



REPUBLIC OF KENYA



**Andrew v Ndungu (Civil Appeal 612 & 644 of 2017 (Consolidated))  
[2023] KEHC 23132 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 23132 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL 612 & 644 OF 2017 (CONSOLIDATED)  
DO CHEPKWONY, J  
JUNE 15, 2023**

**BETWEEN**

**HARRISON NJOROGE ANDREW ..... APPELLANT**

**AND**

**EVASON NGENE NDUNGU ..... RESPONDENT**

*(Being an Appeal from the judgment of Hon. D. A. Ocharo (MR) (SRM)  
delivered on 23<sup>rd</sup> October, 2017 in Milimani CMCC No. 2374 of 2015)*

**JUDGMENT**

**Background**

1. By an amended Plaintiff dated 6<sup>th</sup> June, 2017, filed in court on 28<sup>th</sup> April, 2015, the Plaintiff/Appellant hereinafter referred to as “Appellant” sought the following prayers;
  - a. General damages for pain, suffering and loss of amenities of life.
  - b. Special damages Kshs.290,500/=
  - c. Costs and interest.
2. In his Plaintiff, the Appellant pleaded that at all material times the Defendant/Respondent hereinafter referred to as “Respondent” was the driver and or owner of Motor Vehicle Registration Number KBY 400L. It was stated that on 16<sup>th</sup> May, 2014 the Appellant was standing beside Murang’a road intending to cross it when the Respondent negligently drove, managed or controlled Motor Vehicle Registration No.KBY 400L that it collided with the Respondent who sustained injuries, a result of which he suffered loss and damage.
3. The Appellant pleaded negligence on the part of the Respondents, which was particularized as follows;



- a. Drove at a very high speed in the circumstances.
  - b. Overtook or attempted so to do when it was unsafe.
  - c. Drove off the lawful lane onto the pavement or off the road.
  - d. Failed to keep any or any proper look out or have due regard for other road users.
  - e. Failed to take any reasonable any or any reasonable avoiding action.
  - f. Drove onto the plaintiff knocking him down into the ditch.
  - g. Caused the accident by driving recklessly and or dangerously.
  - h. Failed to exercise any or effective control or lost control over the vehicle.
4. The Appellant suffered injuries of facial and scalp lacerations, complete fracture of the right humerus, fracture of the right tibia, fracture of the right fibula, fracture of the left tibia, fracture of the superior pubic rami, fracture of the left fibula and permanent incapacity assessed at 12%. It was pleaded that the Appellant was a mechanic at Ngala market where he was earning Kshs.1,000/=daily and was unable to work while recuperating. He claims loss of earnings for twelve months being Kshs.288,000/=. The Appellant also pleaded particulars of special damages amounting to Kshs.2,500/=.
5. The Respondent failed to enter appearance or file defence and on application by the Appellant, the trial court entered Judgment as prayed for in the Plaint in favour of the Appellant.
6. The Respondent then, upon being served with Judgment, filed an application dated 26<sup>th</sup> July, 2016 seeking to set aside the interlocutory Judgment and on 2<sup>nd</sup> August, 2016, when the matter was listed for hearing of the application, parties recorded a consent to set aside the interlocutory Judgment entered against the Respondent. The Respondent was then granted seven days to file and serve his defence.
7. In response to the Plaint, the Respondent filed a statement of defence dated 26<sup>th</sup> July, 2016. The defence was later amended vide an amended statement of defence dated 17<sup>th</sup> May, 2017. In summary, the Respondent denied the contents of the Appellant's amended Plaint. The Respondent also denied the particulars of negligence as set out in the Plaint and stated that without prejudice, if the alleged accident occurred which he denied, the same was occasioned by the sole contributory negligence of the Appellant. The particulars of negligence on the part of the Appellant were as follows;
- a. Failing to have any or any proper lookout whilst walking along the said road.
  - b. Failing to keep any or any proper look out or to have any or any sufficient regard for his own safety whilst walking along the said road.
  - c. Walking on the said road in the path of Motor Vehicle Registration Number KBY 400L without giving its driver any reasonable opportunity of avoiding the said accident.
  - d. Failing to pay any or sufficient heed of the presence of motor vehicles along the sad road and in particular Motor Vehicle Registration Number KBY 400L.
  - e. Failing to walk on the designated foot bridge provided and thereby putting himself in danger.
  - f. Walking across a busy highway despite knowing that pedestrians are forbidden to cross on the highway.
8. In the alternative and without prejudice, the Respondent averred that the accident was caused by the Appellant's negligence and the Respondent could not have prevented the same. The Respondent



denied that the Appellant suffered any loss and damage. He also denied the allegations by the Appellant that he was earning Kshs.1,000/= and urged the court to dismiss the suit before the trial court.

## **Evidence**

9. The matter proceeded for hearing on 12<sup>th</sup> July, 2017 and the hearing, the Appellant called two witnesses to testify in support of his case. PW1-No. 45751 PC Justus Chimbero testified that he is attached to Gigiri Division on Traffic duties. That on 17<sup>th</sup> September, 2014, their station received a report of a road traffic accident along Murang'a road near Fig Tree involving Motor Vehicle Registration Number KBY 400L Toyota Mark X and a pedestrian Harrison Njoroge Andrew. He stated that at the time of filing the abstract, the matter was pending investigations. He was not the Investigation Officer but that the accident occurred on 16<sup>th</sup> May, 2015. He produced the police abstract as PEx1.
10. On cross-examination he stated that he was not the investigation officer and stated that PC Vincent Ogallo was attending to other duties and that he was still based at Gilgil. He told court that the accident was reported on 16<sup>th</sup> May, 2015 but he did not have the OB because he could not trace it. He also said that he did not have the investigation diary for PC Vincent Ogallo. He contended that he could not tell who was to blame for the accident as his purpose was to produce the abstract. He confirmed that he knows that there was a footbridge along Murang'a road near Fig Tree and that a person who crosses a road at a foot bridge area is liable to be arrested and charged for obstructing free flow of traffic.
11. In his testimony, PW2-Harrison Njoroge Andrew stated that he is a mechanic. That on 16<sup>th</sup> May, 2014 he got involved in a road traffic accident as he was by the road side. It was on Murang'a road next to fig tree. He told court that he was standing by the road side when a motor vehicle from the direction of Globe Cinema hit and threw him into a trench. He identified the vehicle as being Registration Number KBY 400L and he was not close to the foot bridge. He told court that he sustained a fracture on the right hand, the right hip and fracture on both legs. He was taken to Kenyatta National Hospital. The motor vehicle did not stop. He was admitted on 17<sup>th</sup> May, 2014 and discharged on 30<sup>th</sup> June, 2014. In evidence that is not fully recovered and could not stand for long and experiences some pains in his right hand. He was examined by Dr. Wokabi on 1<sup>st</sup> September, 2014 who prepared a report opining that PW2 will have a 10% disability. He confirmed that the driver of the motor vehicle was the Respondent and he was the owner. He was later examined by Dr. Wambugu who prepared a report, in which report, he opined a disability of 8% for the PW2.
12. On cross-examination, PW2 stated that the accident occurred at 9.30 pm as he was standing by the road side attempting to cross and there was no designated place to cross the main road at that spot. He went on to state that the traffic on that road is normally high. It is the Respondent who reported the accident at the station and was taken to Kenyatta National Hospital unconscious. He did not know if he was charged. He stayed home for eight months after being discharged from Kenyatta National Hospital.
13. The Respondent did not call any witness to testify but Counsel agreed by consent to produce a medical report by Dr.Wambugu as DW1.
14. Upon consideration of the evidence, the trial Court delivered its Judgment on 23<sup>rd</sup> October, 2017. The court awarded the Appellant a sum of Kshs.1,001,250/= plus costs and interest.

