



REPUBLIC OF KENYA



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**Randa v Yusuf & 2 others (Civil Appeal E033 of 2021)
[2023] KEHC 3141 (KLR) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E033 OF 2021
RE ABURILI, J
APRIL 17, 2023**

BETWEEN

SAMWEL OLUOCH RANDA APPELLANT

AND

YASKMIN YUSUF 1ST RESPONDENT

TRANSAFRICA MOTOR LTD 2ND RESPONDENT

CHANNAN AGRICULTURAL CONTRACTORS (K) LTD ... 3RD RESPONDENT

(Being an appeal from the judgement and decree of Hon. S.O. Temu, Principal Magistrate delivered on 24th September 2020 in Nyando SPMCC No. 71 of 2018)

JUDGMENT

Introduction

1. The appellant herein is Samwel Oluoch Randa. he filed the instant suit seeking general and special damages as well as costs of the suit following a road traffic accident in which he sustained injuries. It was the appellant's case before the trial court that he was involved in an accident as he lawfully walked along the pedestrian lane off the main Ahero-Kisumu road at Ahero Township area when the 1st and 2nd respondent's vehicle registration number KAY 880, a FAW Prime Mover was so negligently and recklessly driven by the respondent's agent forcing it to veer off the road and knocking down the appellant.
2. The 1st and 2nd respondents filed their defence and denied all the appellant's averments in his plaint. On the 13th August 2020, the parties recorded a consent on liability in the ratio of 80:20 in favour of the appellant as against the 1st and 2nd respondents.



3. In his judgement, the trial magistrate found that the appellant's evidence did not support the pleadings as to which motor vehicle hit him considering that the appellant pleaded a differently registered motor vehicle from the one in his statement that he adopted in court. The trial magistrate found that there was no evidence that could connect the 1st and 2nd respondents to the accident motor vehicle that hit the appellant based on the appellant's pleadings. The trial magistrate thus dismissed the appellant's case.
4. Aggrieved by the trial magistrate's decision, the appellant filed this appeal vide a memorandum of appeal dated 8th April 2021 setting out the following grounds:
 - a. The trial magistrate erred in law and fact in allowing the plaintiff's claim and by dismissing the plaintiff's case.
 - b. The trial magistrate erred in law and fact when making his findings by failing to consider that parties entered in to consent on liability hence the issue of ownership and liability had been dealt with.
 - c. The learned trial magistrate erred in law and in fact and in not considering that once the issue of liability had been dispensed with, his duty was only to assess the quantum.
 - d. The learned trial magistrate erred in law and in fact in considering that the defence did not call any witness to corroborate their case.
 - e. The learned trial magistrate erred in law and in fact in failing to find that the suit was merited.
5. The appeal was by consent canvassed by way of written submissions.

The Appellant's Submissions

6. It was submitted that no authority was cited by the court to affirm and or support the basis upon which it disregarded the consent of the parties more so considering the fact that throughout his pleadings, the appellant was consistent on the identity of the accident vehicle as KAY 880D, the defendants having agreed that they were liable for the accident when they recorded liability consent in court and further that the defendants re-affirmed their liability in their written submissions.
7. The appellant urged the court not to close the door of justice for the appellant based on a typographical error in his witness statement, a mistake occasioned by his counsel who drafted his witness statement.
8. Reliance was placed on Article 159 (2) of *the Constitution* that urges courts not to rely on undue technicalities to dismiss cases. The appellant further relied on the case of Republic v District Land Registrar, Uasin-Gishu & Anor (2014) eKLR and the Court of Appeal case of Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR where the court held inter alia that in administering justice, courts should do so without undue regard to procedural technicalities.
9. The appellant also relied on the case of Abraham Kipkemboi Bore v Samuel Muglo Maina & Another [2012] eKLR where the court addressed itself on appeal to a case where the trial court had dismissed a case based on the inconsistencies in specific paragraphs of his plaint and format of the suit and the appeal court went on to state that courts should be guided by Article 159 (2) of *the Constitution*.
10. The appellant further relied on the case of Silas Mutuma Kabwima v Josphat Ntongai M'Ithungai [2022] eKLR where the court held inter alia that a minor defect that does not go to the core of the suit and or prejudice or occasion injustice to the parties is curable under the law given that the court has wide discretion to do substantive justice under sections 1A and 1B of the *Civil Procedure Act* and Article 159 of *the Constitution*.



