



**Nthenya v Nzilu & another (Civil Appeal 65 of 2020)  
[2023] KEHC 3891 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3891 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 65 OF 2020  
MM KASANGO, J  
MAY 2, 2023**

**BETWEEN**

**ALFRED WAMBUA NTHENYA ..... APPELLANT**

**AND**

**MULWA NZILU ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MULW ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement of the Chief Magistrate's Court at Thika  
(Hon. A.M. Maina, SPM) in Civil Case No. 308 of 2016 dated 29th April, 2020)*

**JUDGMENT**

1. Alfred Wambua Nthenya, the appellant hereof filed a case before Thika Chief Magistrate's Court against the respondents in his claim for negligence on the respondent's part which he pleaded it led to a motor vehicle accident whereby he was injured. He claimed for special and general damages.
2. The trial proceeded with the appellant adducing evidence. The trial court by its judgment of 2<sup>nd</sup> April, 2020 determined that the liability for the accident was 50:50 as against the appellant and the respondents. The trial court awarded special damages as pleaded and proved and general damages for Kshs.150,000. The appellant has appealed in this appeal against the finding on liability and the award of general damages.
3. This is the first appellate court. The duty of this Court is to revisit the case that was before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion but bearing in mind and giving allowance that the trial court had the advantage of seeing and hearing the witnesses: See the case *Selle & Another vs Associated Motor Boat Co. Ltd* [1968] EA 123.
4. From the outset, I wish to state that the respondent did not file submission in this appeal, only the appellant filed his submissions.



5. There are two issues for determination, that is:-
  - a. Did the trial court err in its finding on liability?
  - b. Did the trial court err in its award in general damages?

6. The appellant gave evidence touching on liability as follows:

“I recall 12.7.15 at 3-4 pm. I was crossing the road at Ngoigwa area when I got hit by motor vehicle. I was crossing from right side to left side. There was no zebra crossing or foot bridge. It is a place where pedestrian cross the road ...

It hit me on the right side. And I fell on its windscreen. The vehicle appeared suddenly on the road and hit me. ... It was during the day so I could see the road very well. ...

The scene of the accident was not near a footbridge. Pedestrians cross the road at the scene.”

7. That is the totality of the evidence that the trial court obtain to help it determine liability. The trial court by its judgment well appreciate that the respondents, having not called any evidence in support of their defence that defence remained unsubstantiated. The trial court went further to state that the appellant had to prove on a balance of probability that the respondent was negligent, notwithstanding the failure of the respondents to prove their defence by calling evidence. The trial court made the following holding.

“He who alleges a fact must prove it. The fact that the said accident occurred does not automatically mean that the driver of the accident motor vehicle drove carelessly or negligently.

The fact that the defendants did not testify in this matter does not mean that they were negligent. The plaintiff was expected to demonstrate that the driver of the accident motor vehicle drove in a negligent manner, thus occasioning the accident.

In this case, the plaintiff told the court that the accident motor vehicle hit him while he was crossing the road. He was therefore hit when on the road. He was not off the road, nor was he on a zebra crossing at the time he got hit. He was not at a place designated for pedestrians, at the time of the accident.

On the other hand, the accident motor vehicle was rightfully on the road. It expected to be on the road at all material times. The plaintiff did not tell the court what the driver of the motor vehicle did wrong or failed to do, in order to cause the accident. He also did not tell the court what measures he took to ensure his safety on the road. He too had a duty to exercise due to care and attention when crossing the road.

Having taken all factors into account, I find that the plaintiff did not demonstrate that the said driver was wholly to blame for the occurrence of the accident. I therefore apportion blame between the plaintiff and the driver of the accident motor vehicle equally. Ownership of the accident motor vehicle is not in dispute.

I therefore enter judgment on liability for the plaintiff against the two defendants at the ration of 50:50. The 1st defendant is held vicariously liable.”



8. The Canadian case *Clements vs Clements*, 2012 SCC 32 (CanLII) (2012) 2 SCR 181 discuss the need to prove duty of care in negligence cases thus:

“(7) Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care — a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law “corrects” the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as “corrective justice”, assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm: E. J. Weinrib, *The Idea of Private Law* (1995), at p. 156.

(8) The test for showing causation is the “but for” test. The plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant’s negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.”

9. Bearing in mind the above persuasive decision I find there are certain pointers on liability in the appellant’s evidence, which I am of the humble view the trial court did not consider. The appellant stated that he crossed at a place where pedestrian cross the road. The respondent’s vehicle appeared suddenly on the road and hit him. It was during the day and visibility was good. Bearing that evidence in mind and considering the respondent did not provide evidence in contradiction, there is, therein, evidence of the respondent bearing a greater responsibility to ensure safety of other road users and to ensure to avoid the accident. I am in this regard guided by the case *Equator Distributors vs. Joel Muriu & 3 others* (2018) eKLR as where it was stated:

“A motorist must exercise ordinary care and drive at a reasonable speed commensurate with the conditions encountered on the road, which will enable him or her to keep the vehicle under control and avoid injury to others using the highway. Failure to bring a vehicle to a halt in the face of any danger may constitute negligence on the part of the driver. We are satisfied that the trial court did not err in finding the drivers of the two motor vehicles negligent.’

