



**JTG Enterprises Ltd v Mutai (Civil Appeal E033 of 2022)  
[2023] KEHC 24464 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24464 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E033 OF 2022  
RL KORIR, J  
OCTOBER 18, 2023**

**BETWEEN**

**JTG ENTERPRISES LTD ..... APPELLANT**

**AND**

**KIPKOECH MUTAI ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Principal Magistrate, Kiniale L. at the Principal Magistrate's Court at Bomet, Civil Suit Number E111 of 2021)*

**JUDGMENT**

1. The Respondent (then Plaintiff) sued the Appellant (then Defendant) for General and Special Damages that arose from a road traffic accident that involved the Motor Vehicle Registration Number KDC 107E and Motor Cycle Registration Number KMEX 599K.
2. The trial court conducted a hearing where three witnesses testified on behalf of the Respondent (then Plaintiff) and none testified on behalf of the Appellant (then Defendant).
3. In its Judgement dated 18th July 2022, the trial court awarded Kshs 1,500,000/= as General Damages and Kshs 16,500/= as Special Damages to the Respondent (then Plaintiff).
4. Being aggrieved with the Judgment of the trial court, JTG Enterprises Ltd through its Memorandum of Appeal dated 22nd July 2022 appealed against the whole Judgment and relied on the following grounds:-
  - i. That the learned trial Magistrate erred and misdirected herself in fact and law by awarding damages to the Respondent that were manifestly excessive.
  - ii. That the learned trial Magistrate erred in law and in fact in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries.



- iii. That the learned trial Magistrate erred in failing to consider and critically analyze the submissions made on behalf of the defendants and thus arrived at an unjustifiably high award for the injuries sustained.
  - iv. That the learned Magistrate's award on damages was inordinately high.
  - v. That the learned trial Magistrate erred in law and in fact in awarding damages that were neither properly pleaded nor sufficiently proved as by law required.
  - vi. That the learned Magistrate was in error of law and fact in awarding damages that were not proportionate to the injuries sustained by the Respondent.
  - vii. That the learned trial Magistrate failed to consider that the Plaintiff had fully or substantially healed while assessing the award on damages.
  - viii. That the learned trial Magistrate erred in law and in fact in finding the Appellant 100% liable for the accident.
  - ix. That the learned Magistrate's finding on liability went against the weight of the evidence.
  - x. That the learned trial Magistrate erred in law and in fact in failing to find that the Plaintiff/ Respondent had failed to make out his case and hence dismiss the same.
  - xi. That the learned trial Magistrate erred in law and in fact in finding that the mere fact that the Appellants did not adduce evidence then ipso facto the Respondent's case was proved.
  - xii. That the learned trial Magistrate erred in law and in fact in failing to take into account certain considerations material to an estimate of evidence.
5. My duty as a first appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR.

**The Plaintiff's/Respondent's case.**

- 6. Through his Complaint dated 16th September 2021, the Respondent stated that on 18th July 2021, while riding Motor Cycle Registration Number KMEX 599K he was knocked down by Motor Vehicle Registration Number KDC 107E.
- 7. The Respondent stated that the Appellant being the owner or proprietor of Motor Vehicle Registration Number KDC 107E, was negligent in causing the accident and particularized the negligence in paragraph 4 of the Complaint.
- 8. That as a result of the accident, he suffered the following injuries: -
  - i. Open fracture of the right tibia
  - ii. Closed fracture of the left tibia
  - iii. Multiple soft tissue injuries of the limbs.
- 9. The Respondent prayed for Special and General Damages against the Appellant



### **The Appellant's/Defendant's case**

10. Through its undated statement of defence, the Appellant denied that he was the registered owner of Motor Vehicle Registration Number KDC 107E and further denied the occurrence of the accident or that the Respondent suffered any injuries.
11. The Appellant denied the particulars of negligence levelled against it. That if any accident happened, it was contributed to by the Respondent's negligence. It particularized the Respondent's negligence in paragraph 6 of his statement of its Defence.

