



REPUBLIC OF KENYA



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**Mwangi & another v Kagai (Civil Appeal E015 of 2021)
[2023] KEHC 20627 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E015 OF 2021**

**FROO OLEL, J
JULY 19, 2023**

BETWEEN

JOHN MAINA MWANGI 1ST APPELLANT

WILSON MWANGI 2ND APPELLANT

AND

SAMUEL MBUGUA KAGAI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. B KASAVULI Principal
Magistrate in Mavoko CMCC No 952 of 2019 dated 25th January 2021)*

JUDGMENT

1. This appeal arises from the judgement and decree of Hon. B. Kasavuli (SPM) dated 25th January 2021, issued in MAVOKO CMCC no 952 of 2019 where the learned trial magistrate found that the appellants were liable for the accident which occurred on 16.08.2019 and apportioned liability at 100% as against the appellant's, General damages was assessed at Ksh.1,000,000/=and special damages were awarded at Ksh.61,445/= plus costs and interest. The plaintiff was also awarded the costs of the suit.

Background

2. The appellants were the defendant's in the primary suit, filed by the respondent herein on 06.12.2019, where he sought for damages arising from a Road traffic accident which occurred on 16.08.2019. The respondent averred that he was a lawful passenger on the 1st appellant's motor vehicle registration Number KBV 137W (herein after referred to as the 1st suit motor vehicle), plying along Nairobi Mombasa road, when near Mto Mawe or thereabouts, the appellants driver agent and/or servant did drive the said motor vehicle in a reckless, careless and/or negligent manner that he permitted it to loose control and ram into the back of motor vehicle registration Number KCN 139 G / ZF 6864, thereby causing the respondent to suffer serious injuries for which he claimed damages. The respondent further



pleaded that though the said motor vehicle was registered in the names of the 1st respondent, it was beneficially owned by the 2nd respondent and thus they were both vicariously liable for the damages suffered.

3. The Respondent's filed their joint statement of defence on 12.03.2020 wherein, they denied in toto that their driver, agent and/or employee was negligent or reckless. Further the respondent's in the alternative averred that it was the respondent who was negligent and contributed to the said accident by failing to strap his safety belt and failed to adhere to traffic rules and regulations. His claim for special damages too was denied.
4. PW1 was Samuel Mbugua Kagai. He adopted his witness statement and testified that on 16.08.2019 he was a passenger in the first suit motor vehicle which was a lorry. They were travelling from Nairobi to Machakos and when they reached around Athi River, they got involved in an accident. The 1st suit motor vehicle rammed into the back of the 2nd suit motor vehicle and he sustained serious injuries on the ankle joint and degloving wound on the left leg below the knee. He was treated at Kitengela Sub County Hospital, at Kiambu and Narok county Hospital's. He had not fully recovered as he was still on medication. During cold season, he would experience a lot of pain in the leg and still had to use a walking stick to help him move around. The respondent produced the documents on his list of documents as P Exhibit 1-20.
5. In cross examination the respondent stated that the pain on his leg had reduced, but he still needed to walk with the aid of a walking stick. When the accident occurred, he had put on his safety belt and was not negligent. The respondent closed his case and by consent of counsels for both parties they did produced Dr Wambugu's medical report dated 11.08.2020 as Exhibit D1.
6. The appellant case was closed and parties filed written submissions. Judgment was entered in favour of the respondent. Liability was determined at 100% as against the appellants, General damages awarded for Ksh.1,000,000/=, Special damages at Ksh.61,445/= plus cost and interest. The appellant being dissatisfied by the said judgment filed his memorandum of appeal dated 17th February 2021 and raised Six (6) grounds of appeal. The grounds were that;
 - a. The learned trial magistrate erred in fact and in law to find that the appellant were 100% liable.
 - b. The learned trial magistrate erred in law and in fact in failing to take into account the submissions sent to the court's email address on behalf of the appellant's while considering his judgment.
 - c. The learned trial magistrate erred in fact and in law in by totally disregarding the submissions of the appellant and thereby arriving at a wrong decision.
 - d. The learned trial magistrate erred in fact and in law and misdirected himself in awarding an exorbitant quantum of damages of Ksh.1,000,000/= as general damages by failing to appreciate and be guided by the prevailing range of comparable awards granted for similar injuries, to those sustained by the respondent.
 - e. The learned trial magistrate erred in law and in fact in making such a high award.
 - f. The learned trial magistrate's award on damages was so high as to be entirely erroneous.

