



REPUBLIC OF KENYA



**Anyangu v Chepkirin (Civil Appeal E052 of 2022)  
[2023] KEHC 17954 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL E052 OF 2022**

**JK SERGON, J**

**MAY 16, 2023**

**BETWEEN**

**ROBERT ANGULU ANYANGU ..... APPELLANT**

**AND**

**WYCLIFFE SAMBURUMO CHEPKIRIN ..... RESPONDENT**

*(Being an appeal on quantum against the judgement of Hon F. M Nyakundi  
(SRM) in Kericho CMCC No 256 of 2018 delivered on July 29, 2022)*

**JUDGMENT**

1. The appeal herein is against the judgement of the trial court (Hon F M Nyakundi) in Kericho C M C C No.256 of 2018 wherein the trial court held the Appellant 100% liable and awarded the Respondent General damages of Kshs 850,000/= plus special damages of Kshs 34,150/= all totaling to Kshs 884,150/=
2. The appellant being dissatisfied and aggrieved preferred this appeal and put forward the following grounds:
  - i. The Learned trial magistrate erred in law and fact by apportioning liability at 100% against the defendant contrary to the evidence on record.
  - ii. The Learned trial magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.
  - iii. The learned trial magistrate erred in law and fact by awarding general damages of Kshs 850,000/= for soft tissue injuries, an award which was so excessive as to amount to an erroneous estimate of loss or damages suffered by the plaintiff.



- iv. The learned trial magistrate erred in fact and in law in relying on extraneous circumstances not supported by the evidence on record.
  - v. The learned magistrate erred in law and in fact by overly relying on the Respondent's submissions which were not relevant and disregarded the defendant's submissions and authorities thereby arriving at an erroneous estimate of damages.
  - vi. The learned trial magistrate erred in fact and in law by awarding special damages of Kshs 34,150/= an amount which was not specifically pleaded and strictly proved.
  - vii. The learned magistrate erred in fact and law in failing to consider conventional awards in cases of similar nature.
3. The Appellant urged the court to allow the appeal with cost, set aside the impugned judgement on both liability and quantum and enter a judgement dismissing the suit against the Appellant with costs. That the court re-assesses the award on quantum downwards in line with the evidence on record and that the costs of the Appeal and that of the trial court be awarded to the Appellant.
  4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions and found the issues for determination put forward by both parties to be as follows:
    - i. Whether the trial court erred in law and fact by holding the Appellant 100% liable.
    - ii. Whether the trial court erred in law and facts in assessing the quantum.
  5. On the first issue, the Appellants submitted that the trial court's holding that the driver was fully to blame as he was in full control of the said moto vehicle and failed to tender any evidence on what caused the motor vehicle to cause the accident was erroneous and not supported by any evidence on record and that had the trial court examined the evidence on record, it would have established that the said evidence was contradictory as to the manner in which the accident occurred.
  6. The Appellant further submitted that whereas the Respondent stated that he was hit by the Appellant's vehicle which was overtaking at the time of the accident, PW3, the police officer who had the police file confirmed that the Respondent was hit while walking from right to left as one faces Kapsowet direction and that the said police never mentioned anything to indicate that the Appellants vehicle was overtaking at the time of the accident. It was his submission that there was no evidence to show that the Appellant's vehicle veered off the road and knocked down the Respondent and that there was no independent eye witness who recorded a statement to verify the Respondent's allegations of negligence.
  7. He submitted that the mere fact that the Appellant did not tender evidence was not in itself a factor in holding him liable and that the Plaintiff had a duty to prove his case on a balance of probability as the Appellant was not duty bound to assist the plaintiff in proving his case.
  8. He relied on the case of *Michael Wanjobi Mathenge v Lydiab Nyaguthii Agatha & Another* [2007] eKLR where the court held that:

“I would respond to those grounds by saying that the burden of proving the case was upon the Plaintiff. The Defendants on their part could have, if they so wish, kept quiet without presenting their defence. The burden therefore did not shift to the Defendants to prove their defence. I have examined the evidence presented in the lower court and I am of the view that the Plaintiff/Appellant failed to prove his case on a balance of probability. In that regard I



find that I am in agreement with the lower court's judgment and accordingly I do hereby dismiss the Appellant's appeal."

