



Muia v Philip (Civil Appeal 41 of 2019) [2023] KEHC 17389 (KLR) (15 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 41 OF 2019**

RK LIMO, J

MAY 15, 2023

BETWEEN

GEORGE MUIA APPELLANT

AND

KENNETH KYALO PHILIP RESPONDENT

JUDGMENT

1. This is an appeal that arose from the Judgement of Hon. Munguti-SRM delivered on 26th June 2019 vide Kitui CMCC No. 37 of 2017.
2. In that suit the Respondent had sued the Appellant owing to a road traffic accident involving the Appellant's motor-cycle Registration No. KBR 1620 and Respondent's Tuk-tuk Registration No. KTW 905C. The Respondent claimed damages from the appellant as a result of the injuries sustained in the accident that occurred on 6th June, 2016 around Kalundu along Kitui-Machakos Road.
3. In a Complaint dated 3rd February 2017, the Respondent sought compensation as follows;
 - a. General damages
 - b. Special damages at Kshs 5,550/-
 - c. Future medical expenses
 - d. Costs of the suit
 - e. Interest on (a) and (b) at court rates till payment in full
4. In response, the Appellant filed a defence dated 19th April, 2017 in which he denied liability and attributed negligence on the part of the Respondent in the accident.
5. Below is a summary of the evidence tendered at the trial court.



6. Kenneth Kyalo Phillip (PW3), the Respondent herein, testified at the trial and adopted his statement dated 3rd March, 2017 adding that he was riding motorcycle Registration No. KBR 162V that belonged to his employer Kenya Power and Lighting Company, on 6th June 2017.
7. He stated that he was from Kitui Town heading to Kalundu and on the way he met a Tuk Tuk Registration KTWA 905 C coming from the opposite direction adding the rider of Tuk tuk suddenly did a U-turn and hit him upon which he fell down and sustained a fracture on his leg. He stated that the Police arrived and rescued him by taking him to Jordan Hospital where he received treatment. He tendered a discharge summary as P Ex 4, P3 Form as P Ex5. He tendered Registration records of Tuk tuk as P Ex 5 and receipt for payment of Kshs. 550 as Ex 6.
8. He blamed the rider of Tuk tuk for turning without making any indication.
9. The Respondent blamed the appellant for causing the accident adding that the doctor informed him that the cost of removing a plate inserted on his fractured leg to aid the healing was Kshs. 100,000.
10. Thomas Kituka, a Clinical Officer from Kitui County Hospital was summoned to testify on behalf of Dr. Mutuku who had prepared a medical report dated 22nd November, 2016 in respect to the injuries sustained. Her attempts to tender the report was objected by the appellant's Counsel. However, the report was later produced by consent of both consent of both Counsels on record as P Ex 9.
11. The medical report listed the following injuries as having been sustained by the Respondent;
 - a. Lacerations on the sub mental region of the head.
 - b. Lacerations on left balm.
 - c. Laceration below right knee.
 - d. Fracture of the tibia.The report did not make any indication as to the future medical expenses.
12. Corporal Charles Rotich (PW2) a police officer from Kitui Police station testified on the occurrence of the accident. He told the court that his colleague Officer Moses Kefa was the investigating officer in the matter but he was on transfer to Nairobi on official duties. The officer proceeded to produce a police abstract which was marked as PEXH-3. The officer reiterated information contained on the OB on how the accident occurred as follows; that the Respondent was riding a motor cycle heading to Syongila from Kitui while the Appellant was driving his tuk-tuk on the opposite direction. That upon reaching Kalundu, the Appellant made a U-turn and collided with the Respondent. He restated that the Appellant was to blame for the accident. He also stated that the tuk-tuk was still held at Kitui Police Station as the driver fled the scene after the accident. He however also stated that he was not sure if that was the case and further that he could not confirm whether investigations were conducted. He told the court that he was paid Kshs 5,000/- to attend court.
13. The Appellant offered no evidence in defence.
14. Upon hearing the matter, the trial court found that the Respondent had proven his case on a balance of probability and proceeded to find that the Appellant 100% was liable for the accident. The trial court held that evidence from the Respondent remained unchallenged as the Appellant failed to appear in court to rebut the allegations brought against him by the Respondent. The trial court entered Judgment in favour of the Respondent on 26th June 2019 as follows;
 - a. Kshs. 1,200,000/- as general damages



