



REPUBLIC OF KENYA



**Mogere v Ogenche & 2 others (Civil Appeal 11 of 2020)
[2023] KEHC 22366 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL 11 OF 2020
F GIKONYO, J
SEPTEMBER 20, 2023**

BETWEEN

JOSHUA MOGERE APPELLANT

AND

ZACHARY OCHARO OGENCHE 1ST RESPONDENT

NYAMO INVESTMENT 2ND RESPONDENT

MADONA ENTERPRISES 3RD RESPONDENT

*(Being an appeal from the judgment and decree of Hon. G.N. Wakabi
(CM) delivered on 08.06.2020 in NAROK CMCC No. 23 of 2017)*

JUDGMENT

Appeal on liability and quantum

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. 23 of 2017 delivered on the 08.06.2020 in which the trial court made awards as follows: -
 - a. Liability 100%
 - b. General damages Kshs. 280,000/=
 - c. Special damages 6,130/=Total = 286,130/=
2. The trial court held the appellant vicariously liable for the negligence of his driver.
3. The memorandum of appeal dated 15.06.2020 cited eight (8) grounds of appeal which relate to; i) liability and ii) quantum of damages.



Background

4. The suit arose from a road traffic accident, which occurred along Maai -Mahiu -Narok- road on 24.01.2016 involving a motor vehicle registration no. KBN 096H a trailer registration number ZD5198. The 1st respondent was travelling in motor vehicle registration number KBK 984D. It was averred that the owner of motor vehicle KBN 096H parked it negligently in the road thereby causing motor vehicle no. KBN 096H to collide with an oncoming motor vehicle registration number KBT871A. The 1st respondent blamed the drivers of the three vehicles. The 1st respondent was injured in the accident. particulars of negligence were set out against the three drivers. The 1st respondent sustained injuries listed to be; a) compound fracture of the right ankle joint, b) deep lacerated wound with tissue loss of the right leg, c) blunt soft tissue injuries to the anterior chest and d) blunt abdominal injuries.
5. The 1st respondent during trial called four witnesses- himself PW1, police officer from Ntulele police station PW2 and clinical officer from Narok referral hospital PW3 and PW4 respectively.
6. The appellant called one witnesses, motor vehicle inspector DW2. The 2nd and 3rd respondent called one witness DW1 driver of motor vehicle registration No. KBK 984D.

Appellant's Submissions

7. The Appellant submitted that the totality of the evidence on record point to the cause of the accident to have been over speeding and negligence on the part of the driver of motor vehicle No. KBK 984 D owned by the 2nd respondent herein. The appellant therefore blames wholly the 2nd respondent for the accident.
8. The appellant submitted that in the alternative this court may consider contributory negligence on the part of the appellant with regard to the position of the vehicle after the accident and failure to exercise due care and attention on the part of the driver of motor vehicle KBK 984D. In the circumstances urged this court to apportion liability at 50: 50 percent basis. The appellant relied on the case of [Hussein Omar Farar v Lento Agencies](#) C.A. Nairobi Civil Appeal No. 34/2005[2006] eKLR.
9. The appellant submitted that Kshs. 250,000 is reasonable for the injuries sustained of tenderness on the abdomen and chest as captured in the initial treatment notes.
10. The appellant urged this court to allow the appeal and set aside judgment of the lower court and dismiss the lower court suit against the appellant with costs and award the appellant costs of the appeal.

