



Kivuli v King'ola & 3 others (Sued as the trustees of the beneficiaries of the Estate of Koli King'ola Samwel - Deceased)) (Civil Appeal E080 of 2021) [2023] KEHC 24238 (KLR) (9 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E080 OF 2021
GMA DULU, J
OCTOBER 9, 2023**

BETWEEN

FAITH MUMO KIVULI APPELLANT

AND

BENJAMIN KING'OLA 1ST RESPONDENT

JANET WAENI KING'OLA 2ND RESPONDENT

JENNIFER NGARI KING'OLA 3RD RESPONDENT

BENJAMIN MWONGELA KING'OLA 4TH RESPONDENT

SUED AS THE TRUSTEES OF THE BENEFICIARIES OF THE ESTATE OF KOLI KING'OLA SAMWEL - DECEASED)

(From the judgment of Hon. G. R. Sagero delivered on 2nd November 2021 in Makueni Chief Magistrate's Court Civil Case Number 211 of 2019)

JUDGMENT

1. In a judgment delivered on 2nd November 2021, the trial Magistrate entered judgment for the plaintiff (now appellant) against the defendants (now respondents) and after adopting the liability finding of 80%:20% in Makueni Magistrate's Civil Case 212 of 2019 concluded as follows:-

“In the upshot there is judgment for the plaintiff against the defendant of Kshs. 162,100/= being general damages of Kshs. 200,000/= less 20% contribution plus 2,100/= special damages. The plaintiff will also have the costs and interest of the suit.”



2. Dissatisfied with the judgment and award of the trial court, the appellant (who was the plaintiff in the trial court) filed this appeal through counsel Mutuka Wambura & Associates Advocates, and relies on a Memorandum of Appeal dated 1st December 2021 listing the following grounds:-
 1. The learned Magistrate erred in law and fact by failing to find that the appellant was a pillion passenger and therefore could not have contributed to the accident.
 2. The learned trial Magistrate erred in law and fact by disregarding the appellant's testimony when the same was not rebutted by the respondents.
 3. The learned Magistrate erred in law and in fact by apportioning liability of 20% on the appellant when she was a pillion passenger and could not have contributed to the accident.
 4. The learned Magistrate erred in law and fact by failing to find the respondent's 100% liable despite overwhelming evidence on record.
 5. The learned Magistrate erred in law and fact by failing to take into consideration the appellant's evidence on liability hence arriving at a wrong decision.
 6. The learned Magistrate erred in law by failing to consider the appellant's submissions and authorities on liability hence arriving at an erroneous finding.
3. In response to this Memorandum of Appeal, the respondents filed a cross-appeal through counsel Cootow & Associates Advocates on 30th November 2021 on the following grounds:-
 1. That the learned Magistrate erred in law and in fact in shifting the burden of proof in an action founded on negligence to the respondents thereby misdirecting herself in law and thus arriving at a completely erroneous decision.
 2. That the learned trial Magistrate erred in law and in fact in failing to consider all the material facts that had been placed before the court and thereby failed to take into account relevant matters that he ought to have considered and instead considered irrelevant matters and as a result arrived at a completely erroneous decision.
 3. The learned trial Magistrate erred in law and in fact in apportioning liability at 80% to 20% in favour of the appellant when the evidence and testimony adduced during trial clearly showed that the appellant's negligent and reckless acts were what occasioned the accident, the subject matter of the suit herein.
 4. The trial Magistrate erred in law and fact by misdirecting himself leading to a finding on liability when the evidence adduced did not support such a finding and thereupon assessing damages erroneously without any evidence on liability having been established.
 5. That the learned trial Magistrate erred in law and in fact in failing to appreciate or taking into consideration the respondents' submissions or at all.
 6. That the learned trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the respondents.
 7. That the trial Magistrate erred in awarding the sum of Kshs. 200,000/= as general damages which was inordinately high and excessive in the circumstances thus occasioning a miscarriage of justice.



