



**Charles & another v Muia (Civil Appeal 59 of 2019)  
[2023] KEHC 820 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 820 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 59 OF 2019  
MW MUIGAI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**MAINGI CHARLES ..... 1<sup>ST</sup> APPELLANT**

**MUEMA MARY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MWANZIA MUIA ..... RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrates' Court at Kangundo by the Hon. D. Orimba (SPM) Delivered On 27th March 2019 In Kangundo SPMCC No 107 of 2015)*

**JUDGMENT**

**Trial Court Record**

1. The Plaintiff filed a Complaint dated 29<sup>th</sup> July 2015 in which it was averred that the cause of action arose on/ or about 14<sup>th</sup> May 2015 at about 5.40 a.m along Nairobi- Kangundo road at Malaa area where the Defendant's driver and/ or agent so carelessly and negligently parked or stopped motor vehicle registration number KAM 436 V Isuzu Lorry(hereinafter referred to as "the Lorry") on the road causing motor vehicle registration number KBZ 197S Isuzu Minibus (hereinafter referred to as "the Minibus") to ram into its rear as a consequence of which the Plaintiff who was lawfully travelling as a fare paying passenger in the said minibus to sustain serious bodily injuries. They were particularized as;
  - a. Deep cut on the forehead (left supraorbital area)
  - b. Tender back
  - c. Tenderness of both hands
  - d. Swollen wound on the left leg



2. The Plaintiff pleaded that the Defendants were the joint registered owners of the lorry.
3. Negligence of the Defendant's driver and/or agent was particularized as follows;
  - a. Parking the said vehicle in the middle of the road
  - b. Failing to put any road sign to warn other motorists of the dangers ahead
  - c. Failing to park stop the motor vehicle off the road
  - d. Failing to give way to other motor vehicles and especially the minibus
  - e. Parking the said motor vehicle carelessly and dangerously without any regard to the safety of other motor vehicles on the road especially the minibus.
  - f. Failing to take proper look out or at all.
  - g. Causing the accident.
4. The Plaintiff indicated that he would rely on the doctrine of *res ipsa loquitur* and prayed for the following from the court;
  - a. Special damages of Kshs 4,500
  - b. General damages for pain, suffering and loss of amenities
  - c. Costs of the suit
  - d. Interest on a, b and c above
  - e. Any other relief which the court may deem fit and just to grant.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly filed an amended statement of defense dated 31<sup>st</sup> January October 2017 in which they denied the contents of the Plaintiff and put the Plaintiff to strict proof thereof. They contended that the Lorry KAM 436 V Isuzu Lorry was prudently, reasonably, with due care, competently driven and the driver acted diligently, adhered to the safety rules with due care, reasonableness and in compliance with the applicable statutory provisions and regulations by driving within the lawful and stipulated speed limit and maintaining his lawful lane.
6. The defendants averred that if the accident occurred it was the driver of the Minibus KBZ 197S who was negligent and reckless in his driving. The negligence of the said driver was particularized as follows;
  - a. Driving at a speed that was excessive in the circumstances thereby provoking and causing the alleged accident.
  - b. Overtaking, swerving and driving the Minibus carelessly thereby provoking and causing the alleged accident
  - c. Failing to maintain proper and any effective control of the minibus so as to avoid the accident thereby provoking and causing the alleged accident
  - d. Failing, refusing and/or ignoring to yield to warning signs by the defendants more specifically life savers placed by the Defendants as required under the traffic rules and regulations
  - e. Failure to ensure adequate safety by employing skills diligence and vigilance through stopping, slowing down, swerving and/or controlling, driving and or managing the minibus while in the course of duty in order to avoid the accident



