



**Kariuki & another v Atenya (Civil Appeal E72 of 2022)
[2023] KEHC 23775 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E72 OF 2022
SC CHIRCHIR, J
OCTOBER 12, 2023**

BETWEEN

EDWARD KARIUKI 1ST APPELLANT

SAMMY NJUGUNA NGUGI 2ND APPELLANT

AND

PAUL OWORI ATENYA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. G Ollimo
(SRM) delivered on 15/09/2022 in Butere PMCC No. 32 of 2019)*

JUDGMENT

1. The Respondent herein filed Civil suit No. 32 of 2019 against the Appellants at the chief Magistrate's court in Butere seeking damages for injuries sustained as a result of a road traffic accident which occurred on 28th November, 2018 along Bungoma-Mumias road, involving the Appellant's vehicle Registration No. KD 184T, and the Respondent who was a pedestrian on the said road.
2. The Respondent attributed the accident to the negligence of the 2nd Appellant and the 1st Appellant under the doctrine of vicarious liability.
3. The trial court delivered Judgment in which the Appellants were held fully liable for the accident and the respondent awarded general damages of Kshs.700,000/= and special damages of Kshs.14,225/=.
4. The appellant being aggrieved by the Judgment filed this Appeal against both the determination on liability and the award of damages.
5. The Appellant has set out the following grounds of Appeal;



- a). That the learned trial magistrate erred in law and in fact in holding the appellants 100% liable in negligence
 - b). That the learned trial magistrate erred in law and in fact in failing to dismiss the respondent's suit in view of the evidence adduced.
 - c). That the learned trial magistrate erred in law and in fact by failing to apportion liability on the basis of contributory negligence on the part of the plaintiff in view of the evidence adduced.
 - d). That the learned trial magistrate erred in law and in fact in failing to consider the submissions of the appellant on both issues of liability and quantum
 - e). That the learned trial magistrate erred in law and fact in using the wrong principles in assessment of damages thereby arriving at an erroneous decision.
 - f). That the learned trial magistrate erred in law and in fact by failing to take into account the evidence on record hence arriving at a wrong decision
 - g). That the learned trial magistrate erred in law and in fact by adopting the wrong principles in assessment of damages.
 - h). That the trial magistrate erred in law and in fact by awarding the respondent Kshs. 700,000/= general damages which was excessive thereby arriving at a wrong decision.
 - i). That the learned trial magistrate erred in assessing general damages at Kshs. 700,000/= and failed to apply the principles applicable in award of damages and comparable award made for similar injuries.
6. The appeal was canvassed by way of written submissions.

Appellant's submissions.

7. The Appellants submit that the trial court erred in holding that the accident occurred off the road when there was no such evidence. They further point out that the Respondent's witnesses contradicted each other in that whereas the investigation's officer told the court that the Respondent was hit while off the road, the respondent testified that he was hit at the edge of the road.
8. The Appellants further argue that contrary to the findings of the trial court, there was no evidence indicating that the driver of the subject vehicle lost control or that there were debris on the left side of the road.
9. It is contended that the court made its findings on new evidence which was introduced at the stage of submissions by the respondent, and not on the basis of the witnesses' accounts.
10. It is further argued that the trial court ignored the evidence of the driver to the effect that the respondent made an abrupt turn in an attempt to cross the road.
11. That both the respondent's and the driver's testimony was consistent in that the accident occurred on the left lane as one faces the general direction of Mumias.
12. On quantum, the appellants submit that the award was excessively high and that it should be disturbed.



13. The Appellants argue that there were inconsistencies in the medical records produced and hence the injuries allegedly sustained were not proved. It is further pointed out, albeit on without prejudice basis, that the Doctor's report contained injuries that were not on the initial treatment chits and therefore it was incumbent upon the trial court to first make a finding on what injuries were sustained by the Respondent before making an assessment on the appropriate award. In failing to first decide on the injuries, the Appellants argue, the Trial court erred.
14. The Appellant concludes by proposing an award of ksh. 450,000 as an appropriate award.
15. The Appellants have relied on a number of Authorities which I have perused.

Respondent's submissions.

16. The Respondent submits that the Respondent's testimony on how the accident occurred was corroborated by the investigation's officer, and the presence of the debris on the left side of the road indicated the point of impact. It is further submitted that by his own admission, the driver of the subject vehicle did not hoot or break to avoid the accident.
17. It is argued that since the driver admitted that he had seen the respondent ahead of him pulling the handcart, it behoved him to slow down, yet based on the seriousness of the injuries the driver did not slow down.
18. On the alleged failure to produce the sketch plan of the accident scene the Respondent argues that the Appellant bore the same responsibility to provide them.
19. On the issue of quantum, the respondent argues that the trial court arrived at the middle ground based on the Authorities cited by the parties.