8. That the learned trial Magistrate consequently erred in law and in fact in awarding costs and interest thereto.
4. The appeal and cross-appeal were canvassed through written submissions. In this regard, I have perused and considered the submissions filed by counsel on both sides. I acknowledged that both sides cited and relied on decided court cases.
5. This is a first appeal. That being the position I have to be guided by the principle consistently applied by courts that I have a duty to revisit and evaluate the evidence on record afresh and make my own independent conclusions while bearing in mind that I did not have the opportunity of seeing witnesses testify, and give due allowance for that disadvantage – see *Selle & Another =Versus= Associated Motor Boat Company Ltd (1968) EA 123*.
6. This appeal is on both liability and quantum of damages. With regard to liability which is a finding based on facts, I have to be guided by the reasoning in the case of *Mwangi =Versus= Wambugu (1984) KLR 453* in which it was held that an appellate court will normally not interfere with a finding of fact unless such finding is based on no evidence, or it is based on a misapprehension of the evidence. In addition, with regard to a finding on liability I have to be guided by the principle that there is no liability without fault, see *Kiema Mutuku =Versus= Kenya Cargo Handling Services Ltd (1991) KLR*.
7. With regard to an appellate court’s power to interfere with the quantum of damages assessed by a trial court, I have to be guided by the principle restated in the case of *Kenfro Africa Ltd & Another =Versus= Lubia & Another (1985) eKLR* in it was stated that

“...the principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied either that the Judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage.”
8. Coming back to our appeal, at the trial the appellant called one witness. It was PW1 Faith Mumo Kivuli, who relied on several documents. It was her evidence that she was a passenger on a motor cycle (boda boda) and while being so driven on the road at a corner on 1st September 2019 a Probox motor vehicle appeared at high speed, lost control and hit them and she was injured. She was cross-examined and re-examined. A medical report prepared by Doctor Nathan Wafula was produced by consent. The respondents (cross-appellants) did not call any witness.
9. It is clear that with regard to liability, that only the appellant testified as to what happened during occurrence of the accident. The driver of the motor vehicle said to be dead, did not testify, nor any other witness for the respondents or cross-appellants herein. The appellant was cross-examined thus her evidence was put to test.
10. I note that the appellant was unshaken when she stated in examination in chief that the motor vehicle was at high speed, lost control and crossed to their side and hit her. She was also a pillion passenger and was not able to avert or mitigate the accident in any way as she was neither in control of the motor cycle nor the Probox motor vehicle.
11. On that account, in my view, the Magistrate erred in finding the appellant liable in contributory negligence, as she was a victim of circumstances.



12. I thus find that the trial court erred in finding contributory negligence against the appellant, and find that the driver of the motor vehicle was 100% liable in negligence, as the respondent (cross-appellants) also did not show any negligence on the part of the motor cycle driver.
13. I now turn to the quantum of damages assessed by the trial court. Such assessment of quantum of general damages has to be in line with comparable awards for similar injuries suffered.
14. The injuries suffered by the appellant herein were not seriously contested. They were blunt injuries at the left knee joint. No permanent incapacity was testified to in evidence.
15. In my view from the evidence on record, and the authorities cited to the trial court, the award of general damages of Kshs. 200,000/= cannot either be said to be inordinately low or inordinately high. I will thus uphold the award of general damages.
16. The effect of my above findings is that the cross-appeal is dismissed, and the appeal is allowed in respect of liability.
17. Consequently, and for the above reasons I order as follows:-
 - i. The cross-appeal is hereby dismissed.
 - ii. I allow the appeal to the extent that I set aside the 20% contributory negligence entered by the trial court, and instead find that the respondents (cross appellants) were 100% liable in negligence.
 - iii. The general damages payable to the appellant will be Kshs. 200,000/= Special damages 2,100/=
 - iv. The respondents (cross-appellants) will pay the appellant costs of appeal.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Motuku for appellant

Ms. Osewe holding brief for Owino for respondent