- f. Refusing to heed to road traffic rules and the Highway Code thereby provoking and causing the said accident.
  - g. Failing to invite skill and/or competence while driving the minibus thereby causing and provoking the alleged accident.
  - h. Failing to observe safety rules and precautions expected of a reasonable driver thereby causing and provoking the alleged accident.
  - i. Failing to keep any proper look out while driving on the subject road
  - j. Being careless and reckless
  - k. Driving without due regard to the safety of the passengers especially the plaintiff
  - l. Driving under the influence of intoxicated substances
  - m. Driving a defective motor vehicle.
7. The Defendants also particularized negligence on the part of the Plaintiff as follows;
- a. Failing to observe due care by fastening the seat belt as provided and/or required of a passenger thereby provoking and causing the alleged accident.
  - b. Refusing to take heed of the road traffic rules, the Highway code at a point where and when it was required of him thereby provoking the said accident,
  - c. Failing to take the necessary precautions to ensure his own safety thereby provoking and causing the alleged accident
  - d. Standing and walking inside the minibus thus causing confusion.
8. The Plaintiff filed a reply to the amended statement of defense and reiterated the contents of the Plaint.

### **Hearing**

9. The Trial Court 3 Plaintiff witnesses and 1 Defense witness when an application was filed to join a third party.

### **Third Party Application**

10. The 3<sup>rd</sup> Party, Jones Muindi, filed an application to inter alia be granted leave to enter appearance and defend the claim that was determined and vide Ruling dated 30<sup>th</sup> May 2018, the Application was allowed on condition that his insurer Invesco Company pay throw away costs of Kshs 22,600 being the expense incurred by the Plaintiff during the hearing.

### **Plaintiffs Case**

11. PW1 was PC Peter Nyandemo based at Kangundo police station. He referred to OB, incident 14/5/2015 at 6.10am, an accident occurred at Malaa area along Kangundo- Nairobi road involving motor vehicle KBJ 197J Isuzu Minibus and motor vehicle KBM 436V Isuzu Lorry. He opined that it happened that the driver of motor vehicle KBZ 197J namely, Mbuvi was driving the said Motor vehicle from Kangundo to Nairobi and on reaching the location of the accident he hit motor vehicle KBM 436V from behind which was dangerously parked by the road facing Nairobi direction. As a result, the minibus was extensively damaged and the following passengers sustained injuries;



- A. Daniel Musembi
  - B. Daniel Mwei
  - C. Mwandwa Ndeto
  - D. Meshack Mutuku
  - E. Acent Maingi
  - F. Joseph Mbengu
  - G. Samuel Mwanzia
  - H. Bonface Mbuvi
12. He said that the victims were rushed to Kangundo Level 4 Hospital. He confirmed the scene was visited and the motor vehicle towed to Kangundo for inspection. He stated, he was not the Investigating officer but Cpl Musila who was off duty. He said he had been paid Ksh 5000 for court attendance and produced a petty cash voucher and the police abstract.
13. Upon cross examination, he stated that Samuel Mwanzia is listed in the police abstract as the plaintiff. He said the Plaintiff sustained injuries. That nobody was blamed, the matter pending investigation. He indicated that the accident occurred and it was the matatu/minibus which hit the lorry from behind at about 5.40am. He stated that the road is straight and the driver was able to see clearly. The driver has an obligation to drive in a speed which he can swerve or stop in case of an accident, and not to overspeed. He also said that if the driver was driving in a moderate speed then he would not have hit the vehicle.
14. Upon cross examination by Ms Kioko, he said there was no indicator that the driver of KBZ 197J was speeding, the accident occurred at 5.40am, it was still dark. He said the motor vehicle was stationary on the road and there was no warning sign, it was dangerously parked on the road. He said the accident occurred at Malaa area and the report does not indicate the exact area. He said the Investigating Officer blamed the owner of KBM 436V for dangerously parking on the road.
15. In re- examination he stated that the final finding was that motor vehicle KBM 436V was dangerously parked on the road.
16. PW2 stated that his name was Samuel Mwanzia Muai. He recalled that on 14<sup>th</sup> May 2015, he was involved in an accident between minibus KBZ 197J and KBM 436V Lorry. He was a passenger in minibus KBZ 197J.
17. He said he is also known as Samuel Mwanzia Muai and swore an affidavit to confirm the name. He was treated at Kangundo as outpatient. He conducted a search and the owner of the lorry KBM 436V Isuzu Lorry was Maingi Charles and Mueni Mary as shown by Copy of Records produced as Exh 6a & b. He said he was examined by Dr. James Muoki who prepared a medical report. He prayed for compensation for pain and suffering and costs He produced as exhibits the following documents;
- a. Treatment notes,
  - b. P3 Form,
  - c. Receipt for Kshs 1000 for P3,
  - d. Motor vehicle search and receipt,
  - e. Medical report and receipt,



