



REPUBLIC OF KENYA



**KENYA LAW**  
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**Songa v Resource Management and Policy Analysis Institute Limited & another  
(Civil Appeal 24 of 2020) [2023] KEHC 1581 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1581 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 24 OF 2020  
JM CHIGITI, J  
MARCH 1, 2023**

**BETWEEN**

**JACOB MURUNGA SONGA ..... APPELLANT**

**AND**

**RESOURCE MANAGEMENT AND POLICY ANALYSIS INSTITUTE  
LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BENARD OKINYO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. On the July 18, 2016 the appellant was riding on motor cycle registration number KMDS 180 J when he was involved in an accident along Waiyaki Way.
2. He filed a suit against the respondent's claiming general and special damages for the injuries sustained as a result of the accident.
3. According to the appellant the accident was caused by the 2<sup>nd</sup> respondent who was driving motor vehicle registration number KBY 254 Z. According to the appellant, the 1<sup>st</sup> respondent is vicariously liable for the negligence of the 2<sup>nd</sup> respondent.
4. The 2<sup>nd</sup> respondent on his part blames the appellant for the accident.
5. The appellant sustained injuries as set out on the medical report dated February 26, 2018.
6. The appellant filed a list of documents on September 26, 2016 while the 1<sup>st</sup> and 2<sup>nd</sup> respondent filed theirs on September 28, 2017 and May 21, 2019 respectively.
7. The matter proceeded for hearing that culminated on the judgment dated January 23, 2020.
8. Being dissatisfied with the judgement, the appellant filed a memorandum of appeal on February 7, 2020.



9. The appellant raises grounds of appeal therein in that the learned trial magistrate;-
- a. Grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same by;
    - i. That the magistrate erred by arriving at her decision on liability in the ratio of 60% to 40% in favour of the respondents on assumptions not supported by evidence on record.
    - ii. That the learned magistrate erred in law and fact in disregarding and failing to appreciate the evidence addressed, thus failing to arrive at her decision on the issue of liability in a judicious manner.
  - b. Further erred in law and fact in that he failed to find that the case before the court was a civil case and the appellant had indeed proved the elements of negligence as required by the law and thereby the court imposed a higher degree of proof on the part of the appellant thereby arriving on a wrong finding.
  - c. Erred in law and fact in that he disregarded the appellant's submissions and judicial authorities on liability with the resultant miscarriage of justice to the appellant.
  - d. Erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the appellant had proved his case against the respondent on a balance of possibilities and thereby arrived on wrong findings on the issue before the court.

#### **Analysis and Determination;**

10. This court has powers to proceed in determining the appeal as sought under article 165 of the [Constitution](#) which provides as follows:

The [Constitution](#) at article 165 provides:

- "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

11. I am guided by the principles as communicated in the case of *Selle & another vs Associated Motor Boat Co Ltd & others* [1968] EA 123, where the court enunciated that:

"...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..."

#### **Issues for Determination:**

- A. Who should shoulder liability.



- B. The quantum of general and special damages.
12. The appellant testified that the accident occurred at 7.30 am on February 18, 2016. He told the court that at the time of the accident he was a pillion passenger who was carrying a glass pane.
  13. He said that the motor bike that he was riding on was on the left part of the road while the 2<sup>nd</sup> respondent was on the right.
  14. He testified that he used to work as a hawker earning 500 per day.
  15. Dw2 the driver of motor vehicle registration No KBY 254 Z confirmed during cross examination that he changed lanes so as to navigate a turn at Sugar Board Estate off Waiyaki way so as to get to his home.
  16. He confirms that as he was changing lanes, the motor cycle was on the 1<sup>st</sup> lane speeding.
  17. During cross examination the witness told the court that he needed to change lanes from the right to the left, when the accident took place.
  18. During re-examination he repeated the fact that in order turn into Loresho he had to drive right across the road.
  19. I have analyzed the evidence and arrived at a conclusion that the 2<sup>nd</sup> respondent should shoulder the bigger part of the liability.
  20. He changed lanes and almost completed the exit into his destination before the accident occurred. He pointed out that he saw the motor cycle that was moving fast.
  21. One is left to wonder what he did so as to avoid the motor cycle into whose lane he was shifting to. He found the motor cycle on its lane and interfered with the motor cycle's path.
  22. He must have changed lanes and probably crossed the appellants path too suddenly so as to navigate into his estate exit turning.
  23. On his part the motor cycle rider did nothing to avoid the accident. He did not brake, slow down nor swerve so as to avoid the accident. He must shoulder part of the blame.
  24. It is my finding in the circumstances that the trial court apportioned liability in the ratio of 60%:40% erroneously and I will apportion liability at 90%:10% against the respondents and the appellant respectfully.

**The Issue of Special damages:**

25. The appellant pleaded and prayed for:  
Medical report- 3,000  
Medical expenses- 7,650  
Copy of records- 500  
11,150
26. Special damages must be both pleaded and proved, before they can be awarded by the court. Suffice it to quote from the decision of the Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 of 1983



[1985] KLR 716, at p 717, and 721 where the Learned Judges of Appeal - 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.”

27. According to the medical report of Dr Wandungu the metal implants did not need to be removed. He did not make provision for any future medical treatment need.
28. The court erred in awarding the appellant the sum of Kshs 150,000 for future medical expenses.
29. The court cannot award any damages for future medical and earning capacity without justification. The appellant did not tender evidence to demonstrate that he is exposed to a future medical expense of Kshs 150,000 without evidence to support the same.

### **The Issue of General Damages:**

30. In *Antony Peter Wainaina v Jumba Patrick Oganda & 3 others* [2021] eKLR the court stated that the principles for awarding general damages arising from accidents are well known. Award of damages entails the exercise of discretion by the trial court. An appellate court should not review awards by a lower court for the sole reason that it would have awarded a different sum.
31. In the judgment the appellant was awarded Kshs 2,000,000. The appellant is not satisfied with the amount awarded.
32. I will only disturb the trial court’s finding if I find that the trial magistrate awarded an inordinately high or low amount such that the same does not accord with the injuries sustained as set out in the medical report dated February 26, 2018.
33. The principles of interfering with the trial courts discretion was aptly put by De Lestang, Ag VP in *Mbogo v Shah* [1968] at page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
34. The court in the case of *Butt -vs- Khan* [1981]KLR 349 sets the guiding principle of when an appellate court can interfere with an award of damages that:

“... 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 at a figure which was either inordinately high or low...”
35. According to the appellant he sustained the injuries as pleaded in paragraph 6 of the plaint and the medical report.



36. The appellant relied on the cases of *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR and *Harrison Ndungi v John Wambua Musau* [2017] eKLR while the respondents relied on the case of *Kennedy Nyangoya v Bash Hauliers* [2016] eKLR.
37. Upon analyzing these cases as cited by the parties in support of their cases as set out in their submissions, I find the amount awarded by the trial court as reasonable and I uphold the same.
38. The appellant also sought compensation for loss of earnings, future medical and earning capacity.
39. He told the court that he earns 500 per day. No evidence was tendered to support this. The figure was simply thrown at the court. I do not see how the court decided to grant damages for loss of future earnings bringing in the sum of Kshs 60,000 and the same must fail.

**Orders:**

The appeal succeeds partly;

1. The liability is apportioned at 90 %:10% against the respondents and the appellant respectfully.
2. The general damages Kshs 2,000,000 les 10%.
3. Special damages of Kshs 11,150.
4. Costs.

**DATED, SIGNED AND DELIVERED AT KIAMBU THIS 1ST DAY OF MARCH, 2023.**

.....

**JOHN CHIGITI (SC)**

**JUDGE**