9. The Respondent on the other hand submitted that the Respondent was lawfully walking along the verge of Sondu Kapsoit road at Sigowet area when motor vehicle Reg No, KBT 798H, driven by the Defendant and/or his servant, agent, representative and/or driver negligently controlled the said motor vehicle that it lost control and caused an accident occasioning the plaintiff serious bodily injuries.
10. It was his further submission that the Respondent tendered his evidence before the trial court and produced exhibits in support of his claim which was uncontroverted save for the defence that was filled as a matter of procedure.
11. He further submitted that the effect of not calling evidence to challenge the plaintiff's testimony renders not only the defence unsubstantiated but also leaves the evidence of the plaintiff and his witnesses unchallenged.
12. He relied on the case of *John Wainaina Kagwe v Hussein Dairy Limited* [2013] eKLR where the court held that:

“...the respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence.”
13. He submitted that PW3 in re-examination told the court that the driver of motor vehicle Reg No KBT 798H was to blame for the accident, he urged the court to hold the Appellant 100% liable as according to PW3 the Respondent had completely crossed the road to the right when he was hit from behind and that the Respondent did not in any way contribute to the occurrence of the accident as he was hit while on the right side of the road facing Kericho from Sondu. That the driver of the said motor vehicle was overtaking another vehicle and, in the process, hit the Respondent from behind causing him severe bodily injuries.
14. It was his submission that the said driver ought to be held 100% liable for the accident as the Appellant did not call any witness to controvert the evidence by the Respondent not even the driver of the motor vehicle Reg No KBT 798H that caused the accident.
15. On the second issue the Appellant submitted that the particulars of injuries pleaded in the Plaint were Degloving injury on both lower limbs at the fore and lateral sections, injury to the tendons of the right ankle, injury to the toes of the right foot except the big toe, laceration wounds to both feet and swelling on both legs and that according to the treatment notes availed from Kericho District Hospital, the Respondent was seen with a history of soft tissue injuries in both lower limbs.
16. It was his submission that the P3 form captured that the Respondent sustained Degloving injuries to both lower limbs and that Dr. Andai who examined the Respondent two and half years after the accident confirmed that the Respondent sustained serious soft tissue injuries and assessed permanent disability at 15% but on being cross examined he confirmed that the injuries had healed save for the ugly scar and admitted that the disability was expected to reduce from 15% upon full healing.
17. It was his further submission that the trial court placed reliance upon wrong precedents thereby arriving at erroneous estimate of injuries sustained as the authorities cited were irrelevant in so far as the



- Respondents sustained serious fractures apart from the degloving injuries and that had the trial court carefully analyzed the authorities cited by the Appellant, it would have arrived at the correct estimate of damages awardable.
18. He relied on the case of *H Young Construction Company Ltd v Richard Kyule Ndolo* [2014] eKLR where the plaintiff sustained a degloving injury to the left leg with loss of skin over the calf muscle, blunt injury to the left ankle joint, and court awarded Kshs. 250,000/=.
  19. He therefore submitted that the court erred in law and fact by arriving at an erroneous estimate of injuries sustained and placing reliance upon erroneous authorities thus arriving at a wrong sum awardable.
  20. The Respondent on the other hand submitted that degloving involved removal of massive muscles from some parts of the Respondent's body to budge the affected areas and that the Respondent has large ugly scars all over his legs and thighs as he underwent excruciating pain and the trial court had the opportunity to view the respondent's injuries when he testified in court and confirmed that the said scars were indeed horrifying.
  21. He submitted that the Medical Report by Dr Elias Adoka at the conclusion of the report stated that the patient got serious distinction of the muscles and tendons of both legs leaving permanent ugly muscle deformities and non-movement of all small right leg toes and that the said Respondent had a permanent injury.
  22. He further submitted that the Respondent was admitted at Kericho Referral Hospital for almost 5 months and that Dr. Andai in his opinion and prognosis indicated that the Respondent sustained serious soft tissue injuries in the mishap, mainly de gloving wounds to the anterior aspects of both legs and laceration wounds to both feet and that the wound to the right leg must have involved the extensor tendons of the toes which was completely severed, that is why he is unable to extend the toes with a permanent disability of about 15% and that the Respondent was left with a permanent ugly scars on both legs.
  23. The Appellants further emphasized that the De gloving injuries are a type of severe injury in which the skin and underlying tissues are separated from the underlying structures such as muscles, bones and tendons signifying the severity of the injuries sustained by the Respondent hence justifying an award of Kshs 850,000/= in general damages as was awarded by the trial court.
  24. The Respondent reiterated their submissions before the trial court and the authorities cited in support of the quantum to oppose the Appeal and strongly support the award of Kshs 850,000/= given by the trial court.
  25. On special damages, the Appellant submitted that the same must be pleaded and strictly proved. That although the Respondent pleaded for a sum of Kshs 34,150/=, evidence on record showed only Kshs 22,400/= was proved and that the trial court erred by awarding a sum of Kshs 34,150/= contrary to what was proved.
  26. In retort the Respondent submitted that he produced receipt in proof of the sum which includes fees for preparation of his medical report and other medical bills and that the threshold of strict pleading and proof was discharged by the Respondent.
  27. The appellant submitted that he proven on account of the evidence on record that indeed the trial court erred both in law and in fact on the issues of liability and quantum thereby arriving at an erroneous decision and urged the court to allow the appeal and substitute it with an order dismissing



the Respondent's suit with costs or in the alternative the court re assesses the issue of liability and quantum in line with the evidence on record.

