



**Easy Coach Limited & another v Kimani (Civil Appeal 462 of 2019)
[2023] KEHC 17290 (KLR) (Civ) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 462 OF 2019

AA VISRAM, J

MAY 11, 2023

BETWEEN

EASY COACH LIMITED 1ST APPELLANT

WILLIAM OKOLI SEWE 2ND APPELLANT

AND

MOSES GITHUKU KIMANI RESPONDENT

*(Being an Appeal from the Judgment delivered on 24th July, 2019 by Hon.
D. O. Mbeja (Mr.) Senior Resident Magistrate in CMCC No. 7 of 2018)*

JUDGMENT

1. The Respondent (Plaintiff in the lower court) filed the suit in the lower court vide a plaint dated January 3, 2017. He alleged that on or about April 30, 2017, at about 3:45 PM while standing on the pavement along Haile Selassie Avenue, he was hit by a motor vehicle, registration KBY402V which resulted in injury, loss and damage.
2. In particular, he claimed that he suffered extensive degloving injuries on the left foot; stiffness of the ankle joint, resulting in restricted movement; and a large skin graft covering the entire upper foot. Accordingly, he sought special damages and general damages arising out of the said injury.
3. The Appellants opposed the suit in the lower court vide their Statement of Defence dated 25th January, 2018, in which they denied that the 1st Appellant was the registered owner of the said motor vehicle; and denied that the accident involved the Plaintiff and the said motor vehicle as stated by the Plaintiff; and further alleged negligence on the part of the deceased. The Appellants put the Respondent to strict proof in relation to the same.



4. The matter went for a full trial and on July 24, 2019, the lower court entered judgment in favor of the Respondent. The lower court found the Appellants jointly and severally liable and ordered the Appellants to pay general damages for pain and suffering in the sum of Kshs 600,000/- and special damages in the sum of Kshs 3,050/- plus costs of the suit, and interest at court rates.
5. Aggrieved by the above judgment, the Appellants filed this appeal dated August 13, 2019 on the following grounds:
 1. The Learned Trial Magistrate misdirected himself and erred in law and in fact in failing to find that there were contradictions and inconsistencies between the Plaintiff's pleadings, his witness statement and the oral evidence given in court and thus arrived at an erroneous finding on liability.
 2. The Learned Trial Magistrate misdirected himself and erred in law and in fact by holding that the Plaintiff had proved his case on liability against the Appellants on a balance of probability.
 3. The Learned Trial Magistrate misdirected himself and erred in law and in fact in holding that occurrence of the accident was proved and that the Appellants were 100% liable for the same.
 4. The Learned Trial Magistrate misdirected himself and erred in law and in fact by failing to dismiss the Plaintiff's suit in the lower court in view of the evidence tendered before him.
 5. The Learned Trial Magistrate misdirected himself and erred in law and in fact in failing to find that the Plaintiff did not prove his case to the required standards and that his own pleadings evidence and documents were contradictory.
 6. The Learned Trial Magistrate misdirected himself and erred in law and in fact by awarding general damages that are so manifestly excessive as to be erroneous vis-a-vis the injuries allegedly sustained by the Plaintiff.
 7. The Learned Trial Magistrate misdirected himself and erred in law and in fact by not properly considering the medical report on record and hence arriving at a wrong assessment of damages that are so manifestly excessive as to be erroneous.
 8. The Learned Trial Magistrate misdirected himself and erred in law and in fact by not properly considering the evidence on record, the Appellants/Defendants' submissions and authorities and hence did not write a considered judgment.
6. The parties agreed that this appeal be disposed of by way of written submissions. The Appellants filed their submissions dated February 23, 2023 and the Respondent, in turn, filed his submissions dated March 1, 2023.

Appellants Submissions:

7. The Appellants submitted that the real issues for determination are as follows:
 1. Liability - Who was to blame for the said accident?
 2. Quantum - what amount of damages is the Respondent entitled to?
8. On the issue relating to liability, the Appellants admitted that they did not call any witnesses to give evidence. In spite of this, they submit that it is incumbent upon the Respondent to prove his case on a balance of probabilities, which balance never shifts to the Appellants. This had not been done.



