



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutuku v Toboso (Civil Appeal E030 of 2021)
[2023] KEHC 581 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 581 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E030 OF 2021
LN MUGAMBI, J
FEBRUARY 3, 2023**

BETWEEN

JACKSON MUTUKU APPELLANT

AND

NICHOLAS OBONYO TOBOSO RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Kiambu (Hon. G. Omodho, PM) in Civil Suit No. 340 of 2019 delivered on 29th January, 2021)

JUDGMENT

1. The appellant being dissatisfied with the decision of the lower court filed this appeal in which he challenged the findings of the trial court on both liability and the award of general damages.
2. The memorandum of appeal raises the following grounds:
 - i) That the learned trial magistrate erred in law and in fact by failing to find and hold that the plaintiff wholly and/or substantially contributed to the accident.
 - ii) That the learned trial magistrate erred in law and in fact by finding that the plaintiff was injured pursuant to the accident material to this suit as pleaded yet his medical records, specifically the medical report by Dr Wokabi, was prepared using treatment notes issued in another person's name.
 - iii) That the learned trial magistrate erred in law and in fact in assessing general damages at Ksh 2,000,000 which was inordinately excessive in the light of injuries claimed to have been sustained and evidence adduced.
 - iv) That the learned trial magistrate erred in law and in fact by assessing the diminished earning capacity at Ksh 700,000 by using global method to reach that determination.



- v) That the learned trial magistrate erred in law and in fact in awarding diminished earnings that were not proved.
 - vi) That the learned trial magistrate erred in law and fact by applying wrong principles in arriving at awards of Ksh 2,000,000 and Ksh 700,000 as particularized above.
 - vii) That the learned trial magistrate generally reached at the judgment in a cursory and perfunctory manner without applying herself to the evidence, precedents objections, oral and written submissions all tendered on behalf of the defendant.
3. The appellant thus prayed that the lower court's judgment be set aside and the appeal be allowed with costs; in the alternative, the entire judgment be set aside and the suit be heard afresh.
 4. In brief, this appeal emanates from a suit concerning a personal injury claim that was filed by the respondent against the appellant at Kiambu Chief Magistrate's Court following a road traffic accident on April 26, 2019 along Kiambu road. It was alleged the appellant's motor vehicle was negligently driven thereby losing control and knocking down the respondent who was a pedestrian. As a result, he sustained the following injuries: Loss of consciousness Traumatic rupture of the right eye Fracture of the right mandible Deep abrasion on the left mandible Blunt soft tissue injuries to the chest and abdomen
 5. It was further pleaded that, prior to the accident the respondent was a casual labourer, earning an average of Ksh 15,000 every month.
 6. The appellant not only filed a defence but also testified in his defence before the trial court.
 7. After the full trial, the trial court entered judgment against the appellant as follows: Liability was assessed at 100% against the appellant. General damages - Kshs 2,000,000 Lost income/diminished earning capacity - Kshs 700,000/- Special damages of Ksh 22,500
Total award – Ksh 2,722,500/=
Cost of the suit and interest at court rates.
 8. On March 5, 2022, directions were made by the judge to admit this appeal who also ordered that the same be disposed off by way of written submissions. Those directions were complied with by the parties. The appeal was consequently listed for disposal under the the rapid results initiative of the High Court during the service week for the period of between 15th to January 30, 2023.
 9. The issues in this appeal are as outlined in the memorandum of appeal and submissions filed by both sides.
 10. One of the major contentions raised by the appellant's counsel is that medical documents in another person's name were used in the preparing the medical report that was relied upon by the respondent to prove his case at the lower court. It was thus contended the injuries were thus not sustained by the respondent. The appellant's counsel submitted he objected to production of the documents without availing the maker but he was overruled by the trial court.
 11. According to the appellant's counsel, the medical notes used by Dr Wokabi, (PW 3) to prepare the medical report originated from Kiambu county Level 5 hospital. They bore the name of Stephen Mwangi, a fact confirmed by the said doctor in his evidence before the trial court. Despite the fact that the documents were of a different person, it is these documents that were used to prepare the medical report that the respondent, Nicholas Obonyo Toboso used in his evidence before the court to prove the injuries. It was thus the appellants contention that those injuries were not sustained by the respondent but a different person.



