



**Mbelezi & another v Njenga (Civil Appeal E034 of 2020)  
[2023] KEHC 18469 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 18469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E034 OF 2020  
RB NGETICH, J  
FEBRUARY 16, 2023**

**BETWEEN**

**NGUMBI MBELEZI ..... 1<sup>ST</sup> APPELLANT**

**GODFREY GITONGA MUSA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMWEL MACHARIA NJENGA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Honourable Resident Magistrate E. Riany)*

**JUDGMENT**

1. This appeal arises from the judgment and decree of the Chief Magistrate in Thika CMCC No 70 of 2020 in which the Respondent instituted a suit for general and special damages against the appellants for injuries sustained in a Motor Vehicle accident on July 16, 2019. From the record, the Respondent was lawfully walking along Ngoliba- Muti road when Motor Vehicle Registration No KCG 585M veered off the road and hit him at the pedestrian crossing.
2. The Defendants who are Appellants in this appeal filed their defence dated April 3, 2020 denying the allegations of negligence and blamed the Plaintiff for the accident.
3. After hearing, the trial court found the appellants 100% liable for the accident and awarded general damages of Khs 490,000/= and special damages of Kshs 11,400/=.
4. Aggrieved by the trial court's judgment, the appellants filed a Memorandum of Appeal citing the following five (5) grounds:
  - a. The learned Magistrate erred in law and in fact when he failed to consider the appellant's submissions, evidence and facts produced in assessing liability and quantum to the Respondent.



- b. The learned Magistrate erred in law and in fact when he failed to consider points of law and facts in finding the appellants fully liable for the accident which is the subject matter of this suit.
  - c. The learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
  - d. The learned Magistrate's decision was just, against the weight of evidence and was misguided in deciding that the respondent was entitled to Kshs 490,000/= as general damages which ought to be dismissed.
  - e. That the learned Magistrate erred in law and in fact in awarding an excessive and undeserved sum of Kshs 490,000/= to the Respondent as general damages for injuries sustained and liability as against the appellants at 100% without assessing the real question on liability on the part of Samwel Macharia Njenga.
- And prayed for the following order:
- a. The appeal be allowed.
  - b. Dismiss the judgment of the trial court delivered on December 15, 2020.
  - c. Costs of the appeal be awarded to the appellants.
  - d. Any other orders of the court.
5. The appeal proceeded by way of written submissions.

#### **Appellants' submissions**

6. Counsel filed submissions on September 6, 2022. He submitted that the Respondent did not prove his case before the trial court; the Respondent failed to prove that the Appellants were liable for the accident and there is no connection between the dislocation treated in July 2017 and the road traffic accident that occurred in March 2017; the dislocation was not included in the earlier contemporaneous accident examination.
7. Counsel further submitted that the injuries sustained were as a result of a fall and not as a result of a road traffic accident and urged this court to exclude the fracture from the quantum assessment.
8. In conclusion, counsel submitted that damages as awarded by the trial court are excessive and urged this court to set aside the lower court's award.

#### **Respondent's Submissions**

9. Counsel filed submissions on September 12, 2022 and submitted that the evidence of CPL. Gabriel Mwangi the Investigating Officer who visited the scene of the accident and confirmed the occurrence of the accident remains unchallenged and the appellants' assertion that the injuries were as a result of a fall are misleading to the court. That the Appellants failed to call a witness to support their claim and cannot therefore be heard to state that the appellant's evidence was not considered.
10. In conclusion, counsel submitted that the respondent proved to the court that as a result of the accident he suffered a fracture of the left fibula bone proximal aspect and the award of Kshs 490,000/= was within the allowable limits considering the injuries sustained. He urged this court to dismiss the appeal.



