



**Makhanu & 7 others v Tigaad Transport Company Limited & 2 others (Civil Appeal 27, 28, 29, 30, 31, 32, 33 & 34 of 2020 (Consolidated)) [2023] KEHC 3904 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3904 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 27, 28, 29, 30, 31, 32, 33 & 34 OF 2020 (CONSOLIDATED)**

**REA OUGO, J**

**MAY 3, 2023**

**BETWEEN**

**ROBERT WASILWA MAKHANU ..... 1<sup>ST</sup> APPELLANT**  
**CHRISPINUS BARASA WALEKHWA ..... 2<sup>ND</sup> APPELLANT**  
**MICHAEL WABWILE WEKESA ..... 3<sup>RD</sup> APPELLANT**  
**ROSELYN NAJALA SIMIYU ..... 4<sup>TH</sup> APPELLANT**  
**ROBAI IMBITI DACHU ..... 5<sup>TH</sup> APPELLANT**  
**MAURICE CHEPKWESI KIPSONGOCHI ..... 6<sup>TH</sup> APPELLANT**  
**AK (MINOR SUING THROUGH MOTHER AND NEXT FRIEND**  
**RNS) ..... 7<sup>TH</sup> APPELLANT**  
**PC (A MINOR SUING THROUGH FATHER & NEXT FRIEND**  
**MC) ..... 8<sup>TH</sup> APPELLANT**

**AND**

**TIGAAD TRANSPORT COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**KASSAM ABDULGANI ..... 2<sup>ND</sup> RESPONDENT**  
**OSMAN HUSSEIN MOHAMED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeals arising from the judgment of Hon. N.N. Barasa (S.R.M) which was delivered on the 28th January 2020)*

**JUDGMENT**

1. The appellants were passengers aboard on motor vehicle registration no. KAV382R when the 3<sup>rd</sup> Respondent driving motor vehicle registration number KAV 691U-ZB 6095 rammed into their motor



vehicle. The issue of liability was determined in the test suit PMCC No 103 of 2014 which found the respondents 100% liable.

2. The only issue before the trial magistrate was on the damages due to the appellants. However, the trial magistrate in her judgment found that the appellants had not proved their injuries because the treatment notes from Bungoma District Hospital Marked for Identification as PMFI3 were not produced as exhibit in the case. The court found that the appellants had not proved that they suffered the injuries enumerated in their plaints.
3. The appellants being dissatisfied with the finding of the trial magistrate lodged their various memoranda of appeals. The common grounds raised are as follows:
  1. That the learned Magistrate erred in law and in fact by failing to consider that Medical report prepared by Doctor Obed Omuyoma who testified and produced the same in court had not been challenged by the production of a contrary Medical report.
  2. That the learned Magistrate erred in law and in fact by failing to consider that the Respondent herein did not give any oral evidence and hence their defence remained a mere allegations.
  3. That the learned Magistrate erred in law and in fact by failing to consider the evidence of the Appellant with regards to the injuries sustained as the Appellant was the victim of the Accident hence the primary source of information.
  4. That the learned Magistrate erred in law and in fact by completely disregarding the Appellant's submissions and authorities that had been relied on therein.
  5. That the learned Magistrate erred in law and in fact by laying a higher burden of proof that which was required in civil cases.
  6. That the learned Magistrate erred in law and in fact by making a finding that the Plaintiff had proved his case on liability and still failed to award special damages notwithstanding that the same had not only been specifically pleaded but also proved.
  7. That the Learned Magistrate erred in Law and in fact by relying on the cases of Peter Migiro v Valley Bakery Limited Nakuru HCCA No 5 of 2011 eKLR, Eastern Produce (k) ltd v James Kipketer Ngetich (2005) eKLR and the case of Lochab Brothers Limited and Another which cases are distinguishable from the present case.
  8. That the Learned Magistrate erred in law and in fact by proceeding to make a proposal on quantum of damages which was very low.
  9. That the learned Magistrate erred in law and in fact by proceeding to make a finding that the treatment notes ought to have been produced by the makers notwithstanding the fact that the Doctor Obed Omuyoma who testified in court stated in his evidence that he had relied on the history taken from the Appellant and looked at the Treatment notes while preparing the medical report.
4. The appeal came up for hearing and the parties were directed to file their respective submissions and they have both complied. Parties also agreed that HCCA 27 of 2020 be the lead file. The appellants in their submissions argue that the doctor in preparing his report relied on the P3 Form, treatment notes and the appellant's history. The medical reports were not challenged by the respondent by the



production of a contrary medical report. To buttress their argument they relied on the case of Beatrice Nthenya Sila v Ruth Mbithe Kitsisa & 3 others [2014] eKLR where the court held that:

7. But perhaps of more importance is that Dr. Ndegwa examined all the Respondents and thereafter prepared a medical report. That medical report was not challenged by the Appellant by production of a contrary report. Further a Police Officer gave evidence and in so doing produced police abstracts which identified those that were injured and categorized their injuries. For example in the case of the first Respondent her injuries were stated to be grievous harm.

