



REPUBLIC OF KENYA



**Nyagu v Kariuki (Civil Appeal E176 of 2023)
[2024] KEHC 12665 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E176 OF 2023
JK NG'ARNG'AR, J
OCTOBER 23, 2024**

BETWEEN

BOII OMAR NYAGU APPELLANT

AND

ANTHONY MBURU KARIUKI RESPONDENT

(Being an appeal against the Judgment and decree of the Hon. J. Nyariki (SRM) delivered on 18th July 2023 in Mombasa Chief Magistrate's Court Civil Suit No. 884 of 2021, Boii Omar Nyagu v Anthony Mburu Kariuki)

JUDGMENT

1. The background of the appeal is that on or about 4th December 2020, the Appellant was lawfully riding motorcycle registration number KMFF 600P along Likoni – Ukunda Road within Mombasa County where upon reaching Ujamaa area when the Respondent's authorized driver so negligently and carelessly drove the motor vehicle registration number KBW 469R Nissan Saloon permitting it to over speed and without due care to other motorists on the road made a U-turn on the said road and knocked down the Appellant's motorcycle from which he sustained fracture (compound) of the left tibia/fibula, sprain and strain of the left ankle, blunt trauma to the back, and bruise of abrasion to the left shoulder. The Appellant prayed for judgment against the Respondent for special damages of Kshs. 242,700.00, general damages, costs and interests at court rates and any other relief the court deemed fit and just to grant.
2. The suit was heard in the trial court and judgment delivered on 18th July 2023 where the court found on liability that both the Appellant and Respondent owed other road users a duty of care. The court therefore apportioned liability at 60% as against the Appellant and 40% as against the Respondent. On quantum, the court awarded the Appellant Kshs. 700,000 as general damages and Kshs. 254,150 as special damages inclusive of future medical fees, and considering the liability apportioned at 60:40,



- the Appellant was awarded an all-inclusive amount of Kshs. 381,660 which amount was awarded with costs.
3. Being dissatisfied, the Appellant appealed against the whole decision through the Memorandum of Appeal dated 25th July 2023 on grounds that the learned magistrate erred in finding that the Plaintiff was 40% liable for causing the said accident, that the learned magistrate misdirected himself and based his finding on wrong considerations, that the learned magistrate failed to consider the fact that the Appellant's injuries were solely occasioned by the Respondent and thus the Respondent was 100% liable, that the learned magistrate erred in fact by failing to award the Appellant special damages and future medical expenses, that the learned magistrate erred in fact by failing to consider the evidence adduced by the Investigating Officer on behalf of the Appellant, that the learned magistrate failed to appreciate the submissions of the Appellant, and that findings of the learned magistrate was not supported in law or on the basis of the evidence adduced.
 4. The Appellant prayed for orders that the appeal be allowed, that judgment delivered on 18th July 2023 be set aside and/or varied, that the order made by the learned magistrate apportioning liability at 60:40 against the Plaintiff be set aside and/or varied, and that costs of this appeal be awarded to the Appellant.
 5. The Appeal was canvassed by way of written submissions. The Appellant in their submissions dated 29th November 2023 on the consequences of a party failing to adduce evidence placed reliance on decisions in *Motex Knitwear Limited v Gopitex Knitwear Mills Limited*, Nairobi (Milimani) HCC No. 834 of 2002 which cited with authority the case of *Autar Sign Babra and Another v Raju Govindji*, HCCC No. 548 of 1998, *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*, Nairobi (Milimani) HCCS No. 1243 of 2001, *Karuru Munyororo v Joseph Ndumia Murage & Another*, Nyeri HCCC No. 95 of 1988, *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)*, Kisumu HCCC No. 68 of 2007, and *Interchemie EA Limited v Nakuru Veterinary Center Limited*, Nairobi (Milimani) HCCC No. 165B of 2000. The Appellant submitted that he is guided by the case of *John Njoroge Maina & Another* (2022) eKLR together with the case of *Kenya Breweries Limited & Another v Alex Ephraim Induswe*, Court of Appeal Civil Appeal No. 215 of 1997 where it was held that a judge should only act on evidence adduced before him and not on assumptions or experience.
 6. The Appellant argued that he is entitled to special damages and future medical expenses amounting to Kshs. 254,150.00 and this position was supported by authorities in *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR, *Ephantus Mwangi v Duncan Mwangi Wambugu* (1984) eKLR, *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*, Nairobi (Milimani) HCCS No. 1243 of 2001, and *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)*, Kisumu HCCC No. 68 of 2007. On the burden of proof, the Appellant relied on Sections 107 (1) and 109 of the *Evidence Act* and that this position was reaffirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blueshield Insurance Company Limited*, Civil Appeal No. 101 of 2000 (2005) 1 EA 280.
 7. The Appellant submitted that the Respondent against whom such presumptions operated did not adduce any countering or rebuttal evidence and that the trial court was expected to test the evidence of the Appellant and whether there was burden of proof on a balance of probabilities. That the Respondent did not present any evidence and that one tendered by the Appellant stood uncontroverted. The Appellant therefore prayed that the court allows the appeal and varies judgment of the lower court accordingly.
 8. The Respondent in his submissions dated 27th November 2023 contended that it is trite law that he who alleges proves in accordance with Section 107 and 109 of the *Evidence Act* as well as the holding



