



REPUBLIC OF KENYA



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Mutie t/a Dama Tours & Safari Company Limited v Kilonzo (Civil Appeal E128 of 2021) [2023] KEHC 2356 (KLR) (7 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E128 OF 2021**

JM CHIGITI, J

MARCH 7, 2023

BETWEEN

**PETER KAEKA MUTIE T/A DAMA TOURS & SAFARI COMPANY
LIMITED APPELLANT**

AND

FRANSCISCAH MWONGELI KILONZO RESPONDENT

(Being and Appeal from the whole judgement delivered on 14th July, 2021 at the Chief Magistrates Court at Thika by Honourable O. M. Wanyaga – SPM)

JUDGMENT

Brief background

1. On December 6, 2017, the respondent sustained injuries as a result of a road traffic accident that took place along Thika-Muranga road. It was alleged that the respondent was a passenger in the appellant's motor vehicle registration no KBT 286L when it got involved in an accident with motor vehicle no KCF 393.
2. The matter proceeded into hearing after which the trial magistrate delivered a judgment on July 14, 2021 - in Thika CMCC No 666 of 2018 - whereby the court apportioned liability at 50:50 percent against the defendant/appellant and a 3rd party. The court awarded general damages at Kshs 130,000/= special damages at Kshs 7,050/=, and costs of the suit; and interest.

The Appeal

3. Being aggrieved by the aforementioned judgment, the appellant herein instituted this appeal vide a memorandum of appeal dated July 19, 2021. The memorandum of appeal contains 7 grounds of appeal as below:



- i. The learned magistrate erred in law and in fact when he failed to consider the appellants' evidence on points of law and facts on finding the appellant 50% liable for the accident which is the subject matter of this suit.
 - ii. The learned magistrate's decision was against the unjust, weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - iii. The learned magistrate's decision was unjust, against the of weight evidence and was misguided on deciding that the appellant was 50% liable for causing the accident which ought to be dismissed.
 - iv. The learned magistrate erred in law and in fact in finding the appellant liable and awarding the respondent general damages of Kshs 130,000/- and special damages of Kshs 7,050/- without assessing the real question on liability on the part of Peter Kaeka Mutie t/a Dama Tours & Safaris Company Limited.
 - v. The learned magistrate erred in law and in fact in awarding liability as against the appellant at 50% without assessing the real question on liability on the part of Peter Kaeka Mutie t/a Dama Tours & Safaris Company Limited.
 - vi. The learned magistrate erred in law and in fact in unduly disregarding the appellant evidence, submissions and facts produced in assessing liability to the respondent.
4. The appellant sought from the court for the following orders:
- a. That this appeal be allowed.
 - b. That the judgment of the Hon Hon OM Wanyaga senior resident magistrate sitting at Thika in Civil Suit No 666 of 2018 and delivered on July 14, 2021 be dismissed.
 - c. That the costs of this appeal be awarded to the appellant.
 - d. That such further orders may be made by this honourable court may deem fit to grant.

The Cross Appeal

5. On their part, the respondent filed a cross appeal against the above judgment, being a cross appeal against the liability and set forth the following grounds of cross appeal namely that:
- i. That the learned magistrate erred in law and in fact by disregarding the cross appellant's evidence and that of her witnesses on the issue of liability and placing heavy reliance on the unsubstantiated averments of DW2 and DW3 that there was a third motor vehicle which disengaged from a breakdown and thus causing and/or contributing to the accident.
 - ii. That the learned magistrate erred in law and in fact by failing to find the respondent herein 100% liable but instead apportioned liability at 50.50 between the respondent herein and the other alleged motor vehicle which was not a party to the suit.
 - iii. That the learned magistrate erred in law and in fact by relying on an unauthenticated sketch map and a contentious abstract dated January 16, 2018 which contradicted the actual OB that had indicated that motor vehicle registration number KBT 280L hit motor vehicle registration number KCF 393M