The 1st Respondent's Submissions

11. The 1st respondent submitted that the chief magistrate's court was correct in finding the appellant to be 100% liable for the accident that resulted in serious injury to the 1st respondent. That the appellant negligently parked his trailer in the middle of the road at night without any indication or warning whatsoever. This act of negligence resulted in the collision of the vehicle in which the 1st respondent was travelling and another vehicle. That it is clear that the appellant's actions were the direct cause of the accident. See Phipson on evidence, 16th ed. (2005) at pp. 154-5, and section 3(2) of the [Evidence Act](#).
12. The 1st respondent submitted that the damages awarded by the chief magistrate's court were based on the evidence presented and were just and reasonable. The 1st respondent suffered serious injuries as a result of the accident caused by the appellant's negligence including physical and emotional pain, loss of income, medical expenses and other related costs. further that currently the 1st respondent is



unable to work and is depending on his wife financially. The 1st respondent relied on the case of *Kilda Osbourne v George Barned And Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both lord Morris and lord Devlin in *H. West & Sons Ltd v Shephard* [1963] 2 All ER 625 Sykes J, *Price and Another v Hilder* [1996] KLR 95

The 2nd and 3rd Respondents' Submissions

13. The advocates for the 2nd and 3rd respondent have filed their written submissions with the heading 'appellant's written submissions', but closed the submissions with 'These Are The Submission of The 2nd & 3rd Respondents and so we Pray' and signed out as 'advocates For The Appellants'.
14. The 2nd and 3rd respondents submitted that nothing in this case would warrant apportionment of liability to the 2nd and 3rd respondents. The 2nd and 3rd respondents relied on *Karugi & Kabiya & 3 Others* [1983] eKLR as quoted in *Benter Atieno Obonyo v Anne Nganga & another* [2021] eKLR.
15. The 2nd and 3rd respondents submitted that according to the initial treatment notes, p3 form and discharge summary, the injuries sustained were soft tissue in nature. That the treatment notes do not reflect any fracture as pleaded. The 2nd and 3rd respondents relied on the following authorities *Entertainer Trucks Company Ltd v George Karanja Maina* [2020] eKLR as quoted in *Sospeter Kimutai & Another v Isaac Kipleting Boit* [2021] eKLR, *John Mwendwa Kuti & 2 Others v Ibrahim Kunyaga* [2020] eKLR as quoted in *Sospeter Kimutai & Another v Isaac Kipleting Boit* [2021] eKLR .
16. The 2nd and 3rd respondents urged this court to uphold the entire finding of the lower court.
17. The 2nd and 3rd respondents submitted that in the alternative the award of Kshs. 280,000 should be revised downward and substitute it with that of Kshs. 80,000/=. The 2nd and 3rd respondents placed reliance on the case of *Denshire Muteti Wambua Vs Kenya Power & Lighting Co. Ltd* [2013] eKLR as quoted in *Michael Okello v Priscilla Atieno* [2021] eKLR, *Kigaraari v Aya* [1982-88] 1 KAR 768 as quoted in *Godfrey Wamalwa Wamba & Another v Kyalo Wambua* [2018] eKLR, *George Mugo & Another v Akm (Minor Suing Through Next Friend And Mother Of A.N.K)* [2018], *George Kinyanjui T/ A Climax Coaches & Another v Hussein Mahad Kuyala* [2016] eKLR, *Ndungu Dennis v Ann Wangari Ndirangu & Another* [2018] eKLR, *Pf(Suing As Next Friend And Father Of SK(Minor) v Victor O Kamadi & Another* [2018] eKLR, *Blue Horizon Travel Co. Ltd v Kenneth Njoroge* [2020] eKLR, *Godwin Ireri v Franklin Gitonga* [2018] eKLR, And *Lamu Bus Services & Anor v Caren Adhiambo Okello* [2018] eKLR . The 2nd and 3rd respondents relied on cases where awards ranging from Kshs. 130,000 and 90,000.
18. In the end the 2nd and 3rd respondents prayed that this appeal be dismissed and they be awarded costs of the same based on section 27(1) of the *Civil Procedure Act*.

Analysis and Determination

Duty of court

19. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.
20. The first Appellate Court should therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor v Associate Motor Boat Co. Ltd* 1968 EA 123.



