



**Njau v Charles (Civil Appeal 65 of 2019) [2023] KEHC 21801 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21801 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA**

**CIVIL APPEAL 65 OF 2019**

**GL NZIOKA, J**

**JUNE 14, 2023**

**BETWEEN**

**SAMSON KARAUNI NJAU ..... APPELLANT**

**AND**

**KAMAMI CHARLES ..... RESPONDENT**

*(Being an appeal against the judgment delivered by Hon. J. Karanja (SPM) dated 16th October 2019 at the Chief Magistrate's Court at Naivasha vide Chief Magistrate Civil Case No. 260 of 2014)*

**JUDGMENT**

1. The background facts of the matter are that, on September 28, 2013, the plaintiff (herein the “appellant”) was a lawful pillion passenger on a Motor Cycle Registration No KMDD 925A along Moi road at Rillo Park area. That, at about 8:45 pm the motor cycle was involved in a road traffic accident with Motor Vehicle Registration No, KBH 498K owned by the respondent.
2. That as a result he suffered bodily injuries, where he sustained a fracture of the right femur, cut wound on the face, and permanent disability of 20%. Subsequently he sued the respondent vide Chief Magistrate civil suit No 260 of 2014, at Naivasha, seeking for;
  - a. Special damages and future medical expenses of Kshs 50,000;
  - b. General damages for pain, suffering and loss of amenities
  - c. Costs of the suit
  - d. Interest on (a), (b), and (c) above at court rates.
  - e. Any other or further relief that this Honourable court may deem just to grant.



3. However, the respondent filed a statement of defence where it denied the averments in the plaint and/or contributory negligence on its part as alleged and sought that the suit be dismissed.
4. At the trial, the appellant relied on his witness statement wherein he reiterated the averments in the amended plaint and averred that the respondent's motor vehicle hit motor cycle on which he was on from the rear. That, he blames the respondent for the accident as he drove on the wrong side of the road, at a speed, failed to break and/or be on the look-out for other road users.
5. That, as result of the injuries sustained on his right leg, a cut on his face and bruises all over his body, he was rushed to Mt. Longonot Medical Services Limited where he was treated and transferred to Naivasha District Hospital on the next day; September 29, 2013, and admitted for ten days and a metal plate was implanted. That he feels pain when it is cold as a result of the metal plate.
6. The appellant averred that he was a casual labourer, working on daily basis at a sum of; Kshs 600 and Kshs 12,000 to Kshs 15,000 monthly. However, due to his injuries sustained and the metal plate he cannot lift heavy objects and therefore cannot work. As such he is unemployed.
7. The appellant's case was also supported by the evidence of; No 80090 PC Paul Muthenyo, who produced the police abstract form and stated that the respondent was charged before the Chief Magistrate's Court with the offence of reckless driving.
8. Similarly, Dr. Obed Omuyoma (PW1), a Medical Practitioner produced a medical report he prepared after examining the appellant. That, on February 22, 2014, he examined the appellant who had been involved in a road traffic accident and sustained a fracture of the right femur and a cut wound. That, the appellant underwent a surgery where open reduction and internal fixation of the fracture was done and a plate of steel applied. The Doctor formed the opinion that the appellant suffered a permanent disability of 20% and classified the injury as grievous harm. Further, that the plate would be removed in future at a cost of Kshs 50,000
9. After the close of the plaintiff's case, the defendant did not offer any evidence in his defence, consequently, the defence case was closed.
10. At the conclusion of the trial the parties filed their submissions and on October 16, 2019, trial court delivered the judgment and apportioned liability in the ratio of: 70:30 in favour of the appellant as against the defendant.
11. Subsequently, the trial court awarded the appellant; general damages in the sum of; Kshs 400,000, special damages in the sum of Kshs 208,000 and Kshs 50,000, for future medical expenses. The sum was reduced by 30% contributory liability giving rise to a total sum of Kshs 460,707.10 plus costs of the suit, and interest at court rates. However, the trial court declined to award damages for diminished earning capacity on the ground that it had not been proved.
12. It is against the subject judgment, that the appeal herein arises on the grounds in the memorandum of appeal, filed November 15, 2021 stated as follows:
  - a. That the learned Magistrate erred in fact and in law by proceeding to apportion liability against the appellant notwithstanding the fact that the respondent did not adduce any evidence to controvert the appellant's case.
  - b. That the leaned Magistrate erred in law and in fact in by proceeding to award liability against the appellant notwithstanding the fact the appellant was a pillion passenger.



