



**Kimani v Kemnwa & another (Civil Appeal 219 of 2009)
[2023] KEHC 4069 (KLR) (Civ) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4069 (KLR)

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

CIVIL

CIVIL APPEAL 219 OF 2009

AN ONGERI, J

MAY 8, 2023

BETWEEN

MOSES NDARUA KIMANI APPELLANT

AND

JAMES KAMAU KEMNWA 1ST RESPONDENT

KPM LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D. MULEKYO
(PM) in Kikuyu PMCC no. 155 of 2008 delivered on 3/4/2009)*

JUDGMENT

1. The appellant in this appeal was the plaintiff in Kikuyu PMCC No 155 of 2008 seeking general damages for pain and suffering and for loss of amenities and also costs for future medical expenses for injuries the appellant sustained on 6/4/2008 when he was hit by the 2nd respondent's motor vehicle registration no KAC 351X which was being driven by the 1st respondent.
2. The 1st respondent filed a defence denying the appellant's claim while the 2nd respondent did not enter appearance or file a defence.
3. When the case proceeded for hearing before the trial court, the appellant said he was walking with his cousin off the road on the left side when facing towards Thogoto when motor vehicle registration no KCA 351X veered off the road and hit him and he found himself at Kikuyu hospital.
4. The 1st respondent on his part said he was driving behind two vehicles when the vehicle ahead of him swerved to the left and he realized it swerved to avoid hitting the appellant who was standing in the middle of the road.



5. The 1st respondent said it was too late to avoid to apply brakes and he hit the appellant because he was in the middle of the road.
6. The trial court dismissed the appellant's claim and said that the 1st respondent was to blame for the accident.
7. The trial court said had the appellant proved his case the respondents would have been ordered to pay him Kshs 220,000 in respect of general damages for pain and suffering and Kshs 62,384 in respect of special damages.
8. The appellant has now appealed to this court on the following summarized grounds;
 - a. That the trial magistrate erred in law and fact in finding that the plaintiff did not prove his case on a balance of probabilities merely because of the contradiction in the site of a fracture to the femur yet the situ of the femur as pleaded in the plaint was proved by the plaintiff and his evidence was further corroborated by Dr G K Mwaura PW2 who not only prepared and produced the P3 but also his medical report.
 - b. That the learned magistrate failed to appreciate that there were other injuries pleaded by the plaintiff in his plaint besides fracture to the femur yet she dismissed the suit.
 - c. That the learned trial magistrate erred both in law and fact in dismissing the claim for special damages contrary to the evidence on record and the applicable law.
9. The appellant filed written submissions and in it argued that he needed to prove the evidence on a balance of probabilities which should not be as high as the burden of proof in a criminal case. The trial learned Magistrate erred by solely relying on a contradiction on the site of the fracture to the femur yet the situ of the femur as pleaded in the plaint was proved by the Appellant. Dr Mwaura-PW2 corroborated the evidence by preparing and producing the P.3 including the Appellants medical report.
10. That PW 1 also confirmed in his adduced evidence that the Appellant suffered the said injuries including head injuries, bruises over the face and scalp. However the trial magistrate failed to appreciate to appreciate this and dismissed the suit as if the assessment of the damages lied solely on the basis of one pleaded injury.
11. The appellants also argued that learned trial Magistrate erred in law and fact in failing to find that in terms of medical qualifications, PW2 was more qualified than PW1 and his evidence visa-vis PW2 where there may be inconsistencies, PW2's evidence should prevail. The learned magistrate focused solely on PW1's evidence yet it was the only contradictory evidence and there were other pleaded injuries.
12. The appellants submitted that the award of Kshs 220,000 as general damages was not sufficient and proposed that of Kshs 700,000. It was further argued that special damages were proved as required by the law through receipts totaling to Kshs 60,124, police abstract Kshs 200, and medical reports Kshs 2000.
13. The appellant indicated that he pleaded for future medical expenses at Kshs 50,000 following an amendment made to the plaint on 6th June 2009 which Dr G K Mwaura in his prognosis said that the procedure would be necessary in future to remove the metal implant.
14. The respondents did not participate in the appeal though they were invoked in the trial court.



15. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity of seeing the witnesses. In *Selle v Associated Motor Boat Co* [1968] EA 123 it was held;

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 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.”

16. The issues for determination in this appeal are as follows;

- i. Whether the trial court was right on the finding of liability.
- ii. Whether the appellant is entitled to any damages.

17. On the issue of liability, I find that it is not in dispute that the 1st respondent while driving the 2nd respondent’s motor vehicle hit the appellant on the material day.

18. Although there is evidence that the appellant was in the middle of the road, I find that the trial court ought to have apportioned liability 50:50% instead of holding the appellant 100% liable.

19. I find that the Respondent was liable and I accordingly apportion liability at 50:50%.

20. On the issue of assessment of damages I award special damages of Kshs 62,384 and general damages of 220,000 less 50% liability which amounts to 141,192.

21. The special damages in respect of future medical care were not specifically pleaded and proved as required and the same are not payable.

22. Judgement be and is hereby entered in favour of the appellant against the respondent in the sum of Kshs 141,192 plus costs and interest at court rates from the date of the judgment in the trial court (3/4/2009) until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF MAY, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