5. Similarly, the court in Erick Juma & 2 others v Fredrick Gacheru & another [2016] eKLR held that:

“16. It is also the respondents case that the doctor’s report was also useless as it was based on the treatment notes which were not admitted as evidence. It is true that treatment notes are part of the evidence of the involvement in the accident and injury. I however reject the argument that without treatment notes one cannot prove involvement in an accident or injury. The duty of the court is to examine the entire evidence and make a finding whether the facts alleged are proved on the balance of probabilities. The existence of treatment notes would assist establishing consistency and corroborating the other evidence but are not necessarily decisive.”

6. On the contrary, the respondents argued that the burden of proof lies with the person who makes the allegations, in accordance with section 107 and 108 of the Evidence Act. The appellants failed to give the nexus between the injuries sustained and the alleged accident. For instance, the initial treatment notes were never produced in court as exhibits to prove that indeed the injuries alleged were sustained in the accident.

7. In this case, the trial magistrate was correct to hold that the treatment notes were not produced but were marked for identification as PMFI3. The Court of Appeal in Kenneth Nyaga Mwigie v Austin Kiguta & 2 others [2015] eKLR held as follows:

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

....

22... Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

8. The trial magistrate made the right decision in not taking into account the initial treatment notes from Bungoma District Hospital as the same were not produced by any witness and tendered in as exhibits. However, the appellants’ case did not solely lie on the initial treatment notes. The appellants adopted their witness statement as their evidence in chief in which they testified that they sustained the injuries outlined in their respective plaint. This evidence was further corroborated by the testimony of Dr. Abed Omuyoma who produced the medical reports in respect of each and every appellant. Dr.



Abed Omuyoma testified that in preparing the medical report he relied on the outpatient card from Bungoma Hospital.

9. Having carefully considered the evidence before the trial magistrate, I believe that there was sufficient evidence to prove that the appellants suffered from the injuries listed in their complaints despite the fact that the initial treatment notes were not produced into evidence. While the presence of treatment notes would help to establish consistency and support other evidence, they may not be the sole determining factor (see *Erick Juma & 2 others v Fredrick Gacheru* (supra)). I therefore find that the trial magistrate erred by disregarding the medical report by Dr. Abed Omuyoma.
10. I now turn to consider the injuries sustained by the appellants as per the evidence that was before the subordinate court.

#### **HCCA NO 27 OF 2020**

11. According to paragraph 8 of the plaint, the 1<sup>st</sup> appellant sustained the following injuries: severe soft tissue injuries of the chest and shoulder joint, soft tissue injuries of the right supra-orbital region of the face and a blunt injury to the lower back. The 1<sup>st</sup> appellant therein adopted his witness statement in which he testified that he sustained injuries on the right part of his face, right shoulder chest and parts of his lower back. According to the medical report of Dr. Obed Omuyoma, the 1<sup>st</sup> appellant sustained the injuries enumerated in his plaint. He sought treatment at Bungoma Hospital and a tetanus jab was administered and he was also given oral analgesics.
12. The trial magistrate in her judgment stated that she would have awarded general damages of Kshs 80,000/-. The 1<sup>st</sup> appellant in his appeal now challenges the proposal by the trial magistrate on account that it was very low. He proposed a sum of Kshs 300,000/- as fair compensation. He cited the case of *Mulo Holdings & 3 Others v Rashid Swenta* (2019) eKLR where the respondent therein had sustained bruises on the head, deep cut wound on the head, bruises on both hands, deep cut wounds on the right knee and dislocation of the right knee and was awarded Kshs 300,000/-. In *Jotham Murungi v Dancan Mwenda & Another* (2016) the plaintiff therein sustained bruises on the right elbow and multiple bruises on the right leg and was awarded Kshs 60,000/-. The respondent supported the decision of the trial magistrate and submitted that in *Jotham Murungi v Dancan Mwenda* (supra) the court awarded Kshs 60,000/- for soft tissue injuries that had healed.