12. The appellant's counsel further submitted the belated attempt that purported to clarify the same exposed a further attempt to manipulate the truth. He pointed out that the letter which supposedly sought to confirm that it was the respondent who was referred by that name in the hospital as he was booked by a good Samaritan who was not conversant with his name Stephen Mwangi is dated June 4, 2019. However, the letter that is seemingly offering clarification is dated May 31, 2019. He wondered if clarification was being provided, which of the two letters ought to have pre-dated the other. He also pointed out that the letter of June 4, 2019 bore the hospital stamp but the one of May 31, 2019 did not have any, making it a questionable document.
13. Responding to the above submissions, the respondent's advocate submitted as follows:

“...we draw the attention of this court to the fact that the appellant's counsel objected to the production of letters from Kiambu Level 5 hospital by PW1 and the court made a ruling overruling the said objection

(refer to page 56 of ROA). The said ruling stood at the time the trial court delivered its judgment.

As such, ground 3 of the appeal is defective and moot for it challenges a ruling of the trial court made while proceedings were ongoing after judgment has been delivered. We submit the appellant window to challenge the rulings made during proceedings closed when judgment was delivered...”
14. During the trial before the lower court, the court held counsel submitted appellant's as follows:-

“...The said documents being objected were filed with the plaint. During pre-trial defendant never raised or sought the makers be called to produce the documents as such, I would not uphold the objection. Matter to proceed...”
15. In the judgment delivered by the trial court on January 19, 2021, the trial court once more addressed this issue thus:-

“...The defence disputed the report from Kiambu level 5 hospital taking issue with the name on the said referral letter.

Exhibit 1 and 2 are letters from Kiambu Level 5 hospital dated June 4, 2019 and May 31, 2019 respectively. The letter of May 31, 2019 explains that the plaintiff had been presented to hospital by a good samaritan but registered in the name of Stephen Mwangi. The letter dated June 4, 2019 gives a summary of injuries the plaintiff sustained and confirms plaintiff was discharged on April 30, 2019...”
16. Counsel for the respondent, in my humble view, misapprehends the correct position in law when he submits that because the appellant's counsel did not immediately appeal the ruling made against his objection to the admissibility of the documents when the trial was ongoing, he cannot raise the issue in this appeal having waited for the trial court to conclude and the lower court to deliver its judgement before appealing the said ruling.



17. This is a 1st appeal, and as such, this court is entitled to evaluate or review matters of facts and law in respect of what transpired before the lower court in its entirety and give its verdict as was held in [Peter M Kariuki v Attorney General](#) (2014) eKLR where the court said:

“...We have also as we are duty bound to do, as first appellate court, to reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusion and to satisfy ourselves that the conclusion reached by trial Judge are consistent with the evidence...”

18. This legal position can also be found in *Ngui v Republic* (1984) KLR 729 and [Susan Munyi v Kesbar Shiani](#) and Appeal No 38 of 2002.

19. Furthermore, Justice John Mativo quoting from the case of [Sanitosh Hazani v Purushotan Tiwani \(deceased\)](#) by L.Rs 3 SCC 179, held in [Bwire v Wayo & Sailoki](#) Keh 7 (KLR) 24;

“... A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.

In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of section 78 of [Civil Procedure Act](#), a court of first appeal can appreciate the entire evidence and come to a different conclusion...”

20. I thus find that contrary to the submissions of the respondent’s counsel, the appellant is not estopped from raising the issue on appeal before this court.

21. The matter raised by the appellant counsel is not just an issue of admissibility but also reliability of the said medical report in proving the injuries.

