



**Muhemberi v Musau (Civil Appeal 6 of 2022)  
[2023] KEHC 24299 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 6 OF 2022  
MW MUIGAI, J  
OCTOBER 24, 2023**

**BETWEEN**

**GERALD KAVINGHUA MUHEMBERI ..... APPELLANT**

**AND**

**FRANCIS MUIA MUSAU ..... RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF THE CHIEF  
MAGISTRATES' COURT AT MAVOKO BY THE HON. S. JALANGO (PM)  
DELIVERED ON 16TH DECEMBER 2021 IN MAVOKO CMCC NO 40 OF 2019)***

**JUDGMENT**

**Trial Court Record**

Plaint

1. This suit was initiated by a Plaintiff dated 23.01.2019 in which the Plaintiff averred that on 8.07.2018 he was a pedestrian along Nairobi Namanga Road headed to Keuwini Primary school whereof motor vehicle registration number KAM 911E which was so negligently driven, managed and /or controlled by the defendant, his servant and /or agent that the same was allowed to hit the plaintiff and as a result the Plaintiff sustained severe bodily injuries.
2. The negligence of the Defendant's driver, servant and/agent were particularized as follows;
  - a. Driving in excessive high speed in the circumstances.
  - b. Driving without due care and attention.
  - c. Driving so dangerously and /or so negligently and without regard to other road users and particularly the deceased.



- d. Driving recklessly and in total violation of the Traffic Rules.
  - e. Failure to slow down, stop, brake, swerve and / or take any reasonable step to avoid the said accident
  - f. Causing the said accident.
3. The Plaintiff particularized the injuries suffered as a result of the accident;
  - a. Major head injuries with Brain Swelling (edema) & Loss of consciousness
  - b. Blunt and bruise injuries on both knees
  - c. Frequent headaches with possibility of developing epilepsy.
4. The Plaintiff opined that the Defendant was vicariously liable for the accident and thus prayed for the following from the court;
  - a. General damages
  - b. Special damages as per paragraph 6
  - c. Cost of the suit
  - d. Interests on (a), (b), (c) above from the date of filing the suit.

#### **Statement Of Defence**

5. The Defendant entered appearance and filed its Defence dated 10.04.2019 denying in totality the contents of the Plaint. She contended that if the accident occurred, it was solely caused and or substantially contributed to by the negligence on the part of plaintiff whose negligence was particularized as follows;
  - a. Failing to keep any proper look out, observe or heed the presence or approach of motor vehicle KAM 911E.
  - b. Suddenly and without warning stepping into the road and into the side and alternatively into the path of motor vehicle KAM 911E.
  - c. Crossing or attempting to cross the road when it was not safe to do so and without due regard to the other road users- and especially the defendant.
  - d. Failing to take any steps or at all to ensure her safety while crossing the road or attempting to cross the road.
  - e. Walking in an erratic and haphazard manner and failing to adhere to the kerb drill
  - f. Crossing the road when it was not safe to do so on the face of the oncoming traffic
6. The Defendant asked the court to dismiss the suit with costs.