#### **HCCA 28 OF 2020**

13. According to the plaint of the 2<sup>nd</sup> appellant he sustained a cut wound on the right shoulder and dislocation of the right shoulder. He also sustained soft tissue injuries on the scalp and chest. The injuries were confirmed by the medical report prepared by Dr. Obed Omuyoma.
14. The trial magistrate proposed that she would have made an award of Kshs 80,000/- as general damages and Kshs 650/- as special damages. The 2<sup>nd</sup> appellant in his submissions proposes an award of Kshs 400,000/- and relied on the case of *Mulo Holdings & 3 others v Rashid Swenta* (supra).

#### **HCCA NO 29 OF 2020**

15. The appellant sustained a sprain of the right ankle and soft tissue injuries of the scalp according to his plaint. The medical report by Dr. Obed Omuyoma confirmed the appellant's injury and further noted that the degree of injury was harm. The medical report was produced as Pexh 8 (a). The trial magistrate found that that appellants claim was not successful but had it been, she would have awarded Kshs 80,000/- as general damages.



### **HCCA NO 30 OF 2020**

16. The 3<sup>rd</sup> appellant sustained blunt injury to the anterior chest wall and head and also suffered a cut wound on the right leg. The injuries were also confirmed by the medical report prepared by Dr. Obed Omuyoma. The injuries pleaded in his plaint were therefore sufficiently proved.
17. The trial magistrate in her judgment had proposed that an award of Kshs 80,000/- for damages and Kshs 5,000/- on special damages. The 3<sup>rd</sup> appellant in his submissions proposes an award of Kshs 300,000/- and relied on the case of Mulo Holdings & 3 others v Rashid Swenta (supra).

### **HCCA NO 31 OF 2020**

18. The 4<sup>th</sup> appellant proved the injuries he sustained through his testimony and the medical report by Dr. Obed Omuyoma. The plaintiff sustained the following injuries:
  - a. Bruises on the left hand
  - b. Soft tissue injuries on the head.
  - c. Soft tissue injuries of the chest.
  - d. Sprain on the left hand.
19. The trial magistrate held that had the 4<sup>th</sup> appellant proved its case she would have made an award of Kshs 80,000/- as general damages and Kshs 5,000/- as special damages.

### **HCCA NO 32 OF 2020**

20. According to the medical report, the 5<sup>th</sup> appellant sustained a sprain injury on the right upper limb and soft tissue injury of the chest. The trial court found that had he been successful, she would have made an award of 80,000/- on the head general damages and Kshs 650 for special damages. The appellant herein in his submissions proposes an award of Kshs 300,000/- and relied on the case of Mulo Holdings & 3 others v Rashid Swenta (supra).

### **HCCA NO 33 OF 2020**

21. The 6<sup>th</sup> appellant according to his plaint suffered soft tissue injuries of the chest wall, right hand and left leg. The injuries were confirmed by the medical report produced by Dr. Obed Omuyoma. The trial court that had the claim been successful she would have made an award of Kshs 80,000/- as general damages and Kshs 650/- as special damages. The 6<sup>th</sup> appellant herein in his submissions proposes an award of Kshs 400,000/- and relied on the case of Mulo Holdings & 3 others v Rashid Swenta (supra).

### **HCCA NO 34 OF 2020**

22. After considering the injuries listed in the plaint and subsequently proved by the medical report of Dr. Obed Omuyoma produced as exhibit, the 7<sup>th</sup> appellant sustained the following injuries:
  - a. soft tissue of the lip
  - b. soft tissue injuries of the head
23. The trial court found that had the case been successful she would have made an award of Kshs 80,000/- and Kshs 650/- as special damages. The appellant herein in his submissions proposes an award of Kshs 300,000/- and relied on the case of Mulo Holdings & 3 others v Rashid Swenta (supra).



## Determination on quantum

24. The parameters under which an appellate court will interfere with an award in general damages were stated by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR as follows:

‘An appellate court will not disturb an award for general damages unless it is so 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..’

