



**Magaiwa v Marwa & another (Civil Appeal E087 of 2021)
[2023] KEHC 19710 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E087 OF 2021**

**TA ODERA, J
JULY 5, 2023**

BETWEEN

SAMSON RIOBA MAGAIWA APPELLANT

AND

SUSAN ROBI MARWA 1ST RESPONDENT

MAHALON OTIENO NYAWUOR 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon Moses Oyoko Obiero (SPM) delivered at Migori in Chief Magistrate's Court Case No 1007 of 2018 on 16th September 2021)

JUDGMENT

Introduction

1. In his decision of September 16, 2021, the Learned Trial Magistrate, Hon Moses Oyoko Obiero, Senior Principal Magistrate, entered Judgment in favour of the 1st Respondent as against the Appellant as follows:-
 - i. Liability assessed at 100% in favour of the Plaintiff against the Defendant
 - ii. General Damages - Kshs 200,000/=
 - iii. Special Damages - Kshs 8,390/=
 - Total - Kshs 208,390/=
 - iv. Plus costs and interest of the suit.
2. Being aggrieved by the said decision, on October 15, 2021, the Appellant filed a Memorandum of Appeal dated October 14, 2021. He relied on five (5) grounds of appeal.



3. His Written Submissions were dated August 31, 2022 and filed on September 12, 2022. The Respondent did not file any Written Submissions despite having been given a chance by this court to do so.
4. The Judgment herein is based on the Appellant's Written Submissions only.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - i. Whether or not the Appellant was solely liable for the accident
 - ii. Whether or not the quantum awarded by the Learned Trial Magistrate was excessive warranting the interference of this court.
8. This court dealt with the aforesaid issues in the following distinct heads.

I. Liability

9. The Appellant submitted that the Trial Court's Judgment was entered against the third party but it was not clearly pointed out who was fully to blame between the third party and himself. He contended that liability ought to have been apportioned as between himself and the third party at 50:50%. He relied on the case of *Hussein Omar Farah v Lento Agencies* [2006] eKLR where it was held that where there is no concrete evidence to determine who is to blame between two drivers both should be held equally to blame.
10. Notably, the 1st Respondent sued the Appellant for General Damages, Special Damages, Costs and interest of suit, the cause of action having occurred on May 8, 2017 when she was a lawful passenger aboard motor vehicle registration number KCG 279B when along Isebania-Migori road when the Appellant negligently drove the said motor vehicle that it lost control and hit another motor vehicle registration number KBR 485A belonging to the 2nd Respondent thereby severely injuring her.
11. Later on, vide a Third-Party Notice dated September 26, 2019, the Appellant sought to enjoin the 2nd Respondent as a third party to the suit. The Trial Court allowed the same. After service, the third party who is the 2nd Respondent herein, neither enter appearance nor filed a defence as against the 1st Respondent's claim.
12. The 1st Respondent testified as PW 1 in the trial court. It was her testimony that both drivers were to blame for the accident. She blamed the Appellant as she said his motor vehicle was being driven at a high speed causing it to ram into the 2nd Respondent's motor vehicle. She produced copy of records as P. Exhibit 5.



13. PC Mohamed Salat (hereinafter referred to as “PW 2”) confirmed the occurrence of the said accident involving the two motor vehicles and produced Police Abstract as P. Exhibit 3.
14. The Appellant and the 2nd Respondent did not tender any evidence at the Trial Court but in his submissions, the Appellant blamed the 2nd Respondent herein who was the third party and urged the court to apportion liability at 50:50%.
15. It was not in dispute that the accident occurred. However, no evidence was tendered on the part of the Appellant and 2nd Respondents to enable the court make an informed determination on who was actually to blame between the two. Be that as it may, it came out clearly from the 1st Respondent that the 2nd Respondent’s motor vehicle was parked on the road. The evidence on record was not controverted by 2nd respondent.
16. It is this court’s considered view that t6he 2nd respondent , his driver or servant ought to have placed warning sign at the back and front of his motor vehicle to show other road users that she had parked his vehicle at the alleged place. On the other hand, the Appellant too ought to have exercised due care and caution on the road as he approached the stationary vehicle. If he was not driving in high speed, he would have swerved in good time to avoid the accident. Having said so, it is therefore this court’s view that liability should be apportioned in the ratio of 50%:50% between the defendant’s and the third party.