## Hearing

7. The Plaintiff called a total of two witnesses. PW1 was Francis Muia Musau, the Plaintiff. He adopted his statement dated 23.01.2019 which he stated that on 8.07.2018 he was a pedestrian along Nairobi Namanga road whereof motor vehicle registration number KAM 911E which was so negligently driven and/ or managed and or controlled by the defendant and or/ his agent/servant that the same was allowed to hit the plaintiff and as a result of which he sustained severe bodily injuries.
8. He testified that he was on the right side of the road when the accident happened and that he was knocked by motor vehicle registration number KAM 911E and sustained knee and head injuries. He produced documents as exhibits no. 2-8 respectively.
9. He stated that he was admitted for a period of two weeks in hospital and that he still experiences headaches. He blamed the driver of the motor vehicle for the accident.
10. Upon Cross examination, he stated that he was discharged on 7.7.2018- and the abstract showed that he was admitted on 8.7.2018. He was in comma for 3 days and was not drank. He stated that he was hit on the side of the road before crossing and the motor vehicle was over speeding and that the accident occurred at 3pm not at 9.45 pm as indicated in his statement.
11. PW2, CPL Wilfred Mburugu stated that he was based at Athi River Police Station and produced a police abstract no.1 in respect to an accident that occurred on 8.07.2018 along Namanga road at 22.30 hours. He stated that the accident involved a pedestrian and a motor vehicle registration number KAM 911E Mitsubishi canter
12. He stated that the pedestrian was crossing from the left to the right-side facing Nairobi. The driver who was headed towards Kitengela swerved to the right and hit the pedestrian. He stated that the driver of the motor vehicle KAM 911E was to be blamed for failure to keep to his lane. He stated that he was paid Kshs 5000 to attend court.
13. Upon cross examination, he stated that the accident occurred at 10.30 pm on 8.7.2018. He stated that the motor vehicle swerved to the right lane and the pedestrian was crossing the road. He also stated that the driver was not charged.
14. The Defence did not call any witness.
15. The Plaintiff made an application to amend the number plate of the vehicle to KCF 846G and not KCF 864G which was allowed.

## Trial Court Judgment

16. The Trial Court delivered its judgment on 16.12.2021 where he found the driver of the motor vehicle KAM 911E was to blame for the occurrence of the accident. The defence had failed to show how the pedestrian failed to keep a proper outlook, stepped on the road without warning or crossed the road when it was not safe to do so as the claims were not backed by any evidence. He thus apportioned liability at 100% as against the defendant in Favor of the Plaintiff.
17. In conclusion, judgment was entered in favour of the Plaintiff as follows;
  - a. General damages Kshs 800,000
  - b. Special Damages Kshs 3050



- c. Costs
- d. Interest from date of judgment

### **The Appeal**

18. Dissatisfied by this judgment and decree, the Appellant filed a Memorandum of Appeal on 14.01.2022 founded on the following grounds;
- a. That the learned Trial Magistrate erred in law and in facts by failing to properly scrutinize and evaluate the evidence tendered by the appellant and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of liability, quantum and compensation to the respondent.
  - b. That the learned Trial Magistrate erred in law and in fact in deciding the case against the weight of the evidence on record and apportioning liability at 100% against the appellant.
  - c. That the Trial Magistrate erred in law and fact in awarding kshs. 800,000 as damages as the said award is excessively high considering the nature of the injuries sustained by the respondent.
  - d. That the learned Trial Magistrate erred in law and in fact by holding the appellant liable without any proof or evidence on part of the respondent.
  - e. That the learned Trial Magistrate erred both in law and in fact by making an award on liability which is against the weight of the evidence before court and was without any consideration to the submissions of the appellant.
  - f. That the learned Trial Magistrate erred in law and in fact in failing to appreciate sufficiently or at all the judicial nature of the case that was before him finding the appellant liable merely because of the occurrence of the accident and that the injuries sustained and not because of any proved fault or negligence on the part of the appellant.
  - g. That the learned Trial Magistrate erred in both law and fact in making an award of quantum which is too high and was not supported by relevant authorities, guided by the doctrine of precedent, case law of similar facts and guided by the laws of natural justice and or commensurate with the injuries suffered by the plaintiff.
  - h. That the award on general damages and special damages was against the weight of the evidence before the court and was without any consideration to the submissions of the defence /appellants counsel whilst failing to take into account the amounts claimed by the respondent did not relate to the injuries as per the medical reports produced in court.



19. The Appellant sought the following orders from the Court;
  - a. The Judgment of 16<sup>th</sup> December 2021 be set aside.
  - b. The Court be pleased to assess the liability of the appellant.
  - c. The award of general damages if the appellants are found to be liable be reduced to a fair sum.
  - d. The appeal be allowed with costs.
  - e. The Court be pleased to make such further and other orders as it may deem just in the circumstances of the case.
20. The Appeal was disposed of by way of written submissions.