10. I am further guided by the case *Savannah Hardware V. EOO (Suing as Representative of SO (deceased))* (2019) eKLR where the court held:-

“Thus, the driver of a motor vehicle being driven on a public road has a higher duty of care to other road users. Had the appellant’s driver kept adequate look out and having noticed the presence of young children, he should not have driven on as if the road was clear of children. A person driving as motor vehicle is under as duty to care for other road users since a vehicle is a lethal weapon and due care is expected of him.’

11. The latter case involved a child who was fatally hit by motor vehicle but that notwithstanding the principle that drivers driving on public road have a higher duty of care would also apply to this case.



12. Against the above background, I find that the holding of the trial court on liability needs to be interfered with. The appellant was crossing at a place ordinarily used by other pedestrians. The respondent vehicle appeared suddenly and hit him. The respondent was unable to bring the vehicles to halt leading to the accident. In my view in the absence of contrary evidence, I find the appellant did not at all contribute to the accident. I find the respondent on a balance of probability was proved to have been 100% responsible for the accident which led to the appellant's injury.
13. In respect to Issue (a), I find it in the positive that the trial court erred to apportion liability on 50:50% basis. The respondents were 100% liable for the accident.
14. Issue (b) requires this Court to interrogate the trial court's award on general damages. The doctor's report revealed that the appellant sustained multiple facial bones fractured and degloving injury to the right thigh. The trial court having considered the authorities relied upon by the parties awarded Kshs.150,000 in general damages. The principles upon which an appellate court can disturb the trial court's assessment on damages were discussed in the Court of Appeal decision of KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES GATHOGO KNINI VS. AM LUBIA AND LIVE LUBIA (1982-88) IKAR as follows:
- “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 that 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.”
15. In determining the general damage award, courts are required to consider comparable awards. This was the holding in the case Stanley Maore vs Geoffrey Menda (2004) eKLR thus:-
- “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.”
16. The appellant relied on the case S.M. V. Mahesu Kerai & Manoj A Patel (2009) eKLR. In that case, the injuries were:
- I. Linear fracture left parental bone extending to the roof left orbit.
  - I. Fracture right front parietal bone.
  - II. Thin fracture of anterior wall of right maxillary sinus.
  - III. Head concussion injury leading to a coma.
  - IV. Multiple facial bruises.
  - V. Multiple forearm bruises both forearms
17. In that case, the court awarded Kshs.1million in general damages.



18. Appellant further relied on the case Panniack Investments Limited vs Davidson Mwanzia Kamuta (2018) KLR where the claim's injuries were:
- “(i) Fracture of the left temporal-parietal bones.
  - (ii) Acute epidural hematoma on the left temporal parietal lobes;
  - (iii) Mass effect with midline shift;
  - (iv) Effacement of the sulci and basal cisterns;
  - (v) Concussion with lucid moments; and
  - (vi) Bleeding from the left ear (otorrhea)”
19. The court in that case awarded general damages of Kshs.800,000.
20. The appellant also relied on the case of Kenya Wildlife Services vs Godfrey Kirimi Miti 2018) eKLR where the injuries were noted to be:
- i. Left zygomatic bone fracture.
  - ii. Left ethmoidal bone fracture and maxillary fracture.
  - iii. Nasal septum fracture.
  - iv. Lower orbital floor fracture.
  - v. Loss of teeth, 6 on upper; 3 on lower jaw.
  - vi. Distal left radius fracture.
21. In that case, the court made an award for Kshs.2million in general damages.
22. These cases that the appellant has placed reliance on were not brought to the attention of the trial court. In my view, had the appellant brought them to the attention of the trial court, the award of the trial court would have been different.
23. Having stated so, I do find a basis to interfere with the trial court's award in general damages. The appropriate damages for the injuries the appellant sustained in my view is Kshs.900,000.
24. On issue (b) I do find as discussed above, the trial court erred in its assessment of general damages.

### **Disposition**

25. In the end, the appellant's appeal hereby succeeds and the trial court's judgment is hereby set aside and is substituted judgment:
- a. That the respondents were 100% liable for the accident.
  - b. The appellant is awarded Kshs.900,000 in general damages.
  - c. The award of special damages of Kshs.45,675 is hereby upheld.
  - d. The appellant is awarded costs of the trial court as prayed in the plaint.
  - e. The appellant is awarded costs of the appeal assessed at Kshs.120,000.
26. Orders accordingly.



**JUDGEMENT DATED, SIGNED AND DELIVERED AT KIAMBU THIS 2<sup>ND</sup> DAY OF MAY, 2023.**

**MARY KASANGO**

**JUDGE**

**In the presence of:**

**Coram:**

**Mourice/Julia - Court Assistants**

**Musili Mbiti & Associates Advocates for Appellant:- N/A**

**M.N.M. Advocates for Respondent:- N/A**

**Court**

**Judgment delivered virtually.**

**MARY KASANGO**

**JUDGE**

