



REPUBLIC OF KENYA



**Kamau & another v Otieno (Civil Appeal E190 of 2021)
[2023] KEHC 18932 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E190 OF 2021**

**PM MULWA, J
JUNE 22, 2023**

BETWEEN

GERALD WANJIKU KAMAU 1ST APPELLANT

ALLEN JAMES MALALA 2ND APPELLANT

AND

JOSEPH OTIENO OTIENO RESPONDENT

*(Being an appeal from the judgment delivered on 15th September
2021 in Ruiru SPMCC No. 87 of 2020 by Hon J. A. Agonda)*

JUDGMENT

1. The appeal arises from the decision of Hon. J. A. Agonda (PM) in a trial wherein the respondent Joseph Otieno Otieno had sued the Appellants claiming general and special damages for injuries sustained in a road traffic accident that occurred on 3rd January 2020, near Kihunguro involving a motor vehicle registration number KBA 729G.
2. According to the plaint dated 6th March 2020, the respondent was alighting from the motor vehicle when the 1st appellant negligently and carelessly drove, managed and/or controlled the said Motor Vehicle in a manner that caused the same to run over the respondent causing him to sustain serious injuries. The respondent blamed the driver of the motor vehicle for the accident and particularized the act of negligence.
3. In a joint defence dated 10th June 2020, and filed on 23rd June 2020, the appellants denied the averments of the accident and the particulars of the negligence and averred that in case such an accident occurred the respondent was solely to blame for the accident and particularized the alleged negligence thereof. The appellants urged the trial court to dismiss the suit against them.



Trial Court Evidence

4. At the trial the respondent who was the plaintiff testified on 8th June 2020, and adopted his witness statement and list of documents. He testified that the 1st defendant was the driver while the 2nd Defendant was the registered owner of the motor vehicle. That he did not alight from the motor vehicle before the driver was signaled to st.
5. During the cross-examination, he stated he boarded the motor vehicle at Nairobi, Guru Nanak, and he alighted at Kihunguro when the motor vehicle had stopped. That 6 passengers alighted and he was the last passenger, when the conductor pushed him from the motor vehicle and the motor vehicle started moving. He sustained injury near his elbow (right hand) had a fracture on the upper elbow and the left hand was dislocated and bruise on his face. He has not fully healed.
6. Pw2 - Dr. Cyrianus Okoth a private medical practitioner testified that he examined the Plaintiff on 20th February 2022 where he had sustained fractures of the right humerus and left clavicle and bruises on the left face. The injuries were classified as grievous harm. The right humerus has 20% permanent disability and the left clavicle has 10% permanent disability. He relied on the treatment notes from Ruiru, P3 form and the police abstract, x-rays films treatment, and chorological report.
7. In cross-examination, the doctor said he examined the plaintiff after the fracture had healed but due to the disability he cannot carry a heavy load being a casual labourer. He stated that permanent disability was 20% regardless of whether another treatment was sought and that the fracture can re-fracture even if it unites.
8. Pw3 - Pc Agnes Gitau based at Ruiru Police Station confirmed there was an accident that occurred on 3rd January 2020 at Kihunguro stage involving Joseph Otieno and motor vehicle KBA 729G Isuzu Matatu and the 1st Defendant was the driver of the motor vehicle. She said she was not the investigating officer. She adduced as evidence Police Abstract dated 7th January 2020. That the court the occurrence book was before Thika Law Courts. She could not tell if there were different police abstract for 3rd January 2020 or 3rd September 2020.
9. The defendants called 2 witnesses. Dw1 - PC Hassan Machon testified he is based in Ruiru Police station, he testified there was a serious road accident reported vide OB No. 52/3/7/20. He stated that Joseph Otieno tried to board motor vehicle KBA 729U while the door had been closed and he fell and sustained fractures on his right hand. The Investigating Officer PC Muriuki blamed the passenger Joseph Otieno for the accident, he adduced the police abstract.
10. In cross-examination he told the court he was not the investigating officer, and that he did not have the sketch maps and the investigation report. He told the court he was not aware of an abstract issued in January 2020.
11. Dw2 - Gerald Wanjiku Kamau testified he recorded his statement on 26th February 2021 which he adopted as his examination in chief. He stated he was driving the motor vehicle on 3rd January 2020 when the accident occurred at Kihunguro. He was notified there was a passenger who had wanted to board the vehicle and fell and was under the vehicle. He stated he had not seen him at the scene of the incident. He took the victim to the hospital and later went to report to Ruiru Police Station.
12. In cross-examination he told the court he often saw the victim on the stage, that the police officers were not truthful as the victim was not a passenger. The victim was smelling alcohol. He did not produce a list of passengers in his vehicle and neither did he call his conductor to testify.