Appellants Submissions

7. The appellant filed his submissions on 18.04.2023 and stated that the respondent did not satisfy the legal and evidential burden of proof, especial in proving that the respondent's driver was reckless and/



or negligent in controlling the suit motor vehicle. Secondly the respondent too had a duty of care as a passenger to fasten his safety belt, which upon cross examination he admitted he had not buckled up. The court thus misdirected itself in failing to apportion liability and the same should have apportioned at 10:90 % in favour of the respondent.

8. On quantum the appellant submitted that the trial court ought to have awarded a sum which was commensurate with comparable awards. The respondent had suffered degloving injury wound on the left leg below the knee and degloving wound on the left leg around the medial aspect of the ankle joint. The injuries were confirmed by the 2nd medical report by Dr Wambugu dated 11th August 2020. The appellant described a degloving injury; “ as a traumatic injury that results in the top layer of the skin and tissue being torn away from the underlying muscle, connective tissue or bone. It mostly affects the leg and are frequently associated with underlying fracture.”
9. The appellant did submit that given the nature of injuries suffered and considering similar awards the appropriate award for the respondent should have been Ksh 400,000/= . Reliance was placed on Easy Coach limited v Emily Nyangasi [2017] eKLR, Maseno University college v Elizabeth Kerubo Mokaya [2021] eKLR, H young construction Company ltd v Richard Kyule Ndolo [2014] eKLR, Martin Mutuku & Another v SN (Suing through his mother and next friend DC) 2021 Eklr , Daniel otieno Owino & Another v Elizabeth Atieno Owour [2020] eKLR
10. The appellant submitted that he had adequately demonstrated that this appeal had merit and prayed that it be allowed as submitted.

Respondents Submissions

11. The Respondent did file submissions in opposition to this appeal and supported the finding of the trial magistrate as correct and justified. It was not disputed that an accident did occur and that the respondent who was a passenger in the 1st suit motor vehicle got injured. The appellants did not tender any evidence to rebut the respondent’s evidence and did not institute third party proceedings to enjoin the owner of the 2nd suit motor vehicle and thus based on the evidence on record liability of the appellants was correctly found to be 100%.
12. As regards the quantum of damages the respondent submitted that the medical documents produced especially the medical Report of Dr Ndeti did show that the respondent suffered severe degloving injuries on the left leg below the knee joint and medial aspect. The degree of injury was assessed at 10% permanent incapacity. A review by Dr Wambugu also confirmed the same injuries he assessed the permanent injury at 6%. The respondent also urged the court to look at the initial treatment notes to ascertain the nature and extent of the injuries suffered.
13. The respondent submitted that for similar injuries, the award was appropriate and the trial court did not err in assessing the quantum at Ksh.1,000,000/=. Reliance was placed on Butt v Khan [1977] KAR 1, Denshire Muteti wambua v Kenya power & lighting co ltd [2013] eKLR.
14. The respondent thus urged this court not to interfere with the award as it was not inordinately high nor was it founded on the wrong principles.

Analysis and Submissions

15. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.



16. As held in *Selle & Another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif v Ali Mohammed Sholan*[1955], 22 E.A.C.A 270

17. In *Coghlan v Cumberland* [1898] 1 Ch. 704, the Court of Appeal (of England) stated as follows -

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

18. In this case, it is clear that the issues to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved his case. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides 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.

19. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.



20. The two provisions were dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

21. The question of what amounts to proof on a balance of probabilities was also discussed by. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

22. It therefore follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the appellants in this case depending on the circumstances of the case. This appeal is on both quantum and liability. The appellants did not offer any evidence to counter the respondent’s evidence as to how the accident occurred. The parties also admitted the second medical report by consent and the appellant’s case was closed. It remains basic law that the only forum where the same could have been challenged was at trial. Since the respondent failed to call any witness, the appellant’s evidence remained uncontroverted and thus proved.

23. In *Motrex Knitwear v Gopitex Knit wear Mills Ltd Nairobi (Millimani)HCCC NO 834 OF 2002* Lessit J citing the case of *Autar Singh Bahra & Another v Raju Govindji, HCCC NO 548 OF 1998* where it was appreciated that;

“Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail.”