9. In support of the above contention, they submitted that the Respondent had not proved his case because PW2, Corporal Benjamin Kigo, testified that the matter was still pending investigation, and further, that PW2 was not the investigating officer. Accordingly, PW2 could not have placed blame on the Appellants because he did not know how the accident had occurred.
 10. In support of the above argument, the Appellants cited the authority of *David Mwangi Kariuki & another v Stephen Wangi & another* [2017] eKLR, where the High Court observed as follows:-

“what is unable to make clear determination on the point of impact, this being the bone of contention, there’s no sketch plan of the scene that was produced by the police officer who could not do so in any event as he was neither the investigating officer neither that he had the police file. It was incumbent upon the Appellants to produce to the court all relevant materials and documents to enable it make a well informed decision. Section 107 (1) of the *Evidence Act* comes into play in that; “whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”. The burden of proof lies upon the person who asserts. This burden in my considered opinion, was not discharged by the Appellants.”
 11. Learned Counsel further submitted that the Respondent was negligent because he was the only pedestrian among others present that was hit by a slow moving vehicle in a busy bus stop. Further, that because the Respondent did not know which tire ran over his leg, he could not have possibly been injured by the Defendant’s motor vehicle. If he was, the foot was run over by the tire on the rear right, and thus the Appellant submitted that the Respondent should be held liable for the accident.
 12. Counsel submitted extensively on the duty of care owed by a pedestrian to other road users in support of the above argument.
 13. As regards the consent recorded by the parties at the hearing of this matter in the lower court, counsel stated that the consent to amend the plaint substituting injuries on the ‘right foot’ with injuries on the ‘left foot’ did not amend the medical report prepared by Dr. Okabe, or the contents of the said medical report, which remain the same. Accordingly, injuries to the right foot as stated in the medical report, could not be taken to mean injuries to the left foot.
 14. Finally, counsel submitted that the Respondent had failed to avail sufficient evidence to show that he was not to blame for the accident. Accordingly, the court ought to find the Respondent fully to blame.
 15. As regards quantum, in relation to the award for general damages, the Appellants submitted that an award of Kshs 250,000/- was sufficient compensation for the injury sustained. In support of the above argument, the Appellants cited several cases with awards of the same amount, for what the Appellant considered similar injuries.
 16. Finally, as regards the award of special damages, the Appellants did not specifically take issue with any of the particular claims awarded in the lower court, but rather, cited the principle that only special damages pleaded and proved ought to be awarded.
- Respondent’s Submissions:
17. The Respondent submitted that the evidence he tendered in court was sufficient to prove liability on the part of the Appellants. He submitted that the Appellants had not pleaded negligence against the Respondent but rather, had attributed the occurrence of the accident to a ‘deceased person’ as opposed to the Respondent, who was alive.



18. Further, apart from filing their Statement of Defence, the Appellants had not produced any evidence in support of their assertions. Accordingly, the evidence of the Respondent remained uncontroverted, and the defence mounted by the Appellants were no more than allegations.

19. In support of the above argument, the Appellants cited the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR citing *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001, where the Learned Judge citing the same decision stated that :-

“it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

20. As regards the issue of quantum, the Respondent submitted that the amount awarded was appropriate because the injuries he suffered were commensurate. Accordingly, the court ought not to interfere with the same. The Respondent cited the decision of the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where the court held that:-

“it is firmly established that this Court will be disinclined to disturb the finding of a Trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the Trial Judge on the question of the amount of damages, it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.”

21. Finally, the Respondent submitted that the Appellants had not established a satisfactory basis to warrant interference with the lower court’s award on general damages. He submitted several authorities ranging from lower awards in the sum of Kshs 250,000/- for general damages arising from pain and suffering to higher awards in the sum of Kshs 700,000/-. These authorities were based on what he contended were similar injuries to his arm.

Analysis and determination:

22. I have read the record in its entirety and considered the grounds of appeal raised by the Appellants. The issues that arise for determination are essentially two:

1. Was the lower court correct in its finding on liability?
2. Was the lower court correct in its award of damages?

Was the lower court correct in its finding of liability?

23. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and another v Associated Motor Boat Company Ltd & others* [1968] EA 123, where the court stated that:

“An appeal to this Court from a trial by the High 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 conclusion. 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 in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

24. Looking at the record before me, I see that the Appellants did not call any witnesses to give evidence on their behalf. Accordingly, the only version of events available to the Magistrate at the time of the hearing was the evidence of the Respondent, who called three witnesses in support of his case.
25. I note that the Magistrate considered this predicament and reached a conclusion; quoting with approval Visram, J (as he then was) in the following terms:

"This evidence is uncontroverted. The defence did not provide any evidence to the contrary. There was nothing more easier for the Appellants to do than to come to court and say "no, we did not refuse the use of a four legged ladder..." or whatever it wanted to say, and then leave it to the court to decide who should be believed. Here the court had no choice. The only evidence before it was that of the Respondent, and the court had no reason to disbelieve his testimony. Accordingly, I see no reason to interfere with that finding, and I uphold the finding of fact."
26. Based on the evidence in the record, I am of the view that the lower court reached a reasonable conclusion. I say this because, there are no competing versions of truth here. There is only one story, the Respondent's, and despite the confusion over which leg, the right or left leg, and the further issue relating to the applicability of consent between the parties to the medical reports, it is still clear to me either way, that the Respondent did in fact sustain an injury to at least one of his legs, whether his right, or his left leg. Moreover, the Appellants did not call any evidence whatsoever to refute this.
27. Further, based on the record, I see that the Respondent visited Kenyatta National Hospital on June 15, 2017, where he was examined by Dr Mogire. This medical report clearly states that the Respondent was injured on his left leg. The report is also consistent with the Respondent's testimony regarding his injuries.
28. I have taken into account the various inconsistencies with regard to the Respondent's testimony in the lower court; and in particular, the submission that PW 2 was not the investigating officer. As regards this evidence, I am agreeable that such evidence, in isolation, may not be conclusive of liability. I do not, however, think that the Magistrate went wrong by considering his evidence in relation to the other evidence on record. In other words, I am satisfied that the Magistrate did not err by taking into account a factor that he ought not to have taken into account.
29. Further, given the presence of other corroborating evidence, and in particular, the fact that the Appellants did not lead any evidence at all in the lower court, I am guided by the decision of the High Court in *Shaneebal Limited* (supra) and I am satisfied that the Magistrate reached a reasonable conclusion in the circumstances.
30. As regards the submission relating to various inconsistencies in the Respondent's evidence, I have considered the same, which primarily relate to the right and left leg of the Respondent and I am satisfied, that on balance, the Respondent was in fact injured by the Appellants. If the Appellant was



not to blame, nothing would have been easier than for the Appellants to appear in court and simply say otherwise. They did not do so.

31. Further, having failed to call any witnesses to give evidence, I am less inclined towards counsel's attempts to re-create the factual scenario at the point of submissions. Suggestions relating to the speed of the bus, as fast or slow, or insinuations that the Respondent may have 'dashed out on the road'; or that he failed to 'keep a watchful eye' are matters of fact which ought to have been raised at the appropriate time during the trial process.
32. Based on the reasons above, I am inclined to uphold the decision of the lower court on the issue of liability.

Was the lower court correct in its award of damages?

33. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. This position finds support in the case of *Stanley Maore v Geoffrey Mwenda* NYR Civil Appeal No. 147 of 2020 [2004] eKLR where the Court of Appeal held:-

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

34. Further to the above, in the Court of Appeal decision of *Butt vs. Khan* (1977) 1 KAR the court stated that the test on whether or not to interfere with an award of damages, is as follows:-

“An Appellate court will not disturb an award for 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 so, arrived at a figure which was either inordinately high or low.”

35. With regard to the award of general damages, I have considered the range of relevant awards which vary between Kshs 700,000/- on the high end, and Kshs. 200,000/- on the lower end for similar injuries. I further note that the award in *Parodi Giorgio v John Kuria Macharia* [2014] eKLR being on the lower end was made in year 2014, while the award in *Wycliffe Lumula M'masi v Ernest Waitatka & another* [2020] eKLR, being on the higher end was made in 2020. I do not think that the award of Kshs 600,000/- was inordinate. I am of the view that assessment of general damages is not an exact science and that a certain amount of discretion ought to be left to the trial court subject to the correct legal principals articulated above. Further, I am alive to the fact that over the years the value of money has depreciated substantially and the cost of living has increased considerably.
36. Based on the reasons above, I do not find sufficient reason to interfere with the decision of the lower court.
37. I find that the appeal is without merit and is dismissed with costs to the respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF MAY 2023

ALEEM VISRAM

JUDGE

In the presence of;



..... For the Appellants

..... For the Respondent