- c. That the learned Magistrate erred in law and in fact by proceeding to award minimal general damages which were not commensurate to the injuries sustained by the appellant despite the fact that the latter had never recovered to date.
- d. That the learned Magistrate erred in law and in fact by completely disregarding the appellant's submission and authorities that had been relied on therein.
13. The appeal was disposed of by filing of submission. The appellant filed submissions dated; July 4, 2022, wherein he submitted that the respondent did not place any evidence before the trial court to rebut the appellant's evidence nor to warrant the trial court to hold the appellant negligent in any way.
14. The appellant relied on the case of; *Regina Wangechi v Eldoret Express Co Ltd* (2008) eKLR where the court quoted the case of; *Embu Public Road Services Ltd v Riimi* (1968) EALR 22 and held that the doctrine of *res ipsa loquitur*, requires the plaintiff to prove the accident occurred in circumstances in which it should not have, to discharge the burden of showing negligence on the person who caused the accident.
15. That, the respondent did not call any witnesses despite filing a statement of defence wherein it pleaded that the appellant substantially contributed to the negligence resulting in the accident. That it is trite that, pleadings and submissions are not a substitute for evidence and remain mere allegations not substantiated. Reliance was placed on the case of; *Motex Knitwear Limited V Gopitex Knitwear Mills Limited* (2009) eKLR where Lessit J (as she then was) agreed with the preposition of the court in; *Autar Singh Bahra and Another v Raju Govindjl*, HCCC No 548 of 1998 (unreported) that the failure of the defendant to call any witnesses meant the evidence by the plaintiff was unchallenged and the defendant's defence was unsubstantiated.
16. Further, the appellant submitted that there exists a silent contract between a lawful passenger and the driver of a public service vehicle or the owner of a private motor vehicle that the lawful passenger expects to be safely delivered to his destination. He cited the case of; *Viviane Anyango Onyango & Another v Charity Wanjiku* (2017) eKLR where the court stated that, a passenger cannot be held liable or even contribute to an accident, unless it is demonstrated that he contributed to the occurrence of the accident.
17. On general damages, the appellant submitted that he had relied on the case of Civil Appeal 522 of 2012; *Clement Gitau v GKK* where the plaintiff suffered similar injuries and the court reduced an award of Kshs 800,000 to Kshs 600,000. That, in the present case considering inflation the award by the trial court was on the lower side.
18. Furthermore, the appellant argued on the head of diminishing earning capacity that, he was a casual labourer in constructions sites but can no longer work as a result of his injuries. That he used to earn an average Kshs 20,000 but he shall be incapacitated for about two (2) years and urged the court awards him Kshs 96,000 broken down as (Kshs 20,000 x 12 x 2 x 20%).
19. He further relied on the case of; *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR where the Court of Appeal quoted the case of; *Fairley v John Thompson Ltd* [1973] 2 Lloyd's Rep 40 at page 41 where Denning J stated that, compensation for diminution in earning capacity is awarded as part of general damages.
20. That in the same matter the Court of Appeal stated that an award for loss of earning capacity can be made both when the plaintiff is employed or is not and that the justification for the award where the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him to either lose his job in future or if he loses the job, his diminution of chances of getting an alternative



job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate him for the risk that he will not get employment or suitable employment in future.

21. It is noteworthy that the respondent did not file any submissions in the appeal despite being afforded numerous opportunities to do so, and therefore the appeal is basically unopposed.
22. Having considered the appeal in the light of the materials placed before the court I find that, there are two main issues for determination namely; whether the trial court erred by attributing 30% contributory liability on the appellant, and by declining to award the appellant any money for diminished earning.
23. As regards the 1<sup>st</sup> issue I find that, the trial court relied on evidence adduced in cross-examination of PW 2 that the appellant was not wearing protective gear at the time of the accident. However, what eluded the learned trial magistrate was the fact that; PW2 was not the scene visiting officer or investigating officer. He could not thereof substantiate the alleged evidence especially when the appellant was not charged for failure to wear the helmet or protective gear.
24. Furthermore, the rider and/or the driver who were at the scene and/or involved in the accident did not corroborate PW2's allegation and finally, the appellant maintained in his evidence in chief that he was wearing protective gear. Therefore, it was his word against that of the PW 2. He deserved the benefit of doubt. I therefore find the decision holding the plaintiff 30% liable untenable and even if it was, the 30% is not justified, in view of the fact that, the defendant did not testify and/or attributed negligence on the part of the appellant and/or the rider. I therefore set aside the order of apportionment of liability at 70:30 in favour of the appellant, as against the defendant.
25. As regards the failure by the court to award damages for loss of future earning or diminished earning. The authorities cited by the appellant establish that: -
  - a. Compensation for future earning are awardable for real assessable loss proved by evidence.
  - b. Compensation for diminutions in earning capacity in awarded as part of general damages.
  - c. If the claimant is not employed, there should be evidence that he has lost his job or cannot get another alternative job.
26. In the instant matter the medical report by Dr Obed Omuyoma's indicates that, the appellant has a permanent scar on the head, about 4cm long and permanent disability of twenty percent (20%). The question is how did the doctor arrive at 20% permanent disability, yet the only permanent injury is a scar on the forehead? In fact, he clearly indicates that the plate will be removed at a cost of; Kshs 50,000. He does not allude to any other complication after it is removed. Furthermore, during cross-examination he confirmed that "the appellant had healed, but for the metal plate.
27. In addition, from the evidence relied on by the appellant in chief, he simply said "when it is cold I still feel pain because of metal plate" which is supposed to be removed. He further states "I cannot lift heavy things because of the metal plate". Thus his solution lies in the removal of metal plate, which an award has made provision for.
28. It suffices to note that although the appellant states that he was working as a casual labourer, no evidence was produced to support the same or even the earning. Neither does the doctor's report allude to inability to perform the subject work after the plate is removed. In that regard I find that, the claim for diminished earning is not sustainable. I concur with the finding of the learned trial magistrate on the same.



29. Finally, on the issue of damages awarded the law is settled that, the 1st appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another v Shah (1968) EA and [Mkuba v Nyamuro](#) 1983 KLR 403.*
30. In the same vein the Court of Appeal in *Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 (unreported)* stated that: -
- “We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v Musila [1984] KLR 257*).”
31. The appellant's two main issues outlined above having been dealt with, the upshot of the appeal is that, the appeal succeeds in the following terms.
- a. General damages -----Kshs 400,000
  - b. Special damages----- Kshs 208,000
  - c. Future medical expenses -----Kshs 50,000
- Total amount awarded----- Kshs 658,000
32. The appellant is awarded costs of the suit in the trial court and total sum awarded shall attract interest at court rates from date of judgment in the trial court until payment in full.
33. It is so ordered.

**Dated, delivered, signed on this 14<sup>th</sup> day of June, 2023**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of**

Ms Amboko for the Appellant

N/A for the Respondent

Ms Ogutu-Court Assistant

