Respondent has opposed this appeal through written submissions dated 9th June 2024 done through counsel. He contends that he was a passenger in the subject motor vehicle owned by the Appellant and he submits that that fact is uncontested as well as the fact that he suffered injuries as a result of the accident.
 11. He supports the trial court in its finding on liability. He contends that as a passenger he was not to blame for the accident and that the Appellant's driver never exonerated himself on the steps he took to avoid the accident. He contends that the driver ought to have braked or stopped to avoid hitting the rider of the motorcycle.
 12. He blames the Appellant's driver contending that having seen the rider emerge from a feeder road from a distance of 100 meters, he ought to have controlled the motor vehicle and avoided the accident. He submits that as a driver he owed a duty of care to other road users and relies on the authority of Mary



Njeri Murigi v Peter Macharia & Another (unreported). He submits that the trial court was justified in apportioning the blame at 50:50.

13. On quantum, the Respondent submits that he sustained the following injuries;
 - a. Concussion of the brain
 - b. Crush injury to the neck
 - c. Concussion to the chest with pains
 - d. Crush injury to the right upper limb causing weakness
 - e. Contusion to both lower limbs
14. He submits that there was no rebuttal from the appellant in regards to the injuries sustained. He contends that a medical report filed on 4th October 2022 was never produced and the Appellant cannot therefore place any reliance on it. He submits that the awards on quantum was fair in his view considering that he had cited authorities indicating awards of Kshs. 300,000/= in general damages.
15. This court has considered this Appeal and the response made. This being a first appeal, this court is mandated to re-evaluate the evidence tendered and draw own conclusions. This appeal is on both liability and quantum. I will begin with liability.
16. Liability

The Appellant faults the trial court for apportioning the blame to its driver arguing that the 3rd Party's motor cycle was to blame having emerged from a feeder road and entered into the main road without giving way to Appellant's motor vehicle which was on the highway. The trial court faulted the Appellant's driver for driving at more than 50KPH at a town area where the legal requirement is 50KPH. This court has looked at the evidence tendered and I do not see evidence supporting the trial court's finding that the accident occurred either in a town area or a place where there is a speed limit of 50KPH. The evidence from Galicha Dida (PW2) who was the base commander shows that the accident occurred at Ikutha Junction i.e the road branching to Ikutha Town and he rider was entering the highway of Kibwezi – Kitui road when he was knocked down. The base commander blamed the rider for the accident but the trial court blamed the driver for driving at a speed beyond 50KPH
17. This court upon re-evaluation of evidence tendered finds that the trial court fell into error on liability to some extent. The Appellant's driver stated that he was familiar with that road and in particular the presence of a junction to Ikutha Town and that he slowed down but was unable to avoid the accident. He says he slowed down to around 50KPH but the impact of the accident demonstrates that he was more probable than not doing more than 70KPH because if he was driving at 50KPH he could have applied emergency brakes and the motor vehicle could have come to a halt. The fact that the motor vehicle ended up into a ditch or concrete thus injuring the passengers therein indicates that it was at high speed. It is only to that small extent that this court finds that the driver carried less blame as compared to the 3rd party. The police report clearly shows this. This court finds that apportionment of liability at 50:50 was unjustified given the circumstances. The rider ought to have given way to the Appellant's driver who was on the highway and had the right of way. The 3rd party should have been held at least 70% to blame with the Appellant shouldering 30%. The trial court's finding on liability is set aside and is substituted with a finding that the Appellant's driver was only 30% to blame while the 3rd party shouldered 70% blame or liability.
18. On quantum, this court finds that the injuries suffered by the Respondent were soft tissue going by the doctor's report tendered as PEXT 3, the injuries were expected to heal. I also agree with the Appellant



that the Respondent suffered no concussion of the brain. The medical report does not support the Respondent's claims that he suffered brain concussion and contusion of the chest.

19. In light of the above this court finds basis to interfere with the discretion of the trial court in the award of quantum of damages. The trial court appears to have fell into error by taking into consideration the fact that the Respondent suffered concussion of the brain when as I have observed, there was no evidence of the same.
20. This court finds that the Appellant has cited some authorities but failed to annex the authorities to support his contention that the Respondent should have been awarded Kshs. 70,000/= as general damages. This court finds that taking everything into consideration i.e the nature of injuries and the inflation an award of Kshs. 80,000/= as general damages is fair.

In the premises this appeal for the aforestated reasons partly succeeds. The trial court decision of liability is set aside. In its place, the Appellant is held 30% liable while the 3rd party will shoulder 70% liability. The amount on quantum in general damages is reduced from 150,000/= to 80,000/=. The award on special damages is upheld. The Appellant will therefore pay the Respondent 30% of the total sum as follows;

General Damages Kshs. 80,000.00/=

Special Damages Kshs. 5,625.00/=

Sub-Total Kshs. 85,625.00/=

30% Kshs. 25,687.50/=

The Respondent will pay costs of this appeal at 70% but the Appellant will pay costs of the case in the lower court.

DATED, SIGNED AND DELIVERED AT KITUI THIS 3RD DAY OF OCTOBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