25. I have considered the injuries sustained by the appellants, their submissions on the quantum of damages, the authorities cited by counsel in their submissions for this appeal. I have equally considered the respondents submissions. The appellants in HCCA NO. 27, 29, 30, 31, 32, 33, & 34 OF 2020 all sustained soft tissue injuries. Despite the appellants having cited the case of *Mulo Holdings & 3 others v Rashid Swenta* (supra), the injuries sustained by the plaintiff therein are more severe when compared to those sustained by the appellants in HCCA NO. 27, 29, 30, 31, 32, 33, & 34 OF 2020. The plaintiff in *Mulo Holdings & 3 others v Rashid Swenta* (supra), other than suffering soft tissue injuries also sustained a dislocation which is not the case with the appellants in HCCA NO. 27, 29, 30, 31, 32, 33, & 34 OF 2020.

26. In *John Wambua v Mathew Makau Mwololo & another* [2020] eKLR the plaintiff therein sustained blunt injury right shoulder and a blunt injury to the right big toe and the court upheld an award of Kshs 120,000/-. In *Jyoti Structures Limited & another v Truphena Chepkoech Too & another* [2020] eKLR one of the plaintiffs sustained blunt injury to the head, neck, chest, back, both thighs while the other plaintiff therein suffered bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand and were each awarded Kshs 125,000/-. In *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR the plaintiff therein sustained cut on the head, blunt injury to the right knee, multiple bruises on the upper limbs and bruises on the right knee. The court made an award of Kshs 140,000/-. In *Losagi Insurance Brokers Limited & another v Josephat Achesa Chumbali* [2022] eKLR the appellant’s only injury was a cut knee and was awarded Kshs 95,000/- as general damages.

27. Therefore the 80,000/- proposed by the trial magistrate as general damages was therefore too low considering current comparable awards. An award of Kshs 120,000/- would therefore be more appropriate.

28. The 2<sup>nd</sup> appellant in HCCA 28 of 2020 in addition to the soft tissue injuries also sustained a dislocation of the right shoulder. He proposed an award of Kshs 300,000/- which was awarded by court in the case of *Mulo Holdings & 3 Others v Rashid Swenta* (2019) eKLR where the respondent therein had sustained bruises on the head, deep cut wound on the head, bruises on both hands, deep cut wounds on the right knee and dislocation of the right knee. In *Veronica Mkanjala Mnyapara v Patrick Nyasinga Ameyna* [2021] eKLR the court awarded Kshs 300,000/- where the plaintiff sustained fewer injuries, that is, a dislocation. The trial magistrate proposed an award for general damages of Kshs 80,000/- I find that an award Kshs. 300,000/- is sufficient.

29. For avoidance of doubt the award shall be made up as follows:

1. The 1<sup>st</sup> Appellant, Robert Wasilwa Makhunu, is hereby awarded of Kshs 120,000/-. The 1<sup>st</sup> appellant sought special damages of Kshs 6,000/- but failed to produce receipts to prove his claim for special damages.



2. The 2<sup>nd</sup> Appellant, Chrispinus Barasa Walekhwa, is hereby awarded Kshs 300,000/-. The 2<sup>nd</sup> appellant is awarded special damages of Kshs. 5,000/-.
3. The 3<sup>rd</sup> Appellant, Michael Wabwile Wekesa, is hereby awarded Kshs 120,000/-. The 3<sup>rd</sup> appellant is awarded special damages of Kshs. 5,000/-.
4. The 4<sup>th</sup> Appellant, Roselyn Najala Simiyu, is hereby awarded Kshs 120,000/-. The 3<sup>rd</sup> appellant is awarded special damages of Kshs. 650/-.
5. The 5<sup>th</sup> Appellant, Robai Imbiti Dachu, is hereby awarded Kshs 120,000/-. The 4<sup>th</sup> appellant is awarded special damages of Kshs. 5,000/-.
6. The 6<sup>th</sup> Appellant, Maurice Chepkwesi Kipsongochi, is hereby awarded Kshs 120,000/-. The 5<sup>th</sup> appellant is awarded special damages of Kshs. 650/-.
7. The 7<sup>th</sup> Appellant, AK (Minor suing through Mother and Next Friend RNS) is hereby awarded Kshs 120,000/-. The 6<sup>th</sup> appellant is awarded special damages of Kshs. 650/-.
8. The 8<sup>th</sup> Appellant, PC (A minor suing through father & Next friend MC) is hereby awarded Kshs 120,000/-. The 7<sup>th</sup> appellant is awarded special damages of Kshs. 650/-.
9. The appeal is allowed. The appellants shall have the costs in the lower court and also in the Appeal. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3<sup>RD</sup> DAY OF MAY 2023.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

Miss Amboko For the Appellant

Respondent Absent

Wilkister C/A