Summary of evidence

20. PW1, was the investigation's officer. He told the court that the respondent was pulling a hand- cart along-Bungoma- Mumias road heading towards Mumias when he was hit by motor Vehicle Reg. No. KCD184 T which was headed in the same direction .He stated the pedestrian was hit 2 meters from the tarmac , on the left side.
21. On cross examination, he testified that he visited the scene at around 12.30 hours accompanied by the 2nd appellant but the respondent was not at the scene. He stated that, he got the particulars on how the accident occurred from the respondent and other eye witnesses. He did not have the police file or the sketch map of the accident scene. He blamed the accident on the 2nd Appellant and made a recommendation for his prosecution.
22. PW2 was Dr Charles Andayi . He testified that on 21.12.2018, he examined the respondent following a road accident and found that the respondent had sustained the following injuries:Cut wound to the headBlunt injuries to the chestClosed fractures of right tibia and fibulaAbrasion to the elbow.
23. On cross examination, the witness confirmed that he did not treat the patient but examined him one month after the accident, perused the discharge summary and looked at the x- ray films
24. PW3 was the respondent. He told the court that on 28.11.2019, he was pulling a hand- cart from the general direction of Bungoma towards Mumias when he was hit from the rear by the



Appellants' vehicle. He sustained injuries on the head and chest. He also fractured his leg and the right hand. He was admitted at St. Mary's hospital.

25. On cross examination, he stated that he was going to Mayoni centre which was located on the right-hand side of the road and that the accident happened at Mayoni junction. He testified that he was taking water to his client at Mayoni centre and the accident happened when he was trying to cross the road. He insisted that he was on the extreme left on the edge of the road.
26. PW5 was a clinical officer from St. Mary's Hospital. He confirmed that the respondent was treated at the facility; he was admitted on 28.11.2018 and discharged on 30.05.2018; that the Respondent sustained injuries on his lower limb and bleeding on the chest.
27. He told the court that the Respondent was diagnosed with a case of mild head injury and a fracture of the tibia and fibula
28. On cross examination, he confirmed that he was not the treating doctor and could not tell if the patient had any complications at the time of discharge.
29. The respondent closed his case.
30. Dw1 was the 2nd appellant herein. He adopted his written statement as his evidence-in-chief. He stated that that he was heading the same direction as the respondent; that the respondent was pulling his cart at the edge of the road; that he respondent suddenly entered the road; that he hooted and braked to warn him but it was too late.
31. On cross -examination, confirmed that an accident did occur involving his vehicle and the Respondent. He stated that he driving at a speed of 50 km/hr. The road was narrow; he could not swerve to the right since there were oncoming vehicles.
32. On re-examination, he insisted that he was unable to avoid the accident because the respondent joined the road abruptly.

Determination

33. This is a first appeal and the role of this court as set out in many past decisions is to relook at the evidence, re-evaluate it and come to its own conclusion, without ignoring the conclusions arrived at by the trial court.
34. There are two issues that arise for determination in this Appeal, namely:
 - a). who was responsible for the subject accident?
 - b). whether the award on general damages was too excessive.

Who was responsible for the subject accident?

35. The case of Michael Hubert Kloss & Another –v- David Soreney & 5 Others 2009 eKLR, acts as a guide on determination of liability. It was held: the determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows: “To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or



scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

36. I have considered the evidence tendered by both parties in support of their respective cases. The act of negligence must be proved with cogent evidence, and the burden, as always, belongs to the plaintiff, the respondent in this case.
37. There is common ground that the two parties were heading the same direction, one driving, while the other was walking while pulling a hand- cart. It is also not in dispute that both were using the left lane as one faces Mumias direction. The respondent said he wanted to, but had not crossed the road while the Appellant insist that the respondent had entered the road.
38. A sketch plan of the accident scene would have helped the court in ascertaining the point of impact and hence an indication on whether the point of impact was indeed on or off the road. This was never produced. The onus was on the plaintiff to produce the sketch plan as this would have corroborated his testimony. To assert that the defence had similar responsibility is an attempt to shift the burden to the defence.
39. The respondent did also admit that he never saw the vehicle before the collision, suggesting that he attempted to cross the road without ascertaining if it was safe to cross.
40. I find the Appellant’s testimony on the fact that the accident happened on and not off the road to be more plausible and this is why: - The respondent though denying that he was on the road admitted that his intention was to cross over to the opposite side.
41. I have also perused the record and I agree with the Appellant’s submission that there was no evidence on the location of the debris or any suggestion that the Appellant had lost control of the vehicle. It is apparent that the loss of control or the presence of the debris came from counsel’s submissions and not from the testimonies of witnesses. To the extent that the Trial court based its finding on the counsel’s evidence as opposed to witness’ accounts it did indeed error.
42. Both pedestrians and motorists are expected to be careful on the roads, however it must always be borne in mind that by virtue of being in control of a potentially lethal machine, motorists bear the greater burden to be more careful on the roads.
43. Further despite insisting that he was driving at a speed of about 50km/hr, I agree with the respondent that the seriousness of the injuries suggest a higher speed.
44. The appellant also admitted that he could not break, because the respondent joined the road abruptly. This however contradicts his evidence in chief to the effect that he braked and hooted on the Respondent.



45. In view of the foregoing, am satisfied that each party played a role in the causation of the accident. In arriving at a 100% verdict against the Appellants, trial court's finding in this regard ignored the obvious acts of negligence on the part of the respondent.
46. Consequently, I hereby set aside the 100% verdict and substitute it with 75% as against the Appellant and 25% against the respondent.

Whether the award on general damages was too excessive.

47. The principles upon which an appellate court can interfere with the assessment of damages by the trial court has been restated by the superior courts. In the case of Charles Oriwo Odeyo vs Apollo Justus Andabwa & Ano (2017) e KLR the court held: " On the issue of damages , it is now settled that the award of damages is within the discretion of the Trial court and the Appellate court would only interfere on particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is too excessive or so low that no reasonable tribunal would have awarded , or (c) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at a wrong decision(see Butler vs Butler (1984) KLR 225."
48. According to Dr. Charles Andia, the respondent sustained the following injuries:
 - a. Closed fracture of the right tibia and fibula
 - b. Cut wound to the occipital region of the head and
 - c. Blunt injury to the chest
 - d. Abrasions of the left elbow joint.
49. The Appellant has taken issue with Dr. Andia's report arguing that there was no basis for his assertion that the Respondent suffered soft tissue injuries.
50. However, I notice that the Appellant did not take the witness to task on this at cross-examination. He was not asked to explain how he arrived at the conclusion that the respondent had also sustained soft tissue injuries. Further, and in any event, there was no other medical report submitted by the Appellant to counter that of Dr. Andia. It is trite law that a professional opinion can only be countered by a fellow professional. To the extent that Dr. Andia's findings were not contested, the trial court cannot be faulted for taking Dr. Andia's report as it is. I have no reason too to fault the said Doctor's findings as his report was the only one availed.
51. The trial court made an award of ksh. 700,000 for the injuries. was this too excessive?
52. In the case of Power Lighting Comp. Ltd & another v Zakayo Saitoti Naingola & another [2008] eKLR the court held; "On quantum the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages:-
 - (1) Damages should not be inordinately too high or too low.
 - (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
 - (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.



- (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.....”.
59. In assessing the damages, the trial magistrate considered not just the nature and extent of these injuries but also past awards for similar injuries.
60. I also have no reason to fault the trial court on this award. The award of ksh. 700,000 compares well with recent decisions for similar injuries. In this regard I have taken into account the following recent decisions:-(a) Nahashon Nyabaro vs Peter Nyakweba (2021) e KLR , Where the court awarded ksh. 650,000 for fairly similar injuries and (b) Hussein Sambur Hussein vs Shariff .A. Abdulla & 2 others (2022)e KLR where fairly similar injuries attracted an award of ksh. 600,000.
61. In conclusion, this Appeal partially succeeds, and I proceed to make the following orders:
- a). The Trial court’s finding on liability is hereby set aside.
 - b). Judgment is hereby entered for the Respondent as against the Appellant in the ratio of 75% as against the Appellant and 25% against the Respondent.
 - c). The trial court award on general damages is upheld subject to apportionment as aforesaid
 - d). The award will attract interest at court rates from the date of judgment at the trial court.
 - e). Each party to meet their own costs in this Appeal

Dated, signed and delivered virtually at Kakamega this 12th day of October 2023.

S. CHIRCHIR

JUDGE.

In the presence of:

E. Zalo- Court Assistant

Ms Bii for the Appellants

Mr. Wandallah for the Respondent.

