



REPUBLIC OF KENYA



**KENYA LAW**  
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**Royal Star Energy v Muti (Civil Appeal 96 of 2019)  
[2023] KEHC 21673 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 21673 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 96 OF 2019  
SM GITHINJI, J  
MAY 17, 2023**

**BETWEEN**

**ROYAL STAR ENERGY ..... APPELLANT**

**AND**

**CATHERINE KANINI MUTI ..... RESPONDENT**

*(Being an appeal against the entire judgment and decree of the  
Principal Magistrate's court at Mariakani by honourable N.C Adalo  
(SRM) made on 12th November 2019 in PMCC No. 124 of 2017)*

**JUDGMENT**

CORAM: Hon. Justice S. M. Githinji

Mr Abdullahi Advocate for the Appellant

Mr Lewa Advocate for the Respondent

1. This appeal arises from the judgment and decree of Hon, N.C Adalo (SRM) in Malindi PMCC No. 124 of 2017 wherein she awarded the plaintiffs a sum of Kshs. 681, 300 as general damages for pain and suffering with liability apportioned against the defendant at 100%.
2. Aggrieved with the judgment, the appellant preferred an appeal based on the following grounds;
  1. That the learned Magistrate erred in law and fact in finding that the respondent had proved her case against the appellant.
  2. That the learned Magistrate erred in law and fact in finding that the cause of action occurred within the appellant's premises, contrary to uncontroverted evidence on record.



3. That the learned magistrate erred in law and fact in finding that the respondent was a visitor within the appellant's premises.
  4. The learned magistrate erred in law and fact in finding that the appellant was liable to compensate the respondent.
  5. The learned magistrate erred in law and fact in totally disregarding defence which was uncontroverted.
  6. The learned magistrate erred in law and fact in shifting the burden from the respondent to the appellant.
  7. The learned magistrate erred in law and misdirected herself in matters of evidence.
  8. The learned magistrate erred in law and fact in introducing extraneous matters and arriving at extraneous findings on matters which were not pleaded and or proved.
  9. The learned magistrate erred in law and fact in finding that the appellant owed the respondent a duty of care.
  10. The learned magistrate erred in law and fact in misdirecting herself on the intents and purposes of the provisions of Order 1 rule 15 (1) (a), (b) and (c) of the Civil Procedure rules 2010.
  11. The learned magistrate erred in law and fact in awarding the damages which were excessive in the circumstances.
  12. The learned magistrate erred in law and in fact in dismissing the appellant's defense.
3. The Respondent Catherine Kanini Muti vide the plaint dated 22<sup>nd</sup> March 2017 sued the appellant seeking damages arising out of an accident within the appellant's premises on or about 4<sup>th</sup> June 2016 within Mazeras township.

### **Evidence at Trial**

4. Pw1 Dr Stephen Ndegwa told the court that he had examined Catherine Kanini Muti on 31<sup>st</sup> October and prepared a medical report on even date. He again saw her on 3<sup>rd</sup> March 2017 and prepared a second medical report on the same date.
5. He told the court that the injury was from a fall in a dug hole at a petrol station within Narobi-Mombasa highway thus sustaining a duplicated fracture of the right patella.
6. Pw2 Catherine Kanini Muti adopted her witness statement dated 23/03/2016. She also produced a bundle of documents as per the list of documents in support of her case. She added that she fell in a drainage within the defendant's premises.
7. On cross examination she told the court that she fell in a hole belonging to the defendant and after the accident the petrol station visited her and paid part of her bill.
8. Pw3 Roseline Musalia adopted her witness statement dated 26/2/2019. She told the court that she was present at the time of the accident. She stated that the petrol station had started digging the hole which they had asked them to cover but did not.



9. Dw1 Mary Atieno Abiero told the court that she was present when the accident happened and it was not within the defendant's premises. Further, that the defendant had not dug any hole and that the defendant is not liable for the accident.
10. Dw2 Mohamed Abdillahi the manager of Royal Petrol station, the defendant company, told the court that one security officer called Omar had told him that he had a neighbor who could not raise hospital bills and he gave him money to settle the bill on humanitarian grounds. He added that the trench where the accident occurred belongs to KenHA and that they did not dig the trench

### **Submissions, Analysis and Determination**

11. I have perused and seriously evaluated the contents of the pleadings, judgment, grounds of appeal, submissions and decisions referred to.
12. This being a first appeal, this court has a duty to revisit the evidence adduced before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and should therefore make an allowance for that. This position was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. In particular, this 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 (*Abdul Hamed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

13. The discretion of this court to interfere with the determination of the trial court also exercising its discretion should be exercised within the confines of the principles set out by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows: -

“I think it is well settled that this court will not interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

14. Having weighed the grounds of appeal, records of the trial court and submissions, the issues for determination are as follows: -
  - a. Whether the appellant is liable for the occurrence of the accident.



- b. Whether the general damages awarded are excessive.
15. From the evidence on record, the instant case raises the question of occupier’s liability. The respondent amongst others, was a trader operating around the appellant’s premises.
  16. Section 3 of the Occupier’s Liability Act reads as follows;
    - “(1) An occupier of premises owes the said duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
    - (2) For the purposes of this Act, ‘the Common duty of care’ is duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
    - (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases –
      - (a) an occupier must be prepared for children to be less careful than adults .....

37. Section 3 (6) states as follows;

“For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.”

17. The appellant in its defence stated that the respondent and other traders had been paid to conduct their businesses outside the premises. The respondent is not cited to have been carrying out her business within the appellant’ premises. The accident occurred on a trench that is at the petrol station. The appellant provided evidence that the trench or ditch was maintained by KenHA and had paid the relevant licenses for entry and exit.
18. In my view, by admission that the appellant was in use of the area the trench was, qualifies them under the aforesated Section under Occupier Liability Act and therefore the appellant owed a duty of care to the respondent which duty was breached.
19. On the issue of General damages these are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be noted that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that:

“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.”

20. The court must take into account the value of the shilling and effects of inflation. Although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR* and *Jabane v Olenja [1986] KLR 661*).
21. The respondent suffered a displacement fracture on the right patella. Percentage for partial permanent disability was not determined in the medical reports produced. The trial court however, did note that the respondent at the time of trial could not fold her foot.
22. In *Alphonse Muli Nzioki v Brian Charles Ochuodho MSA HCCA No. 141 of 2011 [2014] eKLR* where the plaintiff suffered a compound comminuted fracture of the right tibia and fibula and a degloving injury medial aspect of the right leg and foot. The plaintiff was awarded Kshs. 800,000/- as general damages in 2014.
23. In my view, these were more serious injuries comparable to the respondent’s herein. However, taking into account the passage of time, and the effects of inflation, I do find that the amount awarded to the respondent was fair and reasonable. I find no need to interfere with it. The appeal lacks merit and is hereby dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17<sup>TH</sup> DAY OF MAY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

In the absence of; -

Mr Abdullahi for the Appellant

Miss Katana for the Respondent

