



REPUBLIC OF KENYA



**Ufanisi Freighters (K) Limited v Aburiri (Civil Appeal E126 of 2020)
[2023] KEHC 22218 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 22218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E126 OF 2020**

F WANGARI, J

JUNE 16, 2023

BETWEEN

UFANISI FREIGHTERS (K) LIMITED APPELLANT

AND

SAMUEL AKHURI ABURIRI RESPONDENT

*(Being an appeal against the judgement of the Learned Honourable
G. Kiage, Senior Resident Magistrate, dated 2nd September, 2020
in Mombasa Magistrate's Court Civil Suit No. 282 of 2018)*

JUDGMENT

1. This is an appeal against the judgement delivered by Honourable G. Kiage, SRM. The appellant being dissatisfied with the said judgement preferred this appeal. The appellant preferred ten (10) grounds of appeal in urging this court to set aside the judgement of the lower court, among them that the trial magistrate erred in law and in fact by finding the defendants liable for the accident contrary to the evidence before it.
2. Directions were taken and the appeal was disposed of by way of written submissions where all parties duly complied and relied on various decisions in support of their rival positions. I have duly considered the said submissions together with the various cited authorities.
3. As the first appellate court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).



4. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, decree, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise, I will carefully revisit the record.
5. The appellant *vide* a plaint dated February 9, 2018 sought for general and special damages from the respondents for an accident that allegedly occurred on November 7, 2017 along old Nairobi-Mombasa Road, occasioning the appellant severe injuries. The suit was defended and the same was fully heard.
6. Through a judgement delivered by Honourable G. Kiage, SRM, the respondent was found 60% liable for the accident, general damages awarded at Kshs 1,000,000 and special damages at Kshs 2,000. The appellant being aggrieved by the said judgement preferred this appeal. The appeal is both on liability and quantum.
7. In dealing with the issue of liability, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanor (see *Selle v Associated Motor Boat Co* (supra)).
8. The evidence of the parties was that the respondent was a pillion passenger in motor cycle registration No Kxx xx7. While riding along old Mombasa Nairobi road, the appellant's motor vehicle which was facing the same direction, registration number Kxx xx Zx xxx0, started to reverse on the road causing the rider of the motorcycle to ram on the trailer. the rider died on the spot while they responded sustained serious injuries, including loss of vision of the right eye.
9. The appellant stated that it was the rider who was riding the motor cycle at a high speed coming from the opposite direction. That is when another trailer started to reverse from a petrol station and the rider swerved but lost control of the motor cycle and rammed into the rear tyre of the appellant's vehicle.

Analysis and Determination

10. I have reviewed the evidence on my own and it is not in dispute that the accident occurred and the respondent herein sustained serious injuries. The point of departure was who was to blame for the accident. Each party blamed the other for the accident.
11. It is trite that he who alleges must prove. That is what section 107 and section 108 of the *Evidence Act* states.
 - S.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.
 - S.108.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
12. On question of proof, and burden thereof, it is stated in *Charlesworth & Percy On Negligence*, 9th edition at P.387: - 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”

13. It was the appellant’s duty to prove on a balance of probabilities that the respondents were to blame for the accident. There were no eye witnesses to the accident, as the rider died on the spot. The respondent was a passenger in the motor cycle. He said he had worn a helmet that was damaged due to the impact of the collision. He blamed the appellant for reversing the vehicle on the road. On the other hand, the appellant blamed the rider of the motor cycle and the driver of a trailer that was reversing from a petrol station, hence causing the motor cycle which was being driven at a high speed to lose control and ram into their vehicle. The evidence of the traffic police officer was that no party was blamed for the accident.
14. Under order 1, rule 15 of *Civil Procedure Rules*, a party who wishes that another party is substantially to blame or is entitled to contribution should take out a third party notice to enable that other party to defend himself. In this case, the defendant proceeded on stating to show that he was not liable but the motor cyclist and the driver of the reversing trailer were to blame for the accident. No third party proceedings were carried out.
15. Further, it was not shown how the respondent being a pillion passenger in the motor cycle contributed to the accident. The court found the rider of the motor cycle liable for the accident. The rider is deceased and no third party proceedings were carried out against his estate. In the absence of the above, I set aside judgement on liability, decline to apportion liability between the appellant and the motor cycle, and proceed to find the appellant 100% liable for the accident. If they wish that the issue of liability between them and the motor cycle be determined, that can only be done in an indemnity suit if still within time.

