



**Mauti v Kinyamal (Civil Appeal 93 of 2021)
[2023] KEHC 18881 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 93 OF 2021
SM GITHINJI, J
JUNE 13, 2023**

BETWEEN

RICHARD MAUTI APPELLANT

AND

JULIUS KINYAMAL RESPONDENT

*(An Appeal from the judgment and decree by Hon. S. K. Ngii (PM)
delivered at Mariakani on 14th April, 2021 in PMCC No. 53 of 2019.)*

JUDGMENT

1. Before the trial court was a claim commenced by a plaintiff dated March 11, 2019 in which the respondent herein (the plaintiff in the trial court) sued the appellant herein seeking general damages for loss of amenities, pain and suffering, special damages as pleaded plus interest together with costs of the suit and interest thereon.
2. The respondent pleaded that on or about July 30, 2018 at around 11:30 pm after crossing the road at Weighbridge area along the Mombasa- Nairobi road and while standing on the pavement waiting for transportation from Weighbridge to Mariakani Police Station, the appellant drove, managed and/or controlled Motor Vehicle Registration No KCM 392J so negligently that it veered off its rightful lane and hit him thereby occasioning him serious injuries, from which he claimed both special and general damages.
3. The appellants denied the claim by their defence dated July 16, 2019 and prayed for the respondent's suit to be dismissed.

The Appeal

4. The appeal before this court is against the award of damages by the trial court in the sum of Kshs 1,216,800/= for general and special damages, with liability at 90%. The judgment was delivered on



April 14, 2021. Aggrieved by the judgment, the appellant filed a memorandum of appeal on the 15th day of October, 2021. The appeal is mainly on the trial court's finding in respect to assessment of damages. The grounds of appeal are that: -

1. The Learned Trial Magistrate erred and misdirected himself by proceeding on wrong principles when assessing damages to be awarded to the Respondent if any and failed to apply precedents and tenets of the law applicable;
2. The Learned Trial Magistrate erred and misdirected himself by awarding a sum in respect of damages which was inordinately high and excessive in the circumstances, occasioning a miscarriage of justice;
3. The Learned Magistrate erred in law and in fact by failing to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

He urges the court for the following orders;

- a. This appeal be allowed with costs.
- b. The Judgment delivered on April 14, 2021 by Honourable SK Ngii, Principal Magistrate at Mariakani Law Courts in Senior Resident Magistrate Court Civil Suit No 53 of 2019 be set aside and the award made therein be re-assessed.
- c. That costs of this appeal be borne by the Respondent.

Summary of the evidence

5. PW1 Dr. Ajoni Adede told the court that he prepared a medical report dated January 14, 2019 for Julius Kinyamai who was involved in a road traffic accident on July 30, 2018. That he suffered compound fracture of the right tibia and fibula bones fracture of the ulna (forearm bone) facial cuts and bruises on the head as well as blunt object injury to the head. According to him, he examined him 5 ½ months after the accident by which time he was still on crutches. That the right leg was swollen and had skin graft at site, trauma site, scars where external metal implants had been placed. Upon examination, the right ankle was stiff and his upper hip also had stiffness and curve.
6. It is his testimony that the cuts and bruises on the head and face had left some scars. He told the court that he saw treatment notes from Mariakani Hospital and others from Mewa Hospital where he had been admitted for 14 days. He further told the court that he concluded that the patient had suffered 18% permanent disability due to the fact that the disability wouldn't reverse within time.
7. On cross examination by Mr Nyabuti, he confirmed that he saw the patient (5) months after the accident. That the remnant effects are in the medical report which informed the permanent disability assessment. According to him, he did not give any estimation for future medical expense because the external metal plants had been removed at the time of examination.
8. PW 2 No 67571 PC Julius Nkumun from Mariakani Police Station stated that he had an OB and the original police file No OB/30/2018 in respect of Road Traffic Accident which occurred on July 30, 2018 at 23:45 hours at Weigh Bridge area along Nairobi- Mombasa Road involving KCM 392J; Nissan Matatu and a pedestrian Julius Kinyamal, the Plaintiff. He also stated that the officer (Plaintiff) was on his way to Mariakani Police Station where he was attached and as he was crossing the road from the right to the left facing the Mombasa direction, he was hit by the said motor vehicle and that he was dragged on the road for a distance of about 20 meters.