11. It was submitted that the trial court erred by dismissing a suit where a consent order had already been entered into. The appellant submitted that the parties had entered into a consent on the ratio on liability, which consent had been adopted as a judgement of the court and that the conditions under which a consent judgement could be set aside had not been met prior to the trial court dismissing the appellant's suit as was held in the cases of Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR, Flora Wasike v Destimo Wamboko (1982 – 1988) 1 KAR625 , John Shikuku Keya v Lubao Jaggery Limited [2018] eKLR, Douglas Kyalo Mbati v Stella Muthoki Mulandi & Another (being sued as the personal representatives of the estate of Sylvester Musembi Tilas (Deceased), Machakos High Court Civil Appeal No. 29 of 2019 as well as the case of Peter Ngwili Wambua (Suing as legal representatives of the Estate of Sammy Mboya Wambua (Deceased) v Ali Mwanzia Kelly [2021] eKLR.
12. On quantum, the appellant submitted that the injuries he sustained and pleaded were uncontroverted as the 1st and 2nd respondents failed to call any witness in support of their case and relied on the holding in the case of Linus Nyanga Kiogo & 3 Others v Town Council of Kikuyu [2012] eKLR.
13. Accordingly, the appellant submitted that an award of Kshs. 1,050,000 would suffice as damages. He relied on the cases of Ambrose Micheni Kinyamu v Gilbert Bundi & Another [2012] eKLR where the court sitting on appeal enhanced an award of Kshs. 150,000 to Kshs. 400,000 for injuries of a fracture of the right leg on the ankle, the case of SAO (Minor suing thro next friend) M O O v Registered Trustees, Anglican Church of Kenya Maseno North Parish [2017] eKLR where the court awarded Kshs. 600,000 to the plaintiff for injuries of fractured left ankle joint malleolus bone and the case of Edward Shoboi Gambo v Fatma Osman Ahmed & Another [2020] eKLR where the plaintiff suffered displaced fracture of the right distal malleolus among other injuries and the award was enhanced from Kshs. 300,000 to Kshs. 650,000.

The Respondents' Submissions

14. The respondents submitted that there was variance in the pleadings and evidence on record where in paragraph 3 and 4 of the plaint dated 15th May 2018 the appellant alleged that the motor vehicle that caused the accident was KBD 169W, a Toyota L-Touring belonging to the 1st respondent and motor vehicle registration number KAY 880 FAW Prime Mover whereas in his adopted statement in court, it stated that the motor vehicle that caused the accident was registration number KCF 527Q, a Toyota Matatu.
15. The respondents relied on the case of Patrick Muiru Kamunguna v Kaylift Services Ltd and Njuguna Mbugua Nyeri Civil Appeal No. 31 of 2019 and the Court of Appeal case of Kiruga v Kiruga & Another [1988] KLR 348 where the courts in both instances stated that an appeal court cannot properly substitute its own actual finding for those of a trial court unless there is no evidence to support the finding or unless the judgement is plainly wrong.
16. It was the respondents' contention that the appellant did not prove his case on a balance of probability as there were numerous discrepancies in the pleadings, statement and evidence that could not be cured by referring to them as an error and misdescription of the subject motor vehicle.
17. The respondent submitted that parties are bound by their pleadings and therefore the contents of the pleadings rightfully bound the appellant as was held in the case of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR and by the Supreme Court in the case of Raila Amollo Odinga 7 Another v Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR.



18. The respondents submitted that contrary to the submission by the appellant, the error by the appellant could not be cured by section 100 of the *Civil Procedure Act* or Article 159 (2) of *the Constitution* as the discrepancy was major and not curable except by amendment of pleadings and thus the trial magistrate was right in dismissing the appellant's suit.
19. On quantum, the respondents submitted that the proposed award by the trial court was fair and reasonable and that the proposed award of Kshs. 250,000 less 20% should be upheld. The respondents relied on the case of Naivasha Civil Appeal No. 38 of 2017, China Zhongxing Construction Company Ltd v Ann Akuru where the court held inter alia that the court can only interfere with an award of damages if the trial court took into account irrelevant factors or left out relevant factors when assessing damages and further that the amount of damages was so inordinately high or low that the quantum awarded was a wholly erroneous estimate of damages.