- iv. That the learned magistrate erred in law and in fact by failing to consider DW2 testimony in cross examination that as per the OB report motor vehicle registration number KBT 286L was blamed for having hit motor vehicle registration number KCF 393L.
 - v. That the learned magistrate erred in law and in fact by speculating on the circumstances of the alleged towed lorry's contribution to the accident and thus occasioning a miscarriage of justice.
 - vi. That the learned magistrate erred in law and in fact by speculating the contribution of the alleged towed lorry to the accident at 50%.
 - vii. That the learned magistrate erred in law and in fact by failing to appreciate that the cross appellant herein had sufficiently proved liability against the respondent herein on a balance of probabilities.
 - viii. That the learned magistrate erred in law and in fact by introducing another defendant and apportioning liability to them in the judgment.
 - ix. That the learned magistrate's decision on liability was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.
6. The cross appellant sought for the orders that:
- a. This cross appeal be allowed with costs.
 - b. The honorable court do find the respondents 100% liable for the accident.
 - c. The judgment of the Honourable Senior Principal Magistrate honourable OM Wanyaga as the award on future medical expenses are concerned delivered on July 14, 2021 be set aside.
 - d. The honourable court be pleased find the respondent herein a 100% liable for the accident as pleaded in the cross appellant's pleading.

Analysis and Determination

7. In *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA. The court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect. This principle was enunciated thus:
- “...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...”
8. Section 107 of the *Evidence Act* provides that 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.
9. Section 109 of the *Evidence Act*, 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.



10. The cross appellant was dissatisfied that the trial magistrate introduced a third party vehicle into the claim. From the pleadings, there are only two vehicles that are the subject of the suit being motor vehicle registration number KBT 286L and KCF 393. The trial magistrate fell into error when the apportioned liability to a third party. This had the effect of blaming a driver who was not given a chance to defend himself.
11. From the grounds of appeal, I have identified the following as the issues for determination: (i) The question of liability (ii) Whether the orders sought in the appeal or the cross appeal should be granted.
12. PW2 the respondent testified that at the time of the accident she was in motor vehicle KBT 286L as a passenger. She testified that as a result of the accident she sustained the injuries as set out in the plaint. DW2 confirmed that the accident occurred and produced the police abstract as exhibit 1. According to him the cars were moving in the same direction. DW3 the conductor testified that he could not see the front well since the driver was separated from the cabin. He confirms that the accident took place.
13. The fact that there were contentions police abstracts cannot be a ground to defeat an otherwise genuine claim. PW1, PW2, and the defence witnesses confirm that the accident did occur. An analysis of the witness confirms that the accident occurred and that the respondent who was a passenger sustained the injuries as pleaded in the plaint through the doctor.
14. It is my finding that the accident was caused by the negligence of the driver of motor vehicle No KCF 393 who I find to be 100% liable for the accident. The passenger cannot shoulder any liability.
15. The second issue is whether the appeal or cross appeal be allowed. I have looked at the nature of the injuries as pleaded and I am satisfied that the same have been proven through the medical report and the testimony of the doctor. PW2 the respondent testified that at the time of the accident she was in motor vehicle KBT 286L as a passenger. She testified that as a result of the accident she sustained the injuries as set out in the plaint. PW3 the doctor gave evidence and produced the medical report for the respondent as exhibit 4a. He has proven that the respondent sustained the injuries pleaded.
16. I have reminded myself of the principles that were settled in the case of *Bhatt v Khan* (1977) IKAR which held that, “An appellate court will not disturb on award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and also arrived at a figure which was either accordingly high or low.”
17. In the case of *Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd* [2013] eKLR and *Simon Taveta v Mercy Mutitu Njeri* Civil Appeal No 60 of 2004 that similar injuries attract similar awards or differently put, that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.

Disposition

18. I find that the trial court awarded an amount that is in keeping with the amounts set in the precedents, and also as authorities submitted by the respondent. I do not find any reason to interfere with the trial magistrate’s award.
19. For special damages, the amount pleaded and prayed for is the sum of Kshs 7,050/=. PW3 testified that he charged Kshs 5,000 for the medical report, and 15,000/= for court attendance. I will award special damages at Kshs 5,000 being the amount that was pleaded and proven.



Orders:

20. The following are the orders of this court:

1. The appeal is dismissed.
2. The cross appeal is allowed.
3. The appellant shall shoulder 100% liability.
4. The cross appellant is awarded Ksh 130,000 as general damages
5. Kshs 5,000 for special damages.
6. The cross appellant is awarded costs in the suit and in the appeal.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 7TH DAY OF MARCH, 2023.

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J. Chigiti (SC)

Judge

In the Presence of:

For Appellant:

For Respondent

C/A:

