



REPUBLIC OF KENYA



KENYA LAW
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**Kathuri & another v Mwenda (Civil Appeal 5 of 2023)
[2023] KEHC 19791 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 5 OF 2023**

LM NJUGUNA, J

JULY 3, 2023

BETWEEN

BENARD KATHURI 1ST APPELLANT

EASTON MULTIPLES LIMITED 2ND APPELLANT

AND

VICTORIA KAWIRA MWENDA RESPONDENT

*(Being an appeal against the judgment of Hon. J. Gichimu (S.P.M.)
delivered on 29.09.2022 in Runyenjes SPMCC No. E069 of 2021)*

JUDGMENT

1. The appellants herein who were the defendants in the lower court, filed the instant appeal having been dissatisfied with the judgment by the trial magistrate.
2. In her amended plaint amended on 17.03.2022, the respondent who was the plaintiff averred that on or about the 27.05.2021, she was a lawful pillion passenger aboard motor cycle registration number KMDL 823E along Embu-Meru Road and while at KCC area, the 1st appellant who was the authorized driver and/or agent of the 2nd appellant managed and/or controlled motor vehicle registration number KCE 990Q so negligently, carelessly and/or recklessly that it lost control and failed to maintain safe distance while overtaking, causing it to hit motor cycle registration number KMDL 823E, as a consequence of which the respondent sustained injuries.
3. The particulars of negligence and the injuries are set out in paragraphs 6 and 7 of the amended plaint, respectively.
4. The appellants entered an appearance and filed a defence dated 04.02.2022 wherein they denied the occurrence of the accident on the material day and that the respondent sustained injuries as pleaded in the plaint. They also denied the particulars of special damages as pleaded by the respondent.



5. The matter proceeded for hearing and the trial magistrate after considering the facts and evidence adduced before him, awarded the respondent an amount of Kes. 260, 150/= against the defendants/appellants.
6. The appellants herein listed four (4) grounds of appeal in the memorandum of appeal dated 31.10.2022. The appeal is on quantum of damages.
7. Directions were given that the appeal be disposed off by way of written submissions and wherein only the respondent complied with the directions. The court has considered the said submissions, the grounds of appeal and has re-evaluated the evidence as its required of it, being the first appellate court.
8. The respondent submitted that the case against the appellants was proved in that the appellants participated through their appointed advocate on record but opted not to adduce any documentary or oral evidence thereto. That it is absurd for the appellants to allege that the trial magistrate failed to inform himself from the evidence tendered by the appellants, yet, they tendered no evidence. Reliance was placed on the case of *Autar Singh Babra and Another vs Raju Govind JL HCCC No. 548 of 1998* (Unreported) and cited with authority in *Motex Knitwear Limited Vs Gopitex Knitwear Mills Limited* [2009] eKLR. On special damages, it was submitted that the same were proven through receipts and given that the appellants have not raised any issue with the same, the award should therefore stand. In conclusion, the respondent submitted that the appeal herein is devoid of any merit and the same should therefore be dismissed with costs to her.
9. As already stated in this judgment, the appellants have contested the court's finding on quantum only.
10. This being a first appeal, the court relies on a number of principles as set out in *Peters vs Sunday Post* 1958 (EA) 424.
11. The court has considered the pleadings, evidence adduced at trial, and submissions in the lower court and on appeal in support of the grounds of appeal. The sole issue for determination is whether the Appeal herein has merits. The court will address its mind as to whether the respondent proved his case on a balance of probabilities.
12. The applicable law on the burden of proof is found in Section 107 (1) of the [Evidence](#) Act which states that:

“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.”
13. Section 108 further provides that:

“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.”
14. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. See decision by the court of Appeal in *Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another* [2015] eKLR.



15. The appellants herein have challenged the quantum of damages awarded by the trial court. The circumstances under which this court can upset such a determination have been previously laid down by the Court of Appeal in the case of *Mbogo & Another vs Shah* [1968] EA where it was held:

“.....that this court will not interfere with the exercise of...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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
16. Similarly, Madan JA (as he then was) in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* [1985] E.A held that;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
17. From the amended plaint, it is noted that the respondent suffered lacerations on the left side of the face, pain in the chest anteriorly, lacerations both upper limbs, lacerations both lower limbs and right frontal temporal scalp swelling and tenderness.
18. The case of *Peter Njuguna vs Francis Njuguna Njoroge* [2015] eKLR was relied on. In that case, the injuries were:- bruises on the occipital region of the scalp; Deep cut on the forehead; Bruises on the chest and lower back; Bruises on the right elbow; Bruises on both hands; Tender left knee joint; Broken tooth.
19. In *Kenya Power & Lighting Co. Ltd vs Mary Akinyi*, HCCA No. 72 of 2007, Korir J upheld the award of Kshs. 350,000/= as general damages for the following injuries: -Deep cut wound on the calf muscles of the left leg; Laceration on the right knee and right shoulder; Contusion on the chest.
20. Meanwhile in the case of *Poa Link Services Co. Ltd & Another vs Sindano Boaz Bonzemo*, HCCA NO. 17 of 2019, Riechi J upheld general damages of Kshs. 350,000/- for the plaintiff, who had sustained the following injuries: - Blunt injury to the chest; Bruises to lower abdomen; Bruises of the right hip joint; Bruises of the thigh; and Bruises on the knee.
21. In *Anthony Nyamweya vs Jackline Moraa Nyandemo* [2022] eKLR, Ochieng’ J (as he then was) awarded Kes. 230,000.00 to the plaintiff who sustained the following injuries: - Rugged cut wounds on the temporal region of the head; Tenderness on the neck; Tenderness on the anterior chest; Tenderness on the lower back; Tenderness on the shoulders; Swelling and tenderness on the right hand; Bruises on right index finger; Swelling, tenderness and bruises on both legs.
22. On special damages, the same were proved by way of receipts to an amount of Kes. 10,150/=.
23. From the foregoing, I find that the trial court did not err in its finding and therefore:
 - i. The finding of the trial magistrate is hereby upheld.



ii. The appeal herein is dismissed with costs to the respondent.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent

