



**Mmbando & another v Kisaka (Civil Appeal 143 of 2021)
[2023] KEHC 4004 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 143 OF 2021**

SM MOHOCHI, J

MAY 4, 2023

BETWEEN

ALEX MMBANDO 1ST APPELLANT

BIYO HARDWARE LTD 2ND APPELLANT

AND

ROBERT WANYAMA KISAKA RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable Barnabas Kiptoo (Resident Magistrate) delivered on 12th October, 2021 in Eldoret CMCC No. E104 of 2021)

JUDGMENT

1. The appeal is both on quantum and liability.

Background

2. By a plaint dated 22nd November, 2020, the Respondent sued the Appellant's claiming general damages for pain and suffering, special damages, future medical expenses and costs of the suit plus interests of the suit arising from a road accident that occurred on 6th December, 2020, along Eldoret - Webuye road involving the Respondent's motor cycle registration number KMFJ 525Y and the Appellants' motor vehicle registration number KCP 372U Mitsubishi. As a result, the Respondent sustained severe injuries.
3. In a joint statement of defence dated 27th February, 2021, the Appellants herein denied the occurrence of the said accident. In the alternative, they blamed the Respondent for occasioning the said accident.
4. After trial Judgment was delivered on 12th October, 2021 and the Appellants were found 100% liable and damages assessed as hereunder: -
 - a. General Damages..... Kshs.900,000/=



- b. Special Damages..... Kshs.15,524/=
 - c. Future medical expenses..... Kshs.175,000/=
 - d. TotalKshs.1,090,524/= Plus, costs and interests
5. The Appellants were aggrieved by the Judgment of the lower court and filed a memorandum of appeal dated 2nd November, 2021 citing the following grounds: -
- 1. That the learned trial magistrate erred in law and in fact in failing to properly analyse the evidence adduced in Court thereby arriving at an erroneous decision on the issue of liability,
 - 2. That the learned trial magistrate erred in law and fact in failing to properly analyse the evidence adduced in court thereby arriving at an erroneous decision on the issue of liability.
 - 3. That the learned trial magistrate erred in law and fact by failing to dismiss the Respondent's suit in view of the evidence on record.
 - 4. That the learned trial magistrate erred in law and fact by failing to consider the Appellant's written submissions on both liability and quantum thus making an award which was manifestly excessive.
 - 5. That the learned trial magistrate erred in law and fact in adopting wrong principles in the assessment of damages payable to the Respondent.
 - 6. That the learned trial magistrate erred in law and fact in awarding general damages which were manifestly excessive in view of the injuries sustained by the Plaintiff.
6. The appeal was canvassed by way of written submissions. The Appellants filed their submission on 16th September, 2022, whereas, the Respondent did not file.

Appellant's Written Submissions

- 7. On the issue of liability, the Appellant's faulted the trial Magistrate for apportioning liability at 100%. The Appellants submitted that the Respondent failed to prove his case on a balance of probability and thus the suit ought to have been dismissed.
- 8. The Appellants submitted that the burden of proving that the accident was occasioned by the negligence of the driver of motor vehicle registration number KCP 371U squarely lies with the Respondent. The Appellants maintained that the burden of proof still lies with the Respondent even where the Appellants chose to remain silent.
- 9. The Appellants relied on the following cases to buttress their submissions; *Susan Kanini Mwangangi & Another Vs. Patrick Mbithi Kavita* [2019] eKLR, *Nickson Muthoka Mutavi Vs. Kenya Agricultural Research Institute* [2016] eKLR and *Charterhouse Bank Limited (Under Statutory Management) Vs. Frank N. Kamau*.
- 10. The Appellants further submitted that in the instant suit, the Respondent called a police officer as PW3, who was not the investigating officer in this matter. The Appellants contend that PW3, did not author or make the abstract that he produced in court. The Appellants further faulted PW3, for not



producing the police file and the sketch plans of the scene of the accident. The Appellants contended that an abstract cannot be held as conclusive proof of liability on their part.