## **The Appeal**

15. Both parties were aggrieved by the Trial's court judgment delivered on 23<sup>rd</sup> October, 2017 and preferred to appeal before this court. The first appeal is by the Appellant in this matter which was filed vide a Memorandum of Appeal dated 30<sup>th</sup> October, 2017, citing the following grounds;



- a. That the learned Magistrate erred by apportioning liability equally.
  - b. That the Honourable learned Magistrate erred by declining to award damages for lost earnings.
16. The Appellant has urged this Court to grant the following reliefs: -
- a. That the finding apportioning liability equally be set aside and substituted with a finding of full liability against the Defendant/Respondent.
  - b. That the court does award the plaintiff damages for lost earnings.
  - c. That the appeal be allowed with costs.
  - d. That such further or other relief the court may deem just.
17. The second appeal is by the Respondent in this matter which is Civil Appeal No.644 of 2017 between Evanson Ngene Ndung'u vs Harrison Njoroge Andrew. The Memorandum of Appeal is dated 20<sup>th</sup> November, 2017 and is based on the following grounds;
- a. That the learned Magistrate erred in law and in fact and arrived at a decision against the weight of evidence before him.
  - b. That the learned Magistrate erred in law and in fact when he shifted the burden of proof from the Respondent to the Appellant.
  - c. That the learned Magistrate erred in law and in fact by failing to consider the Appellant's case especially its written submissions.
  - d. That the learned Magistrate erred in law by failing to have due regard and to take into account the various issues of fact raised by the Appellant.
  - e. That the learned Magistrate erred in law and fact in finding that the Appellant was driving at a high speed and thus was partly to blame for the accident.
  - f. That the learned Magistrate erred in law and fact in finding that the Respondent was only partly to blame in crossing a road where there is a designated pedestrian footbridge.
  - g. That the learned Magistrate erred in law and fact in finding that the Appellant was liable for the alleged accident to any extent.
  - h. That the learned Magistrate erred in law and in fact by finding that the Appellant was liable for the damage allegedly suffered by the Respondent.
  - i. That the learned Magistrate erred in law and fact by awarding the Respondent Kshs.2,000,000/ = as general damages subject to 50% contribution.
  - j. That the learned Magistrate erred in law and in fact in awarding a sum that is excessive in the circumstances.
18. The Appellant has urged this Court to grant the following reliefs;
- a. That the appeal be allowed.
  - b. That the Judgment delivered by the Honourable Mr. D. Ocharo on 23<sup>rd</sup> October, 2017 in Milimani Civil Case No. 2374 of 2015 be set aside.
  - c. That the Appellant be awarded the costs of this appeal as well as the full costs in the Chief Magistrate's court.



19. On 1<sup>st</sup> November, 2019, the two appeals came up for hearing on 21<sup>st</sup> March, 2022 and were consolidated. At the hearing, parties agreed to canvass the appeal by way of written submissions. The Appellant complied with the court's directions and filed his submissions dated 1<sup>st</sup> April, 2022 however there are no submissions on record for the Respondent. I have read through the grounds of appeal and the submissions alongside the cited authorities which this court will take into consideration.

### **Analysis and Determination**

20. I have considered the grounds in both appeals and the written submissions by the Appellant and finds the issues relevant for determination before this court as being;
- a. Whether the Appellant proved his case on a balance of probabilities?
  - b. Whether the award was manifestly excessive?
  - c. Whether the Appellant's claim on loss of earnings was proved?
21. It is important for this court to remind itself of its duty as a first appellate court. The duty of a first appellate court is well settled. In the case of *Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR the Court of appeal held as follows;
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.”
22. The duty of this court is to re-appraise the evidence adduced before the trial court afresh and come up with an independent conclusion bearing in mind that this court did not have the opportunity to observe the witnesses testify.
23. It should be noted that an appellate Court will only interfere with Trial's court judgment if the same is proved to have been founded on wrong legal principles or wrong interpretation of the law. That was the position by the Court of appeal in the case of *Bashir Ahmed Butt vs Uwais Ahmed Khan* (1982-88) KAR where it held that:
- “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...” emphasis added.