### **Appellant Submissions**

21. The Appellant filed submissions on 17. 5 .2023 in which she submitted on two main issues, liability and quantum on general damages. On liability, reliance was placed on the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Another(1968)* EA 123 which defined the duty of the appellate court in reaching a finding that it had no opportunity of hearing or seeing the parties as they testified.
22. It was contended that an appellate court can interfere with a trial court's finding on facts as crystallized by the court of appeal decision in *Ephantus Mwangi & Another Vs Duncan Mwangi Wambugu CA 77*. Where Kneller JA stated;

” a member of an appellate court is not bound to accept the learned judges’ findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities material to an estimate of evidence, or if the impression based on the demenour of a witness is inconsistent with evidence in the case generally”.
23. Further, reliance was placed in the case of *Mwana Sokoni Vs Kenya Bus Service Limited CA 35 OF 1985* where Hancox JA stated that an appellate court would disturb a finding on a fact.
24. It was submitted that the appeal falls within the parameters as laid out on the above authorities.
25. On quantum, while relying on the case of *Kipkebe Ltd Vs Moses Kauni Masaki , Civil Appeal No. 127 of 2004* that the award of general damages is an exercise of discretion by the trial court and the award depends on the peculiar facts of each case. Reliance was placed on the case of *Kemfro Africa Ltd t/a Merua Express and Another Vs A.M.Lubia and Another* where the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were set out.
26. It was contended that the medical report of Dr. M.W Wokabi which was produced during trial, the injuries sustained by the respondent can be ascertained. The doctor also stated in his opinion that there was a possibility of the respondent developing epilepsy, there is no actual confirmation that the respondent is now epileptic at the time of re exam. It was contended that the timelines between the two medical examinations was nine months period and urged the court to rely on the most recent medical report by Dr Wambugu.



27. Reliance was placed in the case of Joseph Musee V Julius Mbogo Mugi & 3 Others [2013] eKLR it was stated that the damages should represent a fair compensation but should not be excessive. It was submitted that Kshs 350,000 would be sufficient compensation for the respondent. Reliance was placed in the cases of Gatete Muthee David V Joseph Charo Ndaa[2021] eKLR, Gabriel Maina Mungai Vs Jane Wanjiku Mwaura, Elizaphen Mokaya Bogonko v Fredrick Omondi.

### **Respondent Submissions**

28. The Respondent filed submissions on 17.05.2023 where he opposed the appeal on the basis that the same is unmerited and is only meant to delay and frustrate the respondent in realization of the decretal sum. It was submitted that issues for determination were: whether or not the learned Magistrate erred in law and fact in his determination of liability, whether or not the learned Magistrate erred in law and In fact in his determination of the quantum payable and who is to bear the cost of appeal.
29. Under the head of liability, it was submitted that the court is enjoined to re-evaluate, re -assess and re -analyze the evidence on record in considering the merits of first appeal. Reliance was placed in the case of Abok James Odera & Associates vs John Patrick Machita T/A Machira & Co. Advocates [2013] eKLR.
30. It was submitted that the police officer PW2 CPL Winfred Mbungu Who gave evidence on the occurrence of the accident told the court that the driver who was headed towards Kitengela swerved to the right and hit the pedestrian and was to be blamed for failure to keep to his lane. The appellant did not call any witness in support of the defence case therefore his evidence remained rebutted. Reliance was placed in the case of John Wainana Kagwe v Hussein Dairy Limited (2013)e KLR, Isaac Katambani Iminya V Firestone East Africa (1969)Limited[2015] eKLR, Interchemie EA Limited Vs Nakuru Veterinary Centre Limited HCCC NO.165B of 2000.
31. On the issue of quantum of damages, it was submitted that the trial magistrate took into account the law and evidence and consequently awarded damages that were commensurate to the nature of injuries sustained. It was submitted that the learned Trial Magistrate in awarding damages relied on authorities where the injuries sustained were similar to the respondent and therefore the assertion that the learned trial magistrate's award was excessive is unmerited and stand on flimsy grounds.
32. It was further submitted that the appellant has not put forth any justification for this court to interfere with the judgement of the trial court and prayed that the court upholds the quantum of the trial court.
33. On who is to bear the cost of the appeal it was submitted that the costs follow the cause. Reliance was placed in the case of Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd, Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR.
34. The Respondent contended that the decision of the Trial Court should not be disturbed as the appellant had not proven his claim and the Court was urged to dismiss the appeal with costs.