- b. Kshs 15,550/- as special damages
Total Kshs 1,215,550/-
 - c. The Respondent was also awarded costs of the suit and interest at court rates.
15. The Appellant felt aggrieved on the whole judgement and filed this appeal raising the following grounds namely: -
- i. That the Learned Trial Magistrate erred in law and in fact by apportioning 100% liability against the Defendant/ Appellant and failing to take into account evidence on record that the Plaintiff/Respondent was a negligent and careless unlicensed motor cycle rider when the accident occurred.
 - ii. That the Learned Trial Magistrate erred in law and in fact in failing to attribute apportionment on liability to a careless, negligent and unlicensed motor cycle rider who carelessly joined the road without being attentive and giving way.
 - iii. That the Learned Trial Magistrate erred in law and in fact in awarding General damages and special damages that were inordinately high.
 - iv. That the Learned Trial Magistrate erred in law and in fact in failing to consider the nature of the injuries sustained by the Respondent and awarding general damages that were inordinately too high and incomparable to the injuries sustained.
 - v. That the Learned Trial Magistrate erred in law and in fact in special damages that were not proved and inordinately too high.
 - vi. That the Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's submissions and authorities on record on liability and quantum of damages.
 - vii. That the Learned magistrate erred in law and fact in considering evidence that was never on record and issuing judgment on presumptions and issues not established in evidence
 - viii. That the Learned Magistrate's judgment was thus unjust, against the weight of evidence, submissions and authorities relied upon by the Defendant and was based upon misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
16. On liability, the Appellant submits that the Respondent failed to prove his case on a balance of probabilities. The Appellant relied on his submissions in the trial court on liability where he submitted that there was no proof presented in court that the accident actually occurred. It was also his submission that the Respondent was negligent and that in the event that the trial court was to find that the accident occurred, then liability ought to have been shared on a 50:50 basis between the two parties.
17. On quantum, the Appellant faults the amount awarded by the trial court and submits that the same was too high. He submits that Kshs 500,000/- as general damages would be an appropriate award in comparison to the injuries sustained by the Respondent. He has placed reliance on the following cases on this head;
- i. *Stephen Kamau Wanderi & Another vs Gladys Wanjiku Kungu* (2006) eKLR a case where the Respondent was involved in a traffic road accident on 29th June 1998 and was awarded Kshs 600,000/- in general damages. The Respondent sustained fractures on the left fibula and tibia as well as excessive skin loss from the knee downwards for which she underwent a skin



graft. The fractures were reduced through conservative methods by application of plaster and external fixators. This award was maintained by the High Court on appeal.

- ii. [*Daniel Otieno Owino & Anor vs Elizabeth Atieno Owour*](#) (2020) eKLR where the court set aside an award of Kshs 600,000/- for general damages with that of Kshs 400,000/-. The Respondent in the matter sustained a compound fracture of the right leg, tibia and fibula. The fracture was treated through application of Plaster of Paris (P.O.P).
 - iii. [*Civicon Limited vs Richard Njomo Omwancha & 2 Others*](#) (2019)
 - iv. eKLR where the court set aside an award of Kshs 1,000,000/- as general damages with that of Kshs 450,000/-. The 2nd Respondent in the matter sustained a single fracture of the tibia and fibula and dislocation of the hip joint. Like the case above, the fracture was treated through application of Plaster of Paris (P.O.P).
18. The Respondent on the other hand opposed this appeal through written submissions done through Counsel and dated 17.01.2023.
 19. On liability, the Respondent submits that his testimony and evidence remained uncontroverted as the Appellant failed to call witness to rebut his evidence on the occurrence of the accident. He submits that the trial court was correct in finding that the Appellant was 100% liable for the accident and he has cited the case of [*Linus Ng'ang'a Kiongo & 3 Others vs Town Council Kikuyu*](#) (2012) eKLR where the court faulted a party's failure to adduce any evidence and stated that the consequence of that meant that evidence adduced by the Plaintiff against remained uncontroverted.
 20. On quantum, the Appellant submits that he adduced evidence of his injuries in the form of a medical report by the Late Dr Mutuku which was produced by PW1. He submits that Kshs 1,200,000 awarded was appropriate and commensurate to the injuries sustained. The Appellant has placed reliance on the case of [*Charles Mwanja & Another vs Batty Hassan*](#) (2008) eKLR where the court upheld an award of Kshs 800,000/- in general damages for the following injuries; bruise on the forehead, a wound on the right thumb and left wrist joint, a wound on the second right finger, fracture of the right tibia and fibula, a wound below the right knee and wound on the lateral aspect of the right ankle joint. The fractures were managed by Plaster of Paris. The Respondent also required post-healing treatment by way of skin grafting.
 21. The Respondent supports the decision made by the trial court and is asking this Court to uphold it.
 22. This Court has considered this appeal and the response made. The primary role of this court as the 1st Appeal Court is to re-evaluate – re-assess the evidence tendered at the trial with a view to reaching own conclusions. That duty was well stated in *Selle Versus Associated Motor Boat CO.*[1968] EA where the Court of Appeal stated;