### **Whether The Appellant Proved His Case On A Balance Of Probabilities?**

24. On this issue, it is worth noting that the standard of proof in civil cases is on a balance of probability. In criminal cases the standard of proof is beyond reasonable. Therefore, it is worth of note that Section 107 of the [Evidence Act](#) provides that;
- “ 107.
- (1) 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.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. In the case of *Hellen Wangari Wangechi vs Carumera Muthoni Gathua (2015)*eKLR, Mativo J (as he then was) stated that;

“In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.”

26. It is well established legally in evidence that whoever asserts must prove that those facts indeed exist. In the instant appeal, evidence was adduced by PW1 who was not the Investigating Officer in the accident and on cross examination, he stated that he could not tell who was to blame for the accident. With such evidence, it is clear that the Appellant failed to discharge his evidential burden before the trial court.

27. The burden does not change even if the evidence is uncontroverted or the defendant fails to give evidence. This was the position in the case of *Charterhouse Bank Limited (Under Statutory Management vs Frank N. Kamau (2016)* eKLR where the court stated that;-

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

28. In this Court’s considered view, its found that the Appellant proved his case on a balance of probability to the required standard by the law. Therefore, the finding by the trial court in apportioning liability at 50%:50% was proper based on the evidence that was submitted before the court.

### **Whether The Award Was Manifestly Excessive?**

29. The general principle on assessment of damages is a matter of court’s discretion so that if the trial court appropriately exercises its discretion, the Appeal Court should respect its decision regarding the assessment of damages. In the case of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) vs Kiarie Shore Stores Limited [2015]* eKLR, the Court of appeal expressed itself as follows;

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 the damages.”

30. The Respondent argued that the award of Kshs.2,000,000/= as general damages subject to 50% contribution was excessively so high. In determining this issue it is important to consider the injuries suffered by the Appellant. It is trite law that comparable injuries should attract comparable award of damages. This was the position held by the Court of appeal in Odinga Jacktone Ouma vs Moureen Achieng Odera [2016] eKLR where it stated that “comparable injuries should attract comparable awards.”
31. Upon re-evaluating the evidence adduced before the trial court, the Appellant suffered facial and scalp lacerations, complete fracture of the right humerus, fracture of the right tibia, fracture of the right fibula, fracture of the left tibia, fracture of the superior public rami, fracture of the left fibula. The injuries were confirmed by two medical reports by Dr. Wambugu and Dr. Wokabi.
32. In my opinion, the court correctly applied the principle that comparable injuries should, to the extent possible, be compensated by comparable awards while keeping in mind the appropriate level of awards in similar cases. I have given the learned trial magistrate’s assessment of general damages some thought.

#### **Whether The Appellant’s Claim On Loss Of Earnings Was Proved?**

33. On loss of earnings, this court must point out that the Appellant asked for loss of earning in his appeal. It was his evidence that he used to work as a mechanic at Ngala market earning Kshs.1,000/= daily and therefore claimed a sum of Kshs.288,000/= for loss of earnings.
34. This prayer fails for one simple reason that there is no evidence on loss of earnings. In the case of Cecilia W. Mwangi & Another vs Ruth W. Mwangi [1997] eKLR, the Court of appeal held that;  

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”
35. Similar position was echoed in the case of Douglas Kalafa Ombeva vs David Ngama [2013] eKLR, the Court of Appeal held that:  

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”
36. In the absence of any evidence on record to confirm that the Appellant earned Kshs.1,000/= daily, this court will not belabor too much on that issue.
37. As a result, this court finds both appeals to be without merit, and dismisses them with no orders as to costs. The judgment of the trial court is upheld.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 15<sup>TH</sup> DAY OF JUNE , 2023.**

**D. O. CHEPKWONY**



**JUDGE**

**In the presence of:**

M/S Mwangi holding brief for M/S Matasi counsel for the Respondent

Court Assistant - Martin