Quantum

16. I now turn to the quantum of damages. It is settled that in awarding damages, the trial court is exercising discretion. The law is quite clear as to when an appellate court can interfere with the trial court’s exercise of discretion in arriving at quantum of damages. The Court of Appeal in *Butt v Khan* (1982 - 88) KAR 1 set the parameters as follows: -

“...An appellate court will not disturb an award of 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 arrived at a figure which was either inordinately high or low...”

17. The appellant submitted that the trial court’s arrival to an award of Kshs 1,000,000 was too excessive and there were no adequate reasons as to how the figure was arrived at. In the case of *Stanley Maore v Geoffrey Mwenda Nyeri* CA No 147 of 2002 the Court of Appeal had the following to say on the assessment of general damages;

“It has been stated now and again that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases.”

18. The respondent sustained the following injuriesSevere head injuries involving injury to the right eye resulting to loss of visionCut wound on the right upper eye lidbruise on the left lower backlarge bruises on the calf of the right legbruises on the left leg and thigh



19. Did the trial court commit any error in awarding Kshs 1,000,000 as general damages? Clearly, the appellant had sustained multiple injuries resulting to permanent incapacity at 30%.
20. The duty of this court was set out in assessing damages *Lim v Camden HA* {1980} AC 174:

“ Even in assessing compensatory damages, the Law seeks at most to indemnify the victim for the loss suffered, not to mulct the tortfeasor for the injury he has caused.”
21. I am guided by the following authorities. In *Rent Works East Africa Limited v SSM (Minor suing through SMH Next Friend)* civil appeal E004 of 2021 [2022] KEHC 9969 (KLR) (30 June 2022) (Judgment) where the plaintiff was awarded Kshs 700,000 as general damages suffered severe open degloving facial injuries where reconstruction surgery was done. In *Telkom Orange Kenya Limited v ISO (minor suing his next friend and mother IN)* where serious head injuries involving a depressed skull, blurred vision and scars on the tempo-parietal area and bruises on the leg, the High Court found an award of Kshs 950,000 as excessive and reduced it to Kshs 500,000. The above authorities involved more severe injuries than the ones sustained by the respondent.
22. The lower court awarded Kshs 1,000,000 for injuries sustained. However, from the above cited authorities, it clearly shows that the award is not only high but inordinately high. This is also informed by the decision of the court of appeal on setting of discretion.
23. In the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2)* [1987] KLR, it was held;

“ I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at some wrong principle or is manifestly excessive or inadequate”
24. I therefore set aside the award of Kshs 1,000,000, and in lieu thereof, I award Kshs 500,000 on the basis of comparable authorities. The respondent pleaded Kshs 2,000 and produced receipts. I therefore allow the said amount as special damages.
25. On the issue of costs, it is trite that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. However, the court can exercise its discretion as to award of costs, I order that each party shall bear its costs of the appeal.
26. Following the foregoing discourse, the upshot is that the following final orders do hereby issue: -
 - a. The finding on liability is set aside and judgment is entered for the respondent against the appellant at 100% liability.
 - b. General damages for pain and suffering awarded at Kshs 1,000,000 is set aside, and *in lieu* thereof substitute it with Kshs 500,000.
 - c. Special damages of Kshs 2,000 awarded
 - d. General damages to attract interest from the date of judgment in the lower court.
 - e. The special damages to attract interest from the date of filing suit in the court below.
 - f. Each party to bear its own costs



g. The file is closed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE, 2023.

F. WANGARI

JUDGE