- f. Demand notes and postage receipts
18. Upon cross examination by Mr. Kamau, he stated that he sustained injuries due to the accident and continues to take medicine. He feels headaches and indicated that he had no witness to prove that he tightened the seat belt while in the vehicle.
  19. Upon cross examination by Ms. Kioko, he stated that he was a passenger in motor vehicle KBZ 197J, a minibus and the lorry was KBM 436V which was dangerously parked on the road. There was no warning he said.
  20. PW3 was Dr James Muoki, a medical doctor specialized in surgery and trauma told the court that on 18<sup>th</sup> June 2015, he examined Mwanzia Muia who was involved in a road accident and treated at Kangundo District Hospital. He said he sustained the following injuries; deep cut on the forehead, tenderness on the back, tenderness on both hands and a wound on the left leg. He was stitched, given painkillers, tetanus vaccine and the wound was dressed. The accident left him with a permanent scar. The degree of injury was harm. He indicated that he relied on P3 form, treatment notes and physical examination. He charged Kshs 3,000 for the report and Kshs 15,000 for attendance. He produced the medical report, medical receipt and court attendance receipt
  21. Upon cross examination, he stated that the injuries PW2 sustained were soft tissue injuries and he was still in pain. He said he saw the scar and the Plaintiff complained of recurrent pain. There were no internal injuries.
  22. Upon further cross examination by Mrs. Kioko, he indicated that he was not admitted and the injury was a result of road traffic accident.
  23. In re-examination, he stated that he examined the patient based on history and the documents.

### **Defence Case**

24. The Defence called one witness. Samuel Kioko, a driver. He did recall on 14<sup>th</sup> May 2016, he was from Kangundo to Kamulu at about 5am, he was driving his KBM 436B lorry at about 5am. He experienced a mechanical problem on the road and he stopped the vehicle aside the road placed a life saver sign. Suddenly, he saw a motor-vehicle coming at high speed and hit his vehicle from behind, he was in the driver's cabin. He blamed the owner of motor vehicle KBZ 195S for causing the accident.
25. Upon Cross examination, he stated that it was 5am, there was darkness. He said he parked beside the road near Mutalia. There was little space beside the road. He was not in the middle of the road. He had a life saver sign to warn the oncoming motor vehicles. Inspection was done, the vehicle had a problem. He blamed KBZ 197S which hit his vehicle and was speeding. He was not aware whether the driver of motor vehicle KBZ 197S was charged in Court. He was never called as a witness to testify in a civil suit. He contended that he did not park on the road and the lorry was not parked dangerously and it is not true that he left the vehicle on the road.
26. Upon Cross examination by Mr. Muia, he said the scene was a slope and the police officers came later to the scene after the matatu had been removed. His vehicle was still at the scene when the police came. He did not have any problem with the police, they lied. He did not know the Plaintiff and had no issues with him. The vehicle was repaired before being moved. It locked while in motion, it could not move.
27. In Re -examination he stated that he parked beside the road and there was a life saver. There was darkness and leaves, the matatu had light and could see the vehicle. He reiterated that he has never been charged with traffic offence and did not know the Plaintiff. The police were called by matatu owners. The matatu had been moved from the scene