Analysis and Determination

20. Being a first Appeal, the court is obliged to adhere to the principles as set out in section 78 of the *Civil Procedure Act* and espoused in various decisions among them, the case of *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123 where it was stated 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
21. It was also held in the case of *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
22. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”
23. Therefore, this Court is under a duty to delve into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.
24. The main issues in this appeal for determination are:

Whether the Appellant proved his case on a balance of probabilities



25. This degree of proof is well enunciated in the case of *Miller v Minister of Pensions* [1947] cited with approval in *D.T. Dobie Company (K) Limited v Wanyonyi Wafula Chabukati* [2014] eKLR. The court stated: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

26. Further, Section 107 of the *Evidence Act* Cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts.

27. My perusal of the Record of Appeal reveals that the Plaintiff dated 15th May 2018 indicates in paragraph 3 and 4 that the appellant alleged that the motor vehicle that caused the accident was KBD 169W, a Toyota L-Touring belonging to the 1st respondent and motor vehicle registration number KAY 880 FAW Prime Mover.

28. In the amended plaint dated 15th March 2019, the appellant repeated the assertions in the original plaint that the motor vehicle that caused the accident was KBD 169W, a Toyota L-Touring belonging to the 1st respondent and motor vehicle registration number KAY 880 FAW Prime Mover. In his testimony before court, the appellant adopted his statement that was dated 24th April 2018 wherein he had stated that the motor vehicle that caused the accident was registration number KCF 527Q, a Toyota Matatu.

29. The Police Abstract indicates that the accident was caused by motor vehicle registration number KAY 880D, a FAW Prime Mover stated to be owned by the 1st respondent that caused the accident whereas the copy of records produced in evidence by the appellant showed that the motor vehicle registration number KAY 880D belonged to the 2nd respondent.

30. From the above, it follows that the oral testimony of the appellant was inconsistent with the plaint as far as the registration number and make of the accident motor vehicle is concerned. The 1st respondent in its defence denied ownership of the motor vehicle mentioned in the plaint as having caused the accident.

31. However, the appellant in his submissions in this appeal stage has explained in his submissions that this discrepancy was an error and a mis-description of the subject motor vehicle as typed by his advocate.

32. It is not lost to this court that a party is bound by his pleadings. In this case, the case proceeded to hearing only after the parties had agreed and entered into a consent on liability, apportioning 80% against the respondents and 20% against the appellant. In my view, by the time the parties were agreeing on liability and recording a consent, they had already agreed on certain facts being correct as per the pleadings, notwithstanding the evidence which was to be adduced later. These facts included ownership of the motor vehicle that was involved in the accident and the level of culpability of the driver/agent then driving the said motor vehicle. That being the case, the court could not go back to the consent recorded by the parties and dismiss it on account that the appellant in his testimony gave a different registration number of the motor vehicle yet the testimony in chief was only supposed to assist the court determine the quantum of damages payable to the plaintiff/ appellant herein.



33. It is also worth noting that the respondents counsel had occasion to cross examine the appellant but never raised the issue of the registration number of the accident motor vehicle and the simple reason is that the parties had already agreed that indeed, the motor vehicle that was pleaded is the one which was the correct motor vehicle. I say so because the pleadings agree with the police abstract which show the accident motor vehicle to be hence I am inclined to accept the explanation by the appellant's counsel that in typing out their client's witness statement, they gave a wrong description of the accident motor vehicle which mis-description should not be visited on their client since the issue of liability was long settled by consent of both parties.
34. The appellant's plaint was clear in paragraph 4 that it was motor vehicle registration number KAY 880, a FAW Prime Mover, that caused the alleged accident. In my view, the error on the registration of the motor vehicle in the witness statement adopted by the appellant was not fatal at all and was curable suo moto. Section 100 of the *Civil Procedure Act* provides that:
- “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”
35. The typing error in my view did not occasion any prejudice or injustice to the respondents who proceeded to file a defence, concede liability for the accident and file submissions to the plaint despite the typing error in the appellant's witness statement. See the cases of Joseph Francis Makokha v Raphael Simiyu Wekesa & Another [2009] eKLR, Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR, Ali Okata Watako v Mumias Sugar Co. Ltd [2012] eKLR, Julius Nzioki Wambua v Mohamed Salim Khamis & another [2020] eKLR, Printing Industries Ltd & Another v Bank of Baroda [2017] eKLR.
36. Consequently, the defect was minor and curable under the law given the court has wide discretion to do substantive justice under Sections 1A, 1B and 100 of the *Civil Procedure Act* and Article 159 (2) (d) of *the Constitution*. The defect was not so fatal as to go to the core of the suit and or prejudice or occasion injustice to the parties. Furthermore, the police abstract produced by the appellant dated 18th December 2017 shows the 1st respondent as the owner of motor vehicle registration KAY 880D while the copy of records also produced by the appellant shows that it was owned by the 2nd respondent.
37. Having found that there was no defect in the appellant's case, I find and hold that the consent on liability as recorded in court between the plaintiff/ appellant herein and the 1st and 2nd respondents was sufficient to establish the level of liability in negligence that the parties were to bear and which the trial court could not dismiss after a hearing on quantum of damages payable. No evidence was adduced by the appellant against the 3rd respondent hence no adverse orders can be issued against it.
38. Accordingly, I find that the trial magistrate was in error when he dismissed the appellants' suit on liability. That order of dismissal is amenable for setting aside which I hereby do and substitute it with an order that judgment on liability as consented to by the parties shall remain.
39. I now turn to the question of quantum of damages. The trial magistrate stated that had the appellant proved his case, he would have awarded him Kshs. 250,000 as general damages and proven special damages of Kshs. 1550.
40. The appellant submitted that an award of Kshs. 1,050,000 would suffice as damages whereas the respondent agreed with the trial magistrate on the award to be awarded had the appellant proven his case.