28. In retort the Respondent submitted that the Appeal lacked merit as the trial magistrate judiciously considered and appreciated the Applicable principles in assessing the damages payable to the Respondent and the same was not excessive as alleged by the Appellant.
29. It was the Respondent's submissions that the Appellant has not cited any instance in the trial court's judgement where he resorted to extraneous circumstances as alleged by the Appellant in ground 4 of his Memorandum of Appeal and that the rest of the grounds raised by the Appellant have no merit whatsoever and urged the court to uphold the award of Kshs 850,000/= given by the trial court and that the appeal should be dismissed with costs to the Respondents.
30. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See *Selle & another vs Associated Motor Boat Co Ltd & others* (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters vs Sunday Post Limited* [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
31. I have considered the parties submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the Trial magistrate. It is clear that the appeal fundamentally lies against the Trial Magistrate's judgement awarding the Respondent a sum of Kshs. 850,000/= in general damages and special damages of 34,150/=.
32. The Plaintiff testified that on August 12, he was on the road at Sigowet and was hit from behind by a vehicle KBT 798H that was trying to overtake another vehicle along Sigowet-Sondu road while heading to Kericho direction and that he got serious injuries and was rushed to Kericho Referral Hospital by good Samaritans where he was admitted for 4 months. He blamed the driver of the vehicle for the accident. On cross examination he stated that he never saw the vehicle coming from behind and that the vehicle knocked him from behind on the pedestrian side of the road in which he suffered serious injuries and has not recovered yet. On re-examination, he confirmed that the vehicle veered off the road and knocked him from behind.
33. According to the Medical Report of Dr Ellias Adoka, a Medical Superintendent dated November 29, 2017 he saw the Respondent on the even date and noted that he had sustained soft tissue injuries of the lower limbs leading to his admission to Hospital from August 12, 2016 to December 3, 2016. Upon general and physical examination, he noted that the Respondent had DE gloving injury of the muscle of both lower limbs at the fore and lateral sections which has healed leaving permanent deformities of the muscles of both legs. That the tendons of the right ankle joint were affected and healed leaving a deformed right ankle which has made the Respondent limb while walking. That the toes of the right foot except the big toe can't move spontaneously due to injuries of the tendons at the same toes and that both thighs where grafts were removed have healed leaving permanent ugly scars. That he was treated surgically by surgical toileting, he was put on antibiotics that is flummox and Flagyl, he was on analgesia that is Diclofenac, that he underwent several cleanings and dressing until he healed and that skin grafting of both lower legs was done with the graft that was removed from both his thighs.



34. His opinion and prognosis were that the Respondent got serious destruction of muscles and tendons of both legs leaving permanent ugly muscle deformities and non-movement of all small right leg toes and that the Respondent needed to be on follow up and to continue with further management.
35. Dr Charles Andai in his Medical Report dated April 4, 2018 was in agreement with Dr. Adoka's findings and added that the Respondent complained of pain in the left leg, inability to move the toes of his right leg and inability to stand for a long time. He also noted that though the Respondent was in a fair general condition with stable vital signs, he walked with a limping gait supporting himself on a walking stick.
36. Upon physical examination he noted that the Respondent had swellings on both legs, had a large skin grafted scars covering the entire anterior aspects of the two legs, had a wound 4cm by 2cm in size on the left shin, had a scar approximately 6cm by 5cm by 3cm in size on the anterior aspect of the right ankle, that he had a scar approximately 6cm by 4cm in size on the dorsum of the left foot, he had scars donor sites on the anterior aspects of both thighs and that he was not able to passively extend the toes of his right foot.
37. His opinion and prognosis was that the Respondent sustained serious soft tissue injuries in the mishap mainly degloving wounds to the anterior aspects of both legs and laceration wounds to both feet and that the wound to the right leg must have involved the extensor tendons of the toes which was completely severed, that is why he is unable to extend the toes with a permanent disability of about 15% and that the Respondent was left with permanent ugly scars on both legs.
38. PW3 IP David Korir testified that the Respondent was injured while walking as a pedestrian on his lane. On cross examination he reiterated that the Respondent was on his right lane on the left side of the moto vehicle when he was hit. On re-examination, he stated that the Respondent was almost completing crossing the road and the person to blame for the accident was the driver of the motor-vehicle.
39. The trial court considered the evidence and made the award the subject of this appeal. The appellant faults the trial court for the award it made arguing that it was inordinately high compared with the injuries the Respondent suffered. He therefore urged this court to interfere with the trial court's assessment of damages.
40. The principles under which an appellate court may interfere with the award of damages made by a lower court are as was stated by Kneller, JA in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia* [1985] eKLR, where he stated that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
41. The trial magistrate in the impugned judgement cited the case of *Simon Kyunguti vs Krushali Enterprises Ltd* [2019] eKLR, *Stella Nasimiyu Wangila & Another vs Raphael Oduro Wanyamah*