22. As pointed by counsel for the appellant, the glaring abnormality in the letter that sought to explain that it was the respondent that was treated at Kiambu Level 5 hospital in the name of Stephen Mwangi should have been explained by the person asserting that fact and this was maker of the document himself. The fact that the letter pre-dated the letter it purported to provide explanation for is a matter that dented the credibility of the document unless there was a proper explanation. The trial court thus rushed to admit this evidence without a proper basis being laid.

23. The fact that the appellant did not indicate at the pre-trial conference that he would require the makers of those two letters to be called as witnesses should not have been used against him by the trial court to exonerate the respondent from adducing sufficient proof of those facts. The documents were part of the respondent/plaintiff’s case and it was his duty ensure they were properly produced in evidence before the court as required by law. In any case, it is not even indicated that the appellant and the respondent had agreed to have the documents admitted by consent at the said pre-trial conference.



24. The law of *Evidence*, section 107 is clear, that he who alleges must prove. The burden of ensuring that a reliable and sufficient evidence to prove the respondent's case on a balance of probabilities lay on the respondent.
25. The fact that the alleged good samaritan who took the respondent to hospital and booked him under the name Stephen Mwangi was neither called to testify nor was any medical staff from Kiambu county Level 5 hospital called to identify the appellant positively as the person who was treated at Kiambu level 5 hospital threw the respondent's case into deep sea as there was no linkage established between him and the treatment records that were used to prepare the medical report. His identity card which he produced during the trial shows he is Nicholas Obonyo Toboso, (not the Stephen Mwangi whose records were used by Dr Washington Wokabi (PW 3) to prepare the medical report).
26. As such, I find that the trial court's finding that the injuries contained in the medical notes from Kiambu Level 5 hospital and by extension the medical report of Dr Wokabi is not borne of out of evidence and thus the award of damages based on that medical evidence was misleading.
27. Nevertheless, I will still proceed to consider what would have been my findings had this appeal been dismissed.
28. On liability, the manner this accident happened is based on the account of the respondent and the appellant. There was no other eye witness. The police officer who produced the police abstract, PC Alice Laban (PW 2), was not at the scene of the accident. She was not the investigating officer either. In any case, the police abstract does not state who was responsible for the accident. The attempt by the police officer who testified to blame the accident on the appellant for overlapping is based on information she said she received from the investigating officer which is inadmissible hearsay as the said investigating officer was never called as a witness.
29. In resolving the issue of liability for the accident, the trial court, reasoned thus: -

“...An analysis of facts above are that if the driver is moving slowly due to traffic, even if someone dashed onto the road, wouldn't he be able to bring the motor vehicle to a stop to avoid the accident? Only a speeding driver would fail to stop in-case of an emergency. This gives credence to plaintiff's account that the driver was speeding. While the defence gave its account of events, the said account of events goes towards confirming that indeed the defendant counsel caused the accident. Having observed, I would lay blame on the defendant for the accident observing that the defence herein may be an afterthought too weak to rebut the plaintiff's case ...”
30. Flowing form the above, it is clear that the that the trial court accepted the respondent's evidence wholly. It blamed the appellant for over-speeding and causing the accident and slammed him with liability at 100%.
31. Part of the trial court's reasoning can be summed up as follows:-

“if someone dashed on the road and is knocked by an over speeding vehicle which ought to have been moving slowly due to heavy traffic, the driver must shoulder full blame for the accident. It is immaterial that the person dashed into the road, it was up to the driver to bring the vehicle to a complete stop and avoid knocking him down.”
32. That reasoning is twisted and does not reflect the duty road users owe to each other. Pedestrians, just like drivers have a duty of care too. Dashing into the road full of traffic even when vehicles are ordinarily



expected to be driven slowly is an act of recklessness too. A pedestrian is not supposed to dash into the road but cross the road calmly and especially at the designated pedestrian crossing.