Issues

21. This appeal relates to: liability and quantum of damages.

Liability

22. Who is to blame for the accident, and by what proportion if at all?
23. The trial court found the driver of the appellant's vehicle to be solely to blame for accident, and so held the appellant to be vicariously liable.
24. The appellant rooted for contributory negligence on the part of the appellant's driver on a 50:50 basis.
25. What does the evidence say?
26. The cause of action herein arose from a road traffic accident, which occurred along Maai -Mahiu - Narok- road on 24.01.2016 involving a motor vehicle registration no. KBN 096H a trailer registration number ZD5198. The 1st respondent was travelling in motor vehicle registration number KBK 984D. It was averred that motor vehicle KBN 096H was parked negligently in the road thereby causing motor vehicle no. KBN 096H to collide with an oncoming motor vehicle registration number KBT871A. The 1st respondent blamed the drivers of the three vehicles.
27. PW1- Zachary Ocharo Ogenche testified that the driver of motor vehicle KBK 984D tried to avoid the stalled trailer by braking and swerving. He stated that the vehicle he was travelling in was on a speed of 150 KPH but he could not substantiate the same. On the other hand, he told the investigating officer the vehicle was on a moderate speed.
28. PW2-PC Saidi Kuuza who was the investigating officer testified that the trailer was at fault having stalled across both lanes of the road including the climbing lane. He further stated that there were no warning signs placed by the driver of the trailer.
29. DW1-Joshua Mogere, the owner of the trailer testified that his driver had been charged in court for causing death by obstruction. The vehicle had been repaired to some extent and was to be moved from the site but its cargo proved heavy so they sent for another vehicle to offload the cargo.
30. The police abstract blames motor vehicle KBN096H/ZA5198, the trailer for the accident.
31. The evidence adduced should vividly depicts how things were on the ground. The appellant's motor vehicle KBN096H/ZA5198 stalled across both lanes of the road including the climbing lane. It was at night around 1.00am. The driver of the said vehicle did not place any sign on the road to warn other motorists of the stalled vehicle. The driver of motor vehicle KBK 984D suddenly noted the trailer and braked and swerved away from it thus, colliding with the on-coming vehicle.
32. The appellant submitted that the court should find negligence, or may consider contributory negligence on the part of the appellant's driver with regard to the position of the vehicle after the accident and failure to exercise due care and attention on the part of the driver of motor vehicle KBK 984D.
33. The appellant did not establish how the driver contributed to the accident for alleged lack of attention and diligence. Upon stalling of the trailer, it was upon the driver to place such visible signs to warn other motorists of the stalled vehicle. The warning is intended to make other motorist aware of, and take precaution as they approach the stalled vehicle. Despite denial by the appellant, there is no evidence to show presence of any or appropriate warning signs of the stalled vehicle. It was at night which placed more onerous duty on the driver of the trailer to place appropriate and visible warning signs on the



road. Evidence show that it is more probable than not that there were no such signs that were placed on the road. Therefore, the submission by the appellant on negligence or contributory negligence remained merely generalized submission without proof thereto.

34. The evidence by PW1 and PW2 support that the appellant's driver was solely to blame for the accident. orts the narrative by the respondent.
35. Accordingly, the trial court did not err in apportioning liability at 100% against the appellant on the basis of vicarious liability. The appeal on liability fails and is dismissed.

Quantum

36. According to the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR: -

‘An appellate court will not disturb an award for general 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 so arrived at a figure which was either inordinately high or low...’