## Determination

35. The Court considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties in this Appeal.
36. This is 1<sup>st</sup> appellate court, as aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 should evaluate and/or assess the evidence on record as follows:-

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
37. It is not in contention that an accident occurred on 8<sup>th</sup> of July 2018 involving registration number KAM 911E in which the Respondent was a Pedestrian along Nairobi Namanga Road when motor vehicle registration KAM 911E was so negligently driven and the same allowed to hit the respondent and as a result caused the Plaintiff grievous and severe injuries. The injuries sustained are also not in contention. The issues raised by the Appellant are with respect to liability and quantum.

## Liability

38. On the first issue of liability. The plaintiff blamed the driver of the suit motor vehicle for the occurrence of the accident since he drove negligently and carelessly and hit him. This was corroborated by PW2 the police officer who produced the police abstract and according to him he blamed the driver of motor vehicle KAM 911E was to blame for the accident as it swerved to the right and hit the pedestrian. The defendant vide his statement of defence noted that the plaintiff contributed to the occurrence of the accident. He did not show how the plaintiff failed to keep proper outlook, stepped on the road without warning or crossed the road when it as not safe to do so. The above claims were not backed by any evidence.
39. The burden of proof in civil cases lies with the Plaintiff. The Court of Appeal while dealing with this question in the case of *Mbuthia Macharia v Annah Mutua Ndwigwa & another* [2017] e KLR observed that;

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”
40. It does not help the Appellant that he did not adduce any evidence or documents to prove the Defence filed and/or controvert the Plaintiff’s case. Secondly, the Plaintiff’s case is corroborated by PW2 who produced Police Abstract and the Defendant did not controvert the Plaintiff’s case.



41. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni LJ.(as She then was)citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

42. The Court finds no evidence to prove any of such particulars of negligence alluded to in the Defense. The Court therefore finds no reason to disturb the Trial Court judgment as far as liability is concerned and uphold 100% liability against the Appellant.

### **Quantum**

43. The second issue is that of quantum of damages. I am guided by the Court of Appeal case of Kivati v Coastal Bottlers Limited Civil Appeal No. 69 of 1984 where it was stated that;

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”

44. The Appellant submitted that the award of Kshs 800,000 for General damages was manifestly high in the circumstances and an award of Kshs 350,000 would be sufficient. In the case quoted of Gatete Muthee David v Joseph Charo Ndaa [2021] eKLR, the Respondent sustained the following injuries; head injury with loss of consciousness, Disorientation, Severe blunt injury in the abdomen with bleeding within the abdomen. An award of Kshs 1,200,000 was given by the subordinate Court was reduced to Kshs 500,000. The injuries sustained in the case and the injuries sustained are not similar to those in this particular case.

45. In the case of Stanley Maore v Geoffrey Mwenda [2004] eKLR the Court of Appeal stated: -

“.....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.”

46. The injuries sustained as per Doctor’s report of 15/10/2018 are;

- a. Major head injuries with brain swelling(edema) & loss of consciousness
- b. Blunt and bruise injuries on both knees
- c. Frequent headaches with possibility of developing epilepsy

47. The Plaintiff relied on medical documents exhibit number 3, 6 and 7 to prove the injuries sustained. In this regard, the Court finds that the award by the Trial Court was fair in the



circumstances. It is therefore prudent for that this Court will not disturb the award granted by the Trial Court.

48. Costs shall be borne by the Appellant as the Appeal was not successful.

49. In the end, I award as follows;

General damages for pain, suffering & loss of amenities Kshs 800,000/-

Special Damages Kshs 3,050

### **Disposition**

1. The Appeal is dismissed with costs.
2. The Trial Court Judgment is upheld.

**JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 24<sup>TH</sup> OCTOBER, 2023 (VIRTUAL/PHY-SICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

### **In The Presence Of:**

Ms Gaya for the Appellant

Mr. Musyimi - for the Respondent

Geoffrey/Patrick – Court Assistant(S)