## **Trial Court Judgment**

28. The Trial court found that there was no evidence adduced linking the 3<sup>rd</sup> party with the case and ought not have been sued at all. The suit against him was dismissed.
29. The Plaintiff witnesses, especially the Police Officers; PW1, blamed the Defendant for the accident. The court found the Defendant 100% liable to compensate the Plaintiff for the injuries sustained. The Trial Court found that the injuries sustained by the Plaintiff were confirmed by the doctor PW3, who examined him and prepared the medical report. He sustained soft tissue injuries and is expected to heal without incapacitation. The Trial Court awarded the Plaintiff, Kshs 160,000 for general damages.
30. As regards special damages, the Trial Court noted that the Plaintiff pleaded Kshs 45,000 but proved an additional 15,000 as doctor's attendance fee and Kshs 3000 for medical report thus awarded Kshs 22,500 for special damages.
31. In total the court awarded Kshs 182,500 together with costs of the suit.

## **The Appeal**

32. Dissatisfied by this judgment, the Appellant filed a Memorandum of Appeal dated 17<sup>th</sup> of April 2019 seeking the following orders;
  - a. The Appeal be allowed with costs
  - b. The award on liability, special damages and general damaged be assessed a fresh
  - c. The judgment on quantum of damages of the Trial Court and consequential orders therefrom be set aside with costs to the Appellants both in the Trial Court and on Appeal.
33. The Appeal is founded on the following grounds;
  - a. The Learned Magistrate erred in law and fact holding the Defendants/ Appellants 100% liable for the occurrence of the accident.
  - b. The Learned Magistrate erred in law and fact in awarding damages in favor of the Plaintiff without any legal and/or evidential justification.
  - c. The Learned Magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby delivering an erroneous finding or conclusion
  - d. The Learned Magistrate erred in law and fact in awarding Kshs 160,000 as general damages without any legal or evidential justification.
  - e. The Learned Magistrate erred in law and fact in awarding Kshs 22,5000 as special damages without any legal or evidential justification.
  - f. The Learned Magistrate erred in law and fact in failing to appreciate as follows; the evidence adduced in support of the Plaintiff's case was incongruous with the pleadings and the Plaintiff's pleadings and evidence tendered in support thereof was incapable of sustaining damages awarded.
  - g. The Learned Magistrate erred in law and fact in awarding excessive damages without regard to the Defendant's submissions



- h. The Learned Magistrate erred in law and fact by awarding excessive damages beyond the scope of evidence and or legal entitlement
  - i. The Learned Magistrate erred in law and fact in entering judgment in favor of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish her case more especially on damages,
34. The Appeal was canvassed by way of written submissions.

### **Appellant Submissions**

35. The Appellant filed submissions on 29<sup>th</sup> August 2022 in which it was submitted that the Learned Magistrate erred in holding the Appellants 100% liable considering the Appellants vehicle had developed mechanical problems and was parked away from the road. That the document on page 26 of the Record of Appeal clearly indicated that the driver of KBZ 197S, the third party herein lost control while attempting to avoid a pothole and rammed the Appellants motor vehicle. He was driving at high speed and in the interest of justice, liability should be apportioned at 50:50 in favour of the Plaintiff against the 3<sup>rd</sup> Party.
36. Secondly, it was submitted that the medical report exaggerated the injuries of the Respondent as harm and therefore the award of general damages of Kshs 160,000 which is excessive. That an award of Kshs 100,000 would be sufficient. Reliance was placed on the case of Ndungu Dennis vs Ann Wangari Ndirangu and another [2018] eKLR, Maji Mazuri flowers limited vs Samuel Momanyi Kioko [2016] eKLR and Nyambati Nyaswabu Erick vs Toyota Kenya Limited & 2 others [2019] eKLR.
37. Thirdly, it was submitted that the Plaintiff is not entitled to special damages and they would be prejudiced and suffer loss as there is no criteria or remuneration scale used in awarding the Doctor court attendance fee of Kshs 15,000/- but the court adopted the award as pleaded.