37. Therefore, the appellate court will question exercise of discretion by the trial court in assessing damages where; i) the trial court committed an error in principle; and or ii) the damages is so inordinately high or low as to represent an entirely erroneous estimate of damages.
38. The appellant has challenged the award of Ksh.280, 000/- for soft tissue injuries. I have considered the fact that injury of a fracture was not listed in the initial treatment notes. The medical treatment notes from Narok referral and district hospital, Murage clinic and Chista Marriane Hospital in Kisii captured only soft tissue injuries.
39. PW4- Patrick Mwanga acknowledged that the documents referred to did not have evidence of a fracture. It is only a P3 form filled on 01.09.2015, almost 8 months after the accident which talks of a fracture.
40. PW3-Hillary Kiptoo testified that a fracture was not mentioned on the discharge summary.
41. Accordingly the trial court made the correct finding that the injuries suffered by the 1st respondent were soft tissue injuries.
42. In *Michael Okello v Priscilla Atieno* H.C.C.A. No. 45 Of 2019, the plaintiff was awarded Kshs 250,000/= for soft tissue injuries.
43. I find that above case to have comparable injuries with those suffered by the 1st respondent herein. Considering the inflation rates I find the award of Kshs. 280,000/= to be just and reasonable. I therefore uphold it.
44. Of special damages, the appellant has stated that the special damages awarded by the trial court were excessive.
45. The 1st respondent in his plaint pleaded Kshs. 14,130/= as special damages.
46. PW1 produced medical expenses receipts of a total of Kshs. 930/=, medical report receipt of Kshs. 3,000/=, receipts for four demand letters of Kshs. 8,000 and motor vehicle search of Kshs. 2,200/= as P Exh 7A,7 B, 6A, 8A, 9A,9B,9C,9D, 11B, 13A, 12B and 14B respectively.
47. The trial magistrate did not consider Kshs, 8,000/= as special damages on the ground that it was not clear what it was spent on. Special damages must be pleaded specifically and strictly proved. It



appears from his arguments, that the 1st respondent is startled that, despite specifically pleading as, and providing a receipt for kshs. 8,000, the trial court did not award the special damages thereto. At this juncture, it is profitable to unpack special damage in law.

Unpacking Special Damages

48. There are varying uses of the term ‘special damage’ in law. In certain types of case, the plaintiff must prove special damage in order to establish a cause of action. For instance, in a case of a tort of public nuisance, the plaintiff must prove that he has suffered special damage- damage more peculiar to himself more than any other person. In this sense, special damage has a direct bearing on the substantive law applicable on the subject.
49. But, there are other types of cases especially action on personal injury where special damages refer to specific financial or monetary loss or expense incurred as a direct result of the accident. Such loss or expense, must be specifically pleaded and strictly proved. If therefore, any item in special damages is inadequately pleaded, or not strictly proved in the sense of the law, it cannot be recovered. This really relate to rules on pleadings and evidence.
50. The conundrum is in the requirement that special damages must be ‘strictly proved’. Strict proof of special damages entails that; i) the item claimed is special damages within the applicable law; and ii) is supported by evidence, which necessitated a better understanding of what special damages in personal injury claims refer to. It bears repeating that the item in question relate to legal fee or costs incurred on demand letters written before action. The court is aware that, in civil proceedings such as for damages for malicious prosecution, legal fee incurred in defending the criminal case in question, may be claimed as special damages. Nevertheless, it is doubtful whether legal fee or costs incurred on demand letters written before action should be claimed as special damages in a claim for personal injury rather than as costs under the Advocates Act.
51. There was no clear explanation as to the inclusion of the item as special damages; therefore, this is a case where the item listed as special damages was not strictly proved. Accordingly, although Kshs. 8000 was specifically pleaded as special damages, it will not be awarded merely because a receipt was produced. The expense must be connected to the cause of action as special damages which are claimable as such. The item was properly declined. The 1st respondent proved and is entitled to special damages in the sum of Kshs. 6,130/= which was duly awarded by the trial court.
52. In the upshot, the appeal on quantum and liability fails and is dismissed.
53. The respondents shall have costs of the appeal.
54. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 20TH DAY OF SEPTEMBER, 2023.

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F. GIKONYO M.

JUDGE

In the presence of:-

1. Modi for the Appellant
2. Brenda Wanyasa holding brief for Ndegwa for the 1st Respondent



3. No appearance for Gachoka for the 2nd and 3rd Respondent

4. Mr. Muraguri – CA.