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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 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 in the case generally.”



23. This appeal raises only two issues for determination namely;
- i. Whether the trial court’s decision on liability was correct.
 - ii. If so if the decision on quantum was justified.
24. Liability
- It is true that the Respondent’s evidence on liability was not challenged by any evidence to the contrary.
25. The Respondent’s testimony was that he was riding his motorcycle towards Kalundu when he met a tuk-tuk which was coming from the opposite direction. That the driver of the tuk-tuk did not indicate that he was intending to turn and suddenly turned and caused the accident. On cross-examination, the Respondent maintained that he was hit when he was on his lane as the tuk-tuk suddenly made a U-turn. This evidence remained uncontroverted and the trial court findings on liability was proper in my view.
26. It is also true that the Appellant filed a defence and attributed negligence on the part of the Respondent. He however tendered no evidence to back up his case.
27. The legal burden of proof as provided for under Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that;
- “Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
28. The evidential burden of proof is captured under Sections 109 and 112 of the *Evidence Act* as follows;
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
29. The Respondent being the Plaintiff at the trial had the evidential burden to prove his claim on the balance of probabilities. The record of proceedings shows that he testified and called 3 witnesses all of who testified and supported his case. The threshold is so far as civil cases are concerned was reached and it meant that the burden then shifted to the Appellant to controvert the Respondent’s Case. The failure or the omission by the Appellant to call or tender evidence meant that his claims that the Respondent was to blame remained unsubstantiated and the trial court cannot be faulted in reaching that conclusion.
30. In *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* [2009] eKLR Lessit, J opined as follows;
- “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. The 2nd Defendant and 3rd Defendant’s defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged.”



31. In the case of *Mercy Mueni Mutuku v Susan Oyondi Ombogo* [2021] eKLR, Odunga J held a similar view as follows;

“In this case there was evidence by the Respondent and her eye witness that the accident occurred on a foot path and the Respondent was hit from behind. There was no other evidence to challenge this evidence. Accordingly, what was pleaded in the defence without more could not form a basis upon which liability could be found. The learned trial magistrate cannot therefore be faulted for finding, based on the only evidence before him, that the Respondent had proved that the accident was caused by the motor cyclist for whose negligent the Appellant herein is vicariously liable and I find no justification for interfering therewith.”

32. Flowing from the above, this Court finds that the trial court was correct in its finding on liability and the same is upheld.

Quantum

33. On general damages for pain and suffering and loss of amenities the trial court awarded the Respondent Kshs. 1, 200,000/-. The Appellant is of the view that the amount awarded as general damages is excessive, and that the same ought to be substituted by an award of Ksh. 500,000/-.

34. The Respondent on the other hand argues that the trial court was not misdirected in assessment of the damages and that the award should not be disturbed.

35. The injuries suffered by the Respondent was soft tissue and a fracture of the tibia. Dr. P.N. Mutuku Medical report dated 22nd November, 2016 lists the following injuries as sustained by the Respondent;

- i. Laceration on the submental area around 0.5 Cm.
- ii. Laceration on left palm around 0.5cm.
- iii. Laceration below the right knee -8cm
- iv. Fracture of Tibia Plateau

The Doctor’s prognosis indicates that the fracture and wounds healed well as of 22.11.2016 save that the Respondent might require strong pain killers to manage Osteon-arthritis pains on the affected limb.