### **The Appellant's Submissions.**

12. In its submissions dated 30th November 2022, the Appellant submitted that they relied on Dr. Malik's medical report (D. Exh 1) in which the doctor was of the opinion that the Respondent had fully healed. That when the Respondent was examined by both doctors, no permanent disability was found. The Appellant further submitted that expert evidence must be considered alongside other evidence. It relied on *Elizabeth Kamene Ndolo v George Matata Ndolo* (1996) eKLR.
13. It was the Appellant's submission that the award of Kshs 1,500,000/= was extremely high considering the injuries sustained by the Respondent and that the award was not accompanied by a reason. That this court had the authority to interfere with the quantum if the amount was inordinately high. It relied on *Butt v Kban* (1977) 1 KAR and *Henry Hilaya Ilanga v Manyema Manyoka* (1961) EA 705.
14. It was the Appellant's further submission that it was trite that awards must be consistent within limits and court awards for damages must be made taking into account comparable injuries and similar awards. It relied on *Denshire Muteti Wambua v Kenya Power & Lighting Company Limited* (2013) eKLR.
15. The Appellant submitted that the principle of compensation required that a Plaintiff receive no more and no less than his actual loss such that the compensation was fair to both the Plaintiff and Defendant.
16. It was the Appellant's submission that an award between Kshs 450,000/= to Kshs 500,000/= would be sufficient. It urged the court to consider *Titus Mburu Chege & another v JKN & another* (2018) eKLR, *Civicon Limited v Richard Njomo Omwancha & 2 others* (2019) eKLR, *Daniel Otieno Owino & another v Elizabeth Atieno Owuor* (2020) eKLR and *Aloise Mwangi Kabari v Martin Muiya & another* (2020) eKLR.
17. In regards to the liability, the Appellant stated that there was no proof that the eye witness was at the scene of the accident. That he did not record a statement with the police. The Appellant further submitted that his testimony be disregarded by this court.
18. It was the Appellant's submission that the police officer testified that he was not the investigating officer and that he did not visit the scene of the accident and did not know the status of the investigations. It was its further submission that the police officer did not have the police file in court which would have assisted in leading evidence through sketch maps and a covering report. It relied on *Lochab Brothers Limited & another v Johana Kipkosgei Yegon* (2017) eKLR and *Kennedy Nyangoya v Bash Hauliers* (2016) eKLR.
19. The Appellant submitted that the trial Magistrate was in error for finding that the mere fact that the Appellant did not adduce evidence then ipso facto the Respondent's case was proved. That the burden of proof did not shift to the Appellant at any instance as it was the Respondent's duty to prove its case



on a balance of probabilities. It relied on *Charter House Bank Limited (under statutory management) v Frank N. Kamau* (2016) eKLR.

20. It was the Appellant's submission that its driver was not charged with any traffic offence. That it was its prayer that liability be apportioned at 50:50 between the Appellant and the Respondent.

### **The Respondent's Submissions.**

21. Through his submissions dated 5th December 2022, the Respondent submitted that the Appellant entered appearance but failed to call any witnesses and was therefore held 100% liable. He relied on *Gateway Insurance Co Ltd v Jamila Suleiman & another* (2018) eKLR, *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* (2021) eKLR.
22. It was the Respondent's submission that he had two witnesses and the police officer's finding was that the Appellant's driver failed to keep to his lane and knocked down the Respondent when overtaking another lorry. That this evidence was corroborated by Benard Kipkorir and that the Appellant did not controvert this evidence. It was his further submission that the Appellant was rightly held to be 100% liable. He relied on *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC NO. 834 of 2002, *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No. 1243 of 2001, *Karuru Munyoro v Joseph Ndumia Murage & another* HCCC NO. 95 of 1988 and *Interchemie EA Limited v Nakuru Veterinary Centre Limited* (Milimani) HCCC No. 165B of 2000.
23. The Respondent submitted that the trial court made an award that was commensurate to the injuries he suffered and that the award was within the range of similar injuries. That the Appellant offered no documentary proof to controvert the injuries he suffered.
24. It was the Respondent's submission that the award was not inordinately high and that there was no evidence that the trial Magistrate acted upon a wrong principle or misapprehended the law. That courts have issued awards of between Kshs 1,500,000/= to Kshs 2,000,000/= for similar injuries to that of the Respondent. He relied on *George William Awuor v Beryl Awuor Ochieng* (2020) eKLR, *Lucy Waruguru Gatundu v Francis Kinyanjui Njuku* (2017) eKLR, *James Okongo v Elmat Sagwe Ogega* (2021) eKLR, *James Katua v Simon Mutua Muasya* (2018) eKLR and *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* (2006) eKLR.
25. I have gone through and carefully considered the Record of Appeal filed on 2nd November 2022, the Supplementary Record of Appeal filed on 1st February 2023, the Appellant's written submissions dated 30th November 2022, and the Respondents' written submissions dated 5th December 2022. The following two issues arise for my determination: -
- i. Whether liability was apportioned correctly.
  - ii. Whether the award on quantum was unreasonably high.