[2016] eKLR and *North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi* [2019] eKLR and stated that:

“In this case, the driver was fully to blame as he was fully in control of the said motor vehicle having failed to tender any evidence on what caused the motor vehicle to cause the accident, then he should be held fully liable for the accident. The defendant chose not to call any witness to testify and or rebut the evidence of the plaintiff’s witnesses and as such the plaintiff’s evidence was uncontroverted and unchallenged.

Based on the above cited authorities and the evidence on record in this matter, it is my finding that in the absence of any evidence from the defendant especially the driver in this case, it is my finding that the plaintiff proved his case on the balance of probabilities, hence the defendant is hereby held 100% liable for this accident.”

42. I find that the trial magistrate correctly explained the reason for holding the Appellant 100% liable for the accident.
43. The Advocate for the Appellant had at lower court suggested a sum of Kshs 1,500,000/= as general damages and cited the case of *Sammy Kipkorir Kosgei v B O L* [2017] eKLR where the court awarded Kshs 1,000,000/= for similar injuries in 2017 and *Kebirigo Tea Factory Co Limited v Rebecca Kwamboka Arwasa* [2021] eKLR where court awarded Kshs 1,500,000/= for 15% disability as adequate compensation.
44. The Advocate for the Appellant on the other hand suggested an award of Kshs 300,000/= and quoted the case of *H Young Construction Company Ltd v Richard Kyule Ndolo*[2014] eKLR where court awarded Kshs 250,000/= for similar injuries.
45. Upon finding that the cases cited by both sides were not helpful, the trial court sought for its own authorities and cited the case of *Reuben Mongare Keba v LPN* (2016) eKLR where the respondent suffered fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg and was awarded general damages of Kshs 800,000/=, *Joseph Mwangi Thuita v Joyce Mwole* [2018] eKLR where the plaintiff suffered injuries of fractured right femur, compound structure, tibia and fibula, shortening right leg and episodic pain with inability to walk without support and the court awarded Kshs 700,000/=
46. The trial court also cited the case of *Sammy Mugo Kinyanjui & another v Kairo Thuo* [2017] eKLR where the Respondent sustained slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs fracture of the right tibia, fracture of the left tibia and fibula and court awarded Kshs 600,000/= and the case of *Alex Wanjala v Pwani Oil Products Limited & another* [2019] eKLR where the respondent suffered fractures of the right humerus and closed fracture of the right femur, closed head injury heading to loss of consciousness and court awarded Kshs 600,000/=.
47. In arriving at an award of Ksh 850,000/=, the learned trial magistrate considered the awards in the four cases he had cited and held as follows:

“I have carefully considered the submissions tendered and the quoted cases and the injuries that the plaintiff sustained and the rate of inflation and the fact that the matter has been in court since 2018 and doing the best I can I hereby award Kshs 850,000/= as sufficient for general damages.”

48. I have keenly gone through the cases relied on by both parties. I find the authorities cited by the appellant not suitable for the kind of injuries suffered by the respondent herein. I do not think that the



injuries can only attract a paltry Kshs 300,000/= as submitted by the advocates for the appellant. The Respondent in this case was left with a permanent disability of 15% hence the injuries were far much serious than the case quoted by the appellant.

49. I have considered the awards in the cases cited by the trial magistrate. The trial Magistrate in this case had the advantage of seeing the respondent and observed that he had been left with permanent ugly scars on both legs. His doctor's report indicated that he had also been left with a permanent disablement of about 15%. In my view, the injuries sustained by the Respondent were serious.
50. The trial court in arriving at its decision considered the authorities cited by both parties and therefore, the argument by the appellant that the trial magistrate did not consider his submissions/authorities is false.
51. On special damages, the trial court considered the claim and found a sum of Kshs. 34, 150/= have been proved through production of receipts as exhibits hence the amount awarded in special damages was proved.
52. In light of the fact that the respondent sustained serious soft tissue injuries with permanent physical disablement of about 15%, I do not find reasons to interfere with the trial court's finding on damages.
53. The upshot of the foregoing is that I find the appeal lacking merit. It is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 16<sup>TH</sup> DAY OF MAY, 2023.**

.....

**J K SERGON**

**JUDGE**

**In the presence of:**

**C/Assistant - Rutoh**

Nyambane for the Appellant

No Appearance for the Respondent

