



REPUBLIC OF KENYA



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**Shanga v Wanjala (Civil Appeal E013 of 2022)
[2023] KEHC 17330 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E013 OF 2022
EM MURIITHI, J
MAY 11, 2023**

BETWEEN

SAHAL SHANGA APPELLANT

AND

MARTIN WANJALA RESPONDENT

*(Being an appeal from the Judgment of Hon. A. G Munene
(PM) delivered on 29/12/2021 in Maua CMCC No.13 of 2012)*

JUDGMENT

1. The Respondent herein, the Plaintiff in the trial court, sued the Appellant vide a plaint dated January 19, 2011 seeking Ksh 15,500, General damages for pain, suffering, loss of amenities and loss of income and costs plus interests. The Respondent pleaded that on May 18, 2011, he was on lawful business at Pluto Petrol Station in Maua Town when the Appellant and/or his driver so carelessly and negligently accelerated Motor Vehicle Registration No KAX 091 P that it crushed him thereby occasioning him injuries, loss and damages.
2. The Appellant denied the claim through his statement of defence dated 10/8/2021, and prayed for the claim to be dismissed with costs.
3. Upon full hearing of the case, the trial found the Appellant to have been 100% liable and awarded the Respondent special damages of Ksh 9,570, general damages for pain and suffering of Ksh 800,000 together with costs and interests.

The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 21/1/2022 set out 4 grounds of appeal as follows:



1. The learned trial magistrate erred in law and fact by failing to properly evaluate the evidence presented before him and particularly the evidence of PW2 and find that the Respondent was wholly to blame for the accident.
2. The learned trial magistrate erred in law and fact by finding the Appellant 100% liable for the accident against the weight of evidence presented before him and failed to appreciate that the burden of proving liability against the Appellant rested on the Respondent.
3. The trial court award of general damages in the sum of Ksh 800,000 is inordinately excessive considering the injuries sustained by the Respondent.
4. The judgment of the trial court is against the law and weight of the evidence on record.

Duty of the Court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1, Martin Wanjala, the Respondent herein, adopted his statement dated January 19, 2011 as part of his evidence in chief. He produced the P3, medical records and cards, bundle of medical receipts, police abstract, medical report and receipt, demand notice and receipt and certificate of postage as exhibits in court. He went on to state that, "I was involved in an accident on May 18, 2011. I was working at Pluto Petrol Station as a security officer. I had been employed by Uhuru security guards. The motor vehicle herein came at the station and the driver wanted to park the motor vehicle. The station offered parking services. I tried to control the driver so as to park the motor vehicle properly. This was part of my duties. He instead accelerated the motor vehicle and he hit me. I was on the front of the motor vehicle. He could see me clearly. It was a sudden acceleration. I sustained injuries in pelvic region. I was taken to Methodist Hospital. I was admitted for 3 days. I stayed for 3 months at home before I could make any movement. I obtained police abstract. I was issued with a P3. It was filled at Maua Methodist. It is before the court. I can't tell why the police stated that I was to be blamed. I was examined by a Dr. called Dr. Njeru. He prepared a report. He charged me 5,000/= for the report. My advocate issued demand notice. It is dated December 15, 2011. The advocate charged 5,000/= for the letter. I have suffered a lot as a result of the accident. I can't do heavy duties. My relationship was affected as I couldn't perform conjugal duties. The injuries still affect me upto date. I seek costs plus interest."
7. On cross examination, he stated that, "I used to work as a security guard. It is not true that I went behind the car as it was reversing. It hit me on the front side. I saw the car coming into the petrol station. The car was in the process of being parked. He then accelerated the car and it hit me. I went to Maua Methodist Hospital. I used my money to pay for my treatment. I have not fully recovered but I generally performing my duties. I was unable to continue with clinic due to financial constraints."
8. On re-examination, he stated that, "I saw the motor vehicle coming in at the station. The driver saw me."
9. PW2 PC Muita Julius from Maua Police Station performing Traffic duties testified that, "I have the police abstract. It is in regard in accident which occurred on May 18, 2011. It involved a motor vehicle KAX 091 P Toyota Land Cruiser and a pedestrian namely Martin Wanyala. The owner of the motor vehicle is not indicated in the police abstract. The accident was reported vide OB 12/May 18, 2011. I have the OB. As per the OB of the said date, an accident was reported at around 4:00 pm involving the



above parties. It happened at Pluto Petrol Station parking yard. The pedestrian was a security guard at the said petrol station. As per the OB nobody was to be blamed, the circumstances under which the initial investigating officer blamed the pedestrian are not stated in the OB. Police abstract was issued to pedestrian.”

10. On cross examination, he stated that, “The only document is the police abstract. The initial investigating officer was PC Wekesa. The OB shows an accident happened. Investigations are carried further after the report. The circumstances were not disclosed as I don’t have the police file. The police abstract has not been interfered with.”
11. PW3 Dr. Sammy Githu Waduru, a medical officer at Nyambene Hospital produced the Respondent’s medical report together with the receipt on behalf of his colleague Dr. Charles Njeru.
12. On cross examination, he stated that, “I did not see the patient. I would expect the plaintiff to have recovered but possibility of some complications. For instance, injury to the left socket of the hip joint. There is risk of post traumatic arthritis. I can only be discovered if he undergoes further examination. He did not sustain permanent disability.”
13. On re-examination, he stated that, “Fracture can recover from 2 weeks to 4 months but complications can remain for long.”
14. The Appellant closed his case without calling any witnesses but produced the medical report by Dr. Macharia dated November 27, 2021 as Dexh. 1 by consent.

Submissions

15. The Appellant urges that the Respondent negligently and carelessly entered into the path of the Appellant’s vehicle hence causing the accident, and cites *Benter Atieno Obonyo v Anne Nganga & Another* (2021) eKLR. He faults the Respondent for failing to prove on a balance of probabilities the particulars of negligence as pleaded in the plaint and relies on *Mount Elgon Hardware v United Millers Ltd* (1996) eKLR, *Gilbert Kimatare Nairi & Another (suing as personal representatives of the Estate of Lemayian Richard Kimatare (Deceased) v Civiscope Limited* (2021) eKLR, *Calistus Juma Makhanu v Mumias Sugar Co. Ltd & Another* (2021) eKLR, and *Ishmael Nyasimi & Another v David Onchango Orioki suing as personal representative of Antony Nyabando Onchango (deceased)* (2018) eKLR. He faults PW2 for failing to produce any police sketch map to support the Respondent’s claim and relies on *Peter Matara & 2 Others v Alloy Kenyatta Kevongo* (2017) eKLR. He submits that the award of Ksh 800,000 is excessive and urges the court to reconsider the evidence on record and revise the same downwards to Ksh 500,000. He relies on *Mbaka Nguru and Another v James George Rakwar* (1998) eKLR, *Michael Ouma Nyaoke v Cires Nyanchama Nyasoko* (2010) eKLR, *Jitan Nagra v Abidnego Nyandusi Oigo* (2018) eKLR, *Gilbert Kariuki Kithi v Monica Wangui Wangetbi* (2016) eKLR and *Mwavita Jonathan v Silvia Onunga* (2017) eKLR to support his submissions.
16. The Respondent faults the Appellant for failing to give warning by hooting or instantly breaking or even turning off the engine to avert the impending accident, thus making him wholly to blame for the accident, and cites *Polytanks Limited v Everlyne Wanza Musau and Mary Mutheu Sila & 2 others* (2020) eKLR. He further faults the Appellant for failing to either testify to counter the evidence on record or call the initial investigating officer to prove that he was indeed the one to blame for the accident. He feels that in view of the evidential analysis and his submissions, the trial court erred in awarding an inordinately low award of general damages, and urges the court to enhance the same to Ksh 1,500,000.



Analysis and determination

17. The issues for determination from the grounds of appeal are whether the Appellant was 100% liable for the accident, and whether the award of general damages of Ksh 800,000 was excessive.