24. In the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR, Odunga Judge relied on the case of *Trust Bank Ltd v Paramount Universal Bank Ltd & 2 others Nairobi (Millimani) HCCS No 1243 OF 2001* where it was held that;

“it is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged”

25. The appellant case was that the first suit motor vehicle rammed into the back of the second suit motor vehicle. Both motor vehicles were going in the same direction and prima facie that implied that the 1st suit motor vehicle, were the appellant was a passenger failed to keep distance and is therefore to blame for the accident. The appellant’s claimed that the respondent should have been held partially negligent



- on account of failure to wear his safety belt. This line of submissions too, has no basis as the record clearly indicates that the respondent in cross examination confirmed that he had his safety belt on.
26. The appellant's clearly failed to fully discharge the burden of proof, which had shifted on them, based on the evidence presented and also failed to prove that indeed the respondent in any way contributed to the said accident. The liability as awarded at 100% as against them was appropriate.
 27. On the quantum of damages. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tete* Civil Appeal No. 284 of 2001[2004]eKLR 55 set out circumstances under which an appellant court can interfere with an award of damages 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 in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors or 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”.
 28. Similarly, in *Jane Chelagat Bor v Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”
 29. The respondent pleaded that he suffered degloving injury on the left leg below the knee joint and degloving wound on the left leg around the medial aspect of the ankle joint. He presented various treatment notes from Kitengela sub county hospital, Kiambu level five hospital to prove his injuries.
 30. The medical report by Dr T. Ndeti confirmed the degloving injuries which formed a huge V shaped scar on the left leg below the knee and was unable to flex the left knee joint or even fully extend it. The left ankle joint too was stiff. The doctor stated that the respondent suffered maim. He had severe soft tissue injury and was ground for four months due to the accident. He would not be able to resume duty due to the injuries suffered and the degree of functional permanent disability was assessed at 10%
 31. Further the respondent was examined by the appellant's doctor, one Dr Wambugu P.M a consultant surgeon who stated that due to the injuries suffered the appellant was admitted to Kiambu level five hospital from 27.08.2019 to 16.09.2019. There was stiffness of the left ankle joint with scarring and loss of heal tissue. There was also scarring of posterior aspect of the ankle joint. Flexion movements of the joint were restricted
 32. The final prognosis by the doctor was that the respondent sustained loss of heel's soft tissue resulting in a pseudo equinus deformity with restriction of the ankle joint full flexion movements. The decree of permanent incapacitation was placed at 6%.
 33. The trial magistrate relied on the citation of *Easy coach ltd versus Emily Nyangasi HCCA (KISUMU) NO 20/2015*, where the sum awarded was Ksh.1,300,000/= and awarded the respondent a sum of



Ksh.1,000,000/= . The appellants have submitted that the award was inordinately high and not with the prevailing damages for similar awards. They suggested that the award be reduced to Ksh.400,000/= .The respondent on the other hand submitted that the award was appropriate and the sums awarded should be retained.

34. The appellant's injuries were not soft tissue. The same were serious and as aptly captured by both doctors' reports. He suffered extensive loss of the heel tissue and had flexion movements of the joint left ankle joint was restricted. The appellant in their own submissions described a degloving injury; "as a traumatic injury that results in the top layer of the skin and tissue being torn away from the underlying muscle, connective tissue or bone. It mostly affects the leg and are frequently associated with underlying fracture."
35. In *Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Ltd* [2020] eKLR, and *Ruben Mongare Keba v L.P.N* (2016) eKLR the court awarded the appellants between Ksh.700,000/= to Kshs.1,200,000/= for degloving injury of the left ankle with tendon tear In *Easy coach ltd v Emily Nyangasi HCCA Kisumu No 20/2015*, for severe soft tissue injuries the respondent was awarded Ksh.1,000,000/= , which was reduced on appeal to Ksh.700,000/=.
36. The respondent did not suffer from a fracture but severe degloving injuries on the left leg necessitating three weeks of admission at Kiambu county hospital. He obviously lost muscle and heel tissue that left him with a permanent degree of disability, which was confirmed and he would be unable to resume his normal duties. Looking at similar awards and factoring in inflationary rates, I find that the award of Ksh.1,000,000/= is a bit on the high side and thus the trial magistrate arrived at a wrong estimate I would in the circumstance given the serious nature of the injuries suffered reduce it to Ksh.800,000/=

Disposition

37. I hold and find that that this appeal is partially successful the Judgment of Honourable B Kasavuli (SPM) dated 25th January 2021 is partially set aside and the general damages awarded is reduced to Ksh.800,000/=. The summary of the judgment entered in favour of the respondent as against the appellants jointly and severally will be as follows;
 - a. Liability 100%
 - b. General Damages Kshs 800,000/=
 - c. Special Damages Kshs 61,445/=Total Kshs 861,445/=
38. The respondent shall also be awarded costs of the primary suit and interest. Interest on special damage's shall be calculated from the date of filing the suit until date of payment in full
39. Each party shall bear its costs for this appeal
40. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JULY 2023.

FRANCIS RAYOLA OLEL

.....

JUDGE

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 19TH DAY OF JULY 2023

In the presence of;

.....**For Appellant**

.....**For Respondent**

.....**Court Assistant**