## Analysis and determination

11. This being the first appeal, I am obligated to re-evaluate the evidence of the trial court and come up with my own conclusion. I am however minded of the fact that unlike the trial court, I did not have the chance to hear witnesses and observe their demeanor, for this I give due allowance. This position was held in the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123, where the court held as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
12. In view of the above, I have perused the record of appeal and find that the issue for determination is whether this court should interfere with trial court’s finding on liability and whether assessment of general damages was inordinately excessive to warrant interference by this court.
13. On the issue of liability, the trial court in the judgment found the Respondent had proved his case on the balance of probability and apportioned liability of 100% jointly against the Appellants. The trial court opined that the 1<sup>st</sup> Defendant was the beneficial owner of the Motor Vehicle while the 2<sup>nd</sup> Defendant is the registered owner.
14. From the record, the Respondent who testified as Pw3 stated that he was walking on the pathway along the Ngoliba-Muti road when the driver of Motor Vehicle of KCG 585M hit him with the rear wheel while negotiating a corner. The evidence of the Respondent was corroborated by Pw2 who was the Investigating Officer. He stated that the driver of the Motor Vehicle KCG 585G was to blame for the accident and the owner of the vehicle was to blame for allowing unlicensed person to drive the Motor Vehicle. He produced police abstract which confirmed that the Appellants were to blame for the accident. The evidence of the Respondent was not controverted. The trial court found that in the absence of the Defendant’s evidence to challenge the particulars of negligence as alleged by Plaintiff, the defendants were 100% liable.
15. In view of the fact that the plaintiff’s evidence was uncontroverted, I am not persuaded that the trial court erred in awarding 100% liability to the appellants. I will therefore not disturb the trial court’s finding on liability.
16. In respect to assessment of damages, I note from the plaint dated February 6, 2020, the injuries sustained by the Plaintiff was fracture of the left fibula bone proximal aspect. Injuries were supported by the treatment notes adduced from Ngoliba and Thika level 5 hospital as well as the P3.
17. The Plaintiff also produced a medical report from Doctor Karanja who confirmed the injuries as stated in the plaint. From the report, examination was done three (3) months after the accident and the doctor found that the plaintiff was in fair general condition but was walking with a limping gait with the aid of a walking stick. On the left leg, the doctor observed there was mild tenderness and swelling of the upper third of the leg.
18. The principles within which the trial court interferes with the assessment of quantum are stated in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia*



(1982-88) 1 KAR 727 and restated by the Court of Appeal in the case of Arrow Car Ltd v Elijah Shamalla Bimomo & 2 Others (2004) eKLR that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. ...”

19. The appellant contends the award of Kshs 490,000/= was excessively high and an award of Kshs 200,000/= would be appropriate compensation.

20. In the case of *Stanley Maore Vs Geoffrey Mwenda* Nyeri CA No 147 of 2002 the Court of Appeal held as follows: -

“On the assessment of general damages; “It has been stated now and again that in the assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases.”

21. The trial court in the assessing of damages cited the case *Harun Muyoma Boge Vs Daniel Otieno Agulo* (2015)eKLR where an award of Kshs 300,000/= was made for blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia, fibula and soft tissues injuries in 2015.

22. I note that in the trial court, the Plaintiff proposed an award of Kshs 600,000/=. The trial court however found that the injuries sustained in the case cited in support of the said figure were not comparable to injuries sustained by the Respondent herein.

23. The court relied on the case of *Harun Muyoma Boge Vs Daniel Otieno Agulo*[2015] where the injuries sustained were comparable with injuries herein. I note that the court considered the age of the authority and inflation trend and found a sum of Kshs 490,000/= as sufficient to compensate the Plaintiff as general damages.

24. Having compared the injuries herein with injuries sustained by victims in the cited authorities, I find the award reasonable; the award under general damages is not inordinately high to warrant interference by this court.

25. On the issue of Special damages, the respondent adduced the receipts as proof of payments. It is trite law that special damages must be pleaded and specifically pleaded. I have perused the plaint and confirmed as admitted by both parties that the Respondent pleaded for Kshs 5,400/= as special damages. The award of kshs 11,400/- as special damages by the trial court was therefore erroneous.

26. In *Hahn v Singh*, Civil Appeal No 42 Of 1983 [1985] KLR 716, the court of appeal 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.”



27. From the foregoing, I find that the trial Magistrate erred in awarding special damages of Kshs 11,400/= which were not pleaded. In the upshot, I therefore review the trial court's award and award Kshs 5,400/= as special damages pleaded and proved.
28. Accordingly, I find the appeal partially succeeds only on the issue of special damages.
29. Final Orders: -
1. Appeal on liability is hereby dismissed.
  2. Award under General Damages to remain as assessed by the trial court.
  3. Award under Special Damages is reviewed to Kshs 5,400/=.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU**

**THIS 16TH DAY OF FEBRUARY, 2023**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Martin – Court Assistant**

No appearance by Parties