### **Whether liability was apportioned correctly.**

26. Kipkoech Mutai (PW2) testified that on the material day (18th July 2021), motor vehicle registration number KDC 107E knocked him down as he was riding motor cycle registration number KMEX 599K along Bomet-Kapkwon thereby road causing him injuries. He produced a copy of records from NTSA and the same was marked as P.Exh6. It indicated that as at 1st September 2021, the Appellant was the owner of motor vehicle registration number KDC 107E (hereinafter referred to as the subject motor vehicle). The production of P.Exh 6 was not disputed by the Appellant and the ownership of the said



motor vehicle was not challenged during cross examination. It is therefore my finding that at the date of the accident, motor vehicle registration number KDC 107E belonged to the Appellant.

27. It was PW2's testimony that the subject motor vehicle knocked him down as it was overtaking another lorry. It was his further testimony that he was on his lane when he was hit and that he blamed the driver of the subject motor vehicle for the accident. When he was cross examined he stated that the accident happened on his lane.
28. Benard Kipkoror (PW3) testified that he witnessed the accident. That on the material day, he was riding behind PW1 when he saw a lorry coming from the opposite direction. That the overtaking lorry veered on PW2's lane and hit him. When he was cross examined, he confirmed that he was riding behind PW2 on the material day. He also stated that he recorded his statement with the police.
29. The police abstract marked as P.Exh 1 confirmed the occurrence of the accident between the subject motor vehicle and motor cycle registration number KMEX 599K on the material day at around 12.30 p.m.
30. The Appellant filed its defence denying culpability in the accident. It however did not call any witness to testify or adduce evidence that would explain the circumstances of the accident or to substantiate its pleadings. I concur with Mwongo J. in *Michael Matonye Munyao & another v JNK (suing as the legal administrators of the estate of JOA)* (2019) eKLR, where he stated that:-

“I do not see how the case of WK v Ghalip is of any assistance to the appellant here. This being an appeal, and no evidence on contributory negligence, indeed no defence evidence at all, having been adduced, there can be no appeal on contribution. The WK case clearly demands that there must be evidence of the blameworthiness of both parties before apportionment of liability. In this case there is absolutely no defence evidence at all. In the brief case of *Interchemie EA Ltd v Nakuru Veterinary Centre Ltd* [2001] eKLR, Mbaluto J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. In this light, I have no choice but to treat this as an appeal purely against the quantum of damages awarded”.

31. Similarly, I am persuaded by Lesiit J. in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* (2009) eKLR, where she held:-

“The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged. In *AUTAR SINGH BAHRA AND ANOTHER v RAJU GOVINDJI* HCCC NO. 548 of 1998(UR) Mbaluto J. held:

“ Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”



32. A trial court has discretion to apportion liability after hearing the witnesses and considering the evidence adduced. An appellate court will interfere only if it finds that the trial court was clearly wrong, or apportioned liability based on no evidence or applied the wrong principle. In *Khambi and Another v Mahithi and Another* (1968) EA 70, it was held that:-

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

33. It was clear from the proceedings that the testimonies of the Respondent (PW2) and Benard Kipkoror (PW3) who was an eye witness to the accident were uncontroverted. The Appellant on the other hand failed to call witnesses or adduce evidence and as such the assertions contained in his defence remained allegations. In the totality of the evidence adduced, it is my finding that the Respondent discharged his burden of proof as he was able to demonstrate to the court the circumstances of the accident. It was therefore not true for the Appellant to suggest that the trial court apportioned liability on the basis of the Appellant’s failure to adduce evidence.

34. It is true that No. 7XXX2 PC Reyand Mwembe Nzae (PW1) was not the investigating officer and that he did not produce sketch maps or a covering report to assist the court to have an idea as to how the accident occurred. However, the same was not fatal to the Respondent’s case as I am satisfied by the sufficiency of PW2 and PW3’s testimony regarding the circumstances of the accident.