9. That he was taken to Mariakani Sub County Hospital where he received first aid and later referred to Mewa Hospital. His testimony is that the driver of the matatu was blamed for the accident and according to the investigating officer, the motor vehicle was moving at high speed yet the area is built up and known for traffic jam as vehicles turn into and out of the weighbridge. His further testimony is that the driver recorded a statement stating that he was driving at about 75km/hr -80 km/hr but according to him, the recommended speed in such area is 50km/hr or below. The Police Abstract was issued on 6th September, 2018 and the same was produced as Plaintiff Exhibit No 4. A P3 Form was also issued and filled at Mariakani Sub- County Hospital which was produced as Plaintiff Exhibit No 5.
10. On cross examination by Mr Nyabuti, he informed the court that the driver was arrested and charged with driving without due care in Traffic Case Number 565/2018. That the accident occurred at 11:45 PM and that it was not indicated whether the Plaintiff had worn a reflective jacket. He told the court that a matatu is supposed to drive at 80km/hr on a highway except in prohibited areas.
11. PW3 No 113404 PC Julius Kinyamal told the court that he recorded a statement on March 11, 2019 which he adopted as his evidence in chief. He further told the court that the accident occurred on July 30, 2018 at around 11:30 pm as he was headed to work at Mariakani Police Station. That as he crossed the road from the right to the left, shortly before getting off the road, he was suddenly knocked down by a vehicle and lost consciousness. He also told the court that he later came to learn that he was hit by a matatu registration number KCM 392J belonging to Naekana.
12. He testified that he fractured his left leg, the right leg and suffered head injuries and that his leg was stabilized with external metal implants. That he was admitted at Mewa Hospital for two (2) weeks and was also hospitalized at Tenwek Hospital for two (2) weeks. It is his testimony that he only resumed duty after three (3) years. He blamed the driver of the matatu for the accident as the road section where the accident occurred was well lit and he could see and that he was driving at high speed.

Analysis and determination

13. It is trite that this being a first appeal, as provided in the well settled principles, the court is entitled to re-evaluate the entire evidence, but must remember that the Learned trial magistrate had the advantage of hearing and seeing witnesses testify before him of which this court does not have, and must therefore make due allowance for that as was held in *Peters v Sunday Post Limited* [1958] EA 424.
14. I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the appellant and the respondent together with all the authorities cited. Having done so, I find that the only issue for determination is whether the learned trial magistrate proceeded on wrong principles while assessing damages and whether the awarded damages are inordinately high in the circumstances.
15. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the Court of Appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR 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. As was held in *Kemro v A M Lubia & Olive Lubia* [1982-88] 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985] KLR 470.”



16. PW3, the Plaintiff testified that after the accident he was treated at Mariakani Sub County Hospital and was later admitted at Mewa Hospital for 2 weeks. According to Dr. Ajoni Adede, the Plaintiff suffered compound (open) fractures of the right tibia and right fibula leg bone, fracture of the right ulna forearm bones, a head injury, multiple facial cuts and bruises on the head. He later concluded that the Plaintiff had suffered Eighteen percent (18%) permanent partial disability due to multiple compound lower limb (fractures), right upper limb fractures, multiple joint stiffness insertion and removal which weakens bone and accompanying soft tissue injuries have left no residual disability.
17. This court, therefore, finds that the award of general damages of Kshs 1,350,000 to a Plaintiff who sustained fracture injuries and Eighteen percent (18%) permanent partial disability due to multiple compound lower limb injuries which were serious in nature, is fair and justified. I find that the assessment by the trial magistrate was proper.
18. For the foregoing reasons, I do not find any merit in the appellant's appeal. The same is hereby dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF JUNE, 2023.

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S.M. GITHINJI

JUDGE

In the absence of; -

1. Firm of Kimondo Gachoka for the Appellant
2. Mr Mokaya for the Respondent

Parties be notified.

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S.M. GITHINJI

JUDGE

13/6/2023