36. The general method of approach in assessment of damages should be that comparable injuries should as far as possible be compensated by comparable awards. In *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini Vs A.M. Lubia & Olive Lubia* (1982-88) I KAR 727 at page 730, Kneller J.A. stated:

“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 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...”



37. Ngugi J in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR stated as follows;

On my part, taking into consideration the nature of the injuries in this case and the global impact on life quality it has had on the Plaintiff while taking into consideration the guiding principle that in assessing damages for pain, suffering and loss of amenities is to both take into consideration the prevailing conditions in Kenya while ensuring that uniformity must be sought in the award of damages.

38. In the case of *P.W. v. Peter Muriithi Ngari* [2017] eKLR, the plaintiff was awarded Kshs. 1,600,000 in respect of the following injuries: a fracture of the left femur which had been operated before and fixed with a metallic plate. The plaintiff also suffered fractures of the left fibula and tibia malleoli, which were operated on and fixed with k-wires and plates. The plaintiff also suffered blunt injuries to the pelvis causing fractures of the pelvis

39. The above decision shows that the Plaintiff suffered 3 fractures-femur which was operated and a metallic plate implanted, fracture on the left fibula and tibia which were fixed with K-wires and plates. The amount of Kshs. 1,600,000 reflects the nature of injuries suffered.

40. In the case of *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR, the Appellant sustained fractures of the right tibia and fibula leg bones (lower 1/3rd bi-malleolar ankle fracture); dislocation of the right ankle and bruise on the right leg. Metal implants were inserted at the tibia and fibula. The court awarded damages at Kshs 600,000/-.

41. In the case of *Mwavita Jonathan v Silivia Onunga* [2017] eKLR The respondent sustained a fracture at the hip joint which corrective surgery involving insertion of surgical plantings and screws. The other injuries she sustained were in the nature of soft tissue injuries. The court awarded Kshs 400,000/- in general damages.

42. In the case of *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] eKLR, the Appellant sustained head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb. X-rays and CT Scans were done, together with an operation to fix a plate on the tibia fracture. The court observed that the trend for such injuries included an award of general damages between Kshs 300,000/- and 500,000/- and proceeded to decline disturbing an award of general damages at Kshs 300,000/-.

The above decisions show that the trial Court's award of Kshs. 1.2 Million in general damages was on the higher side. I am inclined to interfere with the trial Court decision on quantum because the award appears excessive in light of the comparative cases cited above. It is my considered view that an award of Kshs. 500,000 again going by the above comparative decisions will be a fair award.

43. I have also considered the amount awarded on special damages and finds that the same was totally unjustified. The Clinical Officer stated that she was claiming Kshs. 5,000 because Dr. Mutuku could have charged the amount if he had gone to court to testify but he did not. A claim on special damage must be specifically pleaded and proved. The same was not proved.

44. Secondly, the claim by CP Charles Rotich that he charged Kshs. 5,000 to come and testify is equally unjustified. In my view the claim by Police Officers that they are paid to come to Court and testify must be justified. Payments of Kshs. 5,000 for a traffic officer from Kitui Central Police Station which is barely 50 metres from the Court precincts is totally unjustified, unsupported and cannot be sustained.

Travel or subsistence expenses might have been justified if it was shown that the Police Officer travelled from far to come and testify.



This Court finds that in the absence of an official receipt proving that the Police Officer was paid Kshs. 5,000, the same should not have been awarded. The award on special damages is therefore set aside.

In shortwhile, this appeal fails in respect to liability, on quantum, it partly succeeds. The award of Kshs. 1.2 Million in general damages, for the aforesaid reasons is set aside. In its place an award of Kshs. 500,000 is given. The award on special damages is set aside. The Appellant will have half costs of this appeal but the Plaintiff will have costs of Kshs. 500,000 in the Lower Court and interests of that sum from date of judgement in the lower court.

DATED, SIGNED AND DELIVERED AT KITUI THIS 15TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