41. The appellant pleaded that he sustained the following injuries: Head injuries involving neck tenderness; Chest injury involving back aches; Tenderness on the shoulders; Tenderness and swelling on the left ankle joint; Fracture of the lateral malleolus posterior aspect
42. The appellant produced treatment notes from Ahero County Hospital & Ritri Imaging Clinic that showed he sustained a chip fracture of the lateral malleolus posterior aspect as well as chest pain, back pain and neck pain.
43. I have considered the authorities relied on by the appellant and find in all the authorities cited, save for the fracture of the ankle, the plaintiffs therein suffered far more serious injuries than the appellant herein. Further to the above, the appellant's injuries which have since healed were mainly soft tissue injuries with no permanent incapacity assessed. Assessment of damages for injuries suffered cannot be confined to one limb or area of the body where there are multiple injuries. The extent and nature of injury, the pain suffered and the residual effects are all important factors in assessing damages.
44. In the case of Michael Okello v Priscilla Atieno [2021] eKLR, this court awarded Kshs. 250,000 as general damages for injuries of Blunt injury to the head, Blunt injury to the forehead, Blunt injury to the neck, Blunt injury to the chest with fracture of the 1st anterior rib, Bruises and blunt injury to the left shoulder, Bruises to the left shoulder, Bruises and blunt injury to the left upper limb, Bruises and blunt injury to the right upper limb and Cut wound and blunt injury to the right lower limb.
45. In the case of Simon Kimote v Agro Solutions Limited [2021] eKLR the plaintiff sustained the following injuries: a) Right femoral fracture lower 1/3; b) Tibia plateau fracture; c) Blunt head injury; and d) Blunt neck injury.
46. He was awarded Kshs 350,000/- general damages.
47. I am thus persuaded that an award of Kshs. 250,000 proposed by the trial magistrate was well within the requisite range for damages as the appellant's injuries were mostly soft tissue and with no permanent incapacity noted.
48. In the end, I allow this appeal to the extent that the trial court's judgement dismissing the plaintiff's suit against the defendants/ respondents herein is hereby set aside and substituted with an order entering judgment for the plaintiff/ appellant on liability as consented to by the parties in the ratio of 80:20 in favour of the appellant against the 1st and 2nd respondents and uphold the award of general damages in the sum of kshs 250,000 for the injuries sustained by the appellant in the material accident, less 20% contribution.
49. General Damages Kshs. 250,000
Less 20% Kshs. 50,000
Total Kshs. 200,000
Special Damages Kshs. 1,550
Net Total Kshs. 201,550
50. The appellant shall also have costs of the suit in the lower court and interest on the general damages from date of judgment until payment in full as well as interest on special damages from date of filing suit until payment in full.
51. On costs of this appeal, as the error that led to dismissal of the suit was occasioned by the appellant's counsel who mis-described the accident motor vehicle, I decline to award costs of this appeal which



appeal is hereby allowed only to the extent stated above with an order that each party shall bear their own costs of the appeal.

52. This file to be returned to the lower court for execution on recovery of the awarded sums of money. Decree to issue. File closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF APRIL, 2023

R.E. ABURILI

JUDGE