13. In her judgment the learned magistrate, found the defendant did not call crucial witnesses to corroborate the evidence of the police officer Dw1 who was not the investigating officer, and in the absence of the evidence of the crucial witnesses, she found the witness of the plaintiff credible. The learned trial magistrate found the only eyewitness who testified was the plaintiff. She found the failure to call the bus driver and conductor to elaborate on how the accident occurred and disapprove the particulars of negligence imputed upon the plaintiff was fatal. She went ahead to hold the 2nd Defendant vicariously liable for the actions of the 1st Defendant and his driver and held the defendants were jointly and severally liable 100% for the occurrence of the accident.
14. On quantum, she found the plaintiff sustained injuries of fracture of right humerus, fracture of the right clavicle and bruises on the left face, and assessed general damages of Kshs. 500,000, and special damages of 30,850/= plus costs and interests.
15. Aggrieved by the said judgment the appellants filed a Memorandum of Appeal on 12th October 2021. The grounds of the appeal are:
 - i. The trial magistrate erred in law and in fact and misdirected herself in finding the appellants 100% liable when indeed the Plaintiff himself was to blame for the accident.
 - ii. The learned trial magistrate misdirected herself in ignoring the principles applicable in awarding liability and relevant authorities on liability cited in the written submissions presented and filed by the Appellants.
 - iii. That the learned trial magistrate proceeded on the wrong principle when assessing the liability to be apportioned to the Appellants and the Respondent (to apply precedents and tenets of law applicably.)
 - iv. That the learned trial magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on liability thereby arriving at a decision unsustainable in law.
 - v. The learned magistrate erred in law and in fact in arriving at her said decision.
 - vi. That the learned trial magistrate's decision was unjust, against the weight of the evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - vii. That the learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.
16. The appellants pleaded with the court to allow the appeal, set aside the judgment of the trial court on liability, award costs of the appeal to the appellants and award any other orders the court deems fit.
17. The court directed the appeal be canvassed by way of written submissions. Each party filed written submissions.

Appellants' submissions

18. In the submissions filed on 15th May 2023, the appellants submitted the trial court erred in apportioning 100% liability against the appellant and failed to find that the respondent's evidence was contradictory. According to the appellants the respondent was wholly to blame for the accident and he failed to call witnesses to corroborate his evidence. And that the respondent failed to prove his case on a balance of probability.



19. On the issue of quantum counsel submits the trial court award of Kshs. 500,000/= was excessive and urged the court to review it downwards and award Kshs 300,000/=.

Respondent's Submissions

20. Opposing the appeal counsel for the respondent filed submissions on 23rd May 2023. He urged the court to find the respondent had discharged his duty and had proved his case on a balance of probability against the respondent.
21. Counsel pleaded with the court to dismiss the appeal with costs and find that the holding of the trial magistrate was proper and proceed to uphold the trial court's finding on liability and the award on general damages.

Analysis And Determination

22. This is being a first appeal I am alive to the duty of the court as stated in by the Court of Appeal in *Kenya Horticultural Exporters Ltd vs Julius Munguti Maweu* Civil Appeal No. 9 of 2004, where it was held that:

“On a first appeal the Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and bearing in mind that unlike the trial court it neither saw nor heard the witnesses.