11. The Appellants relied on the following cases to support their submissions; *Kennedy Nyangoya V Bash Hauliers [2016] eKLR and Lochab Brothers & Another V Johana Kipkosgei Yegon [2017] eKLR.*
12. Further, the Appellants contended that during cross-examination PW3, informed the Court that this matter is still under investigation and that no one has since been charged for the accident.
13. The Appellants urged the Court to find that the Respondent failed to dispense with the onus of proof in this matter and thus the suit ought to be dismissed.
14. Regarding quantum, the Appellants submitted that the trial Magistrate in this matter misdirected himself as to the nature of the injuries that were sustained by the Respondent and thus awarded damages that were manifestly high. The Appellants cited the case of *Butt Vs. Khan [1975] eKLR* to buttress their argument.
15. The Appellant's further submitted that according to the Plaintiff, the Respondent sustained the following injuries: -
 1. Blunt injury to the head
 2. Bruises to the face
 3. Blunt injury to the neck
 4. Blunt injury to the back
 5. Bruises on the left-hand fingers
 6. Fracture of the right tibia (comminuted)
 7. Fracture to the right fibula (comminuted)
 8. Laceration on the right leg
16. The Appellants submitted that PW2, Dr. Joseph Sokobe, produced a medical report Pexh5 confirming the above listed injuries which treatment was administered. The Appellants maintained that from the evidence tendered by PW1 Dr. Paul Rono and PW2. Dr. Joseph Sokobe, the Respondent sustained the following injuries; a fracture of the right tibia and fibula and some soft tissue injuries.
17. In light of the above injuries, the Appellants submitted that the award of Ksh.900,000/= was inordinately high in the circumstances. The Appellants urged the Court to set aside the said award and in its place award Kshs.450,000/=.
18. The Appellants relied on the findings in the following cases to buttress their submissions; *Civicon Limited Vs. Richard Njomo Omwacha & 2 Others [2019]*, where the Court awarded Kshs.450,000/= for a fracture of the left tibia and fibula, a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left elbow, bruises on the left elbow and cut wound on the left foreleg and the case of *Tirus Mburu Chege & Another V JKN & Another [2018] eKLR*, where the Respondent suffered a broken upper right second front tooth, fracture on the tibia and fibula on both legs, blunt injury on the forehead, nose bleeding and consistent loss of consciousness the Court lowered the award for general damages from Kshs.800,000/= to Kshs.500,000/=.



19. The Appellant's contend that the injuries suffered by the Plaintiffs in the above listed cases were more grievous compared to the injuries that the Respondent herein sustained.
20. It would be appropriate to commence the analysis of this appeal affirming the Law and power of the Court to review or vary or affirm the impugned Judgment. G. V. Odunga's Digest on civil case Law and Procedure 3rd Edition Vol. 2 at page 501 paragraph (K) citing with approval the principles in *Peters v Sunday Post Ltd* {1958} EA 429 and *Shah v Aguto* {1970} EA 265 stated: -

“The Court on first appeal has jurisdiction to review the evidence in order to determine whether the conclusion originally reached on that evidence should stand. It is a strong thing for the appellate Court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing, hearing witnesses. But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate Court might itself come to a different conclusion. “(See also *Sotiros Shipping Inc v Slmeler Solholt* {1983} 1 Lloyds Rep 605).”
21. Having held as above following the grounds of appeal by the appellant, I consider that there are two central issues stand out to determine fully concerns to be tackled by the Court.
 1. Whether the Respondent discharged the burden of proof required of him to proof breach of duty of care and acts of negligence?
 2. Whether the two twin issues on liability and quantum were judiciously determined and sustained by the Learned trial Magistrate with proper assessment of the evidence?
22. This is on whether the conclusion reached to apportion liability was valid and further the Court decision on the award of damages was consistent with the applicable legal principles.

