



REPUBLIC OF KENYA



**Rachuonyo v Onyango (Civil Appeal E048 of 2021)
[2023] KEHC 1790 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E048 OF 2021**

KW KIARIE, J

MARCH 7, 2023

BETWEEN

FREDRICK ODHIAMBO RACHUONYO APPELLANT

AND

PHILIP ONYANGO RESPONDENT

*(Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No. 47 of 2019 by Hon. B. Omwansa–Senior Principal Magistrate)*

JUDGMENT

1. Fredrick Odhiambo Rachuonyo, the appellant herein, was the defendant in Oyugis Senior Principal Magistrate's SPMCC No 47 of 2019. This was a claim that arose from a road traffic accident that involved motor vehicles registration number KCG 718U and the motor cycle registration number KMDCU 614X which the respondent was riding. The learned trial magistrate delivered judgment dated April 28, 2021. He apportioned liability at 70:30 in favour of the respondent.
2. The learned trial magistrate made an award of Kshs 855,000.00 in general damages and special damages Kshs 17940.00 in favour of the respondent before factoring liability.
3. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Obach & Partners Advocates. The following grounds of appeal were raised:
 - a. The learned trial magistrate erred in law and in fact by ignoring the appellant's evidence and treating it superficially.
 - b. The learned trial magistrate erred in fact and in law in finding and holding that the defendant herein had proved and/or established his case against the appellant herein and thus warranting judgment in his favor, notwithstanding the evident and apparent contradictions between the pleadings and the evidence on record.



- c. That in finding and holding that the respondent had proved his case, the learned trial magistrate, failed to appreciate and/or discern the veracity of the evidence tendered by the appellant, which in any event, was incredible.
 - d. That the learned magistrate erred in law in making a finding of damages against the defendant.
 - e. That the learned magistrate erred in law and fact in holding that the defendant was 70:30% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.
 - f. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of Kshs 855,000/- without any tangible proof of the same.
 - g. That the learned trial magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs 17,940/- allegedly spent in what the plaintiff turned to be a merry celebration without concrete documentary evidence.
 - h. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to excess general and special damages without concrete documentary evidence.
 - i. That the learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.
 - j. That the learned trial magistrate erred in law and fact in failing to appreciate as follows:
 - i. That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.
 - k. That the learned trial magistrate erred in law and fact in entering judgment in favour of the plaintiffs against the defendant in spite of the plaintiff's miserable failure to establish his case more especially on quantum.
 - l. That the learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability.
4. The respondent was represented by the firm of Nyatundo & Company Advocates. He opposed the appeal on the following grounds:
- a. That liability was apportioned on the basis of the evidence on record.
 - b. That the general damages were reasonable in the circumstances.
 - c. That special damages were proved.
5. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd [1965] EA 123*, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.



6. The respondent contended that he was hit while stationary on the side of the road on the left as one faces Kosele. His evidence was supported by that of Corporal Ken Mbeche, a police officer who testified that the driver of motor vehicle registration number KCG 718U lost control and hit the motor cyclist who was stationary on the opposite side of the road.
7. The appellant's driver in his statement which was adopted as his evidence in chief claimed that the respondent made a U-turn and this was what caused the accident. During cross examination he denied that he knocked the respondent. He appeared evasive and failed to explain his side of contention. Since he did not offer a contrary explanation of how the accident occurred, and since it was proved by the evidence on record that the complained of accident occurred, the learned trial magistrate was justified to hold the appellant 70% liable for the accident.
8. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt v Khan [1981] KLR 349 at page 356* Law JA stated:

...an appellate court will not disturb an award of damages unless it is so 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 so arrived a figure which was either inordinately high or low.
9. The appellant complained that the award of Kshs 855,000/= was inordinately high. The respondent as a result of the accident sustained the following injuries:
 - a. Head injury;
 - b. Brain edema;
 - c. Pneumocephalus;
 - d. Chest contusion;
 - e. Multiple bruises on the left hand;
 - f. Multiple bruises on the right knee;
 - g. Multiple bruises on the left knee;
 - h. Frontal bone fracture;
 - i. Pterygoid bone fracture;
 - j. Orbital bone fracture; and
 - k. Maxillary bone fracture.
10. At the trial, the respondent proposed an award of Kshs 2.5 million as general damages and relied on several authorities. The appellant did not make any proposal. Considering the injuries sustained, I am not persuaded to interfere with the award on general damages.
11. In order for Special Damages to be awarded, the same must be pleaded and strictly proved. The Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716, at Page 717, and 721 the Court (Kneller, Nyarangi JJA, and Chesoni Ag JA) held:

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.

In the instant case, I have checked the receipts produced and I am satisfied that the respondent discharged his onus; he strictly proved the special damages awarded.

12. The upshot of the foregoing evidence on record is that the appeal has no merits and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

