



REPUBLIC OF KENYA



KENYA LAW
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**Pandal v Aiya & another (Civil Appeal E028 of 2022)
[2023] KEHC 19122 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E028 OF 2022**

TA ODERA, J

JUNE 20, 2023

BETWEEN

HARJEET SINGH PANDAL APPELLANT

AND

JARED OMONDI AIYA 1ST RESPONDENT

ANN N. ONDABU 2ND RESPONDENT

*(An appeal from the ruling/order of Hon S.O. Temu S.P. M
in Nyando SPMCC No. 19 of 2015 delivered on 2/9/2021)*

JUDGMENT

1. Jared Omondi Aiya sued the appellant and Ann N. Ondabu claiming general damages as a result of an accident which occurred on 3rd December, 2014 along the Kopere-Chemelil road. The appellant's tractor registration number KTCA 03B-B63903 had been parked on the road casing the motor vehicle the 1st respondent was travelling in to ram onto it occasioning serious injuries. The plaintiff then attributed the occurrence of the accident to negligence.
2. The appellant filed his statement of defense denying the claim and stated that the accident was solely caused by the negligence of the driver of the vehicle in which the 1st respondent was travelling in.
3. In the ensuing trial, the 1st respondent testified as PW-1 and called Prof Okombo who testified of the injuries sustained and PC Paul Kiambati who stated that the accident occurred at night and had formed the opinion that the tractor driver be charged as it was.
4. The appellant on his part called the evidence of Mathew Nandi, who allegedly witnessed the accident.
5. At the close of the case, the court awarded Kshs.250,000/- in general damages subject to 50% contribution.



6. Dissatisfied, the appellant preferred the instant appeal which is anchored on the following grounds;
 - i. The learned magistrate erred by failing to appreciate the evidence on record.
 - ii. The learned magistrate erred in failing to appreciate that the statement of defence and the evidence tendered by the 1st defendant/appellant was such that no liability would have attached to the appellant
 - iii. The trial court failed to take into account the standard of proof in a civil suit which made him arrive at a skewed decision contrary to the evidence on record.
 - iv. The judgement, findings and award by the trial magistrate is against the weight of the evidence on record.
 - v. The quantum of damages awarded were manifestly excessive and not in line with both the prevailing authorities, the policy and principles in the award of damages..
 - vi. The learned trial magistrate erred by applying and or using wrong principles and or factors in assessing the quantum of damages.
7. The appeal proceeded by way of written submissions. The appellant submits that the party who bears the burden of proof must produce evidence to meet the threshold in order to prove their claim. That in the instant case, the 1st respondent produced an abstract showing that the case was pending investigations. That since this was the document the plaintiff relied on to prove negligence. That since there was no conclusion on the investigations, the abstract could not have been used in finding liability against the appellant.
8. That since the investigating officer had retired, there was no clear proof of liability as the person who produced the said abstract was not at the scene of the accident.
9. That the trial magistrate fell into error by assuming that the tractor was carrying cane when it was pleaded.
10. In support of their position, the appellant relied on the authorities in *Curie vs Dempsey* (1967) 69 SR (NSW), 116, *Mbuthia Macharia Vs Annah Mutua Ndwiga & another* (2017) eKLR, *Florence Mutheu Musmbi & Geoffrey Mutunga Kimiti Vs Francis Karenga* (2021)eKLR and *David Kajogi M’ mugaa Vs Francis Muthomi* (2012)eKLR.
11. The 1st respondent on his part submits that the accident was caused by the negligence of driver of motor vehicle registration number KBE 552E which was carrying the 1st respondent and the appellant should have therefore filed an application under Order 1 rule 24 claiming contributory negligence from the owner. That for failing to take this step, the appellant cannot therefore fault the trial magistrate.
12. He further submits that the appellant did not avail the driver of the driver to give an account of how the accident occurred.
13. The 1st respondent therefore submits that the appeal lacks merit and should be dismissed with costs.

Analysis and determination.

14. The duty of an appellate court has been stated in several authorities for instance in *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if



there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide

15. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, it was held;

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.

16. Having perused the record as well as the submissions filed herein, I am of the considered view that the issue for determination is on liability.
17. The trial magistrate having considered the evidence tendered found that the drivers of both tractor and motor vehicle were to blame and proceeded to apportion liability at 50% against each.
18. The appellant faults the trial magistrate for the finding. In arriving at this decision, the trial court considered that the driver of the matatu was at high speed and there were no efforts shown as how he tried to avoid the accident. The tractor's driver on the other hand was to blame for driving at night when the reflectors were not visible.
19. It is now trite law that there cannot be liability without fault as was expressed in *Readsetters Tyres Ltd –Vs- John Wekesa Wepukhulu* [2010] eKLR where Ibrahim J. while allowing an Appeal quoted Charles worth & Percy On Negligence, 9th edition at P. 387 on the question of proof, and burden thereof where it is stated:-

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

20. In the plaint filed before the trial court, the plaintiff, pleaded that the appellant was to blame for the accident for among other things parking the tractor in the middle of the road. The appellant on the other hand blamed the driver of the matatu for driving at an excessive speed.
21. The record shows that the accident occurred at about 8.00 pm and it is obvious that darkness had set in by that time and each party had a duty of care towards the other road users. It was prosecution's case that as at the time of testifying, the police had not concluded their investigation and there was therefore no conclusive proof of who was to blame for the accident. However a perusal of the file has an opinion of from the office of Director of public prosecution's recommending prosecution of the driver of the tractor herein for leaving the vehicle stationary in the middle of the road. The said driver was not called to testify herein and since he was a crucial witness this court can only infer that had his evidence being called it would have been adverse to defence. It is trite law that hitting another vehicle from behind is prima facie negligence and that a driver should always drive in such a manner as to allow him to control, stop or swerve the vehicle in case of an emergency on the road. When a vehicle stalls on the road the driver has a duty to display reflectors on the road to warn the other drivers of the presence of the vehicle on the road. Both drivers thus had a duty of care towards all the road users. It has emerged



from the evidence herein that the tractor had stalled on the road while the matatu was speeding and hence it rammed into the trailer of the tractor. The courts have formulated instances where liability is to be apportioned. Lord Denning in *Jones v Livox Quarries Limited* 1952 2 QB 608 stated:

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself and in his reckonings he must take into account the possibility of others being careless.”

22. In *Lakhamshi Vs Attorney General* (1971) EA 118, 120 Spry VP observed; -

“It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

23. The evidence on record further shows that the owner of the motor vehicle carrying the 1st respondent perished in the accident while the tractor’s driver was not called to testify. The police officer who testified in court was not the investigating officer either as the investigating officer was already retired at the time of hearing leaving the evidence of DW-1 who allegedly witnessed the accident. His testimony was to the effect that the driver of the matatu was trying to overtake and when he saw an oncoming car, he swerved back to its lane and hit the tractor from behind.

24. Having carefully re-evaluated the evidence with a view of reaching at my own conclusion, I am of the firm view that the circumstances of the case were not conclusive on who was to blame for the accident. I find that this was a proper case for apportionment of liability given the nature of the evidence on record. I do agree with the trial magistrate’s finding on liability at the ratio of 50 : 50 between the Appellant and 2nd respondent .

25. On the issue of quantum , plaintiff pleaded that he sustained head injury, injury on the neck, facial injuries with bruises, injury on the nose with cut wound , injury on the mouth with broken tooth ,injury on the right leg with cut wound and injury on the left leg with dislocation on the ankle joint. Pw1 said he sustained the said injuries but Pw2 Professor Okombo who made his medical report (Pexh 5a) classified the injuries as harm while in the p3 form the injuries were classified as grievous. He admitted that he neither saw the p3 form nor the discharge summary from Jaramogi Oginga Odinga Teaching and referral Hospital. Also that admission to Muhoroni sub-county hospital does not feature in his report. It has also emerged that the dislocation injury is not mentioned in the p3 form. It is thus clear that the injuries of 1st respondent were exaggerated to include dislocation. I find that the 1st respondent sustained moderate soft tissue injuries.



26. The principles which guide the courts in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...”

27. On whether this court should interfere with the discretion of the trial magistrate on quantum, in the case of Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini vs A.M. Lubia & Olive Lubia (1987) eKLR, Kneller J.A. stated: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango V Manyoka* [1967] E.A. 705, 709, 713; *Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto* [1970]E.A. 414, 418, 419. This court follows the same principles.”

I have seen the case of *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd* {2015} eKLR: Where an award of Kshs.700,000/= was reduced to Kshs.150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.

In this case the trial Magistrate awarded general damages which were excessive considering the nature of injuries of 1st respondent, inflation factor and the current trend of awards for similar injuries, I proceed to reduce the general damages to Kshs.180,000/=.

28. The appeal thus partially succeeds on quantum and I allow it to that extent. Each party to bear it's own costs.

T. A. ODERA - JUDGE

20.6.2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

No appearance for the Appellant.

No appearance for the 1st Respondent.

No appearance for the 2nd Respondent.

Court Assistant; Apondi.

T. A. ODERA - JUDGE

20.6.2023