Analysis

23. In the case of [Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR, the same Court stated with regard to the duty of the first Appellate Court: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
24. This Court is guided by the Court of Appeal in, [Gitobu Imanyara & 2 others v Attorney General](#) [2016] eKLR, cited the case of [Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia](#) (1982 –88) 1 KAR 727 at p. 730 where Kneller J.A. said: -

“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. See *Ilango V. Manyoka* [1961] E.a. 705, 709, 713; *Lukenya Ranching And Farming Co-operatives Society Ltd V. Kavoloto* [1970] E.a., 414, 418, 419.”



25. The Court further refers to the case of *Gicheru Vs Morton and Another* (2005) 2 KLR 333 where the Court stated: -

“In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal 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 small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.”

26. Madan, JA (as he then was), on the difficulties that confront a judge in assessment of general damages in the context of personal injuries claims as follows in *Ugenya Bus Service V Gachiki*, (1976-1985) EA 575, at page 579: -

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.”

Standard of Proof

27. It is true as expressly stated under Section 107 (1) of the *Evidence Act*: -

“That whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

28. Further in Section 108 “the burden of proof in a suit or proceedings, lies on that person who would fail if no evidence at all were given on either side. In consonant with these express statutory provisions the value Judgment of the Supreme Court in *Raila Amolo Odinga & another v IEBC & 2 others* {2017} eKLR stated thus inter alia: -

“though the legal and evidence burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

29. G. V. Odunga JA in his book on Digest on Civil Case Law and procedure 2nd Edition at page 3711 paragraph 7986 at par (b) used similar language: -

“If the plaintiff in his testimony does not say how the driver of the bus was negligent although negligence is pleaded, the plaintiff has failed to prove any fault attributable to the driver and thereof he has failed to prove his case on a balance of probabilities.”

30. Another aspect of Section 107 which requires proof on a balance of probabilities is to the effect once the plaintiff who bears the burden of proving negligence against the defendant tortious causation of the harm allegedly done and suffered, it turns out that the defendant bears the burden of setting up a defence to the prima facie case. It will also suffice that shifting the burden of proof to the defendant may be explicitly established through a rebuttable presumption given the level of persuasion of the evidence



adduced before the trial Court. As Michael Taruffo AJCL 51 {2003} 666 (Clermour Sherwin) (The Exclusionary Rule Journal of Criminal Law and Police Science) it was observed: -

“The Law does not ask the Judges (Jurors) to account for the means by which they convinced themselves. It does not charge them with any rule from which they shall specifically derive the fullness and the adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence. The Law asks them but this single question, which encloses the full scope of their duties are you inwardly convinced?”

31. It is therefore follows, that the standard of proof in civil cases is merely on preponderance of the evidence. Based on these principles, the Appellant case against the Respondent was to proof causation and wrongdoing for loss and damage to attach, to enable the Court to conclude and assess damages. The core of this instructions is essentially on the elements of negligence. In *Treadsetters Tyres Ltd v John Wekesa Wepbukhulu* {2010} eKLR: -

“In an action for, negligence as in every action the burden of proof falls upon the plaintiff alleging to establish.... That the defendant was reasonably negligent or from the circumstances negligence is infact inferred.”

32. Thus, in the case of *Stapley v Gypsum Mines Ltd* {1953} AC 663, the Court held as follows: -

“To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical scientific Theory of causation it is quite irrelevant in this connection. In a Court of Law, this question must be decided as a properly instructed and reasonable jury would decide it the question must be determined by applying common sense to the facts of each particular case one may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but does not mean that the accident must be regard as having been caused by the faults of them.”(See *Tread Setters Tyres Ltd v John Wekesa Wepbukulu* {2010} eKLR [Nickson Muthoka Mutavi v Kenya Agricultural Research Institute](#) {2016} eKLR).