23. I have considered the memorandum of appeal, the submissions in support and in opposition to the appeal, the trial court's evidence and the issues for determination are:
- i. Whether the respondent proved his case on a balance of probabilities
 - ii. Whether the trial court erred in apportioning liability to the appellants
 - iii. Whether this court should interfere with the quantum of damages awarded
 - iv. Who should bear the costs of the appeal?
24. On the first issue, the legal burden is placed on the person asserting a certain issue to prove. In the instant appeal, at the trial court the burden of proof was on the plaintiff to prove the accident was caused by the negligence of the defendants.
25. In *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR it was held that: “As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Sections 109 and 112 thereof...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
26. The respondent had testified that on 3rd January 2020, he was a fare-paying passenger in motor vehicle KBA 729G, he boarded the motor vehicle at Guru Nanak and alighted at Kihunguro with Six (6) other passengers when the motor vehicle came to a halt. He was the last passenger to alight and the conductor pushed him and he fell down and the motor vehicle ran over him and he sustained serious body injuries. He avers the conductor was also to blame for the accident for pushing him from the vehicle. Pw3 the police officer who testified on behalf of the investigating officer testified the respondent was alighting from the motor vehicle when he fell as the vehicle started moving before he could fully alight.



27. It is the appellant's case that the respondent attempted to board the motor vehicle while in motion and the door was closed and he fell. Dw2 - the driver of the motor vehicle testified that he was informed a person was lying under the motor vehicle and that he had not seen the victim at the stage. He denied the respondent was a fare-paying passenger and to him, the respondent worked at the stage as he had seen him severally.
28. Dw1 evidence mirrored that of Dw2, he testified that as per the police abstract which he generated from the occurrence book the respondent was boarding the motor vehicle when the same was in motion and the door had been closed and fell off.
29. The trial magistrate in her judgment found the evidence of the appellants was not conclusive. Though she stated the appellant failed to call the driver and the conductor who were crucial witnesses, this court notes from the trial court record that the driver testified. However, his testimony was what he had been informed. The conductor was not called to testify.
30. In the circumstance this court is convinced the respondent proved his case on a balance of probability in the trial court and the learned trial magistrate did not err in finding the 1st appellant to blame for the accident, with the 2nd Appellant being held vicariously liable for the actions of the driver.
31. Based on the evidence, this court finds the trial magistrate did not err in finding the only eye witness called to testify. This court finds the apportionment of 100% liability on the appellants was proper.
32. This court appreciates the holding in *Mary Njeri Murigi vs Peter Macharia & Another* [2016] KLR where the court opined that: "A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof."
33. Further in *Khambi and Another v Mabithi and Another* [1968] EA 70, it was held that: "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its apportionment for that made by the trial Judge."
34. I am not persuaded to disturb the trial court's apportionment of liability and in the circumstances, I uphold the trial court's finding thereof.
35. The third issue on whether this court should interfere with the quantum of damages awarded by the trial court.
36. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete* civil Appeal no. 284 of 2001(2004) 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms: "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."
37. The learned trial magistrate taking into account the nature of the injuries sustained by the respondent, the age of the authorities cited and the inflationary trends awarded the respondent general damages of Kshs. 500,000/=.



38. The appellants submit the award was inordinately high and pleaded with the court to interfere with the award and review it downwards to Kshs. 300,000/=. They cited the case of *Maina Onesmus vs Charles Wanjohi Gitbome* (2019) where an award of Kshs. 600,000/= was reviewed downwards to 350,000/= where the plaintiff suffered fractures of the mid-shaft humerus, and condyles and fragment fractures of the shoulder girdle.
39. The respondent supports the award of the trial court and urged this court to uphold the same.
40. As regards the damages, it is clear the respondent suffered a fracture of the right humerus, fracture of the right clavicle and bruises on the left face. Pw2 - Dr. Cyrianus Okoth testified the respondent suffered 20% permanent disability in the right humerus with a 10% permanent disability on the left clavicle.
41. In my considered view, this award cannot be said to be excessive. I find that the appellants did not demonstrate that the trial magistrate erred in awarding the general damages to invoke the discretion of this court to interfere with the award thereof.
42. From the foregoing, the appeal has no merit and is dismissed with costs to the respondent.

Orders accordingly

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU
THIS 22ND DAY OF JUNE, 2023.**

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P.M. MULWA

JUDGE

In the Presence of:

Kinyua – court assistant

Mr. Kabiti -for the appellant/respondent

Mr Wanjohi h/b for Mr. Gitahi -for the respondent/applicant