in *Stephen Wasike Wakbu & Another v Security Express Limited* (2006) eKLR and CACA 87 of 2014, *Charterhouse Bank Limited v Frank N. Kamau* where the Court of Appeal reiterated Section 107 of the *Evidence Act*. The Respondent submitted that the eyewitnesses to the accident were the Appellant and the Respondent's driver who both gave contradictory evidence. That the evidence provided by the Appellant did not establish negligence as against the Respondent. That the Respondent's driver was joining the main road from a feeder road, after another vehicle gave way, when the Appellant went riding at high speed, overtaking the vehicle that had given way thereby hitting the Respondent's vehicle. That the motor vehicle had just started making the U-turn when the Appellant hit it on the front right head lamp.

9. The Respondent argued that the Appellant in his evidence stated that he did not have a driving license, that no negligence was established as against the Respondent's driver and the finding of the court of 60:40 was fair in the circumstances. The Respondent made reference to the case of *Peter Kanithi Kimunga v Aden Guyo Haro* (2014) eKLR where the court held that it was upon the Plaintiff who instituted the suit to demonstrate how negligent the Defendant was, and that the court made reference to the case of *Staplye v Gypsum Mines Ltd (2)* (1953) AC 663 at page 681. The Respondent also cited the case of *Kennedy Macharia Njeru v Packson Githongo Njau & Another* (2019) eKLR.
10. On whether the Appellant is entitled to special damages and future medical expenses, the Respondent submitted that the court awarded Kshs. 700,000.00 in general damages which the Appellant has not challenged. That the court awarded the Appellant Kshs. 254,150.00 which was special damages inclusive of future medical expenses. That the Appellant in his plaint pleaded special damages of Kshs. 242,700 inclusive of future medical expenses as per the medical report dated 25th January 2021 of Dr. Kiema which he was awarded. The Respondent prayed that this court dismisses the Appellant's appeal and uphold the subordinate court's award on liability and quantum as is appropriate. The Respondent also prayed that costs of the appeal be payable to the Respondent.
11. The role of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out in *Selle v. Associated Motor Boat Co.* (1968) EA 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 ...”
12. I have considered the Record of Appeal dated 14th August 2023 and submissions by the parties. The issues for determination are: -
 - a. Whether the trial court erred in apportioning liability at the ratio of 60:40.
 - b. Whether the award of special damages and future medical expenses was proper.
 - c. Whether the trial court considered the evidence and submissions of the Appellant in arriving at a decision supported by law.
 - d. Who should bear costs.
13. On the first issue, the Appellant in his evidence on the one hand stated that he was hit at Likoni – Ukunda Road by motor vehicle registration number KBW 469R which was coming from an untarmacked feeder road and suddenly made a U-turn. The driver of the motor vehicle in defence evidence on the other hand stated that when he was about to join the main road, on his way from Ujamaa Miben, a motorbike on his right side ridden at high speed to overtake the vehicle that had given him way hit the car on the driver's side and the Appellant sustained injuries on the leg.