33. In this Instant Appeal the Appellant offered no evidence at all to the trial magistrate to counter the Respondent’s own evidence or the evidence of PW3 the police officer on the circumstances of the accident. On the converse the Respondent herein testified how he was riding his motorcycle registration KMFJ 525Y with his wife along the Webuye-Eldoret Road when the Appellant who was driving motor vehicle KCP371N Mitsubishi Canter, suddenly turned right without indicating. To this Court, this is where negligence lies upon the Appellant.
34. My analysis reveals establishment in evidence of negligence on the part of the Appellant who elected not to offer evidence to the contrary.
35. This Court finds no cogent grounds to disturb the discretion exercised by the trial magistrate in apportionment of liability and thus the ground of appeal fails.

Whether the award of damages was consistent with the applicable legal principles?

36. It is true that where a trial exercises its discretion and makes an informed award on damages, an Appellate would rarely interfere unless it is shown that the trial Court considered an irrelevant factor or



disregarded a relevant one or that the amount awarded is so inordinately high or so low as to amount to erroneous estimate of principle.

37. This principle was well illustrated in the decision of *Kemfro Africa Ltd T/a Meru Express Service & Another vs- Mm. Lubia & Another* [1998] eKLR where the Court of Appeal held as follows: -

“The Principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge are 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 high that it must be a wholly erroneous estimate of damages.”

38. The Respondent herein pleaded, that he suffered the following injuries; blunt injury to the head, bruises to the face, blunt injury to the neck, blunt injury to the back, bruises on the left-hand fingers, fracture of the right tibia (comminuted), fracture to the right fibula (comminuted), and Laceration on the right leg.

39. Dr. Paul Rono testified and produced medical records that corroborated the evidence of the Respondent that he sustained the injuries as pleaded.

40. Dr. J. C. Sokobe equally testified and produced a medical report dated 8th December 2020, he confirmed the Respondent suffered the pleaded injuries and that he sustained severe soft and bony (fractures) tissue injuries from which he has not recovered. And that the Respondent would require Kshs (estimate) 200,000/- for further treatment.

41. The Appellant on their part similarly led no evidence to controvert the nature of injuries that the Respondent sustained.

42. It is trite that comparable injuries should attract comparable damages, the Court of Appeal observed in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR that: –

“The context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

43. In the case of *George William Awuor v Beryl Awuor Ochieng* [2020] eKLR, the Court set aside an award of Kshs 2,000,000/- and substituted it with an award of Kshs 1,200,000/- where the Respondent had suffered injuries that included fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r)

44. In *Ndwiga & another v Mukimba* (Civil Appeal E006 of 2022), where the Plaintiff sustained tenderness and swelling of the left leg, fracture of tibia and fibula left leg, the Court reviewed and set aside an award of Kshs 1,200,000/- on account of general damages for pain, suffering and loss of amenities and substituted the same with an award of Kshs 500,000/-.

45. *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR where this court upheld an award of Kshs. 800,000 where the plaintiff had suffered femur fractures and fractures of the tibia fibula.

46. From the above authorities, it is evident that Courts have awarded lower amounts in general damages in the past even in cases where the victims sustained other injuries in addition to fractures of the tibia and fibula of both legs. In the instant case, I note that the learned magistrate awarded general damages indicating the authorities that she had relied upon so as to arrive at the award of Kshs 900,000/-. I hold the considered view that the said award was manifestly high to warrant interference by this Court.



47. I, therefore, interfere with the same and substitute the award of Kshs 900,000/- with an award of Kshs 700,000/= for general damages.
48. The Award under the head “Future Medical Treatment” is unaffected.
49. The Appellant has been partially successful in this Appeal. However, in this case, this Court orders that each party, do bear their own costs as the appeal was on liability and quantum and the fact that the Respondent’s costs as awarded in the trial Court are considerably reduced in view of the reduction of the general damages in this appeal.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 4TH DAY OF MAY, 2023.

MOHOCHI S.M (JUDGE)