35. It is therefore my finding that the apportioning of 100% liability on the Appellant by the trial court was proper and just and I so hold.

#### **Whether the award on quantum was unreasonably high.**

36. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Section 107 of the *Evidence Act* provide as follows:-

- (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.

37. In determining general damages, the court has to examine the extent and gravity of the injuries suffered by the Respondent. The Respondent stated that he had suffered the injuries listed in the Plaintiff. The Medical Report by Dr. Ronald Kibet marked as P.Exh 2 and the 2nd Medical Report by Dr. M.S. Malik marked as D.Exh 1 confirmed the injuries sustained by the Respondent as a result of the road traffic accident.

38. There was no challenge by the Appellant during cross examination as to the production of the two medical reports and as to the type of injuries the Respondent suffered. Flowing from the above, I am satisfied the Respondent suffered the injuries as described and listed in the Plaintiff.

39. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. In the case of *Stanley Maore*



*v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 (2004)eKLR*, the Court of Appeal stated that:-

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

40. The injuries suffered by the Respondent were fractures and soft tissue injuries. I have found the following cases quite helpful in terms of comparison:-

- I. In *Nahson Nyabaro Nyandega v Peter Nyakweba Omboga* (2021) eKLR where the court reduced an award of Kshs. 900,000/= to an award of Kshs. 650,000/=. The Respondent had sustained bruises on the face, compound fracture of the right tibia and a cut wound on the right leg.
- II. In *Daneva Heavy Trucks & another v Chrispine Otieno* (2022) eKLR the court awarded Kshs 800,000/= for a fracture of the pelvis and fracture of tibia and fibula.
- III. In *Aloise Mwangi Kahari v Martin Muitya & another* (2020) eKLR, the Respondent suffered a compound fracture of right tibia and fibula, bleeding from left lower limb and a swollen leg. The trial court’s award of Kshs 300,000/= was substituted with an award of Kshs 500,000/=

41. The Court of Appeal in the case of *Fredrick Masaghwe Mukasa v Director of Public Prosecutions & 3 others* (2019) eKLR stated that: -

“In doing so, we shall be guided by the well-established principles as set out in *Mbogo & another -v- Shah* (1968) EA 93, where the predecessor of this Court stated that an appellate Court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the trial court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

In order for this appeal to succeed, the appellant must bring himself within the ambit of the principles set out in *Mbogo v Shah* (supra). He must demonstrate to the satisfaction of this Court that the trial court exercised its discretion wrongly in making the conclusions that it did.”

42. I have considered the authorities provided by both parties and I have also taken into account the nature of injuries suffered by the Respondent and it is my finding that the award of Kshs 1,500,000/= was inordinately high. A comparable award of Kshs 800,000/= would be sufficient compensation for the injuries sustained. Consequently, the trial court’s award of Kshs 1,500,000/= is set aside and is substituted with the award of Kshs 800,000/=.

43. Regarding special damages, it is trite that they ought to be specifically pleaded. The Court of Appeal in *Caltex Oil (Kenya) Limited v Rono Limited* (2016) eKLR held that:-

“.....If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a



specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.”

44. The Respondent did not particularize the special damages in the Plaint but made a prayer for special damages of Kshs 16,500/=. I have gone through the trial court record and I have only found two receipts, one was a receipt for the copy of records from NTSA that was marked as P.Exh 6b which showed a payment of Kshs 550/- and the other was a receipt for the CR12 search marked as P.Exh8b which showed a payment of Kshs 600/=.
45. There was no other evidence to support the trial court’s award of Kshs 16,500/= under this head. Consequently, the trial court’s award of Kshs 16,500/= is substituted with Kshs 1,150/=
46. In the final calculation, the summation of the General and Special Damages awarded is Kshs 801,150/ =.
47. In the end, the Memorandum of Appeal dated 22nd July 2022 succeeds as the Damages awarded to the Respondent are reduced from Kshs 1,516,500/= to Kshs 801,150/=.
48. Each party shall bear their costs in this Appeal while the costs of the suit remain as awarded by the trial court.
49. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 18TH DAY OF OCTOBER , 2023.**

.....

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of Ms. Mbugua for the Appellant, Mr. Ngeno for the Respondent and Siele (Court Assistant)