### **Respondent's Submissions**

38. The Respondent filed submissions on 8<sup>th</sup> October 2021 in which it was submitted that the Learned magistrate did not err in finding the Appellants 100% liable as the Plaintiff and his witnesses' evidence was unshaken and both blamed the Appellants' driver for the accident as he dangerously parked the lorry in the middle of the road with no lights or indicators and it was very early in the morning at 5.am causing the minibus to ram into it. That the driver ran away after the accident leaving the motor vehicle at the scene.
39. It was submitted that the award was commensurate to the current court awards for similar injuries and the evidence adduced in court. Further, that the learned Magistrate put into consideration the Appellants submissions, the conventional awards and the seriousness of the Respondent's injuries in arriving at its award.
40. The Respondent cited the cases of Samson Mlawali vs Daniel Omenda HCCC 948 OF 1991 Mombasa, Equity Bank Kenya Limited vs David Gathuu Kuria [2020] eKLR , Patrick Mwiti & Another vs Kevin Mugambu Nkunja [2013]eKLR, Kara Roadways Limited vs Peter Kivuva Nyamai [2018] e KLR, Tarmal Wire Products Limited vs Ramadhan Fondo Ndegwa [2014] eKLR, Spin Knit Limited vs Johnstone Otara [2006] e KLR and Patrick Kamuya & Another vs Asaph Gatundi Wanjiku [2016] e KLR.



## Determination

41. The Court considered the Trial Court Record, Memorandum of Appeal, and the written submissions of the parties.

42. In *Coghlan vs. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows;

Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

## Liability

43. It is not in contention that on 14<sup>th</sup> May 2015 at about 5.40 a.m along Nairobi- Kangundo road at Malaa area the Appellants driver stopped or parked the lorry Reg. KBM 436V on the road as a result of which the minibus KBZ 197S in which the Respondent was a passenger rammed into it leading to the Respondent sustaining the following injuries; deep cut on the forehead, tenderness on the back, tenderness on both hands and a wound on the left leg. It is also not in contention that the Respondent was treated at Kangundo district hospital Level 4 he was not admitted in hospital.

44. The Appellant raised issues that can be summarized to liability and quantum including special damages. The burden of proof was on the appellant to prove his case. Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya provide that:

107(1). Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

45. On the issue of Liability, the Court of Appeal in *Micheal Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR had this to say;

"The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. Gypsum Mines Ltd* (2) (1953) A.C. 663 at p. 681 as follows:

"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying



common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

46. The Trial Court found the Appellants 100% liable for the accident that occurred on 14/5/2015 due to the Defendants motor vehicle KBM 436 V that was parked on the road as evidence was adduced to this fact by PW1 and was subjected to cross-examination before the Trial Court.
47. The Trial Court in the judgment delivered on 27/3/2019 and found the Defendants 100% liable for the accident. PW1 testified, the driver of motor vehicle KBZ 197J namely, Mbuvi was driving from Kangundo to Nairobi and on reaching the location of the accident he hit motor vehicle KBM 436V from behind which was dangerously parked by the road facing Nairobi direction. The minibus was extensively damaged and the passengers sustained injuries.
48. In *Selle vs Associated Motor Boat Co.* (1968) E.A 123 at page 126;  
“(the) principles upon which this court acts in such an appeal are well settled. Briefly put they are but this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally..”
49. This Court shall rely on the evidence on record as adduced during trial and subjected to cross-examination by the Appellants. The Trial based its findings on liability on the testimony of the Police Officers who testified in Court; PW1 PC Peter Nyandemo and also PW2 PC Alex Samoei who issued the Police Abstract.
50. The Appellant contends and relies on the document on Page 26 of the Record of Appeal clearly indicated that the driver of KBZ 197S, the third party herein lost control while attempting to avoid a pothole and rammed the Appellants motor vehicle. He was driving at high speed and in the interest of justice, liability should be apportioned at 50:50 in favour of the Plaintiff against the 3<sup>rd</sup> Party.
51. The document referred to is unnamed undated unsigned is a copy of what appears to be a newspaper article on page 26 of the Record of Appeal. Although, Section 78 of *Civil Procedure Act* grants additional evidence to be adduced during an appeal, the said caption annexed in the Record of Appeal was not part of the Trial Court’s record. Ideally, legally, the Appellant ought to have sought leave or put the parties and the Court on notice that new evidence was introduced. In the circumstances this Court cannot refer and/or rely on the said caption as its source/ author is unknown and the content unconfirmed. It is inadmissible evidence at this stage as it was not included in the Trial and the author/ source of the document called as a witness during trial, and as such it would not be in the interest of justice to rely or to even consider it at this stage.