33. The testimony of the appellant that the respondent dashed into the road was ignored by the trial court yet it appears to have entertained the thought of this possibility when it reasoned thus:-

“if the driver is moving slowly due to traffic, even if someone dashed onto the road, wouldn’t he be able to bring the motor vehicle to a stop to avoid the accident?”

34. With due respect, the trial court got it all wrong in its reasoning and arrived at a wrong conclusion. Moreover, there are no reasons it has assigned for disregarding the appellants testimony other than merely terming it an afterthought. Why it labels it an afterthought is only a matter of speculation as the reasons are not provided.
35. The respondent even appears to have changed his story when he indicated in his testimony that he was stationary when he was knocked as he waiting to board a vehicle whereas in his statement which was served with the plaint he had stated that he was walking along Kiambu road when he was suddenly hit by the vehicle, KCT 569F.
36. While I concur with the finding that over-speeding mainly contributed to the accident happening, it is also my finding that under the circumstances, it was not the only cause or that the pedestrian was absolutely blameless as found by the trial court.
37. I would thus tinker with the trial court’s finding on liability by apportioning blame at 20% to the respondent while the appellant shoulders 80%.
38. On quantum, the principle applicable is that the appellate court should scarcely interfere with an award for damages as it is an exercise of judicial discretion unless it is shown that the trial court acted on the wrong principles or awarded excessive or little damages that no reasonable court would award or where it takes into account matters it should not have considered. This was the holding in *Kenfro Africa Limited T/a Meru Express Service Gathongo Kanini v Ann Lubia* (1982 – 88) 1 KAR 727)
39. No evidence was provided to demonstrate that the respondent worked as a gardener earning the sum of Ksh 15,000/- monthly. The respondent did not attest to this fact and no evidence whatsoever was called in that regard. The trial court was thus correct to hold that the claim for of loss earnings was not proved.
40. Nevertheless, the court went ahead and awarded a sum of Ksh 700,000/- for loss of earning capacity basing it on 35% disability indicated in the medical report.
41. Loss of earnings refers to decrease in a person’s earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but lost of earnings must be specifically pleaded and proved.
42. Usually, loss of earning capacity is concerned with the effect of the injury on the person’s future earning ability as opposed to the present loss.
43. However, it was the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head. Such a claim can then be evaluated by the court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of incapacity and such other



factors. In short, court must show how it has arrived at that amount, it not just by coming up with a random figure.

44. In this case, there was no evidence led on the respondent's earnings hence, the difference/reduction of those earnings in future as a result of the disability inflicted by the accident could have not possibly been worked out in absence of such guiding evidence. The court thus engaged in speculation when it came up with the figure of Kshs 700,000/-.
45. In conclusion therefore, I would strike out the award of a further Ksh 700,000/- as damages for loss of earning capacity as it is not evidenced how the court arrived at this figure neither did the respondent tie the disability to his future loss in earnings in the evidence he led before the court.
46. Nevertheless, I would uphold the award of Kshs two million in general damages as full compensation based on judicial precedent relied on by the trial court. I consider this was a reasonable assessment of general damages going by the extent of the injuries and comparable awards. The amount however would be less 20% contribution by the respondent in causing the accident hence the amount payable would have come to Kshs 1,600,000/-.
47. In the overall analysis, this court has already found that the medical report relied on to prove the injuries sustained is unreliable as it is based on medical records that were not linked to the respondent. The respondent did not establish his case on a balance of probabilities as evidence called did not meet the requisite test of admissibility, credibility and reliability.
48. It is my finding that this appeal succeeds.
49. I allow the appeal and set aside the entire lower court judgment together costs of the suit.

JUDGMENT READ, SIGNED and DELIVERED at KIAMBU IN OPEN COURT THIS 3RD DAY OF FEBRUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of:-

Coram: L.N Mugambi

Court Assistant: Kinyua

Kitonga for Appellant - Absent

For Respondent: M/s Ndwiga holding brief for M/s Mariga

COURT

Judgment delivered in open court.

L.N. MUGAMBI

JUDGE