II. Quantum

17. The Appellant submitted that the second medical report prepared by Dr J.A.S Kumenda affirmed that the injuries sustained by the 1st Respondent herein had well healed without permanent disability. He added that the 1st Respondent had also admitted during hearing that from where she was seated she could not view the speedometer and therefore had no basis for stating that the subject motor vehicle was speeding. He pointed out that the 1st Respondent failed to table any evidence to prove she was undergoing further treatment.
18. He placed reliance on the case of *Denshire Muteti Wambua v Kenya Power Lighting Co ltd* [2013]eKLR where it was held that awards must be reasonable and assessed with moderation and that comparable injuries should be compensated by comparable awards. He also relied on the cases of *Dungu Dennis v Anne Wangari Ndirangu & Another* [2018]eKLR and *Maimuna Kilyunga v Notrex Transporters Ltd* [2019]eKLR where the courts therein awarded Kshs 100,000/= and Kshs 125,000/= respectively where the Plaintiffs sustained soft tissue injuries.
19. He further relied on several other cases among them the case of *Salim Zein & Another v Rose Mulec Mutua* Civil Appeal No 147 of 1994 (eKLR citation not given) where the court held that as to the extent where an appellate court can interfere with a Trial Court’s assessment of general damages the court must be satisfied either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage. It was his case that an award of Kshs 150,000/= would be sufficient and reasonable in the circumstances.
20. In her Complaint dated November 5, 2018, the 1st Respondent pleaded that as a result of the accident she sustained the following injuries; blunt chest injury, cut wounds on right hand, multiple cuts on the left leg, bruises and lacerations on left ankle joint. She was treated at Ombo Mission Hospital in Migori. She produced the treatment notes as exhibit. She was examined by Dr Marwa who opined that she had suffered soft tissue injuries which had since healed.



21. Applying the doctrine of stare decisis, this court had due regard to the cases with comparable awards to come to a fair and reasonable assessment of the general damages that ought to be awarded herein:-
- a. In the case of *Fred Barasa Matayo v Channan Agricultural Contractors* [2013] eKLR, the court reviewed an award of Kshs 250,000/= downwards to Kshs 150,000/= where the respondent therein had sustained moderate soft tissue injuries that were expected to heal in eight months' time.
 - b. *Dickson Ndungu v Theresia Otieno & 4 Others* [2014] eKLR, the court reviewed the award of Kshs 250,000/= to downwards to Kshs 127,500/= for soft tissue injuries which produced no complaints.
 - c. *Purity Wambui Muriithi v Highlands Mineral Water Company Ltd* [2015] eKLR where the award of Kshs 700,000/= that had been given for injuries to the left elbow, pubic region, lower back and right ankle was reduced to Kshs 150,000/=.
22. Applying these cases, their ages, the principles in the aforesaid cases and considering the inflation factor this court is not persuaded that the Learned Trial Magistrate misdirected himself on the appropriateness and reasonableness of the award for the soft tissue injuries that the 1st Respondent sustained.
23. It is important to point out that an appellate court ought not to interfere with the discretion of a trial court merely because it could have awarded a lower or higher sum than that which was awarded by the trial court. An appellate court can only interfere where the award of general damages is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles.
24. For the foregoing reasons, the upshot of this court's decision was that Appellant's appeal lodged on was partly merited. The effect of this decision is that the Trial Court's finding on liability is set aside and be substituted with a ratio of 50:50% between the Appellant and the 2nd Respondent. The award on quantum is hereby upheld.
25. Orders accordingly.

T. A. ODERA - JUDGE

5/7/2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

No appearance for Appellant.

No appearance for Respondent.

Court Assistant; Bor.

T. A. ODERA - JUDGE

5/7/2023