Liability

18. It is indicated in the police abstract that was produced as Pexh. 4 that the Respondent was the one to blame for the accident. When PW2 testified, he stated that the initial investigating officer, PC Wekesa did not record in the OB the circumstances under which he blamed the pedestrian. PW2 maintained that according to the OB, nobody was to blame for the accident. Despite the Appellant's insistence that it was the Respondent who was to blame for the accident, he neither called any evidence to rebut the testimony on record nor the initial investigating officer to explain how he had reached the conclusion that it was the Respondent who was to blame for the accident. When the Respondent testified, he affirmed even on thorough cross examination that he was in front of the Appellant's car when the Appellant, clearly seeing him, suddenly accelerated thus hitting him. He stated that, "The motor vehicle herein came at the station and the driver wanted to park the motor vehicle...I tried to control the driver so as to park the motor vehicle properly. This was part of my duties. He instead accelerated the motor vehicle and he hit me. I was on the front of the motor vehicle. He could see me clearly. It was a sudden acceleration."
19. In the absence of any evidence to the contrary, this court finds that the Respondent proved on a balance of probabilities that the Appellant was wholly to blame for the accident.

Excessive general damages

20. This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows: "The well-known principles for interference of an award of damages by a trial court are laid down by the *Privy Council in Nance v. British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v. M. Manyoka* [1961] EA 705, 713 as follows: "The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601."
21. The Respondent testified that, "I sustained injuries in pelvic region. I was taken to Methodist Hospital. I was admitted for 3 days. I stayed for 3 months at home before I could make any movement...I was examined by a Dr. called Dr. Njeru. He prepared a report...I have suffered a lot as a result of the accident. I can't do heavy duties. My relationship was affected as I couldn't perform conjugal duties. The injuries still affect me upto date." His evidence was buttressed by PW3 who testified that although the Respondent was expected to make a full recovery, there was a possibility of some complications like post traumatic arthritis. He however confirmed that the Respondent did not sustain any permanent disability.



22. The discharge summary from Maua Methodist Hospital shows that the Respondent was admitted at the facility on May 18, 2011 and discharged on 20/5/2011.
23. The injuries the Respondent sustained were captured by Dr. Njeru CM in his medical report dated 5/12/2011 to be tender pelvic region rendering him unable to walk, contusion on the suprapubic region and the pelvic X-ray revealed a fracture Lt acetabulum/ chip fracture. The doctor noted that if the Respondent walked for long, he would have a painful Rt hip joint and he could not do heavy work. As a result of the accident, the Respondent was dismissed from his work place where he was a security officer, thereby messing up his source of livelihood. There was no indication that the Respondent would require future medical attention.
24. The Respondent was only admitted at the hospital for 3 days after which he was discharged. The nexus between the Respondent's alleged loss of employment and the accident was not established.
25. The court is satisfied that the award of Ksh 800,000 as general damages was excessive in view of PW3's affirmation that the Respondent was expected to make a complete recovery and he did not suffer any permanent disability. The court is mindful of the fact that the Respondent sustained only soft tissue injuries with a single fracture of left acetabulum/chip.
26. The court in *Sylvester Onyango Lire v Isack Ouma Shikuku* [2022] eKLR ((R.E. Aburili J.)) substituted an award of general damages of Ksh 850,000 with Ksh 650,000 where the claimant sustained multiple bruises on the head, blunt injury to the chest, bruises on the right elbow, fractured pelvis and fractured left femur.
27. This court in *Shadrack Mutuma M'munoru v Zakayo Mbaabu Meru Civil Appeal No E043/2022* substituted an award of general damages of Ksh 900,000 with Ksh 600,000 where the claimant sustained soft tissues injuries and a left neck of femur fracture.

Orders

28. Accordingly, for the reasons set out above, this court finds the appeal to be merited and makes the following orders:
 1. The trial court's award of general damages of Ksh 800,000 is set aside and substituted with an award of Ksh 600,000/-
 2. As each party has partially succeeded in their respective contentions, there shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Masamba, Advocate for Appellant.

Mr. Ngugi, Advocate for the Respondent.