52. The Appellants witness in cross examination contends that the Lorry developed mechanical problems and stopped while in motion but on the other hand also insists that he moved the Lorry to the side and put life savers to warn other residents. If the motor vehicle stalled or stopped while in motion, how was he able to move it to the side? If he had placed the leaves and life saver signs as he purports, how come this was not mentioned by the Police Officers whom he says went to the scene and found the minibus had been moved but the Lorry was still at the same place?
53. PW1 on the other hand categorically blames the Lorry driver for the accident. The Respondent as well. The fact that no one was charged does not negate the fact that there was someone to blame for the accident. I note that the Appellant pleaded a number of items in his statement of defence which he said “provoked and caused the accident” but did not provide any evidence to support the said allegations. It is trite law that he who alleges must prove and parties should desist from preparing defences without being keen on proving the circumstances. How did the Respondent provoke the accident?
54. In *Masembe vs. Sugar Corporation and Another* [2002] 2 EA 434, it was held that an apportionment of liability made by a Trial Court will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous.
55. In the absence of any tangible and/or cogent evidence to blame the driver of the minibus, I find no reason to disturb the finding of the Trial Court as far as liability is concerned.

### **Quantum**

56. On the issue of General damages, the Trial Court considered the injuries namely deep cut on the forehead, tender back and swollen wound on the left leg as per medical evidence by the the doctor and awarded Kshs 160,000. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:
 

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
57. The injuries sustained are deep cut on the forehead, tenderness on the back, tenderness on both hands and a wound on the left leg according to the medical report by Dr. James Muoki PW3 and they are the same injuries that have been pleaded in the Plaint. The doctor categorized the injury as harm. Contrary to the ground of appeal that the medical report the injuries were exaggerated, this is not borne out by the evidence on record.
58. The Appellant contends that this has been exaggerated but does not say how. He also did not bring a doctor to counter this evidence so as to inform the court if the injury could have been something else or subject the Plaintiff to a 2<sup>nd</sup> medical examination.
59. The Trial Court considered submissions on quantum by parties through their respective Counsel relying on authorities, the Plaintiff proposed an award of Kshs 300,000/- and the Defendants proposed and award of Kshs 70,000/- as general damages and the Trial Court assessed the injuries against the



submissions made and awarded Kshs 160,000/- general damages. Assessment of damages is not an exact science but consideration of the specific facts against the legal principles which this Court finds was applied by the Trial Court. This Court finds no legal basis to interfere with his findings are regards the injuries and the award of damages.

### **Special Damages**

60. As for special damages, Parties and the Court are bound by pleadings and special damages must be specifically pleaded and proved. Pleadings are also meant to bring to the opposite party's attention the nature of the case that he is expected to face. In his pleadings, the Plaintiff at Paragraph 6 lists Particulars of special damages and Paragraph 7 the Respondent indicated that he will claim "witness expenses particulars whereof will be provided at the hearing". In this case, the receipts were filed with the pleadings, produced in evidence and the medical report expense as well as the doctors attendance receipt of Kshs 15,000/- was produced in court without any objection. It is too late for an objection to be taken for the first time in this appeal.

### **Disposition**

61. In the premises, the Court upholds the Trial Court judgment of 27/3/2019 and Appeal is dismissed and costs awarded to the Respondent.

It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 9<sup>TH</sup> FEBRUARY, 2023  
(PHYSICAL/VIRTUAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

### **In The Presence Of**

No appearance - for the Appellants

Mr. Mutava H/B Ms Mutunga for the Respondent

Geoffrey/Patrick - Court Assistant(s)