14. The Appellant has submitted extensively on the burden of proof and that it was sufficiently discharged in accordance with Section 108 of the *Evidence Act*. The Respondent has submitted that the Appellant and the driver both give contradictory evidence but it was the Appellant who hit the Respondent's vehicle.
15. The trial court in its judgment stated that if the Plaintiff rode the motorcycle at a manageable speed, he could have braked in time to avert the accident and that in his testimony that that he did not see the motor vehicle joining the road is a clear indication that he was not an observant road user. That the Defendant is liable by the fact that he owed a duty of care to other road users and should have waited for the road to clear before joining. That both the Plaintiff and Defendant owed other road users a duty of care. The trial court proceeded to apportion liability at the ratio of 60:40.
16. The Court of Appeal in *Farah v Lento Agencies* (2006) 1 KLR 124, 125 held as follows: -
 - “ 4. The trial court had two conflicting versions of how the accident occurred. It was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident.
 5. Where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was equally to blame.”
17. This court finds that since both the Appellant and Respondent were on an equal footing in their transgression and owed other road users a duty of care, liability ought to have been in the ratio of 50:50.
18. On the second issue, the Medical Report by Dr. Darius Wambua Kiema dated 25th January 2021 showed that the injuries sustained by the Appellant were a fracture (compound) left tibia/fibula, sprain and strain left ankle, blunt trauma to the back, and bruises, and abrasions to the left shoulder. A further medical report by Dr. Udayan R. Sheth dated 11th August 2021 stated that as a result of the road traffic accident on 4th December 2020, the Appellant sustained compound fracture of the left tibia-fibula bone. He was admitted at Msambweni County Referral Hospital where he underwent surgical toilet where the fracture was fixed with external fixator and he was discharged on 15th December 2020. That he was readmitted at Kinando Kwetu Health Center from 17th December 2020 to 26th December 2020 as he developed an infection at the fracture site. That he was given intravenous antibiotics with regular dressing of the limbs and that the external fixator was removed on 5th July 2021 at Kinondo Kwetu Health Center. That below the knee a plaster was applied and on examination on 11th August 2021, there was a 1 cm diameter wound over the left leg at the fracture site. That there was still slight fluid discharge and he was still on below knee plaster and walking with crutches.
19. The Appellant in their submissions in the trial court relied on the authority of *Teresia Ngugi & Another v Michael Masia Kimende* (2018) eKLR where the court awarded Kshs. 1,500,000 as general damages and the Appellant therefore proposed an award of Kshs. 1,900,000. The trial court awarded Kshs. 700,000 as general damages.
20. On special damages, the Court of Appeal in *Hahn v Singh*, Civil Appeal No. 42 Of 1983 (1985) KLR 716, at P. 717, and 721, held as follows: -
 - “Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and



may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

21. This court confirms copies of receipts in the Record of Appeal produced as P-Exhibit 2b from Msambweni amounting to Kshs. 11,400, P-Exhibit 2c from Kinondo Kwetu Health Services amounting to Kshs. 64,750, P-Exhibit 7b for Kshs. 550, P-Exhibit 8b for Kshs. 2000, and P-Exhibit 8c for Kshs. 5,000, which amounted to Kshs. 83,700. Kshs. 254,150 as special damages inclusive of future medical expenses. This court therefore has no basis to unsettle the amount in special damages.
22. On the third issue, the Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar*, NRB CA Civil Appeal No. 133 of 1998 (1998) eKLR that: -

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”
23. The trial court exhaustively analysed the evidence on record and made the awards considering comparable awards and injuries, passage of time and inflation. The trial court cannot therefore be faulted.
24. In the upshot, this appeal partially succeeds as follows: -
 1. Liability 50:50
 2. General damages - Kshs. 700,000.00
 3. Special damages - Kshs. 254,150.00
Total Kshs. 754,150.00
 4. Less 50% Kshs. 377,075.00
 5. Net Award Kshs. 377,075.00
 6. Interest at court rates
 7. Costs of the suit in the court below and the costs of the appeal.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF OCTOBER, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Masinde Advocate for the Appellant

No appearance Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

